

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 41196-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

WILLIAM AARON BARGE,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment when it convicted him without substantial evidence.

2. The trial court, End of Sentence Review Committee (ESRC), and Lewis County sheriff denied the defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, when they failed to give him an opportunity to contest his sex offender classification.

3. RCW 4.24.550(6)(b) violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment by creating a system whereby similarly situated sex offenders are disparately classified depending upon the classification criteria used by each county sheriff.

Issues Pertaining to Assignment of Error

1. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does substantial evidence support a conviction for failure to register as a sex offender every 90 days when the evidence presented at trial showed that the defendant registered 55 days prior to the date upon which he allegedly committed the crime?

2. Does a trial court, the ESRC, and County sheriff deny a defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment if they fail to give that defendant notice and the opportunity to be heard concerning that defendant's sex offender classification when they assign a level II or III status?

3. Does RCW 4.24.550(6)(b) violate equal protection under Washington Constitution, Article 1, § 12 and United States Constitution, Fourteenth Amendment by creating a system whereby similarly situated sex offenders are disparately classified depending upon the classification criteria used by a particular county sheriff?

STATEMENT OF THE CASE

The defendant William Aaron Barge has a 1997 Lewis County conviction for Third Degree Rape of a Child and was required to register as a sex offender under RCW 9A.44.130(7). RP 17-18; Exhibit 1. Prior to his most recent release from prison, the ESRC classified the defendant as a level II offender. *Id.* Once the defendant got out of prison, the Lewis County Sheriff's office did its own assessment on the defendant, and also assigned him as a Level II offender. RP 17-18. Exactly how the Lewis County Sheriff's Office performed this assessment is unclear, although the office does consider the documents provided by the ESRC. RP 18. Detective Brad Borden of the Lewis County Sheriff's office gave the following description of the process of classifying sex offenders:

The classification's a responsibility of the chief law enforcement agency where the individual is living. In Lewis County we do that through a review of the documentation provided by the End of Sentence Review Committee and then we also do a risk assessment ourselves.

RP 18.

On April 22, 2009, the defendant appeared at the Lewis County Sheriff's Office following his release from prison and registered as a sex offender with a fixed address. RP 18-19. At the time, he was under the supervision of the Department of Corrections. *Id.* During the registration process, the sheriff's deputy in charge of sex offender registration told the

defendant that the Lewis County Sheriff's Office had classified him as a Level II offender, which required him to register every 90 days. RP 18-22; Exhibits 1 & 2. On that day, the sheriff's office gave the defendant notice that he had to return to the office for quarterly registration on June 16, 2009, which was the date the Lewis County Sheriff's Office had previously set for second quarter registration for level II and III sex offenders within the county. RP 21-22; Exhibits 1 & 2.

The defendant did not appear at the sheriff's office on June 16, 2009. RP 21-24. Rather, he appeared on the morning of June 17, 2009. *Id.* Although the defendant was not arrested at that time, the Lewis County Prosecutor later charged him with failure to register under former RCW 9A.44.130(7), alleging that he had failed to report "on the required day for the 90 days reporting requirement." CP 31. After being charged, the court appointed an attorney to represent the defendant, who was indigent. CP 44-56. The defendant later complained to the court that his attorney was not providing effective representation. *Id.* Finally, the day before trial, the defendant retained a new attorney, who appeared on his behalf and requested a continuance. RP 1-10. The court denied the motion and refused to allow the new attorney to substitute in as the defendant's current counsel. *Id.* The court made this latter ruling on the basis that the retained attorney had implied that he would not be able to provide effective representation on such

short notice. *Id.*

The next morning, the defendant's retained attorney unequivocally stated that he could provide effective representation. RP 1-15. Based upon this representation, and upon the defendant's request, the court allowed the defendant's retained attorney to substitute in for the defendant's appointed counsel. *Id.* The case then proceeded to trial before the bench, the defendant having waived his right to trial by jury. CP 31-33. During the trial, the state called Deputy Borden as its only witness, and the defendant called two witnesses before taking the stand on his own behalf. RP 16, 35, 38, 41. These witnesses testified to the facts previously set out in this Statement of the Case. *See* Statement of the Case. The parties then presented closing argument, after which the court found the defendant guilty. 49-54. Prior to sentencing, the court entered the following findings of fact and conclusions of law on the trial:

