IN THE SUPREME COURT OF FLORIDA

Case No. SC03-1321

EVERETT WARD MILKS,
Petitioner,

v.

THE STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

BRIEF OF PETITIONER ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

INTRODUCTION

Petitioner Everett Ward Milks was the defendant in the trial court and the appellant on appeal. Respondent State of Florida was the prosecution at trial and the appellee on appeal. The parties will be referred to in this brief as "Mr. Milks" and "the state." The symbol "R" will constitute a reference to the record on appeal.

STATEMENT OF THE CASE AND FACTS

On June 13, 2000, an information was filed in the Sixth Judicial Circuit of Florida charging that on or between March 1 and March 20, 2000, Mr. Milks committed the offense of lewd or lascivious molestation.

Mr. Milks entered a no contest plea (R 89-96) and was sentenced to imprisonment for 6.5 years (R 41). The state filed a notice of its intent to have Mr. Milks declared a sexual predator (R 45). Mr. Milks moved to dismiss the notice (R 46-47) and filed a memorandum in support of the motion (R 48-63). In these pleadings, Mr. Milks asserted the unconstitutionality of Florida's statutory scheme relating to sexual predators.

At the hearing on the state's request to have Mr. Milks declared a sexual predator, Mr. Milks' counsel orally argued the constitutional issues (R 73-77, 79-81). The court rejected Mr. Milks' arguments (R 81-82), denying Mr. Milks' objection (R 82) and concluding, "So, I'm specifically passing upon the

constitutionality of the sexual predator statute and find that the mandatory features of the sexual predator statute are constitutional and are within the legislature's discretion (R 82)." Subsequently, the court declared Mr. Milks to be a sexual predator (R 84) and entered a written order to that effect (R 70).

On appeal, the Second District Court of Appeal affirmed the order of the trial court. *Milks v. State*, 848 So. 2d 1167 (Fla. 2d DCA 2003). This proceeding follows.

SUMMARY OF ARGUMENT

The Florida Sexual Predators Act requires that offenders who meet the statutory criteria must be designated as sexual predators and must therefore be subjected to the act's extensive burdens and severe public stigma. This is true regardless of whether or not a particular offender poses a threat to the community. The sweeping approach taken by the legislature in designating *all* offenders who meet the criteria to be sexual predators, without giving them the opportunity for a hearing on the question of whether they in fact pose a danger, violates both procedural and substantive due process, as well as equal protection.

Procedural due process claims are examined in two steps, the first of which asks whether there exists a liberty or property interest which has been interfered with by the state and the

second of which examines whether the procedures attendant upon that deprivation were constitutionally sufficient.

In determining whether a liberty or property interest has been implicated when governmental action damages a person's reputation, the courts employ the "stigma plus" test, which requires a showing of governmental defamation that is sufficiently derogatory to injure a person's reputation and some tangible and material state-imposed burden or alteration of the individual's status or of a right.

That test was met here. Clearly, the act of being labeled a "sexual predator" results in a stigma. Moreover, the Sexual Predators Act imposes lifelong registration requirements, limits employment possibilities, restricts the right to tort remedies, and infringes on the right to privacy. Thus, the plus prong of the "stigma plus" test has also been met and it is apparent that the act interferes with liberty or property interests.

Once this conclusion is reached, it is apparent that procedural due process has been violated because the act provides for no process whatsoever, instead establishing an automatic determination of sexual predator status.

The decision in *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed. 2d 98 (2003), does not change this conclusion. In *Doe,* the Court found that procedural due process did not mandate a hearing when dangerousness was not

material under the Connecticut statute at issue. In Florida, by contrast, the legislature made it quite clear that its purpose in enacting the Sexual Predators Act was to protect the public from dangerous individuals, not to impose the act's burdens on all persons convicted of certain offenses, regardless of dangerousness.

Should it be found that the rationale of *Doe* applies to the act, however, it would have to be concluded that the act is invalid under a substantive due process analysis. The Court in *Doe* suggested that the lack of a hearing might constitute such a constitutional violation, but did not reach the issue. The factors forming the basis for the procedural due process argument, especially the fundamental rights involved and the fact that the act's purpose is to protect the public, must be weighed in light of the fact that the state has no interest whatsoever in imposing the act's burdens on individuals who are not dangerous and the fact that the state could have achieved its purpose through the less restrictive alternative of providing for a hearing on the issue of dangerousness.

In addition, the act violates equal protection. It allows defendants to escape its requirements when it is apparent from the record that their offenses lacked a sexual component and that they therefore do not present a danger of committing future sexual offenses. It does not, however, allow other similarly

situated defendants to establish the facts of their case when those facts do not appear in the record. The Court in *Doe* did not address this issue either, but Justice Souter, joined by Justice Ginsburg, wrote a concurring opinion that suggested that the Connecticut statute might be subject to an equal protection challenge because only certain offenders were allowed the possibility of avoiding its requirements. The attack alluded to by Justices Souter and Ginsburg is entirely consistent with Florida law finding irrebuttable presumptions to be invalid. It demonstrates that the Sexual Predators Act is a violation of equal protection.

Finally, in leaving the trial court with no discretion to determine whether the declaration that an individual is a sexual predator is necessary for the protection of the public, Florida's statutory scheme also violates the separation of powers clause in Article II, Section 3 of the Florida Constitution.

The statute here wrests from trial courts the final discretion to decide whether an offender should be declared a sexual predator. Analogous situations demonstrate that when such discretion is absent, a constitutional violation occurs.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING MR. MILKS OBJECTION TO THE APPLICABILITY OF FLORIDA'S SEXUAL PREDATOR ACT AND IN DECLARING MR. MILKS TO BE A SEXUAL PREDATOR WHEN THE ACT VIOLATES BOTH PROCEDURAL AND SUBSTANTIVE DUE PROCESS, AS WELL AS EQUAL PROTECTION, UNDER BOTH THE FEDERAL AND FLORIDA CONSTITUTIONS, BY NOT PROVIDING FOR A HEARING ON THE QUESTION OF WHETHER AN OFFENDER IS A DANGER TO THE COMMUNITY AND WHEN THE ACT VIOLATES THE SEPARATION OF POWERS PROVISION OF THE FLORIDA CONSTITUTION.

