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A. IDENTITY OF PETITIONER

Petitioner, Michael Caton, the appellant below, moves this Court for the relief designated in section B.

B. DECISION BELOW

Caton seeks review of the Court of Appeals published decision affirming his conviction. State v. Caton, ___ Wn. App. ___, ___ P.3d ___ (Slip Op. No. 40422-2-II, 2011 WL 4036109, September 13, 2011) (attached as appendix A).

C. ISSUES PRESENTED FOR REVIEW

1. Caton was convicted of violating former RCW 9A.44.130 (7). Under the statute, a level II or III sex offender must report “every ninety days” to the sheriff of the offender’s county of residence on a date specified by the sheriff.

a. Does authorizing the county sheriff to arbitrarily set the reporting date without any legislative guidance or standards violate the separation of powers doctrine and improperly delegate to the county sheriff the determination of an element of the offense?

b. Does the statute violate the equal protection guarantee under the state and federal constitution?

c. Is the statute's requirement that an offender report every 90 days and that an offender report on the date specified by the county sheriff unconstitutionally vague as applied?

2. Was the evidence sufficient to support Caton's conviction for failing to report every 90 days where the evidence only showed Caton failed to report on the 27th day after he registered?

3. Where the sole evidence that Caton was a level II sex offender was based on a conclusion reached by the End of Sentence Review Committee was the conclusion hearsay and improperly admitted and where Caton was not provided an opportunity to cross examine the party who prepared the conclusion was Caton's constitutional right to confrontation violated?

D. STATEMENT OF THE CASE

The State charged Caton with failing to register as a sex offender under former RCW 9A.44.130. It was alleged Caton was a level II sex offender and he failed to report, in person, to the Lewis County Sheriff every 90 days. CP 1. He was found guilty after a bench trial and the court entered findings of fact and conclusions of law. CP 6-8 (attached as appendix B).

Caton registered as a sex offender with the Lewis County Sheriff on May 19, 2009. CP 7 (finding of fact 1.2). Lewis County Deputy

Sheriff Detective Brad Borden set Caton's offender risk level as level II, based on the conclusion of the "End of Sentence Review Committee" (ESRC) provided by the Department of Corrections (DOC). Id. (finding of fact 1.4), RP 57, 63-64. Borden instructed Caton to report for his 90 day reporting requirement on June 16, 2009: 27 days from the date of his registration. Id. (finding of fact 1.5).

On June 9, 2009 Caton was arrested for a driving offense. CP 7 (finding of fact 1.7). On June 10, 2009 he was released from jail and immediately reported to the Sheriff's Office believing that as a registered sex offender he was required to report after release from confinement for an offense. Id. (finding of fact 1.8). Caton did not report to the Sheriff's Office on June 16, but instead one day later, on June 17, 2009. Id. (finding of fact 1.10).

Although Caton reported on June 10 and June 17, because he did not report on June 16, the trial court found Caton guilty of failing to report every 90 days. CP 8 (conclusion of law 2.2). He was sentenced to 50 months in prison. CP 11.

The Court of Appeals affirmed Caton's conviction in a published decision.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. FORMER RCW 9A.44.130(7) VIOLATES THE SEPARATION OF POWERS DOCTRINE AND THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES EMBODIED IN BOTH THE STATE AND FEDERAL CONSTITUTIONS.

Former RCW 9A.44.130 (7)¹ required all level II and level III sex offenders to report, in person, every 90 days to the sheriff of the county where the offender resided. The statute required the offender report on a day specified by the county sheriff's office during normal business hours.

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.

Former RCW 9A.44.130 (7).

- a. The Statute Violates the Separation of Powers Doctrine

The separation of powers doctrine is a founding principle of our state and federal constitutions. State v. Blilie, 132 Wn.2d 484, 489, 939 P.2d 691 (1997); See, Wash. Const. arts. II, III, and IV; U.S. Const. arts. I, II, and III. Under the doctrine, one branch of government may not

¹ RCW 9A.44.130 was amended effective June 10, 2010 to include, inter alia, the elimination of the 90 day reporting provision for level II and III sex offenders. Laws of 2010, ch. 265 (effective June 10, 2010).

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). It is unconstitutional for the legislature to abdicate or transfer its legislative function to others. Brower v. State, 137 Wn.2d 44, 54, 969 P.2d 42 (1998).

The power to define the elements of a crime is a fundamental legislative function and lies solely with the legislature. State v. Wadsworth, 139 Wn.2d 724, 734 (2000). The legislature may, however, constitutionally delegate authority to an administrative agency to implement statutory directives if two requirements are met: (1) the legislature must provide standards to indicate the task and designate the agency to accomplish it and (2) impose procedural safeguards to control arbitrary administrative action and abuse of discretionary power. State v. Ermert, 94 Wn.2d 839, 847, 612 P.2d 121 (1980) (citation omitted).

Former RCW 9A.44.130 (7) required an offender to report to the county sheriff every 90 days. Failure to report every 90 days is an essential element of the offense. See, former RCW 9A.44.130 (11)(a) (“[a] person who knowingly fails to comply with any of the requirements of this section is guilty of a class C felony”). The statute also authorized the county sheriff to set a date when the offender was required to report to comply with the 90 day reporting requirement. The statute does not

instruct the county sheriff on how to apply the 90-day requirement or contain any standards on setting the report date.

Caton reported on June 10 after his release from jail because he believed as a sex offender he was required to report after release from confinement for an offense. He reported again on June 17. Both dates were within 90 days from his registration date. Nonetheless, he was convicted because he did not report on June 16, the reporting date arbitrarily set by the Sheriff's Office. Because the statute delegated to the county sheriffs the authority to arbitrarily set the reporting date (which in this case was 27 days from the date of registration) without any instruction or standards on to apply the 90 day reporting requirement, the legislature improperly delegated to the county sheriffs the authority to determine an essential element of the offense.

In State v. Ramos, 149 Wn.App. 266, 202 P.3d 383 (2009)), Division Two held former RCW 4.24.550, which allowed the county sheriff to assign risk classifications to sex offenders without any standards violated the separation of powers doctrine. Id. at 275-276. The court held by allowing the county sheriff to assign risk classifications without standards the statute improperly allowed the county sheriff to define an essential element of the offense—a legislative function. Id. at 271-272.