II. FINDINGS OF FACT

1.1 The Lewis County Sheriff's Office has quarterly reporting for Level II and Level III sex offenders four times a year. The quarterly reporting dates are preset and the Lewis County Sheriff's Office does not give an individual a separate date that differs from the preset dates.

1.2 The defendant has been previously convicted of a felony sex offense.

1.3 On April 22, 2009, the Defendant registered as a sex offender with the Lewis County Sheriff's Office

1.4 The Defendant registered a fixed address, located at 194 Campground Lane in Winlock, Washington.

1.5 The Defendant[‘s] risk level was set at a Level II by the End of Sentence Review Committee and that level was adopted by the Lewis County Sheriff’s Office.

1.6 On April 22, 2009, the Defendant was given the report date for the next quarterly reporting, June 16, 2009. The Defendant was given this date in writing.

1.7 The Defendant had knowledge that he was to report to the Lewis County Sheriff’s Office on June 16, 2009, between the hours of 8:00 a.m. and 5:00 p.m.

1.8 The defendant failed to report to the Lewis County Sheriff’s Office on June 16, 2009, between the hours of 8:00 a.m. and 5:00 p.m.

1.9 The Defendant did come into the Lewis County Sheriff’s Office on June 17, 2009.

III. CONCLUSIONS OF LAW

2.1 The Court has jurisdiction over the defendant and the present subject matter.

2.2 The Defendant, William Aaron Barge, is guilty, beyond a reasonable doubt, of the crime of Failure to Register as a Sex Offender, as alleged in the Information.

CP 68.

The court later sentenced the defendant to 57 months in prison, which was at the top end of the standard range. CP 85-97. The defendant then filed timely notice of appeal. CP 102-116.

ARGUMENT

I. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT FOUND HIM GUILTY OF AN OFFENSE UNSUPPORTED BY SUBSTANTIAL EVIDENCE.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the defendant argues that the record does not contain substantial evidence that the defendant failed to report “every ninety days,” as was then required by the statute under RCW 9A.44.130(7). Section 7 of RCW 9A.44.130, stated as follows:

(7) All offenders who are required to register pursuant to this section who have a fixed residence and who are designated as a risk level II or III must report, in person, every ninety days to the sheriff of the county where he or she is registered. Reporting shall be on a day specified by the county sheriff’s office, and shall occur during normal business hours. An offender who complies with the ninety-day reporting requirement with no violations for a period of at least five years in the community may petition the superior court to be relieved of the duty to report every ninety days. The petition shall be made to the superior court in the county where the offender resides or reports under this section. The prosecuting attorney of the county shall be named and served as respondent in any such petition. The court shall relieve the petitioner of the duty to report if the petitioner shows, by a preponderance of the evidence, that the petitioner has complied with the reporting requirement for a period of at least five

years and that the offender has not been convicted of a criminal violation of this section for a period of at least five years, and the court determines that the reporting no longer serves a public safety purpose. Failure to report, as specified, constitutes a violation of this section and is punishable as provided in subsection (11) of this section.

RCW 9A.44.130(7) (in effect on June 16, 2009).

Under the rules of statutory interpretation, the court's "primary duty in interpreting any statute is to discern and implement the intent of the legislature." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). In fulfilling this duty, the court looks first to the language of the statute itself. *Id.* When the plain language and ordinary meaning are unambiguous, the courts "will not construe the statute otherwise." *State v. J.P.* 149 Wn.2d at 450. The plain language of the statute here in question requires offenders "designated as a risk level II or III must report" "every ninety days to the sheriff of the county where he or she is registered." Although this section allows the sheriff to specify the day for reporting, it does not allow the sheriff to require an offender to report at an interval of fewer than 90 days, such as 89 days, 88 days, 87 days, or any interval fewer than 90 days. The statutory language is specific: offenders designated as level II or III with a fixed residence "must report, in person, *every ninety days.*" (emphasis added).