A The Florida Sexual Predators Act

The Florida Sexual Predators Act provides that a defendant convicted of any of several offenses who meets the statute's criteria "shall be designated as a 'sexual predator.'" Section 775.21(4)(a), Florida Statutes. As noted in *Robinson v. State*, 804 So. 2d 451, 452 (Fla. 4th DCA 2001), "[t]here is no ambiguity in this particular section; if the defendant meets the substantive criteria for the designation of a sexual predator, the court must designate him so." Thus, when a defendant has the prerequisite criminal conviction, a trial court is required to enter a finding of sexual predator status. *Espindola v. State*, 855 So. 2d 1281, 1284 (Fla. 3d DCA 2003); *State v. Curtin*, 764 So. 2d 645, 647 (Fla. 1st DCA 2000). Indeed, the granting of a motion to declare an individual a sexual predator has been deemed merely "perfunctory." *Espindola*, 855 So. 2d at 1284; *Thomas v. State*, 716 So. 2d 789 (Fla. 4th DCA 1998).

The designation has a major impact on offenders who are subjected to it. Once designated, extensive burdens and a severe public stigma attach to offenders. For instance, they are subjected to registration requirements, Section 775.21(6), Florida Statutes,[1] for the duration of their lives. Section

[1] Within 48 hours of establishing a residence, the offender must personally go to the offices of the Department of Law Enforcement (FDLE), or, alternatively, the sheriff's office, and, within 48 additional hours, of the Department of Highway Safety and Motor Vehicles, to register. Section 775.21(6)(e), 775.21(6)(f), Florida Statutes; *Espindola*, 855 So. 2d at 1285. Upon registration, an offender must provide his or her name, age, race, sex, date of birth, height, weight, hair and eye color, a photograph, address of legal residence, address of any current temporary residence, a brief description of the crimes committed by the offender, and

775.021(6)(l), Florida Statutes. Moreover, the sexual predator registration list is a public record, Section 775.21(6)(k)2., Florida Statutes, and the information is widely disseminated to the community and the public. Section 775.21(7), Florida Statutes. Offenders must obtain driver's licenses or identification cards and identify themselves as sexual predators as part of that process. Section 775.21(6)(f), Florida Statutes. They must report to sheriffs when they move. Section 775.21(6)(i), Florida Statutes. Failure of offenders to comply with the sexual predator requirements is a criminal offense. Section 775.21(10), Florida Statutes.

Moreover, the act prohibits specific offenders from working "at any business, school, day care center, park, playground, or other place where children regularly congregate … ." Section 775.21(10)(b), Florida Statutes.[2]

The act also requires FDLE to take offenders' registration information and photograph and place it on the internet for worldwide distribution, Section 775.21(7)(c), Florida Statutes, and requires county law enforcement to provide the same information to the public through other means. Section 775.21(7)(a), Florida Statutes. In addition, it provides broad immunity to anyone acting in good faith in the implementation of the act's notification requirements. Section 775.21(9), Florida Statutes.

The act, however, does not provide for a hearing on the question of whether an individual upon whom it is being brought to bear poses a danger to the community. This failure violates Mr. Milks' procedural and substantive due process rights, as well as his right to equal protection, under both the federal and Florida constitutions. Moreover, the act violates the separation of powers provision of the Florida Constitution. Thus, the trial court erred in denying Mr. Milks' objection to the act's applicability to him.[3]

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genetic material. Section 775.21(6)(a)1., Florida Statutes; *Espindola*, 855 So. 2d at 1285.

[2] This prohibition applies to Mr. Milks, who was convicted of violating Section 800.04, Florida Statutes, one of the offenses specified in the above provision.

[3] This matter should be reviewed *de novo*. As noted in *Ocala Breeders' Sales Co. v. Florida Gaming Centers, Inc.*, 731 So. 2d 21, 24 (Fla. 1st DCA 1999), "A trial court's decision on the constitutionality of a state statute presents an issue of law that is reviewed by the *de novo* standard of review."

B Procedural Due Process

Procedural due process claims are to be examined "in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State; … the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460, 109 S.Ct. 1904, 1908, 104 L.Ed. 2d 506, 514 (1989) (citations omitted).

1 Liberty or Property Interest

In answering the question of whether a liberty or property interest has been implicated when governmental action damages a person's reputation, the courts employ the "stigma plus" test to determine whether procedural due process rights are triggered. This test, which arose from the decision in *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed. 2d 405 (1976), requires a showing of governmental defamation that is sufficiently derogatory to injure a person's reputation and some tangible and material state-imposed burden or alteration of the individual's status or of a right.

a Stigma

There can be no question that the "stigma" portion of this test has been met here. Clearly, the act of being labeled a "sexual predator" results in a stigma. *Espindola*, 855 So. 2d at 1287. *See also Fullmer v. Michigan Dept. of State Police*, 207 F.Supp. 2d 650, 659 (E.D. Mich. 2002) (plaintiff met first prong of "stigma plus" due to stigma associated with being falsely labeled as a danger to the community when registry included both currently dangerous offenders and those who are not likely to become dangerous again); *Doe #1 v. Williams*, 167 F.Supp. 2d 45, 51 (D.D.C. 2001) ("It is beyond dispute that public notification pursuant to the [District of Columbia sex offender registry] results in stigma); *Doe v. Pryor,* 61 F. Supp. 2d 1224, 1231 (M.D. Ala. 1999) ("While it might seem that a convicted felon could have little left of his good name, community notification … will inflict a greater stigma than would result from conviction alone" because "[n]otification will clearly brand the plaintiff as a 'criminal sex offender' … --a 'badge of infamy' that … strongly implies that he is a likely recidivist and a danger to his community."); *Doe v. Pataki*, 3 F. Supp. 2d 456, 468 (S.D.N.Y. 1998) (because information required by the New York State Sex Offender Registration Act "is likely to carry with it shame, humiliation, ostracism, loss of employment and decreased opportunities for employment, perhaps even physical violence, and a multitude of other adverse consequences[,] … there is no genuine dispute that the dissemination of the information

contemplated by the Act to the community at large is potentially harmful to plaintiffs' personal reputations.").

b Plus

Mr. Milks submits that the "plus" aspect of the test has also been met. As discussed above, the Sexual Predators Act imposes lifelong registration requirements on him, limits his employment possibilities, and restricts his right to seek tort remedies. The court in *Espindola* found that these factors satisfied the plus prong, 855 So. 2d at 1288, noting that in *Paul v. Davis*, employment was a specifically mentioned "plus" factor. *Id.* *See Paul v. Davis*, 424 U.S. at 701, 96 S.Ct. at 1161, 47 L.Ed. 2d at 414. *See also Collie v. State*, 710 So. 2d 1000, 1012 (Fla. 2d DCA 1998) (finding that employment restrictions infringe on a constitutionally protected liberty interest).

