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**A. RESPONSE TO ASSIGNMENTS OF ERROR**

**I. THE TRIAL COURT DID NOT ERR WHEN IT RULED THAT A TRANSIENT REGISTERED SEX OFFENDER'S FAILURE TO LIST THE LOCATIONS WHERE HE HAS STAYED DURING THE LAST SEVEN DAYS IS NOT A CRIMINAL ACT PROSCRIBED BY RCW 9A.44.130.**

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**B. STATEMENT OF THE CASE**

Respondent accepts the Statement of the Case outlined by the State in the Brief of Appellant.

**C. ARGUMENT**

**I. THE TRIAL COURT DID NOT ERR WHEN IT RULED THAT A TRANSIENT REGISTERED SEX OFFENDER'S FAILURE TO LIST THE LOCATIONS WHERE HE HAS STAYED DURING THE LAST SEVEN DAYS IS NOT A CRIMINAL ACT PROSCRIBED BY RCW 9A.44.130.**

The trial court correctly concluded that where a criminal charge such as the one leveled against Mr. Sweetin depends on the decision of individual sheriffs of the various counties in the state whether to place additional burdens on transient sex offenders, the conduct proscribed as by the sheriff is not criminal under RCW 9A.44.130. RCW 9A.44.130 (6) (b) states:

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.

In its brief to this Court, the State makes much of the fact that the legislature gave the various county sheriffs the *choice* of whether to create an additional crime by executive fiat. Where a statute presumes to subject some people within the state to criminal prosecution while others get a

free pass, based solely on the whim of the county sheriff, such a statute does not codify a crime.

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 stated the 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.

*Hall* 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. *Chester* 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).

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 this section. This subsection states:

(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).

A criminal offense under this section would occur where a person required to register under the statute fails 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. In the context of this case, the requirements of RCW 9A.44.130 at issue are found in subsection (6) (b), which states:

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.

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 a county sheriff 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 previous 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 previous seven days is not a crime because the failure to do so is not a violation of the requirements of RCW 9A.44.130. In the case at bar, the trial court did not err when it held that the failure of a transient offender to report his whereabouts for the previous seven days is not a crime under RCW 9A.44.130 (11) (a).

**II. THE TRIAL COURT DID NOT ERR WHEN IT HELD THAT TO THE EXTENT RCW 9A.44.130 (6) (b) CREATES**

**A NEW CRIME OF FAILING, AS A TRANSIENT SEX OFFENDER, TO LIST THE LOCATIONS WHERE HE HAS STAYED DURING THE PREVIOUS 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* notes, this is one of the core principles of our tripartite form of government:

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

*United States v. Nixon*, 418 U.S. 683, 704, 94 S.Ct. 3090 (1974) (quoting *The Federalist*, no. 47, at 313 (S. Mittell ed. 1983)).

Although the Washington Constitution contains no explicit separation of powers clause, as does the federal constitution, the doctrine

has been presumed throughout the State's history by the division of government into three separate branches. *Carrick v. Locke* at 134-35. The principle of separation of powers is violated when "the activity of one branch threatens the independence or integrity or invades the prerogatives of another..." *Moreno, supra*. It is also violated when one branch of government delegates its discretionary authority to another branch. *State v. Ermert*, 94 Wn.2d 59, 578 P.2d 1309 (1978).

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

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

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

Former RCW 69.50.201 (d).

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

The defendant, following her conviction for possession of Valium, appealed her conviction arguing that the legislature, by delegating the authority to determine what was or was not a controlled substance to the federal government, violated the separation of powers doctrine. The Supreme Court reversed the defendant's conviction, holding that RCW

69.50.201 (d) was “an unconstitutional delegation of legislative authority” in that it permitted the “future federal designation, rescheduling or deletion of controlled substances in the Federal Register to become controlled or deleted substances under the Uniform Controlled Substances Act by means of Board inaction or acquiescence.” *Dougall* at 123. *See also State v. Sansone*, 127 Wn.App. 630, 111 P.3d 1251 (2005) (sentencing court’s delegation of the defining of the term “pornography” to community corrections officer for a defendant given the condition of not possessing pornography constituted an improper delegation of judicial authority). *Cf. Caffall Bros. Forest Products v. State*, 79 Wn.2d 223, 484 P.2d 912 (1971), holding no improper delegation where the Commissioner of Public Lands given authority to reject a sale of timber from public lands where it found such a sale to be not in the best interest of the state, because legislature had set forth a number of specific criteria for the commissioner to use when determining what constituted the best interests of the state.

The portion of RCW 9A.44.130 (6) which delegated authority to the various county sheriffs to create a new crime of failing, as a transient sex offender, to list where the person had stayed the previous seven days, was added by the legislature in 2001. See Laws of 2001, chapter 169, sec. 1. As with the power the legislature gave the county sheriff to assign risk

levels (previously invalidated as an improper delegation of power by the legislature to county sheriffs in *State v. Ramos*, 149 Wn.App. 266, 202 P.3d 383 (2009)), the legislature here provides absolutely no criteria, no standards, and no guidance as to how each county sheriff should 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 free to adopt its own arbitrary standard. This method of determining this added reporting requirement suffers from the same defect as existed with the assignment of what constituted a controlled substance in *Dougall*. In the case at bar, the legislature improperly assigned the task of defining which homeless sex offenders must report their locations over the previous 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' of doctrine.

Because the legislature in this case has delegated its authority to define what constitutes the crime of failing to register as a sex offender to

another branch of government and has not included any guiding standards at all, this delegation violates the separation of powers doctrine and is invalid. As a result, the trial court properly dismissed Count I of the Information in this case charging failure to register as a sex offender.