In the case at bar, the uncontested evidence presented at trial reveals two salient facts: (1) the defendant reported in person and registered at the

sheriff's office on April 22, 2009, and (2) the defendant did not report into the sheriff on June 16, 2009. The problem with this evidence as it relates to the charge in this case is that it only proves that the defendant failed to report at an interval between April 22, 2009, and June 16, 2009. This interval is not 90 days. Rather, it is 55 days. Consequently, the state's evidence proved beyond a reasonable doubt that the defendant, a person designated as a level II sex offender within Lewis County, failed to report to the county sheriff at an interval of 55 days. Under the plain language of the statute, this is not a crime.

The state may argue that the statute is ambiguous, and that one reasonable interpretation allows the sheriff to designate a reporting day that is much shorter than the 90 days the statute uses if the defendant's first report date is fewer than 90 days from the regular date designated by the Sheriff. Although the defendant does not concede that this statute is ambiguous, if it were, another reasonable interpretation would be that the sheriff cannot designate a reporting interval of fewer than 90 days. Thus, even were the statute in this case ambiguous, under the rule of lenity, this court must employ the interpretation that favors the defendant. *In re Davis*, 142 Wn.2d 165, 12 P.3d 603 (2000). Thus, in the case at bar, the trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment when it entered

judgement of conviction for failure to register because the state failed to present substantial evidence on this charge.

II. THE TRIAL COURT, ESRC, AND LEWIS COUNTY SHERIFF DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN THEY FAILED TO GIVE HIM AN OPPORTUNITY TO CONTEST HIS SEX OFFENDER CLASSIFICATION.

At a minimum, procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment requires notice and the opportunity to be heard before a competent tribunal. *In re Messmer*, 52 Wn.2d 510, 326 P.2d 1004 (1958). In the *Messmer* decision, the Washington State Supreme Court provided the following definition for procedural due process.

We have decided that the elements of the constitutional guaranty of due process in its procedural aspect are notice and an opportunity to be heard or defend before a competent tribunal in an orderly proceeding adapted to the nature of the case; also to have the assistance of counsel, if desired, and a reasonable time for preparation for trial.

In re Messmer, 52 Wn.2d at 514 (quoting *In re Petrie*, 40 Wn.2d 809, 246 P.2d 465 (1952)). In *Silver Firs Town Homes, Inc. v. Silver Lake Water Dist.*, 103 Wn.App. 411, 12 P.3d 1022 (2000), the Court of Appeals states this principle as follows:

The Fourteenth Amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” The Washington Constitution

contains an almost identical clause. Wash. Const., art. I, § 3 (“No person shall be deprived of life, liberty, or property, without due process of law.”). At minimum, procedural due process requires notice and an opportunity to be heard. *Rivett v. City of Tacoma*, 123 Wn.2d 573, 583, 870 P.2d 299 (1994). “Generally, in looking at the degree of process that will be afforded in a particular case, the court balances the following interests: (1) the private interest to be protected; (2) the risk of erroneous deprivation of that interest by the government’s procedures; and (3) the government’s interest in maintaining the procedures.” For due process protections to be implicated, there must be an individual interest asserted that is encompassed within the protection of life, liberty, or property.

Silver Firs Town Homes, Inc., at 1029.

In the case at bar, the defendant argues that (1) since the state’s classification of him as a level II or III sex offender constitutes an element of the offense of failure to register, he has a procedural due process right not only to notice of that classification, but an opportunity to contest it, and (2) since the ESRC, the sheriff, and trial court did not give him an opportunity to contest that classification, any charge of failure to register that includes that classification as an element violates his right to due process. In response, the state may argue that the Washington Supreme Court has rejected this argument in *In re Meyer*, 142 Wn.2d 608, 16 P.3d 563 (2001). As the following analysis reveals, this argument is incorrect.