Courts from other jurisdictions have reached the same conclusion with regard to the same or similar factors. For instance, in *Doe v. Pataki*, the court indicated that registration requirements "place a 'tangible burden' on plaintiffs, potentially for the rest of their lives." 3 F.Supp. 2d at 468 (citation omitted). Similarly, the court in *Fullmer* found the plus prong satisfied as the result of "the obligations of registration and the attendant penalties for non-compliance." 207 F.Supp. at 660. Likewise, in *Doe v. Attorney General*, 426 Mass. 136, 686 N.E. 2d 1007, 1012 (1997), the court found that registration pursuant to the Massachusetts sex offender act "creates the reasonable possibility that [the registrant] will suffer adverse economic consequences from the disclosure of his new status in addition to the derision of people in the community." Also, in *W.P. v. Portiz*, 931 F. Supp. 1199, 1219 (D.N.J. 1996), the court concluded that the plus prong could be met "by coupling the reputational damage with the loss of employment opportunities or … the continuing legal status as a registrant and the duties imposed as a result." Further, in *Noble v. Board of Parole*, 327 Or. 485, 496, 964 P.2d 990, 995-996 (1998), the court indicated that a decision to designate an individual as a predatory sex offender involves "an interest in avoiding the social ostracism, loss of employment opportunities, and significant likelihood of verbal and, perhaps, even physical harassment likely to follow from designation" and concluded that "that interest, when combined with the obvious reputational interest that is at stake, qualifies as a 'liberty' interest within the Due Process Clause."

Also discussing the concerns regarding the restrictions on employment was the dissenting opinion of Judge Benton in *Therrien v. State*, ___ So. 2d ___, 28 Fla. L. Weekly D2704 (Fla. 1st DCA Nov. 25, 2003), which recognized that "[t]he right to pursue a career has been held to be a liberty interest protected by the

Due Process Clause," *id.* at D2706, that "[t]he Florida Constitution, no less than the federal constitution, protects the right to earn a livelihood in a lawful occupation (citations omitted)," *id.,* that "[i]n addition to recognizing the general right to earn a livelihood, 'various courts have specifically recognized the ability to pursue employment in the child care field as a constitutionally protected liberty interest (citation omitted)," *id.,* and that "[w]hile the right to work in one's chosen profession is not absolute, it cannot be taken away without due process of law." *Id.*

Moreover, the employment impact of Florida's law on Mr. Milks is not limited to the face of the statute. As noted in *Doe v. Pryor*, 61 F.Supp. 2d at 1232 (citation omitted), it will

> "foreclose his freedom to take advantage of housing and employment opportunities well beyond those expressly forbidden. There can be little doubt that prospective employers and sellers or lessors of real estate will think twice before doing business with an individual deemed to be a likely recidivist and a danger to his community, and, because the Act allows government officials to notify communities through the local media and the Internet,[4] it is likely that at least some of these prospective business partners will become aware of the State's warning. To the extent that such opportunities are foreclosed, the plaintiff will have satisfied the 'plus' part of the stigma-plus test."[5]

See also State v. Bani, 97 Hawai'i 285, 295, 36 P.3d 1255, 1265 (2001) ("Potential employers and landlords will foreseeably be reluctant to employ or rent to Bani once they learn of his status as a 'sex offender.'").

[4] As noted previously, the Florida statute also requires local notifications of a registrant's presence in a community, Section 775.21(7)(a), Florida Statutes, and notification through the internet. Section 775.21(7)(c), Florida Statutes.

[5] To the extent that *Doe v. Pryor* discusses the foreclosure of housing opportunities as well as those related to employment, it demonstrates an additional factor in support of the conclusion that the plus part of the test has been met.

In addition the matters relied upon in *Espindola*, Mr. Milks asserts that the infringement on his right to privacy also supports the conclusion he urges here. Although much of the information disseminated to the public pursuant to Florida law is public record, not all of it is. Notably, a registrant is required to provide his or her address of legal residence and address of any current temporary address. Section 775.21(6)(a)1., Florida Statutes.

This consideration was discussed in *Doe v. Pryor*, 61 F.Supp. at 1232 (footnote omitted):

> Third, and finally, the Community Notification Act will deprive the plaintiff of a legitimate privacy interest in his home address. The Act mandates disclosure of the plaintiff's home address when notifying his community, *see* 1975 Ala.Code § 15-20-21(a)(2), and the Eleventh Circuit has repeatedly held that individuals have "an important privacy interest" in such information. *O'Kane v. United States Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999) (per curiam); *accord Federal Labor Relations Auth. v. United States Dep't of Defense,* 977 F.2d 545, 549 (11th Cir. 1992); *cf. United States Dep't of Defense v. Fed. Labor Relations Auth.,* 510 U.S. 487, 501, 114 S.Ct. 1006, 1015, 127 L.Ed.2d 325 (1994) (holding that individuals have a "nontrivial privacy interest" in nondisclosure of their home addresses). It is true, of course, that home addresses are sometimes available in telephone directories, voter registration lists, and other public records. But "[j]ust because the information 'is not wholly "private" does not mean that a person has no interest in limiting disclosure or dissemination of the information.'" *Federal Labor Relations Auth. v. United States Dep't of Defense*, 977 F.2d at 549 (quoting *Department of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 770, 109 S.Ct. 1468, 1480, 103 L.Ed.2d 774 (1989)); *accord United States Dep't of Defense v. Fed. Labor Relations Auth.,* 510 U.S. at 500,

> 114 S.Ct. at 1015. The plaintiff clearly has *some* privacy interest in the nondisclosure of his home address, and community notification under the Act will clearly deprive him of it. This additional deprivation constitutes a third plus-factor to satisfy the stigma-plus test. *See, e.g., Cutshall*, 980 F.Supp. at 933-34; *Doe v. Portiz,* 142 N.J. 1, 662 A.2d 367, 419 (1995).