Here, the Court Appeals distinguished its decision in Ramos and held the delegation to the county sheriff to determine the reporting date, unlike the delegation to determine an offender risk classification, was administrative and did not violate the separation of powers doctrine. Slip. Op. at 7. The court relied on State v. Melcher, 33 Wn. App. 357, 655 P.2d 1169 (1982) to support its holding. Id. Melcher does not support the court's analysis.

Melcher argued former RCW 46.61.506(3) unlawfully delegated legislative power to the state toxicologist to approve techniques or methods for determining a driver's breath or blood alcohol level, an element of the crime of driving under the influence, without necessary procedural safeguards. The Melcher court, in dicta, found it was not an improper delegation because the statute merely delegated the "power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend." 361 (citing Carstens v. DeSellem, 82 Wn. 643, 650, 144 P. 934 (1914) (where the court held the statute that delegated to the commissioner of horticulture the power to designate what pests and diseases were injurious to fruit trees was not an improper delegation of legislative power). The Melcher court relied on a number of this Court's cases holding that delegating certain functions to an agency was not improper where there are adequate procedural

safeguards to prevent arbitrary agency action. Id. at 361 (citations omitted). It found there were adequate procedural safeguards to prevent arbitrary agency action because the defendants in Melcher had been able to challenge both the testing procedure to determine a person's breath or blood alcohol level and the competence of the testing person. Id. at 360 (citation omitted).

Unlike the delegation to determine the mechanism or procedure for measuring blood alcohol, where there were procedural safeguards to prevent arbitrary action, there are no such safeguards to prevent the county sheriff from arbitrarily determining the date an offender must report. Delegating the task of determining the method for measuring blood alcohol or what pests are harmful to trees, both of which are necessarily driven by the available science and as pointed out in Melcher subject to agency rule making procedural safeguards, is a far cry from delegating the authority to arbitrarily fix a date that becomes an essential element of a crime.² Because the legislature provided no criteria, no standards and no guidance as to how each county sheriff should set the date on which an offender is to report every 90 days, the statute invited each county to adopt

² That the Sheriff's Office reporting date became the essential element of the offense is without question. The information charged Caton with "failing to report in person to the Lewis County Sheriff's Office on the required day for the 90 day reporting requirement." CP 1. The trial court's conclusion of law found Caton guilty "as alleged in the information." CP 7 (conclusion of law 2.2).

its own arbitrary standard. Like in Ramos, the county sheriff's office was free to adopt its own arbitrary report date and ultimately an element of the offense in violation of the separation of powers doctrine.

b. Caton's Constitutional Right to Equal Protection was Violated.

Because the legislature set no standards or guidelines for a county sheriff to use when determining when to require a level II or III sex offender to report to satisfy the "every" 90 day reporting requirement, the statute also violates the right to equal protection. Constitutional equal protection guarantees require similar treatment under the law for similarly situated persons. U.S. Const. amend. 14, § 1; Wash. Const. art. 1, § 12; In re Mota, 114 Wn.2d 465, 473, 788 P.2d 538 (1990). Under the minimal scrutiny test, a statute that does not affect a fundamental right or create a suspect or semi-suspect classification will be invalidated if 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, 90 Wn.2d 818, 585 P.2d 1191 (1978). In Peterson v. State, 100 Wn.2d 421, 445, 671 P.2d 230 (1983), this Court ruled that in determining whether a statute meets the requirements of the minimal scrutiny test is analyzed under the following factors: "(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.”
Id. at 445.

Under former RCW 9A.44.130 (7) the determination of when to require an offender to report to satisfy the 90 day requirement is left to the arbitrary decision of each county sheriff. Since each county sheriff is free to assign a reporting date, the same person could be required to report 90 days after he registered in one county and required to report two days after he registered in another. The Court of Appeals does not view this anomaly as a problem, finding that to allow counties to determine the reporting date within the 90 day period rationally relates to the state’s interest in assisting law enforcement in protecting the community by regulating sex offenders. Slip. Op. at 8.³

The purpose behind sex offender registration is to assist law enforcement agencies’ protection efforts by keeping law enforcement informed of the whereabouts of sex offenders who may reoffend. State v. Watson, 160 Wn.2d 1, 9-10, 154 P.3d 909 (2007) (citations omitted). Assuming the requirement that an offender report every 90 days is

³ That premise is doubtful, however, given that the legislature has since abandoned the 90 day reporting requirement.

rationality related to the legitimate purpose of protecting the public by keeping law enforcement apprised of the whereabouts of an offender, allowing each county sheriff to arbitrarily determine the reporting date, which in this case was only 27 days from the date of registration, does not. There is no logical or rational connection between protection of the public, which the legislature at one time determined was satisfied by a 90 day reporting requirement, and an arbitrarily set reporting date.

c. The Statute is Unconstitutionally Vague as Applied.

The due process clause of the fourteenth amendment to the United States Constitution requires statutes to provide fair notice of the conduct they proscribe. Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); State v. Coria, 120 Wash.2d 156, 163, 839 P.2d 890 (1992); City of Spokane v. Douglass, 115 Wash.2d 171, 182, 795 P.2d 693 (1990). The language of a penal statute must explicit inform those who are subject to it what conduct on their part will render them liable to its penalties. State v. Watson, 160 Wn.2d at 7-8 (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391-93, 46 S.Ct. 126, 70 L.Ed. 322 (1926)). A statute fails to provide the required notice if a person of common intelligence must guess at its meaning. Id.

The problem with the statute is obvious. Although the statute warns an offender he must report every 90 days or face criminal sanctions,

it also gives the county sheriff the authority to set the reporting date, which can be less than or something other than “every” 90 days, as this case illustrates. The statute is inherently vague because a person of reasonable intelligence must guess whether it’s a crime to fail to report every 90 days or fail to report on the date set by the county sheriff, which can be any date unrelated to the 90 day requirement.

The issue here involves the application of the separation of powers doctrine, the equal protection guarantee and requirement that a statute is unconstitutionally vague if a person of reasonable intelligence must guess at its meaning. The Court of Appeals decision also conflicts with this Court’s decision in Watson. This Court should grant review. RAP 13.4(b)(1) and (3).

2. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION.

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). Reversal is required where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a

reasonable doubt. State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992); State v. Green, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980).