(1) In re Meyer Recognizes Three Separate Methods for a Sex Offender to Establish a Liberty Interest in His or Her Sex Offender Risk Classification Designation.

In *In re Meyer, supra*, three defendants convicted of sex offenses filed

personal restraint petitions arguing that the sex offender registration and community notification act of 1990 violated their rights to procedural due process in that (1) the act allowed the ESRC to classify them without notice or an opportunity to be heard, and (2) that classification affected what information the county sheriff would disseminate about the defendant to the community. Specifically, the defendants argued that the risk classification of RCW 4.24.550 and RCW 72.09.345 infringed upon their liberty interest without notice or an opportunity to be heard. The defendant's argued that the "liberty interest" arose from three sources: (1) the mandatory requirement of the community notification statute, (2) the right to not be wrongfully stigmatized and labeled as dangerous, and (3) the interest in avoiding further incarceration.

In rejecting the first of these three arguments, the majority opinion first quoted the following from *In re Cashaw*, 123 Wn.2d 138, 866 P.2d 8 (1994), concerning the criteria that must exist before a statute is deemed to create or affect a liberty interest for the purposes of due process. The court stated:

For a state law to create a liberty interest, it must contain "substantive predicates" to the exercise of discretion and "specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 463, 109 S.Ct. 1904, 1910, 104 L.Ed.2d 506 (1989); *Swenson v. Trickey*, 995 F.2d 132, 134 (8th Cir.), *cert. denied*, [510 U.S. 999, 114 S.Ct. 568, 126

L.Ed.2d 468] (1993). Thus, laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot.

In re Meyer, 142 Wn.2d at 618 (quoting *In re Cashaw*, 123 Wn.2d at 144) (brackets in original).

The majority then went on to reject the defendants' first claim, finding that under the standard set in *Cashaw*, "[t]he sex offender registration and disclosure statutes are essentially procedural statutes; no liberty interest arises from them."

(2) The Defendant Meets the In re Meyer "Stigma-plus" Basis for Claiming a Liberty Interest in His Sex Offender Risk Classification Designation.

The majority in *Cashaw* then went on to review the defendants' second argument that they had a liberty interest in not being wrongfully stigmatized with an improper level classification. In addressing this argument, the court first reviewed the United State's Supreme Court's decision in *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), wherein the court addressed whether or not a person had a "liberty" interest solely in his or her reputation. In that case, a plaintiff brought a civil rights action against a police agency that had posted his picture with an identification as an "active shoplifter" in various retail establishments. The *Meyer* court noted the following from that case:

Justice Rehnquist examined a long line of decisions in which the

Court had protected an interest in reputation, and then wrote an interest in reputation is “neither ‘liberty’ nor ‘property’ guaranteed against state deprivation without due process of law.” The Court reasoned the government’s conduct to be actionable, must not only affect the individual’s reputation, but must be accompanied by some other injury. The Court ruled “reputation alone, apart from some more tangible interests” is not deserving of protection. This holding has come to be known as the “stigma-plus” requirement.

In re Meyer, 142 Wn.2d at 620 (citations omitted).

Applying this “stigma-plus” test, the court in *In re Meyer* found no liberty interest in the defendants’ potential mis-classification by the ESRC because any potential mis-classification would harm reputation only with no further injury. On this point, the court noted that all of the information the county sheriffs would be disseminating about level II and III sex offenders was already publicly available. Thus, the majority held that although “there were authorities to the contrary, we do not believe the statutes here satisfy the stigma-plus formulation announced in *Paul*.” *In re Meyer*, 142 Wn.2d at 622 (citations omitted).