See also Doe v. Attorney General, 426 Mass. at 143, 686 N.E. 2d at 1012 (citations omitted) ("The disclosure of a home address presents particular privacy concerns.").

The act also requires disclosure of an individual's social security number. Section 775.21(6)(a)1., Florida Statutes. The privacy interest in this information is apparent from the fact that this court recently limited electronic posting of court records and established a committee to develop a procedure to screen documents to remove sensitive information such as social security numbers. 30 The Florida Bar News, No. 24, December 15, 2003, p. 1.

The right to privacy is also infringed in another manner as well. The dissemination of accumulated information that might be available individually also impacts on that right. This aspect of the right to privacy was discussed in *Doe v. Attorney General*, 426 Mass. At 142-143, 686 N.E. 2d at 1012:

> The fact that most, if not all, the information that the plaintiff must disclose and that the act makes available to the public is available from other public sources does not dispose of the plaintiff's claim that his constitutionally protected privacy interests are violated. In certain instances, the aggregation and dissemination of publicly available information has

> triggered a right to privacy. See *United States Dep't of Defense v. Federal Labor Relations Auth.,* 510 U.S. 487, 500, 114 S.Ct. 1006, 1015, 127 L.Ed.2d 325 (1994) ("An individual's interest in controlling the dissemination of information regarding personal matters [here a home address] does not dissolve simply because that information may be available to the public in some form"); *United States Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 762-764, 109 S.Ct. 1468, 1476-1477, 103 L.Ed.2d 774 (1989); *Doe v. Poritz, supra,* at 87, 662 A.2d 367 ("a privacy interest is implicated when the government assembles those diverse pieces of information into a single package and disseminates that package to the public").

Although the above discussion makes it clear that the act has a major impact on the federal right to privacy, Mr. Milks notes additionally that "[t]he state constitutional right to privacy is much broader in scope, embraces more privacy interests, and extends more protection to those interests than its federal counterpart." *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998) (citations omitted). *See also In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989) (the right to privacy guaranteed by the Florida Constitution "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution"). Thus, Mr. Milks submits that the conclusion reached in the foregoing cases is even more applicable to the Florida statute at issue in light of the scope of Article I, Section 23, of the Florida Constitution.

Because both prongs of the "stigma plus" test have been met, it must be concluded that the rights guaranteed by procedural due process have been triggered.

2 The Right to a Hearing

Once it has been determined that a liberty or property interest has been interfered with, attention focuses on whether the procedures attendant upon that deprivation were constitutionally sufficient. *Kentucky Dept. of Corrections v. Thompson,* 490 U.S. at 460, 109 S.Ct. at 1908, 104 L.Ed. 2d at 514.

Here, as noted in *Espindola*, it is beyond dispute that Mr. Milks received *no* process, much less due process, in light of the act's automatic determination of "sexual predator status." 855 So. 2d at 1289. Most glaring in this lack of process was the lack of a hearing on the subject of whether Mr. Milks posed a danger to the community.

There can be no question that when procedural due process rights are applicable, they encompass the right to a hearing to prove or disprove a particular fact or set of facts relevant to the inquiry at hand. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed. 2d 515, 519 (1971). *See also United*

States v. James Daniel Good Real Property, 510 U.S. 43, 53, 114 S.Ct. 492, 500, 126 L.Ed. 2d 490, 503 (1993) ("The right to prior notice and a hearing is central to the Constitution's command of due process."); *Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed. 2d 62, 66 (1965) (citation omitted) ("A fundamental requirement of due process is 'the opportunity to be heard,' … an opportunity which must be granted at a meaningful time and in a meaningful manner."); *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 313, 70 S.Ct. 652, 656-657, 94 L.Ed. 865, 872-873 (1950) ("Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.").

3 The Impact of Connecticut Dept. of Public Safety v. Doe

The district court in the present case did not dispute any of the principles set forth above, but found that under the decision in *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed. 2d 98 (2003), procedural due process did not entitle Mr. Milks to a hearing. Analysis of Florida's statute in light of *Doe*, however, compels rejection of this conclusion.

In *Doe*, the Court found that dangerousness was "not material under the Connecticut statute" establishing that state's sex offender registry, 538 U.S. at ___, 123 S.Ct. at 1264, 155 L.Ed. 2d at 104, and that, as a result, due process did not mandate a hearing. The district court applied similar reasoning in the present case, concluding that "Florida, like Connecticut, has decided that the public must have access to information about all convicted sex offenders, currently dangerous or not, and that those convicted sex offenders must face certain sanctions." *Milks,* 848 So. 2d at 1169.

The district court's decision, however, failed to consider the intent expressed by the Florida legislature in the statutory scheme at issue. The legislature made it very clear that Florida's registration requirements were based upon the desire to protect the public, not upon a desire to impose a sanction on the offender. Section 775.21(3)(d), Florida Statutes, provides, "It is the purpose of the Legislature that, upon the court's written finding that an offender is a sexual predator, *in order to protect the public*, it is necessary that the sexual predator be registered with the department and that members of the community and the public be notified of the sexual predator's presence (emphasis added)." Similarly, Section 775.21(3)(c), Florida Statutes, indicates that "[t]he state has a compelling interest *in protecting the public* from sexual predators and *in protecting*

children from predatory sexual activity, and there is sufficient justification for requiring sexual predators to register and for requiring community and public notification of the presence of sexual predators (emphasis added)."

The intent expressed above regarding the registration provisions is entirely consistent with the overall intent behind the Florida Sexual Predators Act. In addressing that intent, the legislature found that "[r]epeat sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators *who present an extreme threat to public safety*," Section 775.21(3)(a), Florida Statutes (emphasis added), and that "*[t]he high level of threat that a sexual predator presents to the public safety*, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes," Section 775.21(3)(b), Florida Statutes, the various requirements of the statute.