The Court of Appeals reasoned that the 90 day requirement was trumped by whatever date the county sheriff arbitrarily set as the reporting date. And, because the sheriff set the reporting date as June 16, Caton's failure to report on that date was sufficient to support the conviction. Slip. Op. at 14.

Statutory interpretation is a question of law this Court reviews de novo. State v. Lilyblad, 163 Wn.2d 1, 6, 177 P.3d 686 (2008). Where a statute is plain on its face, the legislature is presumed to mean exactly what it says. Criminal statutes are given a literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). When a statute is ambiguous, however, the rule of lenity requires resolution in the defendant's favor. State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979); State v. Carter, 138 Wn. App. 350, 356-57, 157 P.3d 420 (2008). "The policy behind the rule of lenity is to place the burden squarely on the legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are." State v. Jackson, 61 Wn. App. 86, 93, 809 P.2d 221 (1991).

As argued above, because the county sheriff could specify a reporting date that is more often than or less than every 90 days, as the sheriff did here, the question is whether failure to report every 90 days constitutes a violation, as the statute proscribes, or whether failure to report on the date set by the county sheriff constitutes a violation, as found by both the trial court and Court of Appeals.⁴ The statute fails “to clearly and unequivocally warn people of the actions that expose them to liability.” Reasonable minds could differ on when an offender is deemed to have committed the crime because of the statute’s internal lack of clarity.

There was no evidence Caton failed to report “every ninety days” from the date of his registration. The evidence only showed, and the trial court found, he failed to report on June 16, the reporting date set by the county sheriff but only 27 days from the date of registration. Because the statute is ambiguous regarding whether the failure to report every 90 days or the failure to report on the date set by the county sheriff constitutes the crime, it must be resolved in Caton’s favor. Because the evidence does not show Caton failed to report every 90 days, thus, contrary to the Court of Appeals decision, there was insufficient evidence to support his conviction.

⁴ The legislature could have written the statute to make it an offense to fail to report every 90 days or on the day set by the county sheriff but it did not.

This Court should accept review because the Court of Appeals decision conflicts with this Court's cases holding that an ambiguous statute must be interpreted in favor of the defendant and it presents a significant question regarding the constitutional requirement that there must be sufficient evidence to support a conviction. RAP 13.4(b)(1) and (3).

3. THE COURT ERRED IN ADMITTING HEARSAY AND CATON'S CONSTITUTIONAL RIGHT TO CONFRONTATION WAS VIOLATED.

Detective Borden was permitted to testify that Caton was a level II sex offender based exclusively on the classification set by the ESRC. RP 57. Based on Borden's testimony the State moved to admit exhibit 1, the offender registration form on which Borden identified Caton as a level II offender. RP 57-58. Caton objected to the admission of the exhibit because the information on the form was hearsay and was inadmissible because the conclusion he was a level II offender was derived exclusively from the ESRC. RP 58. The trial court overruled the objection.

On cross examination Borden testified he wrote "level II" on Caton's registration form based on the information "the end of sentence review committee alert documentation" provided through the DOC. RP 64. Caton renewed his objection to the admission of exhibit 1. RP 64. The objection was again overruled. The court apparently believed because

Borden testified that Caton was a level II offender based on information provided by the ESRC, the exhibit was not hearsay. RP 67.

Hearsay is a statement other than one made by a declarant while testifying at trial offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is generally inadmissible unless it falls within an exception to the rule barring hearsay. ER 802.

RCW 5.45.020 is an exception to the rule against hearsay. It authorizes the admission of otherwise inadmissible records, provided they are made and kept in the ordinary course of business. State v. Hines, 87 Wn. App. 98, 100, 941 P.2d 9 (1997). Where the preparation of a report requires the exercise of the declarant's skill and discretion, however, the business record exception does not apply. In re J.M., 130 Wn. App. 912, 924, 125 P.3d 245 (2005).

The ESRC's determination that Caton was a level II offender, which Borden adopted and wrote on the registration form, was hearsay because it was used to prove the truth of the matter asserted—that Caton was a level II offender and therefore required to report. That determination required the skill and discretion of the ESRC so it was not admissible as a business record. See, RCW 72.09.345 (3) and (6) (requiring the Committee to assess each offender on a case by case basis based on a risk assessment). The court erroneously admitted the exhibit.

Moreover, the admission of the exhibit violated Caton's right to confrontation. A written declaration prepared for use in a criminal prosecution violates the Sixth Amendment right of confrontation when it serves as an out-of-court statement by non-testifying witnesses and the accused had no prior opportunity for cross-examination. Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009); State v. Mason, 160 Wn.2d 910, 920, 162 P.3d 396 (2007); U.S. Const. Amend. XI; Wash. Const. art. 1, Sec. 22.

In Melendez-Diaz the Court held documents attesting to certain facts fall within the "core class" of testimonial evidence for which confrontation is required under the Sixth Amendment. Melendez-Diaz, 129 S.Ct. at 2532. A document attesting to a fact in question at trial is the functional equivalent of a live witness and does precisely what a witness would do at trial on direct examination. Id. And, if a document is prepared for the purpose of being available for use at trial, it is testimonial and subject to the right to confrontation. Id.

The registration form was admitted to establish the essential element that Caton was a level II sex offender. Because Caton's classification as a level II offender was determined solely from a document prepared by the ESRC, attested to a fact in question at trial (whether Caton was a level II offender and therefore required to report)

and prepared for the purpose of being available for use at trial, it's admission without providing Caton with the opportunity to cross examine or confront the party who prepared the information violated Caton's right to confrontation.

The Court of Appeals did not address the hearsay issue. Instead, it found Caton's objections were not specific enough to preserve the confrontation issue but it correctly recognized the issue could be raised for the first time on appeal if the claim constituted a manifest constitutional error. Slip. Op. at 12. See, RAP 2.5(a)(3) and State v. Kronich, 160 Wn.2d 893, 900-901, 161 P.3d 982 (2007). It recognized the claim was constitutional but ruled the error was not "manifest" because the court could have relied on Borden's testimony he classified Caton as a level II offender after reviewing all of Caton's records. Id. Thus, the court held, the error was not "subject to our review." Id. at 13. The court was wrong.

