

NO. 38635-6-II

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

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STATE OF WASHINGTON,  
Respondent,  
v.  
DAVID LEE BROSIUS,  
Appellant.

CO. JAMES C. POWERS  
STATE OF WASHINGTON  
BY [Signature]  
10/10/17

DAVID LEE BROSIUS  
10/10/17

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APPEAL FROM THE SUPERIOR COURT  
FOR LEWIS COUNTY  
CAUSE NO. 07-1-00165-9

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HONORABLE NELSON HUNT, Judge

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RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
STATEMENT OF THE ISSUES . . . . .	1
STATEMENT OF THE CASE . . . . .	1
ARGUMENT . . . . .	9
1. <u>Since findings of fact and conclusions of law for the bench trial in this cause have been entered, although after the filing of Appellant's Brief, remand for such entry of findings and conclusions is unnecessary, and the defendant cannot demonstrate any prejudice from the late filing.</u> . . . . .	9
2. <u>The defendant's risk level classification, which led to his 90-day reporting requirement under RCW 9A.44.130, was the result of a delegation of legislative authority to the Department of Social and Health Services which was accompanied by proper standards and procedural safeguards, and therefore that delegation of legislative authority was constitutional.</u> . . . . .	11
3. <u>Whether the defendant had been classified as a risk level II or risk level III should not be found by this court to be an essential element of the crime of failure to register as a sex offender, but if this court finds otherwise, that element can be found to have been included in the Amended Information in this cause by fair construction, and therefore that charging document was not constitutionally deficient.</u> . . . . .	29
CONCLUSION . . . . .	41

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Carrick v. Locke</u> , 125 Wn.2d 129, 882 P.2d 173 (1994) . . . . .	22
<u>State v. Brayman</u> , 110 Wn.2d 183, 751 P.2d 294 (1988) . . . . .	21
<u>State v. Chamberlin</u> , 161 Wn.2d 30, 162 P.3d 389 (2007) . . . . .	10
<u>State v. David</u> , 134 Wn. App. 470, 141 P.3d 646 (2006) . . . . .	22, 23
<u>State v. Head</u> , 136 Wn.2d 619, 964 P.2d 1187 (1998) . . . . .	10, 11
<u>State v. Kjorsvik</u> , 117 Wn.2d 93, 812 P.2d 86 (1991) . . . . .	31, 32
<u>State v. Leyda</u> , 157 Wn.2d 335, 138 P.3d 610 (2006) . . . . .	36
<u>State v. Peterson</u> , 145 Wn. App. 672, 186 P.3d 1179 (2008), <i>review granted</i> 165 Wn.2d 1027, 203 P.3d 379 (2009) . . . . .	32, 34, 35, 36, 40
<u>State v. Ramos</u> , 149 Wn. App. 266, 202 P.3d 383 (2009) . . . . .	18, 19, 20, 21, 24, 38
<u>State v. Simon</u> , 120 Wn.2d 196, 840 P.2d 172 (1992) . . . . .	32
 <u>STATUTES</u>	 <u>PAGE</u>
RCW 4.24.550 . . . . .	17
RCW 4.24.550 (6) (a) . . . . .	20

<u>STATUTES</u>	<u>PAGE</u>
RCW 4.24.550 (6) (b) . . . . .	18,20
RCW 4.24.550 (10) . . . . .	18
RCW 4.24.5502 . . . . .	16,24,26
RCW 9.95.140 . . . . .	16
RCW 9.95.145 . . . . .	15
RCW 9A.44.130 . . . . .	11,33,34,35,36,37,38
RCW 9A.44.130 (6) (b) . . . . .	37
RCW 9A.44.130 (7) . . . . .	5, 30,35,37,38,39,40,41
RCW 9A.44.130 (11) (a) . . . . .	31,34
RCW 13.40.217 . . . . .	14,23
RCW 13.40.217 (1) . . . . .	14
RCW 13.40.217 (2) . . . . .	15,29
RCW 13.40.217 (3) . . . . .	23
RCW 72.09.345 . . . . .	15
RCW 72.09.345 (3) . . . . .	25
RCW 72.09.345 (5) . . . . .	19

A. STATEMENT OF THE ISSUES

1. Since findings of fact and conclusions of law for the bench trial in this cause have been entered by the trial court, although after the filing of Appellant's Brief, whether a remand for the entry of such findings and conclusions has been rendered unnecessary.

2. Whether the defendant's risk level classification, which led to his 90-day reporting requirement under RCW 9A.44.130, was the result of a delegation of legislative authority to the state Department of Social and Health Services that was accompanied by proper standards and procedural safeguards and was therefore constitutional.

3. Whether the classification of the defendant as either risk level II or risk level III is an essential element of the crime of failure to register as a sex offender under the facts of this case, and if so, whether that element can be found to have been included in the Amended Information in this cause by fair construction.