It is thus clear that the legislature was focused on the threat presented by an offender, not on imposing sanctions on that offender. In Connecticut, by contrast, there is no indication in the statutory scheme of any such focus or concern. *See* Conn. Gen. Stat., Sections 54-250 through 54-261. In fact, as noted in *Doe*, in Connecticut, "the public registry explicitly states that officials have not determined that any registrant is

dangerous." 538 U.S. at ___, 123 S.Ct. at 1163, 155 L.Ed. 2d at 103. Thus, the rationale employed in *Doe* to the law in Connecticut is not applicable here.[6]

The Florida legislature's desire to protect the public is certainly laudable. In attempting to achieve that purpose, however, it enacted a statutory scheme that fails to provide for a hearing that would allow an offender who is not in fact a danger to avoid being tarred with the same brush as those who are. "[T]his total failure to provide for a judicial hearing on the risk of the defendant's committing future offenses, makes it violative of procedural due process and therefore unconstitutional." *Espindola*, 855 So. 2d at 1290.

The conclusion in *Espindola* is not unique, as courts in other jurisdictions have reached similar conclusions. *See Fullmer v. Michigan Dept. of State Police*; *Doe v. Pryor*; *Doe v. Pataki; State v. Bani; Doe v. Attorney General.* Utilizing the same reasoning in interpreting the New Jersey law that inspired sex offender registries and restrictions throughout the nation, that state's supreme court read into the law a requirement for a judicial hearing on the risk of future offenses, *Doe v. Poritz*,

[6] This conclusion is underscored by the very language used by the two states. In Connecticut, individuals register as offenders or as persons who have committed certain offenses. *See* Conn. Gen. Stat., Sections 54-251, 54-252, 54-253, 54-254. Such terminology merely reflects the fact of conviction. Mr. Milks, by contrast, is registered as a "sexual predator," a term that strongly implies present and ongoing dangerousness.

142 N.J. 1, 28-35, 662 A.2d 367, 381-385 (1995), because without such an amendment, the statute would have been unconstitutional. *Id.,* 142 N.J. at 107-109, 662 A.2d at 421-422.

Espindola is not the only Florida case to recognize the concerns voiced by Mr. Milks. In *Robinson*, the Fourth District found Florida's mandatory designation unconstitutional as applied to a defendant who was convicted of carjacking and kidnapping a baby girl, when it was not disputed that the defendant had not engaged in any sexual act upon or in the presence of the child. 804 So. 2d at 452. Similarly, in *Raines v. State*, 805 So. 2d 999 (Fla. 4th DCA 2001), the court reversed a judgment, sentence, and order revoking probation for failure to properly register as an sexual offender when the defendant had pled no contest to a false imprisonment charge that was based on the fact that, after his fiancée broke off their engagement, the defendant locked her four-year old daughter in his car and drove away. The defendants prevailed in those cases because the factors showing that they were not a threat to commit future sexual offenses were apparent from the facts in the record. Such facts may exist as to many other defendants,[7] but may not be apparent from the record

[7] Indeed, the legislature has implicitly recognized that some offenders who meet the statutory criteria are not threats to the community. Section 775.21(3), Florida Statutes, sets forth the legislative findings that "[s]exual offenders are extremely *likely* to … repeat their offenses (emphasis added)" and that "*most* sexual offenders commit many offenses." Section 775.21(3)(a), Florida Statutes (emphasis added)." Inherent in terms such as "likely" and "most" is the fact that the concepts being referred to do not apply

because they were not relevant to the charges at issue, because, as here, the case was disposed of by a plea, or because of some other reason. By not allowing for a hearing on the danger issue, such defendants are automatically stigmatized and subjected to the statutory burdens even though they may clearly not pose a future threat. Certainly, if the act's requirements are unconstitutional as to defendants whose lack of dangerousness is apparent from the record, other defendants who dispute the issue based on factors not apparent must constitutionally be entitled to a hearing on the question.[8]

C Substantive Due Process

In the event that this court follows the approach taken by the district court and applies *Doe* to reject Mr. Milks' procedural due process argument, Mr. Milks would submit that Florida's Sexual Predators Act violates substantive due process.

In *Doe*, the Court, citing to *Reno v. Flores*, 507 U.S. 292, 308, 113 S.Ct. 1439, 123 L.Ed. 2d 1 (1993), indicated that it may be that Mr. Doe's "claim is actually a substantive challenge to Connecticut's statute 'recast in "procedural due process"

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to *all* offenders.

[8] Such a conclusion would have the added benefit of serving the interests of judicial economy. A contrary approach could well encourage a defendant to go to trial instead of accept a plea in order to establish a record or encourage a defendant to try to interject into a trial factors not really relevant to the issue of guilt in order to have them available for use in the event that the state seeks to subsequently seek sexual predator status.

terms.'" 538 U.S. at ___, 123 S.Ct. at 1164-1165, 155 L.Ed. 2d at 105. Because Mr. Doe "expressly disavow[ed] any reliance on the substantive component of the Fourteenth Amendment's protections" and "maintain[ed] … that his challenge [was] strictly a procedural one," the Court expressed no opinion on whether the law there violated principles of substantive due process. 538 U.S. at ___, 123 S.Ct. at 1165, 155 L.Ed. 2d at 105. Thus, the question remains unresolved and Mr. Milks submits that the Florida provision at issue here does violate substantive due process.[9]

[9] Unlike Mr. Doe, Mr. Milks does not expressly disavow any reliance on the substantive component of the Fourteenth Amendment's protections. He also disagrees with the Second District's decision when it categorized his argument as relating only to procedural due process and indicated that he did not raise a substantive due process claim. *Milks*, 848 So. 2d at 1169. A look to Mr. Milks' brief in the district court reveals that he argued that that act violated "due process," not limiting his position to either procedural or substantive due process. *See* Initial Brief of Appellant, pp. i, 4, 8). Thus, the argument encompassed both concepts.