Borden testified the only "record" he reviewed was the DOC alert document showing the ESRC classified Caton as a level II offender. It was based on that document, and only that document, that led him to write on the registration form that Caton as a level II offender. RP 63-64.⁵ Moreover, the trial court specifically found "The Defendant's risk level

⁵ Borden testified the document is the ESRC's "synopsis of the details concerning the individual" and its application of the "Washington State Sex Offender Risk Assessment tool." RP 65.

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." CP 7 (finding of fact 1.4). Contrary to the Court of Appeals, there was no other record. "All" the records included the registration form filled out by Borden based on the ESRC classification in the "alert document."

A constitutional error is manifest if the appellant can show the asserted error had practical and identifiable consequences in the trial of the case. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009); State v. Kirkman, 159 Wn. 2d 918, 935, 155 P.3d 125 (2007). If manifest the prosecution has the burden of showing error is harmless. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The evidence Caton was a level II offender was based solely on the conclusion reached in a report by the ESRC based on criteria and assessment tools. The ESRC's classification attested to a fact in question at trial (that Caton was a level II offender) and was the functional equivalent of a live witness. Without evidence Caton is a level II offender the State could not prove he was required to report. The error had an identifiable consequence in the trial. The Court of Appeals decision the error "was not subject to our review" is wrong. Slip. Op. at 13.

The error was not harmless. Without evidence that Caton is a level II offender, there is insufficient evidence that he was required to report under the statute.

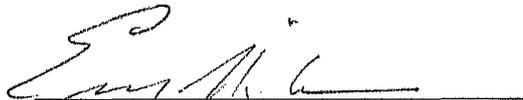
This Court should accept review of this issue because it involves a significant right to confrontation question under the state and federal constitutions. RAP 13.4(b)(3). The issue is also important because the Court of Appeals decision is unsupported by the record and conflicts with this Court's decisions in O'Hara and Kirkman interpreting RAP 2.5. RAP 13.4. (b)(4).

F. CONCLUSION

For the foregoing reasons, this Court should grant review.

DATED this 23 day of September 2011.

Respectfully submitted:



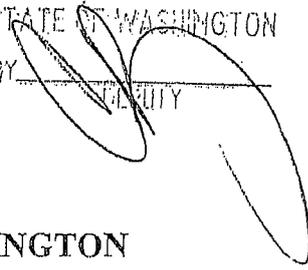
ERIC NIELSEN, WSBA 12773
Office ID No. 91051
Attorneys for Petitioner

APPENDIX A

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  CLERK

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL EDWARD CATON,
Appellant.

No. 40422-2-II

PUBLISHED OPINION

VAN DEREN, J. — Michael Caton appeals his conviction for failure to register as a sex offender. He argues: (1) the legislature violated separation of powers principles when it authorized county sheriffs under former RCW 9A.44.130(7) (2006) to designate a reporting date within a 90 day period for certain registered sex offenders, (2) former RCW 9A.44.130(7) violates equal protection principles on the same basis, (3) former RCW 9A.44.130(7) is unconstitutionally vague, (4) admission of Caton's sex offender registration form at trial violated his right to confront witnesses, and (5) sufficient evidence does not support his conviction. In a statement of additional for review grounds,¹ he also contends: (1) the trial court erroneously included his failure to register as a sex offender conviction when calculating his offender score, (2) the trial court erred when it sentenced him to community custody, (3) sentencing him under

¹ RAP 10.10.

former RCW 9A.44.130(11)(a) violated ex post facto prohibitions, and (4) the county sheriff failed to follow statutory sex offender registration requirements. We affirm.

FACTS

On May 19, 2009, Caton registered as a sex offender with the Lewis County Sheriff's Office. When he registered, he signed a notification form acknowledging his understanding (1) that he was required to report to the sheriff's office every 90 days, (2) that his reporting date was June 16, 2009, between 8:00 a.m. and 5:00 p.m., and (3) that failure to report on that date was a felony offense.² Lewis County Sheriff's Detective Bradford Borden provided Caton with a copy of the notification form.

To reasonably manage the 90 day reporting requirement for all sex offenders living in Lewis County, the county specified four predesignated reporting days, one in each quarter of the year. It did not set individual reporting dates for each sex offender because doing so would be "very chaotic." Report of Proceedings (RP) at 61.

On June 9, Caton was arrested for a "driving offense." Clerk's Papers (CP) at 7. On June 10, after his release from jail, he appeared at the sheriff's office, believing that, as a registered sex offender, he was required to report to the sheriff after release from confinement for any offense. Borden did not give him a new registration date, leaving June 16 as Caton's next reporting date.

On June 16, Caton failed to report to the sheriff's office; instead he reported on June 17. The State charged him under former RCW 9A.44.130(7) and former RCW 9A.44.130(11)(a)

² The trial court admitted this form as "Plaintiff's Identification 2" at trial. Report of Proceedings at 59. It is not part of the record on appeal.

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with failure to register as a sex offender for failing to report in person "on the required day for the 90 day reporting" period. CP at 1.

At a bench trial, Borden stated that he worked in the Lewis County Sheriff's Office Sex Offender Registration Unit and was its sex offender registration file custodian. He stated that the sheriff's office ultimately sets the risk level for registered sex offenders, but that the Washington State Department of Corrections's End of Sentence Review Committee (ESRC) also sets offenders' risk levels when they are released from confinement. Borden stated that the sheriff's office prepared Caton's registration form and used it for "initial registration[] and changes of address." RP at 57. Over Caton's hearsay and foundation objections, the trial court admitted the registration form.

Referring to Caton's sex offender registration form, Borden stated that ESRC classified him as a level II offender. Borden classified Caton as a level II sex offender on the Lewis County registration form based on Caton's sex offender registration file, including the ESRC's report. Borden stated that the ERSC's report contained "a synopsis of the details concerning" Caton and, that, based on numeric assessment tools, the ERSC had elevated him to a level II offender. RP at 65. Caton unsuccessfully renewed his objection to the registration form's admission on hearsay and foundation grounds, arguing that "it's based on some other documentation to indicate risk level II and that that should be a prerequisite foundational requirement, prior to the admission of that document." RP at 66.

The trial court convicted Caton as charged. It calculated his offender score as 9+ and sentenced him to 50 months' incarceration and 36 months' community custody.