B. STATEMENT OF THE CASE

In 2001, Lewis County Sheriff's Detective Bradford Borden became the sex offender registration coordinator for the Lewis County Sheriff. 9-22-08 RP at 88. His responsibilities included classifying sex offenders who were required to register as either a Level I, Level II, or Level III sex offender. 9-22-08 RP at 88.

Borden still had these responsibilities as of April 2004. On April 7, 2004, Borden had his first contact with defendant David Lee Brosius for purposes of sex offender registration. 9-22-08 RP at 89. This was the result of Brosius having been convicted as a juvenile in Lewis County Juvenile Court with two counts of indecent liberties with forcible compulsion and two counts of assault in the fourth degree. Brosius had been given a suspended sentence pursuant to the special sex offender disposition alternative. 9-22-08 RP at 99-100.

Prior to meeting with Brosius on April 7, 2004, Detective Borden used the Washington State Sex offender Risk Level Classification in order to score Brosius on that assessment tool and in this way determine whether he should be classified as a Level I, II, or III. 9-22-08 RP at 90. This classification tool was developed by the Washington State Department of Corrections and as of April 2004 was in use in the majority of Washington counties to determine the risk level

for sex offenders. 9-22-08 RP at 90. The classification used 21 questions, primarily concerning prior criminal history, to reach a numeric score. The classification then required a determination whether any of certain designated risk considerations for notification were present. Borden had been using this risk assessment tool since 2001. 9-22-08 RP at 90-91.

Under this classification method, a person scoring 46 or less with no notification considerations would be considered a Level I. If a person scored 46 or less, but had 1 to 2 notification considerations, that person would be determined to be a Level II. If the person's score was 47 or higher, the designation was a Level III. 9-22-08 RP at 93. In the case of David Brosius, his score on the Risk Level Classification was 49 points, and therefore Borden designated Brosius as a Level III sex offender. 9-22-08 RP at 92-93.

Brosius's suspended sentence was revoked shortly after he first met with Borden. This was

due to a new conviction for unlawful imprisonment with sexual motivation. Brosius was sentenced to the custody of the Juvenile Rehabilitation Administration (JRA). 9-22-08 RP at 100.

Brosius was released from JRA custody in June, 2006. Prior to his release, JRA conducted a risk assessment using the very same assessment tool Borden had used in 2004, the Washington State Sex Offender Risk Level Classification. 9-22-08 RP at 101-104. This time Brosius received a score of 54 points, again placing him in the Level III classification. 9-22-08 RP at 103-104. The difference between this score and the one reached by Borden was due to the new conviction that had not existed at the time of Borden's use of the assessment tool, and the fact that the new conviction had occurred while Brosius was in sex offender treatment. 9-22-08 RP 103-104.

Based on this 2006 Classification, JRA recommended that Brosius be designated a Level III sex offender by the jurisdiction receiving him after release. Borden followed this

recommendation. 9-22-08 RP at 104-105.

Effective September 1, 2006, RCW 9A.44.130(7) required that any sex offender required to register, who had a fixed residence and was classified as a Level II or Level III offender, had to report in person to the Sheriff of the county where he or she registered every 90 days. The offender was required to report on the day specified by the pertinent Sheriff's office during normal business hours. To implement this new requirement, a letter dated June 30, 2006, was mailed to Brosius to notify him that he was required to report to the Lewis County Sheriff's Office on September 27, 2006 between 9 a.m. and 4 p.m. 6-8-07 RP at 7-8. The letter was sent certified and the return receipt showed delivery on July 1, 2006. 6-8-07 RP at 10.

The defendant did report to the Lewis County Sheriff's Office on September 27, 2006 as required. 6-8-07 RP at 11. At that time, the defendant signed a form in Borden's presence which notified Brosius of his next reporting day, which

was December 20, 2006. 6-8-07 RP at 11-12. Borden discussed with Brosius the responsibility Brosius had to report in person again on December 20th. 6-8-07 RP at 12. Brosius was given a copy of the document stating the date on which he was next required to report. 6-8-07 RP at 13-14. The defendant was not given any indication that he would receive any additional notice of this requirement. 6-8-07 RP at 14.

Between September 27, 2006 and December 20, 2006, Detective Borden did not have any additional contact with the defendant. 6-8-07 RP at 14. On December 20, 2006, the defendant failed to come in and report to the Lewis County Sheriff's Office, and he had no other form of contact with Borden that day. 6-8-07 RP at 15. On December 22, 2006, Borden sent an e-mail to the defendant's juvenile parole officer concerning the failure to appear. 6-8-07 RP at 16. Less than an hour later, Brosius phoned Borden, and then came in to meet with Borden. 6-8-07 RP 15-16, 23.

During that contact on December 22nd, Borden

informed the defendant of his Miranda rights. After the defendant had waived those rights, Borden spoke with Brosius about Brosius's failure to report on December 20th. Brosius acknowledged he had failed to report that day, and that he had been aware of his responsibility to do so. His excuse was that he thought he was going to receive another reminder in the mail before December 20th.

6-8-07 RP at 16-17.