Mr. Milks further notes, however, that even if his argument in the district court did not extend to substantive due process, the present claim that the act is unconstitutional on that basis would properly be before this court. A facial challenge to a statute's validity may be raised for the first time on appeal. *Westerheide v. State*, 831 So. 2d 93, 105 (Fla. 2002); *Trushin v. State*, 425 So. 2d 1126, 1129 (Fla. 1982). Moreover, once this court has a case properly before it for review (and here review is clearly proper on two bases, because the district court expressly declared valid the Sexual Predators Act and because its decision expressly and directly conflicts with *Espindola*), it may "consider any error in the record." *Lawrence v. Florida East Coast Ry. Co.*, 346 So. 2d 1012, 1014, n. 2 (Fla. 1977). *See also Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 912 (Fla. 1995) ("Having accepted jurisdiction, we may review the district court's decision for any error." *Cf. Angrand v. Key*, 657 So. 2d 1146, 1148, n. 3 (Fla. 1995), Wells, J., with two justices concurring and one

"Substantive due process "protects the full panoply of individual rights from unwarranted encroachment by the government." *Goad v. Florida Dept. of Corrections*, 845 So. 2d 880, 885 (Fla. 2003); *Dept. of Law Enforcement v. Real Property*, 588 So. 2d at 960. "To ascertain whether the encroachment can be justified, courts have considered the propriety of the state's purpose; the nature of the party being subjected to state action; the substance of that individual's right being infringed upon; the nexus between the means chosen by the state and the goal it intended to achieve; whether less restrictive alternatives were available; and whether individuals are ultimately being treated

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justice concurring in part and dissenting in part (supreme court has discretion to consider issues ancillary to those certified to it). Thus, in *Westerheide*, this court considered three constitutional claims not raised in the district court. 831 So. 2d at 105.

The same approach should be undertaken here and is particularly appropriate in the present case because the case law prior to *Doe*, which was decided after Mr. Milks' brief was written in the district court, consistently examined this issue in procedural due process terms. Indeed, the decision reversed in *Doe, Doe v. Dept. of Public Safety ex rel. Lee*, 271 F.3d 38 (2d Cir. 2001), found exactly such a violation. Under such circumstances, there was no reason to also explore the question of whether there was a substantive due process violation. It was only after *Doe* shifted the analysis to one of substantive due process that there became a need to discuss the issue in those terms. Further, as will be discussed above, the factors relevant to procedural and substantive due process are essentially the same and the doctrines "frequently overlap." *Dept. of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991). Thus, consideration of the two concepts in the same proceeding makes logical sense. Finally, it of course serves the interest of judicial economy to dispose of all pending constitutional challenges in one proceeding, rather than on a piecemeal basis.

in a fundamentally unfair manner in derogation of their substantive rights." *Westerheide v. State*, 831 So. 2d 93, 104 (Fla. 2002), citing *Dept. of Law Enforcement v. Real Property*, 588 So. 2d at 960.

"In considering whether a statute violates substantive due process, the basic test is whether the state can justify the infringement of its legislative activity upon personal rights and liberties." *In re Forfeiture*, 592 So. 2d 233, 235 (Fla. 1992). "In addition, due process requires that the law shall not be unreasonable, arbitrary, or capricious and therefore courts must determine that the means selected by the legislature bear a reasonable and substantial relation to the purpose sought to be obtained." *Id*. (citations omitted). Thus, "[i]f there is a choice of ways in which government can reasonably attain a valid goal necessary to the public interest, it must elect that course which will infringe the least on the rights of the individual." *State v. Leone*, 118 So. 2d 781, 785 (Fla. 1960).

In undertaking a substantive due process analysis of the act, Mr. Milks initially notes, as indicated previously, that the factors relating to procedural and substantive due process "frequently overlap." *See* n. 9, *supra*. Thus, Mr. Milks incorporates his earlier discussion of procedural due process, particularly those portions that deal with the legislative intent to protect the public and with the rights that have been

implicated by the act, and suggests that consideration of those factors within the framework established by the relevant considerations set forth in the above cases compels the conclusion that the Sexual Predators Act is unconstitutional.

1 Lack of State Interest

The state's interest in imposing the act's burdens on individuals who are not dangers to the community is nonexistent. Indeed, the legislature did not in any way even assert such an interest, making it clear instead that its purpose in adopting the act was the protection of the public.

2 The Substance of the Rights Being Infringed Upon

The rights being infringed upon by the act are basic, fundamental rights that are essential to our society. As noted in *Winfield v. Div. of Pari-Mutual Wagering*, 437 So. 2d 544, 547 (Fla. 1985) (citations omitted):

> The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

Thus, statutes that infringe on the right to privacy are subject to "the highest level of scrutiny." *Von Eiff v. Azicri*, 720 So. 2d at 514. *See also North Florida Women's Health and Counseling Services, Inc. v. State*, ___ So. 2d ___, ___, 28 Fla. L. Weekly S549, S552 (Fla. July 10, 2003) ("Florida's right of privacy is a fundamental right warranting 'strict' scrutiny" and therefore "[a] legislative act impinging on this right is presumptively unconstitutional unless proved valid by the State.").

Further, the employment restrictions of the act also involve a fundamental right. *See Florida Accountants Assn. v. Dandelake*, 98 So. 2d 323, 327 (Fla. 1957) (recognizing "the fundamental right of all citizens to enter into contracts of personal employment).

Thus, the act impacts on fundamental rights, is subject to strict scrutiny, and must be deemed invalid unless the state demonstrates a compelling state interest, something it cannot do because, as noted above, the legislature has not even suggested that it has any interest at all in imposing the act's burdens on persons who do not pose a danger to the community.[10]

3 The Failure to Employ a Less Restrictive Alternative

[10] In light of this lack of any interest, the act here could not even be upheld under the rational basis test that would be appropriate in situations in which fundamental rights are not involved. *Shapiro v. State*, 696 So. 2d 1321, 1326-1327 (Fla. 4th DCA 1997).