ANALYSIS

I. SEPARATION OF POWERS

Caton, citing *State v. Torres Ramos*, 149 Wn. App. 266, 202 P.3d 383 (2009), argues that the legislature's authorization of county sheriffs under former RCW 9A.44.130(7) to determine sex offenders' reporting date during the 90 day reporting period violates separation of powers principles because it allows them to define an essential element of the crime of failure to register as a sex offender.

We review a statute's constitutionality de novo. *State v. Abrams*, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008). We presume the statute's constitutionality, and the party challenging it must prove its unconstitutionality beyond a reasonable doubt. *Abrams*, 163 Wn.2d at 282.

Washington courts have recognized the separation of powers doctrine as a founding, implicit principle of our state and federal constitutions. *State v. Blilie*, 132 Wn.2d 484, 489, 939 P.2d 691 (1997). The doctrine serves to ensure that the fundamental functions of each government branch remain inviolate. *Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173 (1994). When separation of powers challenges are raised involving different branches of state government, only the state constitution is implicated. *Carrick*, 125 Wn.2d at 135 n.1.

Authority to define crimes and set punishments rests firmly with the legislature. *State v. Wadsworth*, 139 Wn.2d 724, 734, 991 P.2d 80 (2000). Specifically, the legislature is responsible for defining the elements of a crime. *State v. Evans*, 154 Wn.2d 438, 447 n.2, 114 P.3d 627 (2005); *Wadsworth*, 139 Wn.2d at 735. "[I]t is unconstitutional for the Legislature to abdicate or transfer its legislative function to others." *Brower v. State*, 137 Wn.2d 44, 54, 969 P.2d 42 (1998). Such a delegation is proper, however, when (1) the legislature provides standards to indicate what is to be done and designates the agency to accomplish it and (2) procedural

safeguards exist to control arbitrary administrative action and abuse of discretionary power.

State v. Simmons, 152 Wn.2d 450, 455, 98 P.3d 789 (2004).

We also review questions of statutory interpretation, such as the essential elements of a crime, de novo. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). When interpreting a statute, we seek to ascertain the legislature's intent. *Jacobs*, 154 Wn.2d at 600. "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Jacobs*, 154 Wn.2d at 600 (alteration in original) (quoting *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). We determine the "plain meaning" of a statutory provision from the ordinary meaning of its language, as well as the general context of the statute, related provisions, and the statutory scheme as a whole. *Jacobs*, 154 Wn.2d at 600 (quoting *Campbell & Gwinn*, 146 Wn.2d at 9-10)). We interpret statutes to give effect to all language in the statute and to render no portion meaningless or superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

The elements of a crime are "those facts 'that the prosecution must prove to sustain a conviction.'" *State v. Miller*, 156 Wn.2d 23, 27, 123 P.3d 827 (2005) (quoting BLACK'S LAW DICTIONARY 559 (8th ed. 2004)). "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior.'" *State v. Tinker*, 155 Wn.2d 219, 221, 118 P.3d 885 (2005) (quoting *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). It is proper to look first to the statute to determine the elements of a crime. *Miller*, 156 Wn.2d at 27.

Former RCW 9A.44.130(7) provided:

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.

Former RCW 9A.44.130(11)(a) provided, “A person who knowingly fails to comply with any of the requirements of this section is guilty of a class C felony.”

In *Ramos*, we considered whether the legislature’s delegation of authority under former RCW 4.24.550(6)(b) (2005), allowing the county sheriff to assign risk classifications to sex offenders, violated separation of powers principles.³ 149 Wn. App. at 269-70. We observed that the statute, by allowing the county sheriff to classify offenders with a risk level I or II, allowed the county sheriff to define an element essential to a violation of the requirements of former RCW 9A.44.130(7). *Ramos*, 149 Wn. App. at 271-72. We further observed that former RCW 4.24.550(6)(b) did not provide standards, definitions, or methodologies to guide local law enforcement agencies in determining an offender’s classification. *Ramos*, 149 Wn. App. at 275-76. We held that the legislature’s delegation of this function to the county sheriff was improper. *Ramos*, 149 Wn. App. at 276.

In reaching this holding, we distinguished *State v. Melcher*, 33 Wn. App. 357, 655 P.2d 1169 (1982). *Ramos*, 149 Wn. App. at 273. In that case, Melcher argued that former RCW 46.61.506(3) (1979) improperly delegated legislative authority because the statute allowed the state toxicologist to approve methods of chemical analysis for determining breath or blood alcohol content levels and a driver’s blood alcohol level is one element of the crime of driving under the influence. *Melcher*, 33 Wn. App. at 359-60. But Division Three of this court reasoned that the statute “d[id] not delegate the power to make a law; rather, it delegate[d] the ‘power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend.’” *Melcher*, 33 Wn. App. at 361 (internal quotation marks omitted) (quoting

³ Former RCW 4.24.550(6)(b) provided, “Local law enforcement agencies that disseminate information pursuant to this section shall . . . assign risk level classifications to all offenders about whom information will be disseminated.”

Carstens v. DeSellem, 82 Wash. 643, 650, 144 P. 934 (1914)). Because the statute adequately defined the element of the crime in question (permissible level of blood alcohol content) and properly delegated the duty of establishing measurement procedures for this objective standard to the state toxicologist, the delegation was administrative, not legislative. *Melcher*, 33 Wn. App. at 361. Thus, the delegation was not subject to challenge under separation of powers principles. *Melcher*, 33 Wn. App. at 361.

The legislature's delegation to county sheriffs to set the reporting date for sex offenders who are required to register is more akin to the delegation of power in *Melcher* than to the delegation in *Ramos*. Here, the legislature defined the elements of the crime as knowingly failing to comply with former RCW 9A.44.130(7)'s 90 day reporting requirement. It established the 90 day reporting period as an objective standard. It delegated the power to determine the "fact . . . upon which the law makes, or intends to make, its own action depend," i.e., the reporting date within the 90 day period, to the county sheriff. *Melcher*, 33 Wn. App. at 361 (internal quotation marks omitted) (quoting *Carstens*, 82 Wash. at 650). Thus, the delegation was administrative, allowing each county to manage the reporting requirement in accord with its staffing levels and staff availability, and it did not violate separation of powers principles. Caton's claim fails.

II. EQUAL PROTECTION

Caton also argues that former RCW 9A.44.130's authorization of county sheriffs to specify a reporting date within the 90 day reporting period for level II and III sex offenders violates his federal and state constitutional guarantees of equal protection.