In Lewis County Superior Court Cause No. 07-1-00165-9, an Information dated March 13, 2007, was filed charging the defendant with one count of Failure to Register as a Sex Offender, alleging a violation date of December 20, 2006. CP 106-107. On May 31, 2007, an Amended Information was filed, again charging one count of Failure to Register as a Sex Offender in the following manner:

By this Amended Information the Prosecuting Attorney for Lewis County accuses the defendant of the crime of FAILURE TO REGISTER AS A SEX OFFENDER, which is a violation of RCW 9A.44.130(7), the maximum penalty for which is 5 years in prison and a \$10,000 fine, in that defendant on or about December 20, 2006, in Lewis County, Washington, then and there being a person required to register as a sex offender in

Lewis County, did knowingly and unlawfully fail to comply with the statutory registration requirements by failing to report on the required days for the 90 days reporting requirement as required by RCW 9A.44.130(7); against the peace and dignity of the State of Washington.

CP 103.

The defendant chose to waive jury and so a bench trial was held in this cause before the Honorable Judge Nelson Hunt on June 8, 2007. The State presented the testimony of Detective Borden. The defendant did not testify and no other witnesses testified for the defense. At the end of the trial the defendant was found guilty as charged. While the court orally pronounced sentence, entry of a written Judgment and Sentence was reserved for a later date. 6-8-07 RP at 63.

Before a Judgment and Sentence could be entered, the defendant filed a motion for a new trial. On September 22, 2008, a hearing was held on that motion before the Honorable Judge Gary Tabor, acting as a Visiting Judge. The defendant's motion was denied. On October 20, 2008, the court entered written Findings of Fact

and Conclusions of Law regarding on the denial of that motion. CP 19-25. No issue has been raised on appeal concerning the denial of that motion.

On October 9, 2008, the defendant filed a new motion for arrest of judgment and dismissal without prejudice in this case. A hearing on that motion was held before the Honorable Judge Nelson Hunt on December 3, 2008. That motion was also denied. No issue has been raised on appeal concerning the denial of that motion.

A written Judgment and Sentence was entered on December 3, 2008. The defendant then filed a timely notice of appeal. In defendant's Brief on appeal, it was noted that the trial court had not yet entered Findings of Fact and Conclusions of Law for the bench trial in this cause. On June 5, 2009, Judge Hunt entered those Findings and Conclusions. CP 109-112.

#### C. ARGUMENT

1. Since findings of fact and conclusions of law for the bench trial in this cause have been entered, although after the filing of Appellant's Brief, remand for such entry of findings and conclusions is unnecessary, and the defendant cannot demonstrate any prejudice from the late

filing.

In Appellant's Brief, an issue has been raised regarding the absence of findings of fact and conclusions of law in regard to the bench trial in this cause. The defendant argues that the case should be remanded back to the trial court for the entry of such findings and conclusions. However, on June 5, 2009, such Findings of Fact and Conclusions of Law were entered by the trial court. CP 109-112.

In State v. Head, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998), the Washington Supreme Court held that the proper remedy for an absence of findings of fact and conclusions of law pursuant to a bench trial was a remand back to the trial court for the entry of such findings and conclusions. However, such a remand is unnecessary if the findings and conclusions are entered in the course of the appeal after the filing of Appellant's initial brief. State v. Chamberlin, 161 Wn.2d 30, 42 n. 8, 162 P.3d 389 (2007).

In the case of such a later filing, the defendant is permitted to argue a claim of prejudice resulting from it, such as a claim that the findings and conclusions have been tailored to address an issue raised on appeal by the defendant. However, the appellate court will not infer prejudice simply from the late nature of the entry of the findings and conclusions, and the burden is placed upon the defendant to prove such prejudice. Head, 136 Wn.2d at 624-625.

In the present case, the findings and conclusions simply set forth facts which were essentially not disputed during the bench trial of this cause. Furthermore, these findings and conclusions do not substantially impact any of the issues raised by the defendant on appeal, and so there can be no prejudice to the defendant.

2. The defendant's risk level classification, which led to his 90-day reporting requirement under RCW 9A.44.130, was the result of a delegation of legislative authority to the Department of Social and Health Services which was accompanied by proper standards and procedural safeguards, and therefore that delegation of legislative authority was constitutional.

On appeal, the defendant contends that his

designation as a risk level III sex offender occurred pursuant to an unconstitutional delegation of legislative authority. On that basis, the defendant argues that his conviction for failing to appear on the 90-day reporting date designated by the Lewis County Sheriff's Office must be vacated and the charge against him must be dismissed. In response, given the facts of this case, the State denies that the defendant's Level III designation was the result of an unconstitutional delegation of legislative authority. Rather, the State contends that there were proper standards and procedural safeguards accompanying the delegation of authority pertinent to this case, and therefore the defendant's conviction should be upheld.