The majority in *In re Meyer* then went on to review the defendant’s third argument that they had a liberty interest in avoiding further incarceration. Specifically, two of the defendants the ESRC had classified as level III offenders argued that they had been denied early release into the community because of their erroneous level III classification. However, the court did not reach this legal argument. Rather, the court noted that DOC had

disputed the defendants' factual allegations and argued that the defendants had been denied early release into the community because that release would have violated their individual sentences. In other words, DOC denied that the defendants' level III classification had been the basis for denying release into the community. Noting that this factual issue had not be resolved in the record below, the court refused to address the defendant's legal argument on this point.

One salient fact has changed since the court's decision in *In re Meyer*. At the time of the *Meyer* decision, the only thing affected by either the ESRC or a county sheriff's classification of an offender was the type of notice and information disseminated to the community. In fact, as was reviewed above, this fact was why the defendants' arguments failed the "stigma-plus" test from *Paul v. Davis*. By contrast, the 2006 amendment to the sex offender registration act created a new "injury" to the offenders by increasing their reporting requirements to four times a year as a level II or III. Thus, not only does an offender suffer an injury to reputation through the dissemination of injurious information to the community, but he or she suffers the added injury and limitation to liberty that four annual reporting requirements make. Consequently, under the *Paul v. Davis* injury-plus analysis, the defendant in the case at bar has established a liberty interest in not being improperly classified as a level II or level III offender. Thus, he has a due process right

under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment to notice and an opportunity to be heard.

(3) The Defendant Meets the In re Meyer “Avoidance of Further Incarceration” Basis for Claiming a Liberty Interest in His Sex Offender Risk Classification Designation.

The defendant in the case at bar also has a recognizable liberty interest in the right to prevent further incarceration. In this case, the 2006 amendment created a new offense based upon the county sheriff’s classification. Prior to this amendment, there was a single crime of failure to register as a sex offender. An offender’s classification level was not an element of this offense. Following the 2006 amendment, the legislature created a new offense of failure to register every 90 days as a level II and III offender. Under this statutory scheme, an offender’s classification level has become an element of a new crime, and an offender is subject to punishment under this statute only if the county sheriff has classified the offender as level II or III. Consequently, this classification system now subjects an offender to further punishment. As a result, an offender also has a recognizable liberty interest in being free from improper classification based upon the fact that this improper classification subjects the offender to further punishment.

Since the defendant in this case does have a recognizable liberty interest in being free from improper classification under both the second and

third argument from *In re Meyer*, the ESRC, the Lewis County Sheriff, and the trial court's failure in the case at bar to give the defendant an opportunity to be heard on the issue of his classification level has denied him minimum procedural due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment. As a result, his conviction should be reversed.

III. RCW 4.24.550(6)(b) VIOLATES THE DEFENDANT'S RIGHT TO EQUAL PROTECTION UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 12 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT BY CREATING A SYSTEM WHEREBY SIMILARLY SITUATED SEX OFFENDERS ARE DISPARATELY CLASSIFIED DEPENDING UPON THE CLASSIFICATION CRITERIA USED BY EACH COUNTY SHERIFF.

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.” *Graham v. Richardson*, 403 U.S. 365, 29 L.Ed.2d 534, 91 S.Ct. 1848 (1971); *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*, 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 4.24.550(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 the determination county sheriffs make for the risk assessment levels of sex offenders. Since each county sheriff is left to his or her own devices in assigning risk assessment levels, there are as many approaches to assigning risk assessment levels as there are counties. The result is that the same person could receive one risk assessment set by the ESRC, a week later receive a different risk assessment level by the county sheriff from the county in which the offender was released, and then receive yet a third risk assessment level when the offender moved to a neighboring county.

As a specific example, an offender could be assessed as a level I risk level by the ESRC at the time the offender was released into the City of Woodland in Cowlitz County. That same person, with absolutely no change

in circumstances, could then be assessed as a level II sex offender by the Cowlitz County Sheriff. If the offender then moved across the street into a new house and into Clark County (the county line runs through the city), the Clark County Sheriff would then be free to assess the defendant as a level III sex offender, once again without any changes in circumstances. Each assessment would be valid under RCW 72.09.345 and RCW 4.24.550(6) because there are no standards for the assessment of risk levels by county sheriffs, and each assessing agency is free to use whatever criteria the agency pleases, regardless of the scientific validity of those assessment criteria.