Constitutional equal protection guarantees require similar treatment under the law for similarly situated persons. U.S. CONST. amend. XIV, § 1; WASH. CONST. art. I, § 12; *State v.*

Ward, 123 Wn.2d 488, 515, 69 P.2d 1062 (1994). “Where persons of different classes are treated differently, there is no equal protection violation.” *Ward*, 123 Wn.2d at 515.

We review an allegedly discriminatory statutory classification affecting suspect classes under a strict scrutiny test. *Ward*, 123 Wn.2d at 516. But “[s]ex offenders are not a suspect class for purposes of equal protection review.” *Ward*, 123 Wn.2d at 516. Therefore, we review Caton’s claim under a rational basis test. *Ward*, 123 Wn.2d at 516. A law satisfies this test if it rests on a legitimate state objective, and the law is not wholly irrelevant to achieving that objective.⁴ *Ward*, 123 Wn.2d at 516.

Here, the legislature stated explicitly that the State’s policy is “to assist local law enforcement agencies’ efforts to protect their communities by regulating sex offenders by requiring sex offenders to register with local law enforcement agencies as provided in RCW 9A.44.130.” LAWS OF 1990, ch. 3, § 401. Our Supreme Court has recognized this as a legitimate state objective. *Ward*, 123 Wn.2d at 516-17. Granting law enforcement agencies discretion in specifying a reporting date allows them to effectively allocate their resources and provides them with a manageable number of sex offenders to monitor on each reporting date. *See Ward*, 123 Wn.2d at 517. Therefore, allowing counties to set the reporting date within the 90 day registration period for level II and III sex offenders is not arbitrary and rationally relates to the state’s interest in assisting local law enforcement in this task. Accordingly, we hold that

⁴ Caton cites to additional rational relationship review factors: (1) whether the law applies equally to all members in the designated class, (2) whether there are reasonable grounds for distinguishing between those within and those without the class, and (3) whether the law has a rational relationship to the law’s purpose. *Petersen v. State*, 100 Wn.2d 421, 445, 671 P.2d 230 (1983). Because our Supreme Court declined to apply these factors in *Ward* and, because these factors overlap with the standard applied in *Ward*, we decline to apply them.

authorizing county sheriffs to set the reporting date in former RCW 9A.44.130(7) does not violate equal protection guarantees.

III. VAGUENESS

Caton further argues that former RCW 9A.44.130(7) is unconstitutionally vague because it fails to provide adequate notice of the conduct it requires or proscribes. We disagree.

We review a vagueness challenge to a statute's constitutionality *de novo*. *State v. Watson*, 160 Wn.2d 1, 5-6, 154 P.3d 909 (2007). When the statute does not involve First Amendment⁵ rights, we review a vagueness challenge by examining the statute as applied to the particular facts of the case. *Watson*, 160 Wn.2d at 6. A challenger bears the burden of proving beyond a reasonable doubt that a statute is unconstitutionally vague and, because we presume a statute is constitutional and the standard for finding a statute unconstitutionally vague is high, only in exceptional cases may a challenger overcome this presumption. *Watson*, 160 Wn.2d at 11.

We consider a statute void for vagueness if either (1) the statute fails to define the criminal offense with sufficient definiteness—allowing ordinary people to understand what conduct the statute proscribes—or (2) the statute fails to provide ascertainable standards of guilt to protect against arbitrary enforcement. *Watson*, 160 Wn.2d at 6. Caton appears to challenge former RCW 9A.44.130(7) only on the first ground.

“The due process clause of the Fourteenth Amendment to the United States Constitution requires statutes to provide fair notice of the conduct they proscribe.” *Watson*, 160 Wn.2d at 6. To meet this standard, “the language of a penal statute ‘must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.’”

⁵ U.S. CONST.

Watson, 160 Wn.2d at 6-7 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). “A statute fails to provide the required notice if it ‘either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’” *Watson*, 160 Wn.2d at 7 (quoting *Connally*, 269 U.S. at 391).

But, because “[s]ome measure of vagueness is inherent in the use of language,” we “do not require ‘impossible standards of specificity or absolute agreement.’” *Watson*, 160 Wn.2d at 7 (alteration in original) (quoting *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 740, 818 P.2d 1062 (1991)); *Watson*, 160 Wn.2d at 7 (internal quotation marks omitted) (quoting *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992)). In addition, “[b]ecause of the inherent vagueness of language, citizens may need to utilize other statutes and court rulings to clarify the meaning of a statute” and we consider such materials “[p]resumptively available to all citizens.” *Watson*, 160 Wn.2d at 8 (alteration in original) (internal quotation marks omitted) (quoting *City of Spokane v. Douglass*, 115 Wn.2d 171, 180, 795 P.2d 693 (1990)).

Unconstitutional vagueness is not mere uncertainty, and a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which their actions become prohibited conduct. *Watson*, 160 Wn.2d at 7. Given this, “a statute meets constitutional requirements ‘[i]f persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some possible areas of disagreement.’” *Watson*, 160 Wn.2d at 7 (alteration in original) (internal quotation marks omitted) (quoting *Douglass*, 115 Wn.2d at 179)).

Here, former RCW 9A.44.130(7) required that sex offenders with a fixed residence report to the county sheriff every 90 days on a date specified by the sheriff. Former RCW

9A.44.130(11) stated that failure to comply with any of the requirements of former RCW 9A.44.130 constituted a felony. These statutes were presumptively available to Caton. The Lewis County Sheriff's Office informed Caton that the next specified reporting date was June 16, 2009, and that failure to report on that date was a crime. Accordingly, a person of ordinary intelligence would understand that failure to report on June 16 was a crime. Caton's vagueness challenge fails.

IV. CONFRONTATION CLAUSE

Caton additionally argues that the trial court's admission of his sex offender registration form containing Borden's classification of him as a level II sex offender, based in part on his ERSC classification, violated the confrontation clause and requires reversal. Specifically, he argues that "the trial court admitted and relied upon [the registration form] to find the essential element that . . . Caton was a level II or III sex offender, yet this document merely recited information derived from another document that was not proffered by the State or admitted at trial." Br. of Appellant at 24.