As noted above, the defendant was originally designated a Level III offender by Detective Borden on April 7, 2004. In making this determination, Detective Borden used the Washington State Sex Offender Risk Level Classification, which had been developed by the

Washington Department of Corrections for determining whether an offender should be designated as a Level I, II, or III. 9-22-08 RP at 90. This was done when the defendant first came under Borden's supervision for registration purposes. However, soon thereafter the defendant was sentenced to JRA incarceration, which lasted until June, 2006.

Prior to the defendant's release in June, 2006, JRA did its own end of sentence review to determine whether the defendant should be classified as a Level I, II, or III once back in the community. To conduct this assessment, JRA used the very same Washington State Sex Offender Risk Level Classification previously used by Borden. 9-22-08 RP at 101-104. Again, this classification called for the defendant to be designated a Level III offender. 9-22-08 RP at 104. Once in receipt of that classification recommendation by JRA, Borden saw no need to revisit Brosius's Level III designation. 9-22-08 RP at 105. It was only after the defendant was

back in the community, following JRA's classification of the defendant as a Level III, that Brosius's obligation arose to report to the Sheriff's Office, resulting in the offense for which he was convicted.

In Laws of 1997, Chapter 364, section 2, currently codified as RCW 13.40.217, the Washington Legislature directed JRA to "release relevant information that is necessary to protect the public concerning juveniles adjudicated of sex offenses". RCW 13.40.217(1). The statute provided the following guidance as to what information should be released.

(2) In order for public agencies to have the information necessary for notifying the public about sex offenders as authorized in RCW 4.24.550, the secretary shall issue to appropriate law enforcement agencies narrative notices regarding the pending release of sex offenders from the department's juvenile rehabilitation facilities. The narrative notices shall, at a minimum, describe the identity and criminal history behavior of the offender and shall include the department's risk level classification for the offender. For sex offenders classified as either risk level II or III, the narrative notices shall also include the reasons underlying the classification.

(3) For the purposes of this section,

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

RCW 13.40.217(2).

Similar directives were given to the Washington Department of Corrections with regard to convicted sex offenders who are reaching their point of release back into the community. Laws of 1997, Chapter 364, section 4, currently codified as RCW 72.09.345. Similar directives were also given to the Indeterminate Sentencing Review Board with regard to sex offenders under the Board's jurisdiction who would be pending release from confinement. Laws of 1997, Chapter 364, section 5, originally codified as RCW 9.95.145. The section addressing the Indeterminate Sentencing Review Board was later repealed. Laws of 2001, 2nd Special Session, Chapter 12, section 501. Instead, determination of the pertinent risk level

for a sex offender under the Board's jurisdiction who is pending release has been transferred to the Department of Corrections End of Sentence Review Committee. RCW 9.95.140.

In 1997, the Washington Legislature also provided for the development of a consistent approach at the state level for the classification of sex offenders into risk levels I, II, or III.

The department of corrections, the department of social and health services, and the indeterminate sentencing review board shall jointly develop, by September 1, 1997, a consistent approach to risk assessment for the purpose of implementing this act, including consistent standards for classifying sex offenders into risk levels I, II, and III.

Laws of 1997, Chapter 364, section 7, currently codified as RCW 4.24.5502. As noted above, the consistent risk assessment intended was in regard to the particular convicted sex offender's potential for reoffending within the community after release. This case involved the use of such a consistent risk assessment tool. The Washington State Sex Offender Risk Level Classification, developed by the Department of Corrections, was

used by Detective Borden to make his initial classification of the defendant in 2004, and was again used by JRA to make its own end-of-sentence risk classification in 2006. Borden testified that he had been using this assessment tool since 2001. 9-22-08 RP at 91.

In Laws of 1997, Chapter 364, the Washington Legislature also identified the role of local law enforcement in regard to the classification of a sex offenders' risk level.

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 sex offenders about whom information will be disseminated; . . . . . When a local law enforcement agency or official classifies a sex offender differently than the offender is classified by the department of corrections, the department of social and health services, or the indeterminate sentence review board, the law enforcement agency or official shall notify the appropriate department or the board and submit its reasons supporting the change in classification.

Laws of 1997, Chapter 364, section 1, currently codified as RCW 4.24.550. Thus, when a state

classification of an offender has been made prior to the offender's release from confinement, the sheriff in the county where the offender thereafter resides can choose to impose a different classification upon the offender. However, if the county sheriff does not do so, the state level classification is determinative, as there has not then been any "change in classification". See RCW 4.24.550(10).

In State v. Ramos, 149 Wn. App. 266, 202 P.3d 383 (2009), Ramos was classified by the Thurston County Sheriff's Office as a Level II sex offender. He then failed to appear for his 90-day review at the county sheriff's office and was convicted for that violation. His risk classification had not previously been assessed at the state level. Ramos, 149 Wn. App. at 269. In such an instance the Court of Appeals ruled that the Thurston County Sheriff's classification of Ramos pursuant to RCW 4.24.550(6)(b) was the result of an unconstitutional delegation of legislative authority because the legislature did

not provide county law enforcement with sufficient standards for determining an offender's risk level. Ramos, 149 Wn. App. at 273. In so ruling, the Court of Appeals stressed that it was not deciding what would be the result had a classification determination for Ramos been made by the state Department of Corrections, Department of Social and Health Services (JRA), or the Indeterminate Sentence Review Board.