This factor plainly points to the conclusion that the act violates substantive due process. Obviously, the less restrictive alternative of providing a hearing on dangerousness was available and was not employed. The state's interest of protecting the public could have been equally well served by a statutory scheme that encompasses a hearing and the adoption of such a scheme would address the concerns raised by the infringement of the various rights involved.[11]

4 Fundamentally Unfair Treatment

It is apparent that individuals are ultimately being treated in a fundamentally unfair manner in derogation of their substantive rights under the act. Had the facts of *Robinson* and *Raines* not been apparent from the record, for instance, those defendants, who clearly posed no danger of committing sexual offenses, would have carried an unwarranted brand for life. Similar situations are easy to imagine or identify. Moreover, some of the cases discussed in this brief present situations in which it appears that the defendant is not likely to pose a

[11] There can be no question that such a hearing is possible. Trials are mandated, Section 394.916, Florida Statutes, when the state seeks to have an individual declared a "sexually violent predator," a designation that requires a showing that the person "is likely to engage in acts of sexual violence if not confined in a secure facility for long-term control, care, and treatment." Section 394.912(10)(b), Florida Statutes. Certainly, if such a determination can be made in that context, a determination as to mere dangerousness can be made when an effort is undertaken to have a person such as Mr. Milks declared a "sexual predator."

threat. For example, the victim in *Espindola* testified that she did not fear the defendant and that she considered him a friend. 855 So. 2d at 1283. As a result, the state did not even seek a standard "stay-away" order. *Id*. In *Doe v. Pryor*, the qualifying offense consisted of the defendant receiving one videotape when he was 19 years old. In *Therrien*, the defendant was deprived of an opportunity "'to show that he is not a danger to society …, that he is married and a father, and that he is living a normal, productive life as a citizen of Florida.'" ___ So. 2d at ___, 28 Fla. L. Weekly at D2707, Benton, J., dissenting. Indeed, as noted in that dissent, the act applied even though "[a]n able and experienced trial judge decided against adjudicating appellant guilty of any criminal offense, not doubt in the hope that appellant had learned his lesson and would one day become a contributing member of society." *Id.*, ___ So. 2d at ___, 28 Fla. L. Weekly at D2705.[12]

[12] Mr. Milks of course recognizes that things are not always as they seem and that, in cases such as *Espindola, Doe v. Pryor,* and *Therrien*, there might exist additional factors demonstrating that the defendants are in fact dangerous. If that turns out to be true, those factors can be established at a hearing and, upon a finding of dangerousness, the sexual predator designation can still be imposed. In fact, this procedure can actually benefit the state, as well as the defendant, in certain circumstances. Suppose, for instance, that there existed facts outside of the record that demonstrated that the defendant in *Robinson* or *Raines* actually was a threat to commit sexual offenses. Such a hearing would give the state the opportunity to have that defendant declared a sexual predator, rather than have him excluded from the designation because of the erroneous impression given by the facts in the record.

In addition, it should be realized that the employment restrictions also impact in a fundamentally unfair manner on individuals. As noted in Judge Benton's dissent in *Therrien*, "The french fry cook in a fast food establishment that high school students regularly patronize, the school janitor, the day care center roofer, the park groundskeeper, and many other positions are off limits for people covered by the Act. This blanket, life-long restriction on the right to work '[any]where children regularly congregate makes no provision for an individual to whom it applies to make a showing that his or her employment poses no threat to public safety." ___ So. 2d at ___, 28 Fla. L. Weekly at D2705.

It is therefore apparent that the indiscriminate application of the act to all persons convicted of one of the designated offenses results in fundamentally unfair treatment to many individuals.

5 Weighing the Factors

It is clear that every relevant factor in a substantive due process analysis points to the conclusion that the Sexual Predators Act is invalid. The infringement of the fundamental personal rights involved cannot be justified in light of the lack of any state interest in imposing the act's burdens on persons who are not dangerous, the fundamentally unfair treatment of those persons, and the fact that the state could have achieved its legislative purpose through the less restrictive approach of providing affected persons with hearings that would protect their rights.

D Equal Protection/Irrebuttable Presumption

In *Doe,* Justice Souter, joined by Justice Ginsburg, wrote a concurring opinion that suggested that the Connecticut statute might be subject to an equal protection challenge because certain sex offenders were allowed the possibility of avoiding its requirements. 538 U.S. at ___, 123 S.Ct. at 1165, 155 L.Ed. 2d at 106-107.

The same situation exists in Florida. As discussed above, the decisions in *Robinson* and *Raines* make it clear that the Sexual Predators Act is unconstitutional, and thus inapplicable, to defendants when it is apparent from the record that those defendants are not dangerous. To allow such defendants to escape the act's requirements, but not allow defendants whose lack of

dangerousness is not apparent, but could become apparent at a hearing, constitutes exactly the sort of equal protection violation envisioned by Justices Souter and Ginsburg.[13]

This concept was discussed in greater detail in R. Rotunda and J. Nowack, Treatise on Constitutional Law §17.6 (3d ed. 1999):

> In a few cases the Supreme Court has held that the government could not establish an "irrebuttable presumption" which classified people for a burden or benefit without determining the individual merit of their claims.[14] …
>
> It now seems readily apparent that these cases actually rest on an equal protection rationale, for the

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[13] Another aspect of the act that raises equal protection concerns is the fact that it allows only persons who have "not been arrested for any felony or misdemeanor offense" for 20 years to petition the circuit court to remove the sexual predator designation. Section 775.21(6)(l), Florida Statutes. Thus, persons who were wrongfully arrested are precluded from seeking such relief, even if no charges were filed, if they were acquitted, or if they collected civil judgments for false arrest. Also precluded are persons who were arrested for crimes with no sexual component, even minor offenses. Thus, for example, regardless of the disposition of the charges, a person arrested for misdemeanor littering pursuant to Section 403.413(6)(b), Florida Statutes, or for casting contempt by word on the state flag, also a misdemeanor, Section 256.06, Florida Statutes, cannot have a sexual predator designation removed.

[14] *See, e.g., Turner v. Dept. of Employment*, 423 U.S. 44, 96 S.Ct. 249, 46 L.Ed. 2d 181 (1975) (holding that women could not be excluded from unemployment compensation because they were pregnant without an individualized determination of their ability to work); *United States Dept. of Agriculture v. Murry*, 413 U.S. 508, 93 S.Ct. 2832, 37 L.Ed. 2d 767 (1973) (striking a food stamp act provision which disqualified a large class of households without individualized determination as to their needs); *Vlandis v. Kline*, 412 U.S. 441, 93 S.Ct. 2230, 37 L.Ed. 2d 63 (1973) (striking a college tuition system which did not allow individuals a fair chance to prove they were residents of a state).