The Sixth Amendment to the United States Constitution⁶ and article 1, section 22 of the Washington Constitution⁷ guarantee criminal defendants the right to confront and cross-examine witnesses. The confrontation clause provides that the State can present testimonial out-of-court statements of an absent witness only if the witness is unavailable and the defendant has had a prior opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. 36, 59, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). But the State can present nontestimonial hearsay

⁶ "[T]he accused shall enjoy the right to . . . be confronted with the witnesses against him." U.S. Const. amend. VI.

⁷ Under Washington's constitution, the accused also has "the right to . . . meet the witnesses against him face to face." WASH. CONST. art. I, § 22.

under the Sixth Amendment subject only to evidentiary rules. *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). Accordingly, “the existence of an applicable hearsay exception is not dispositive as to the issue of admissibility at trial. Rather, the Confrontation Clause requires another layer of analysis.” *State v. Kirkpatrick*, 160 Wn.2d 873, 882, 161 P.3d 990 (2007). The State has the burden on appeal of establishing that statements are nontestimonial. *State v. Koslowski*, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009). We review confrontation clause violations for constitutional harmless error. *Koslowski*, 166 Wn.2d at 431.

Caton raises this constitutional claim for the first time on appeal. RAP 2.5(a) generally does not allow parties to raise claims for the first time on appeal. But RAP 2.5(a)(3) allows appellants to raise claims for the first time on appeal if such claims constitute manifest constitutional error. To establish manifest constitutional error allowing appellate review, appellants must demonstrate actual prejudice resulting from the error on the record. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). “Essential to this determination is a plausible showing . . . that the asserted error had practical and identifiable consequences in the trial.” *Kirkman*, 159 Wn.2d at 935 (internal quotation marks omitted) (quoting *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

In *State v. Kronich*, 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007), our Supreme Court held that a confrontation clause violation was “manifest” because, had it been raised at trial, the challenged statement would have been excluded, thus fatally undermining the State’s case. Here, Borden testified that the county sheriff ultimately sets an offender’s risk level and that he classified Caton as a level II sex offender. The trial court could have relied on Borden’s testimony that he classified Caton as a level II offender after reviewing all of Caton’s records, thus requiring Caton to report every 90 days. Even assuming that the trial court erroneously

admitted the form, its exclusion would not have fatally undermined the State's case.

Accordingly, any error here is neither manifest nor subject to our review.

V. SUFFICIENCY OF THE EVIDENCE

Caton also contends that sufficient evidence does not support his conviction because (1) the State showed that he failed to report to the county sheriff within 27 days, not within 90 days, after registering as a sex offender and (2) no admissible evidence established that he was a level II sex offender required to report because admission of the form used by Borden to classify Caton as a level II sex offender violated the confrontation clause.

Sufficient evidence supports a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). On appeal, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. *Hosier*, 157 Wn.2d at 8. In the sufficiency context, we consider circumstantial evidence equally as probative as direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970, *abrogated in part on other grounds by Crawford*, 541 U.S. 36.

Caton assigns error only to finding of fact 1.4, “[Caton’s] risk level was set at a Level II by the [ESRC] and that level was adopted by the Lewis County Sheriff’s Office.” CP at 7. The trial court’s unchallenged findings stated: (1) the Lewis County Sheriff’s Office has four preset quarterly reporting dates for level II and III sex offenders and does not give individual offenders dates differing from the preset dates; (2) on May 19, 2009, Caton registered as a sex offender with the sheriff’s office; (3) he registered a fixed address; (4) on May 19, he was given in writing

the quarterly report date of June 16, 2009; (5) he had knowledge that he had to report to the sheriff's office on June 16 between 8:00 a.m. and 5:00 p.m.; (6) he was arrested on June 9 for a driving offense and was released from jail on June 10; (7) he appeared at the sheriff's office on June 10 after his release from custody; (8) he failed to report to the sheriff's office on June 16; and (9) he reported on June 17. Unchallenged factual findings are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Here, former RCW 9A.44.130(7) required that sex offenders with a fixed residence report to the county sheriff every 90 days on a date specified by the sheriff. Former RCW 9A.44.130(11)(a) stated that failure to comply with any of the requirements of former RCW 9A.44.130 constituted a crime. The trial court's unchallenged findings established that Caton had a fixed residence in Lewis County and knowingly failed to report on June 16, 2009, the designated reporting date. Finally, Borden's testimony established that the Lewis County Sheriff's Office classified Caton as a level II sex offender, and he was thus subject to the reporting requirement. We have determined that any error in admitting Caton's sex offender registration form is neither manifest nor subject to our review and that the trial court considered Borden's unchallenged testimony of his classification of Caton. Sufficient evidence supports his conviction.

VI. STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

A. Offender Score

Caton argues that the trial court erroneously included his failure to register conviction as a sex offense when calculating his offender score at sentencing. But the applicable version of the sentencing reform act of 1981, chapter 9.94 RCW, defined a "sex offense" as "[a] felony that is a violation of chapter 9A.44 RCW other than [former] RCW 9A.44.130(12)." Former RCW

9.94A.030(46)(a)(i) (2008). Here, Caton was convicted under former RCW 9A.44.130(11)(a), not an excluded offense. His claim fails.

B. Community Custody

Caton contends that the trial court erred in sentencing him to community custody for his failure to register conviction. Former RCW 9.94A.545(2)(a) (2008)⁸ provided, “If the offender is guilty of failure to register under [former] RCW 9A.44.130(11)(a), the court shall impose a term of community custody under [former] RCW 9.94A.715 [(2008)].”⁹ Former RCW 9.94A.715(1) provided, “When a court sentences a person to the custody of the department for a sex offense not sentenced under [former] RCW 9.94A.712 [(2008)]^[10] the court shall in addition to the other terms of the sentence, sentence the offender to community custody.” Former RCW 9.94A.712 did not contain failure to register as a crime requiring its application. Here, Caton committed failure to register under former RCW 9A.44.130(11)(a). Thus, the statutes authorized the trial court to impose community custody as part of his sentence. His claim fails.

C. Ex Post Facto

Caton further argues that the trial court violated ex post facto prohibitions by sentencing him under former RCW 9A.44.130(11)(a) instead of the law in effect in 2001. But we apply the law in effect at the time the crime was committed. *State v. Schmidt*, 143 Wn.2d 658, 673-74, 23 P.3d 462 (2001). He committed the crime on June 16, 2009, when former RCW

⁸ LAWS OF 2008, ch. 276, § 304.