Domingo Torres Ramos appeals his conviction of failure to report to the Thurston County Sheriff's Office as a registered sex offender, arguing that the delegated classification system is unconstitutional. Because he was not classified by any entity other than a sheriff, we agree that there is a violation of separation of powers under these facts.

Ramos, 149 Wn. App. at 268 (Emphasis added).

We note that in another section purporting to set out standards for the End of Sentence Review Committee (ESRC), the group responsible for setting risk levels to offenders prior to release, the RCW provides definitions to guide the ESRC's determinations of an offender's risk level. RCW 72.09.345(5) ("The committee shall classify as risk level I those offenders whose risk assessments indicate a low risk of reoffense within the community at large"; in other words, a low risk offender shall be classified as low risk). We need not address separation of powers concerns with that

statute, however, because Ramos never appeared before the ESRC.

Ramos, 149 Wn. App. at 273 n. 5.

Moreover, even if we were to assume the nonbinding determinations of other agencies provided sufficient guidance to the law enforcement agency, in Ramos's case, there were no such prior assessments for the Thurston County Sheriff to review. By failing to provide criteria or standards, the legislature has delegated full responsibility for defining offenders' risk levels, an element of a felony, to local law enforcement agencies.

Ramos, 149 Wn. App. at 276.

As previously noted, we do not reach risk classifications by the ESRC, and we do not address a circumstance in which a local law enforcement agency sets a risk level with the benefit of input from other entities. RCW 4.24.550(6)(a). We hold only that RCW 4.24.550(6)(b), the sole portion of the statute governing Ramos's classification, represents an improper delegation of power.

Ramos, 149 Wn. App. at 276 n. 10.

In the present case, the defendant argues on appeal that this case is factually and legally indistinguishable from Ramos and that reversal with instructions to dismiss the case is required. However, as can be seen from the above quotes from Ramos, that is certainly not accurate. This case

is readily distinguishable from Ramos, in that a determination of the defendant's proper risk classification was made by JRA (Department of Social and Health Services) at the state level before the defendant came back to Lewis County and came under the 90-day reporting requirement due to that risk classification. Borden did not change JRA's classification of the defendant in any way.

Thus, this case presents an issue that was carefully avoided in Ramos: that is, does the legislature's delegation to the Washington Department of Social and Health Services (Juvenile Rehabilitation Administration) to classify the risk level of a juvenile sex offender prior to release from a JRA institution include constitutionally adequate standards, given the manner in which that delegation of authority was carried out in this case.

A statute is presumed constitutional and the burden is upon a challenging party to prove its unconstitutionality beyond a reasonable doubt. State v. Brayman, 110 Wn.2d 183, 193, 751 P.2d 294

(1988). The constitutional separation of powers doctrine is violated when the activity of one branch of government invades the prerogatives of the other. Carrick v. Locke, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). The authority to define the elements of a crime rests with the legislature. State v. Wadsworth, 139 Wn.2d 724, 734, 991 P.2d 80 (2000).

At the same time, however, the separation of powers doctrine is grounded in flexibility and practicality; rarely does it offer a definitive boundary beyond which one branch may not tread. Carrick, 125 Wn.2d at 135. Thus, the separation of powers doctrine does not mandate that the three branches of government seal off hermetically from one another. Carrick, 125 Wn.2d at 135. Rather, the different branches remain partially intertwined to maintain an effective system of checks and balances, as well as an effective government. Carrick, 125 Wn.2d at 135.

State v. David, 134 Wn. App. 470, 479, 141 P.3d 646 (2006).

The legislature may constitutionally delegate authority to an administrative entity to implement a statutory directive if two requirements are met: first, the legislature must provide standards to indicate what is to be done and designate the

entity to accomplish it; second, procedural safeguards must exist to control arbitrary administrative action and abuse of discretionary power. David, 134 Wn. App. at 455. As regards the present case, it is clear that the Washington Legislature has delegated to the Department of Social and Health Services the authority to classify a juvenile sex offender, who is exiting from a JRA institution back into the community, as having a risk level I, II, or III. RCW 13.40.217. Such a designation then creates legal responsibilities, the violation of which can result in the imposition of a criminal penalty. Thus, the question becomes whether there are sufficient standards and procedural safeguards for that delegation.

The standards for that risk level classification are set out in RCW 13.40.217(3).

For the purposes of this section, the department shall classify as risk level I those offenders whose risk assessments indicate a low risk of reoffense within the community at large. The department shall classify as risk level II those offenders whose risk assessments indicate a moderate risk of reoffense within the community at

large. The department shall classify as risk level III those offenders whose risk assessments indicate a high risk of reoffense within the community at large.