In the case at bar, the defendant is in the class of persons convicted of sex offenses and assigned at level II. As the preceding explained, RCW 72.09.345 and RCW 4.24.550(6) do not apply alike to all members within this designated class. Rather, these statutes allow for three different assessments to the same person under the same facts, depending upon the criteria a particular county sheriff decides to employ. In addition, since the assessment statutes apply no standards at all, there are no reasonable grounds to distinguish between assessment levels. Finally, a system of standardless, *ad hoc* risk assessment by county sheriffs does not rationally relate to the legislature's legitimate purpose of protecting the public from those offenders with a moderate or high risk to reoffend because it fails to rationally identify those with a moderate or high risk. As a result, RCW 72.09.345 and RCW

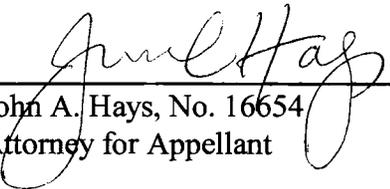
4.24.550(6) violate the defendant's right to equal protection under both Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment.

CONCLUSION

This court should reverse the defendant's conviction and remand with instructions to dismiss because (1) substantial evidence does not support the court's verdict of guilt, and (2) the State classified the defendant as a level II offender in violation of his right to due process and equal protection under Washington Constitution, Article 1, § 3 & 12, and United States Constitution, Fourteenth Amendment.

DATED this 24TH day of January, 2011.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

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 4.24.550(6)

(6) Local law enforcement agencies that disseminate information pursuant to this section shall: (a) Review available risk level classifications made by the department of corrections, the department of social and health services, and the indeterminate sentence review board; (b) assign risk level classifications to all offenders about whom information will be disseminated; and (c) make a good faith effort to notify the public and residents at least fourteen days before the offender is released from confinement or, where an offender moves from another jurisdiction, as soon as possible after the agency learns of the offender's move, except that in no case may this notification provision be construed to require an extension of an offender's release date. The juvenile court shall provide local law enforcement officials with all relevant information on offenders allowed to remain in the community in a timely manner.

RCW 9A.44.130(7)

(7) All offenders who are required to register pursuant to this section who have a fixed residence and who are designated as a risk level II or III must report, in person, every ninety days to the sheriff of the county where he or she is registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. An offender who complies with the ninety-day reporting requirement with no violations for a period of at least five years in the community may petition the superior court to be relieved of the duty to report every ninety days. The petition shall be made to the superior court in the county where the offender resides or reports under this section. The prosecuting attorney of the county shall be named and served as respondent in any such petition. The court shall relieve the petitioner of the duty to report if the petitioner shows, by a preponderance of the evidence, that the petitioner has complied with the reporting requirement for a period of at least five years and that the offender has not been convicted of a criminal violation of this section for a period of at least five years, and the court determines that the reporting no longer serves a public safety purpose. Failure to report, as specified, constitutes a violation of this section and is punishable as provided in subsection (11) of this section.

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

**STATE OF WASHINGTON,
Respondent,**

APPEAL NO: 41196-2-II

vs.

AFFIRMATION OF SERVICE

**William Aaron Barge,
Appellant.**

**STATE OF WASHINGTON)
) vs.
COUNTY OF LEWIS)**

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 **January 24, 2011**, I personally placed in the mail the following documents

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

to the following:

**MICHAEL GOLDEN
LEWIS COUNTY PROS. ATTY
345 W. MAIN ST.
CHEHALIS, WA 98532**

**WILLIAM AARON BARGE
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P.O. BOX 182
ROCHESTER, WA 98579**

Dated this 24TH day of JANUARY, 2011 at LONGVIEW, Washington.

Cathy Russell

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