**III. THE TRIAL COURT DID NOT ERR WHEN IT RULED THAT TO THE EXTENT THAT RCW 9A.44.130 (6) (b) CREATES A NEW CRIME OF FAILING, AS A TRANSIENT SEX OFFENDER, TO LIST THE LOCATIONS WHERE HE HAS STAYED FOR THE PREVIOUS SEVEN DAYS IN A COUNTY WHERE THE SHERIFF HAS ADOPTED THIS REQUIREMENT, IT VIOLATES MR. SWEETIN'S RIGHT TO EQUAL PROTECTION UNDER THE WASHINGTON CONSTITUTION, ARTICLE 1, SEC. 12, AND THE UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.**

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

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

The equal protection guarantees found in Washington Constitution, Article 1, Sec. 12 are at least as stringent as those found in the Fourteenth Amendment. *Hunter v. North Mason High School*, 85 Wn.2d 810, 819 n.9, 539 P.2d 845 (1975). Generally, any violation of the equal protection

clause of the United States Constitution also constitutes a violation of the equal protection clause of the Washington Constitution. *State v. Perrigoue*, 81 Wn.2d 640, 503 P.2d 1063 (1972).

However, the constitutional guarantee of equal protection “does not require that things different in fact be treated in law as though they were the same.” *Jenkins v. State*, 85 Wn.2d 883, 888, 540 P.2d 1363 (1975) (internal citation omitted). Rather, the equal protection clause requires that “those who are similarly situated be similarly treated.” *Jenkins* at 888.

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

If a statute creates an inherently suspect classification such as one based on race, nationality, or alienage, then the statute will be subjected to “strict scrutiny.” *Nielsen v. Washington State Bar Ass’n*, 90 Wn.2d 818, 585 P.2d 1191 (1978). Under this test, the statute at issue must be the least restrictive method by which to address a compelling state interest. If

a statute creates a classification system based on a “semi-suspect” class where an important right is involved, then the “intermediate scrutiny” test is applied. *State v. Heiskel*, 129 Wn.2d 113, 916 P.2d 366 (1996). Under the “intermediate scrutiny” test, “the challenged statute must further a substantial interest of the state” in order to meet the minimum requirements of equal protection. *State v. Coria*, 120 Wn.2d 156, 839 P.2d 890 (1992).

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

In *Peterson v. State*, the Washington State Supreme Court set a three part analysis for determining whether or not a statute meets the

requirements of the minimal scrutiny test. In this analysis, the reviewing court should ask the following questions: “(1) whether the legislation applies alike to all members within the designated class; (2) where there are reasonable grounds to distinguish between those within and those without the class; and (3) whether the classification has a rational relationship to the purpose of the legislation.” *Peterson* at 445.

In this case, Mr. Sweetin argues that even under the lowest level of scrutiny, RCW 9A.44.130 (6) (b) violates his right to equal protection. As argued above, 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. If a transient moved from Cowlitz County to King County, for example, 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 to Cowlitz County, he or

she would then have this added registration requirement simply because of the move of location.

Mr. Sweetin belongs in this class of transient persons required to register as a sex offender. Yet 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.44.130 (6) (b) violates the defendant's right to equal protection under both the Washington and United States Constitution. The trial court did not err in finding an equal protection violation and dismissing Count I of the Information.

**IV. THE TRIAL COURT DID NOT ERR WHEN IT HELD THAT 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 STAYED THE PREVIOUS SEVEN DAYS IN A COUNTY WHERE THE LOCAL SHERIFF HAS ADOPTED THIS REQUIREMENT, IT VIOLATES MR. SWEETIN'S RIGHT TO NOTICE AND DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, SEC. 3 AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

Under the notice and due process requirements of Article 1, Sec. 3 of the Washington Constitution and the Fourteenth Amendment to

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

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

The term “lawful order” in the Seattle criminal trespass ordinance is not sufficiently specific to inform persons of reasonable understanding of what conduct is proscribed. Many questions must be answered to determine if an order is a “lawful order.” Who is an authorized person? Was the substance of the order lawful? Was there a valid reason for the order? How long is the order to be in effect? The foregoing is but a sample of what must be considered and certainly there are many more questions which could be raised. A person receiving an order must thereupon be able to answer all such questions to know if he has received a “lawful order.”

*Rice* at 731-32.

In Mr. Sweetin's case, the sentence of RCW 9A.44.130 (6) (b) at issue is: "The county sheriff's office may require the person to list the locations where the person has stayed during the last seven days." As with the ordinance at issue in *Rice*, this sentence creates more questions than it answers, including: (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 held, 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.

CP 35.

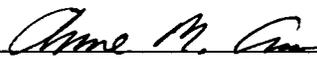
The State has failed to assign error to this finding of fact and it is a verity on appeal. *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994). As it clarifies, there is no public document in which the sheriff's requirement has been published. One is left to contact the sheriff's office on an ad hoc 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 which would inform a person of average intelligence just what conduct constitutes a crime.

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

**D. CONCLUSION**

The trial court did not err in any respect and should be affirmed in every respect.

RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of November, 2009.

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



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AND

Mr. Trenity Sweetin  
110 N. Maple Street  
Kelso, WA 98626

and that said envelope contained the following:

- (1) BRIEF OF RESPONDENT
- (2) RAP 10.10 (TO MR. SWEETIN)
- (3) AFFIDAVIT OF MAILING

Dated this 9<sup>th</sup> day of November, 2009.

  
 ANNE M. CRUSER, WSBA #27944  
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: Nov. 9, 2009, Kalama, WA

Signature: Anne M. Cruser