RCW 13.40.217(3). Thus, a convicted sex offender's potential for reoffending is the criteria for this classification. To be sure, it was left to the administrative agency to choose the specific factors for measuring that risk for reoffending. However, as noted in Ramos, proper delegation does not require that an administrative agency be given word-for-word definitions provided the agency is given adequate direction for the development of the specific criteria used. Ramos, 149 Wn. App. at 275.

In the present instance, the Department of Social and Health Services (DSHS) was required to work with the Department of Corrections (DOC) and the Indeterminate Sentence Review Board to develop a consistent approach to this risk assessment, including consistent criteria for classifying offenders into a particular risk category. Laws of 1997, chapter 364, section 7, codified as RCW 4.24.5502. The Legislature then identified the

body of material to be considered by the Department of Correction's End-of-Sentence Review Committee in, among other duties, assigning risk levels. Those materials included: police reports, prosecutors' statements of probable cause, presentence investigations and reports; complete judgments and sentences; current classification referrals; criminal history summaries; violation and disciplinary reports; all psychological evaluations and psychiatric disciplinary reports; sex offender treatment program reports; and juvenile records. Laws of 1997, chapter 364, section 4, codified as RCW 72.09.345(3). Since DSHS was required to apply an approach to risk assessment consistent with DOC's approach, the Legislature certainly intended DSHS to consider the same sources of information to determine risk of reoffense. That body of source material provided both DOC and DSHS with adequate direction for the development of the specific criteria for making a determination of an offender's risk of reoffense.

The second issue is whether adequate procedural safeguards have been established. As noted above, both DOC and DSHS were directed to jointly develop a consistent approach to risk assessment. RCW 4.24.5502. Such a consistent approach used by both agencies in each evaluation provides a safeguard against arbitrary administrative action.

Furthermore, the resulting assessment tool was described by Detective Borden in his testimony: the Washington State Sex Offender Risk Level Classification, developed by DOC and used by DSHS in its assessment of this defendant.

Q Would you tell us what this document consists of?

A It's a multipaged document with 21 questions concerning sex offenses and crimes in general. The document is a document that was prepared by the Department of Corrections and used by the majority of counties in Washington state for risk assessment. It's a numeric scoring tool, and based on the numeric score and other risk assessments then it gives a number that we can use for classification.

9-22-08 RP at 90. Borden also described how the numeric scoring was designed to translate into a

risk classification.

Q Okay. So having arrived at a score of 49, was there a standard conclusion that was called for by this assessment with that kind of score?

A Yes. 46 is the maximum for a level one with no considerations, no risk considerations. 47 would be then (sic) beginning of a level three. And he scored 49 points.

Q Did you say 46 was a level -

A 46 is the max for level one with no considerations.

Q And where is level two in there?

A Level two would be below the score of 46 with one or two considerations.

9-22-08 RP at 93.

Q Now, in the risk assessment that was conducted by JRA, was this done differently from the one that you had completed in April of 2004?

A No, it was not. The -

Q And so -

A There was - there was a change in the numerical value, but it was the same documentation that I completed.

Q Now, in the risk assessment that JRA conducted in 2006, what numeric score did they arrive at?

A They arrived at 54 and two notification considerations.

Q And in looking over their material, can you tell what the difference was or the reasons for the higher score in their evaluation than yours in 2004?

A Right. The -- the two points that really stand out is the fact that additional convictions and also the fact that he was in sex offender treatment at the time that the crimes occurred.

9-22-08 RP at 102-103.

Thus, the use of numeric scoring in response to identical questions used in each assessment provided a standardized approach, thereby minimizing subjective factors in the evaluation of offenders generally. The development of such an assessment tool pursuant to the Legislature's directive also constituted a safeguard against arbitrary administrative action in any particular case.

Finally, the Legislature directed DSHS to provide local law enforcement with a narrative notice regarding the pending release of any sex offender. Whenever DSHS classified an offender as risk level II or risk level III, the Department was required to specify in the narrative notice the reasons underlying that classification. Laws

of 1997, chapter 364, section 2, codified as RCW 13.40.217(2). This requirement also served to guard against arbitrary administrative action.

Thus, the Legislature's delegation of authority to DSHS to classify sex offenders to a particular risk level, set forth in RCW 13.40.217 and supplemented by other statutory provisions discussed above, constituted a proper delegation of authority to an administrative agency. It was such a classification by DSHS that immediately preceded this defendant's return to the community and his return to his sex offender registration responsibilities in June 2006. Detective Borden simply followed that classification, without changing it in any respect. The defendant's objection to his classification in this case is without merit.

3. Whether the defendant had been classified as a risk level II or risk level III should not be found by this court to be an essential element of the crime of failure to register as a sex offender, but if this court finds otherwise, that element can be found to have been included in the Amended Information in this cause by fair construction, and therefore that charging document was not constitutionally deficient.