⁹ LAWS OF 2008, ch. 276, § 305. Former RCW 9.94A.715 was repealed, effective August 1, 2009, pursuant to the direction found in section 42(2), chapter 28, Laws of 2009 and section 57(3), chapter 231, Laws of 2008.

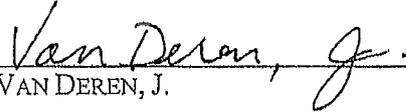
¹⁰ Former RCW 9.94A.712 was recodified as former RCW 9.94A.507 (2008), effective August 1, 2009, pursuant to the direction found in section 56(4), chapter 231, Laws of 2008.

40422-2-II

9A.44.130(11)(a) was in effect. The trial court did not retroactively apply a new statute to his crime. His claim fails.

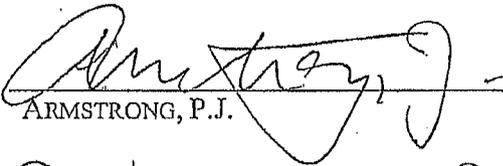
D. Sex Offender Registration Requirements

Finally, Caton contends that Borden failed to follow sex offender registration requirements, such as obtaining his fingerprints and giving him a new registration date, when he reported to Borden after his release from jail on June 10. But he was jailed for a “driving offense.” CP at 7. Former RCW 9A.44.130(4)(a)(i) provided, “Sex offenders who committed a sex offense . . . and who, on or after July 28, 1991, are in custody, as a result of that offense . . . must register at the time of release from custody.” Here, he was not released from custody as a result of a sex offense. His claim fails.

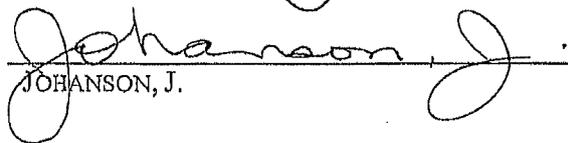


VAN DEREN, J.

We concur:



ARMSTRONG, P.J.



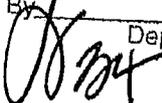
JOHANSON, J.

APPENDIX B

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Received & Filed
LEWIS COUNTY, WASH
Superior Court

MAR 03 2010

Kathy A. Brack, Clerk
By  Deputy

**SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF LEWIS**

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.)
)
 MICHAEL EDWARD CATON,)
 DOB: 02-15-1984)
)
 Defendant.)

NO. 09-1-00362-3

FINDINGS OF FACT
AND CONCLUSIONS OF LAW
BENCH TRIAL

I. RECITALS

This matter came before this court for a trial without a jury on February 17, 2010, the Honorable Judge Richard Brosey presiding. The State was represented by Sara I. Beigh, DPA. The Defendant was present and represented by Daniel Havarco, Jr., Attorney at Law. The court considered exhibits admitted by the State. The court heard testimony from the State's witness, Detective Bradford Borden. The court heard testimony from the Defendant. The court makes the following findings and conclusions:

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II. FINDINGS OF FACT

- 1
2
3 1.1 The Lewis County Sheriff's Office has quarterly reporting for Level II and Level III
4 sex offenders four times a year. The quarterly reporting dates are preset and the
5 Lewis County Sheriff's Office does not give an individual a separate date that
6 differs from the preset dates.
- 7 1.2 On May 19, 2009 the Defendant registered as a sex offender with the Lewis
8 County Sheriff's Office.
- 9 1.3 The Defendant registered a fixed address, located at 114 Deer Haven Drive in
10 Winlock, Washington.
- 11 1.4 The Defendant risk level was set at a Level II by the End of Sentence Review
12 Committee and that level was adopted by the Lewis County Sheriff's Office.
- 13 1.5 On May 19, 2009 the Defendant was given the report date for the next quarterly
14 reporting, June 16, 2009. The Defendant was given this date in writing.
- 15 1.6 The Defendant had knowledge that he was to report to the Lewis County
16 Sheriff's Office on June 16, 2009 between the hours of 8:00 a.m. and 5:00 p.m.
- 17 1.7 The Defendant was arrested on June 9, 2009 for a driving offense. The
18 Defendant was released from jail on June 10, 2009.
- 19 1.8 The Defendant appeared at the Lewis County Sheriff's Office on June 10, 2009
20 after his release from custody.
- 21 1.9 The Defendant failed to report to the Lewis County Sheriff's Office on June 16,
22 2009 between the hours of 8:00 a.m. and 5:00 p.m.
- 23 1.10 The Defendant did come into the Lewis County Sheriff's Office on June 17,
24 2009.

III. CONCLUSIONS OF LAW

25 Based on the foregoing findings:

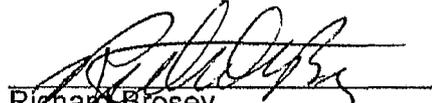
- 26 2.1 The Court has jurisdiction over the defendant and the present subject matter.
- 2.2 The Defendant, Michael Edward Caton, is guilty, beyond a reasonable doubt, of
the crime of Failure to Register as a Sex Offender, as alleged in the Information.

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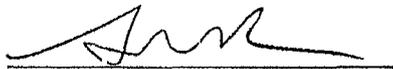
ORDER

3.1 Based upon the foregoing Findings of Fact and Conclusions of Law, the defendant, Michael Edward Caton, is guilty of the crime alleged in the information. A judgment and sentence consistent with these findings shall enter.

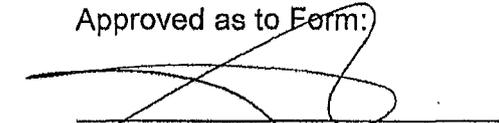
DONE IN OPEN COURT this 3rd March day of ~~February~~, 2010.


Richard Brosey
Superior Court Judge

Presented by:


Sara I. Beigh
Deputy Prosecuting Attorney
WSBA #35564

Approved as to Form:


Daniel Hvirco, Jr.
Attorney for Defendant
WSBA # 19922

NIELSEN, BROMAN & KOCH, PLLC

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Case Name:

Court of Appeals Case Number: 40422-2

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: ____
- Answer/Reply to Motion: ____
- Brief: ____
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: Petition ofr Review _____

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