The defendant in this cause proceeded to trial on the Amended Information dated May 31, 2007. CP 103. The defendant on appeal contends for the first time that the Amended Information was constitutionally deficient in that it failed to specifically allege that the defendant had a fixed residence at the time of the offense, or that he had been designated a risk level II or III. That Amended Information read as follows:

By this Amended Information the Prosecuting Attorney for Lewis County accuses the defendant of the crime of FAILURE TO REGISTER AS A SEX OFFENDER, which is a violation of RCW 9A.44.130(7), the maximum penalty for which is 5 years in prison and a \$10,000 fine, in that defendant on or about December 20, 2006, in Lewis County, Washington, then and there being a person required to register as a sex offender in Lewis County, did knowingly and unlawfully fail to comply with the statutory registration requirements by failing to report on the required days for the 90 days reporting requirement as required by RCW 9A.44.130(7); against the peace and dignity of the State of Washington.

CP 103. RCW 9A.44.130(7) states as follows, in pertinent part:

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

RCW 9A.44.130(7). In RCW 9A.44.130(11)(a), the following is stated:

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).

For an Information to be constitutionally adequate, all essential elements of the crime, both statutory and nonstatutory, must be included in the language of that charging document. State v. Kjorsvik, 117 Wn.2d 93, 101-102, 812 P.2d 86 (1991). The primary purpose of this rule is to give notice to an accused of the nature of the crime he is charged with so that he may prepare to defend against it. Kjorsvik, 117 Wn.2d at 101.

When the adequacy of an Information is challenged for the first time on appeal, that charging document is construed more liberally in favor of validity than a charging document challenged before or during a trial. Kjorsvik, 117 Wn.2d at 105. The resultant two-part test asks: (1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice. Kjorsvik, 117 Wn.2d at 105-106. The proper remedy for a conviction based on a defective Information is dismissal without prejudice to the State refiling the Information. State v. Simon, 120 Wn.2d 196, 199, 840 P.2d 172 (1992).

In State v. Peterson, 145 Wn. App. 672, 186 P.3d 1179 (2008), *review granted* 165 Wn.2d 1027, 203 P.3d 379 (2009), Division One of the Court of Appeals considered what constitutes the essential elements of a violation of the failure to register

statute, RCW 9A.44.130. In that case, Peterson had registered his residence address with the county sheriff based on his conviction for third degree rape, but then had moved from that residence and had failed to re-register a new address for more than 30 days. RCW 9A.44.130 imposed different timelines for re-registering depending on whether Peterson had moved to a fixed residence in the same county, had moved to a fixed residence in a different county, or had become homeless. The defendant was convicted for the crime of failure to register as a sex offender because of his failure to re-register after moving, but the State had no information as to whether this failure occurred pursuant to a move within the same county, a move to a fixed residence outside that county, or whether the defendant had become homeless, and so could not prove which specific time requirement had been violated. Therefore, on appeal, Peterson argued that his residential status upon moving and the resultant time requirement for re-registering were

essential elements of the offense he was charged with, and that the State had failed to prove these essential elements of the offense. Peterson, 145 Wn. App. at 674-677.

Division One of the Court of Appeals rejected this characterization of what the essential elements were in Peterson's case that had to be proved in order to convict Peterson of the crime of failure to register. The appellate court concluded that RCW 9A.44.130 had created only one punishable offense, identified in RCW 9A.44.130(11)(a), which was a knowing violation of any of the registration requirements set forth in that statute. The other provisions of RCW 9A.44.130 were characterized as merely articulating the definition of what constitutes continuing compliance with the registration requirements of that statute, and therefore did not constitute essential elements of the crime of failure to register. Peterson, 145 Wn. App. at 677-678.

Under this interpretation of RCW 9A.44.130,

the defense claim that the Amended Information in this case failed to set forth essential elements of the charged offense must certainly fail. The Amended Information alleged that the defendant was a person required to register as a sex offender in Lewis County, Washington, and that he had knowingly failed to comply with his statutory registration requirements by failing to report on the required day for the 90 days reporting requirement as required by RCW 9A.44.130(7). CP 103. This charging document specified a knowing violation of certain designated registration requirements of RCW 9A.44.130, thereby encompassing all the essential elements of the crime of failure to register as identified by Division One in Peterson, supra.

The defendant appears to argue for a different interpretation of what the essential elements are for a violation of any of the registration requirements of RCW 9A.44.130. He appears to argue that the specific requirements of a particular section of the statute alleged to

have been violated constitute essential elements of the crime, which is essentially the same argument Peterson made in State v. Peterson, supra. In Peterson, Division One cautioned that such an approach would lead to absurd results and could not reflect the true intent of the legislature in regard to the crime of failure to register. Peterson, 145 Wn. App. at 677. This court should also reject such an approach to identifying the essential elements of the crime of failure to register under RCW 9A.44.130.

However, even if the general approach to defining the essential elements of the crime of failure to register advocated by this defendant is adopted by Division Two in this case, there is still no basis for the defendant's contention that an essential element of the offense in this case is that the defendant was living at a fixed residence at the time of the offense. An essential element is one whose specification is necessary to establish the very illegality of the behavior. State v. Leyda, 157 Wn.2d 335, 341, 138

P.3d 610 (2006). Under RCW 9A.44.130, having a fixed residence does not establish a duty to report. Rather, it relieves the offender from having to report at the more frequent rate required of someone who lacks a fixed residence.

If a sex offender is required to register pursuant to RCW 9A.44.130 and lacks a fixed residence, that offender must report weekly, in person, to the sheriff of the county where the offender is registered. RCW 9A.44.130(6)(b). This obviously applies to risk level II and risk level III offenders.

Under RCW 9A.44.130(7), risk level II and III offenders are required to report to the county sheriff where they are registered. However, if they have a fixed residence, they do not have to report every week, but rather only every 90 days. Thus, it cannot be said that having a fixed residence causes a failure to report to be illegal, since a failure to report would also be illegal for a person not having a fixed residence. Having a fixed residence merely lessens the

reporting obligation of a level II or level III sex offender. Thus, having a fixed residence cannot be an essential element of the crime of failure to register.

However, under the approach to defining the essential elements of failure to register under RCW 9A.44.130 advocated by the defendant, having been designated a level II or level III offender would constitute an essential element, since level I offenders are excluded from the reporting requirements set forth in RCW 9A.44.130(7). Some support for this approach to identifying the essential elements of this crime can be found in State v. Ramos, 149 Wn. App. at 272, where the court treated the risk level classification as an element of the crime. However, in Ramos, the appellate court was not concerned with a claim of a deficient charging document, and so did not address the distinction between definitional provisions of RCW 9A.44.130 and the essential elements of the crime of failure to register as a sex offender.

If the risk classification of the defendant is considered an essential element of the crime, then the court must apply the liberal two-part test for challenges first brought on appeal to the issue of the validity of the Amended Information in this case. The court must determine whether the allegation that the defendant had been classified as a level II or level III offender appears in any form, or whether by fair construction it can be found, in the charging document.

It is true that the Amended Information did not specifically include the words "designated as a risk level II or a risk level III" in the charging document. However, the liberal construction of the statute called for does not require the use of those specific words. The Amended Information did specifically allege that the defendant had failed to report pursuant to his 90-day reporting requirement "as required by RCW 9A.44.130(7)". CP 103. That specified statutory section makes the 90-day reporting requirement

applicable to level II and level III offenders. Thus, by fair construction, the wording of the Amended Information gave this defendant fair notice that he was accused of having been designated a level II or level II offender, thus giving rise to the 90-day reporting requirement "as required by RCW 9A.44.130(7)".

The second part of the test asks whether the defendant can nevertheless show that he was prejudiced by the inartful language used in the Amended Information. However, the defendant in the present case has not claimed any such prejudice, and so this second part of the test need not be considered.

In summary, the State asks that this court follow the approach taken by Division One in State v. Peterson, supra, and rule that the designation of the defendant as a level II or level III offender is part of the definition of a particular registration requirement set forth in RCW 9A.44.130(7), but that it does not constitute an essential element of the offense of failure to

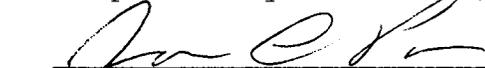
register when the specific failure at issue is in regard to the RCW 9.44.130(7) requirements. In the alternative, should this court hold that the reporting requirements of RCW 9A.44.130(7) constitute essential elements of the offense, the court should find that whether the defendant lived at a fixed residence is not an essential element for the reasons cited above. The court should further find that, applying the appropriate liberal construction to the Amended Information, the allegation that the defendant had been classified at a risk level II or level III can be found by fair construction in that document.

D. CONCLUSION

For the reasons set forth above, the State respectfully requests that the defendant's conviction for failure to register as a sex offender be affirmed.

DATED this 22nd day of June, 2009.

Respectfully submitted,



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JAMES C. POWERS/WSBA #12791  
DEPUTY PROSECUTING ATTORNEY

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
Respondent	)	DECLARATION OF
	)	MAILING
v.	)	
	)	
DAVID LEE BROSIUS,	)	
Appellant	)	

STATE OF WASHINGTON	)	
	)	ss.
COUNTY OF THURSTON	)	

THE  
 COURT OF APPEALS  
 DIVISION II  
 09 JUN 23 PM 12:14  
 STATE OF WASHINGTON  
 BY \_\_\_\_\_  
 DEPUTY

James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County, appointed as a Special Deputy Prosecuting Attorney for Lewis County for purposes of the above-entitled cause; that on the 22nd day of June, 2009, I caused to be mailed to appellant's attorney, Eric J. Nielsen , a copy of the Respondent's Brief, addressing said envelope as follows:

Eric J. Nielsen,  
Attorney at Law  
NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122

I certify (or declare) under penalty of perjury  
under the laws of the State of Washington that the  
foregoing is true and correct to the best of my  
knowledge.

DATED this 22nd day of June, 2009 at Olympia, WA.

  
\_\_\_\_\_  
James C. Powers/WSBA #12791  
Special Deputy Prosecuting Attorney  
For Lewis County