> objectionable portion of each law was the way in which it classified individuals.

See also L. Tribe, American Constitutional Law §16-34 (2d ed. 1988).

Instructive in the present case is a decision in which this precise rationale was applied. In *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942), the Court reviewed a statute requiring persons who had previously been convicted of two or more felonies involving moral turpitude to be rendered sterile upon an additional conviction for such an offense and a sentence of imprisonment. 316 U.S. at 536, 62 S.Ct. at 1111, 86 L.Ed. at 1657. The Court declined to address an argument that the statute violated due process by not giving the defendants the opportunity to be heard on the issue of whether they were the probable potential parent of socially undesirable offspring, 316 U.S. at 538, 62 S.Ct. at 1112, 86 L.Ed. at 1658. Instead, noting that one type of theft, grand larceny, constituted a qualifying offense under the act while another type, embezzlement, did not, 316 U.S. at 538-539, 62 S.Ct. at 1112, 86 L.Ed. at 1658-1659, the Court concluded, 316 U.S. at 541-542, 62 S.Ct. at 1113-1114, 86 L.Ed. at 1660 (citations omitted):

> … [T]he instant legislation runs afoul of the equal protection clause … . When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the

> other, it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. … Sterilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination. … The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.

The rationale of *Skinner* also applies here. There is no reason why the defendants in *Robinson* and *Raines*, who plainly were not threats to commit future sexual offenses, should be able to escape the consequences of the Sexual Predators Act, while other individuals, who might just as clearly not constitute threats, are not even given an opportunity to do so.

Moreover, such a conclusion would be entirely consistent with Florida law, which makes it clear that irrebuttable presumptions are not valid. This court discussed this subject in *State Farm Mut. Auto. Ins. Co. v. Malmberg*, 639 So. 2d 615, 616 (Fla. 1984), stating:

> In *Straughn v. K & K Land Management*, 326 So. 2d 421, 424 (Fla. 1976), this Court held that to be constitutional, a statutory presumption must be rebuttable. Futhermore, in *Public Health Trust of Dade County v. Valcin*, 507 So. 2d 596, 599 (Fla. 1987), this Court reasoned that a conclusive presumption "violates due process in its failure to provide the adverse party any opportunity to rebut."

Although, as noted in the above quote, this court in *Public Health Trust of Dade County v. Valcin,* 507 So. 2d 596, 599 (Fla. 1987), discussed presumptions in due process terms, this court has also recognized the equal protection considerations

identified by Justices Souter and Ginsberg in *Doe*. In *Black v. State*, 77 Fla. 289, 296, 81 So. 411, 413 (1919), this court indicated that if there is a rational connection between the operative fact and the ultimate fact presumed and if the party affected is given a reasonable opportunity to submit facts on the issue,[15] "neither due process of law nor equal protection of law is denied."

Further, an equal protection analysis was undertaken in *Raines*, with the court concluding that the rational relationship discussed in *Straughn* and *Black* was not met when the defendant was convicted of an offense which required him to register as a sexual offender, but which did not involve a sexual component. 805 So. 2d at 1002-1003. Under such circumstances, the court concluded, "the rational basis is lost." *Id*. at 1003. The same is of course true with regard to situations in which individuals whose cases involve facts identical or similar to those of *Raines* (or *Robinson*) are not given the opportunity to contest the issue of whether their offenses contain a sexual component or whether they pose a danger to the public.

[15] The criteria set forth in *Black* remain the cornerstones of modern day analysis of presumptions. As stated in *Straughn v. K & K Land Management, Inc.*, 326 So. 2d 421, 422 (Fla. 1976) (citations omitted), "The test for the constitutionality of statutory presumptions is twofold. First, there must be a rational connection between the fact proved and the ultimate fact presumed. … Second, there must be a right to rebut in a fair manner."

Applying the rationale of the above cases here compels the conclusion that the Sexual Predators Act violates the equal protection of both the federal and state constitutions.[16]

E Separation of Powers

In leaving the trial court with no discretion to determine whether the declaration that an individual is a sexual predator is necessary for the protection of the public, Florida's statutory scheme also violates the separation of powers clause in Article II, Section 3 of the Florida Constitution.

In *State v. Curtin*, 764 So. 2d 645 (Fla. 1st DCA 2000), while the court's opinion did not reach the issue, Judge Padovano's concurring opinion pointed out that the Florida courts had yet to determine this issue.[17] 764 So. 2d at 647, Padovano, J., concurring.

As noted by Judge Padovano, the statute here "appears to 'wrest from [the] courts the final discretion' to decide whether an offender should be declared a sexual predator." *Id*. at 648, citing to *State v. Benitez*, 395 So. 2d 514, 519 (Fla. 1981),

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[16] Although equal protection was not argued in the district court, the reasons set forth in the second and third paragraphs of n. 9, *supra*, demonstrate that the issue is a proper one for consideration by this court in the present case.

[17] Subsequent to the decision in *Curtin*, the Fifth District, in *Kelly v. State*, 795 So. 2d 135 (Fla. 5th DCA 2001), did rule on the issue, rejecting the separation of powers argument. The Second District, in the present case, followed *Kelly. Milks,* 848 So. 2d at 1169. For the reasons that set forth above, Mr. Milks submits that the approach taken by the two district courts was an incorrect one and that it should not be adopted by this court.

which in turn was quoting from *People v. Eason*, 40 N.Y.2d 297, 301, 386 N.Y.S.2d 673, 676, 353 N.E.2d 587, 589 (1976).

A look to analogous situations supports the view that the statute here violates the separation of powers provision. In *State v. Meyers*, 708 So. 2d 661, 663 (Fla. 3d DCA 1998), for instance, the court concluded that the separation of powers doctrine was not violated by the violent career criminal classification because "the trial court retains the discretion to conclude that … [these sanctions] are not necessary for the protection of the public …." The reliance on that discretion makes it clear that when, as here, it is not present, the provision does violate the separation of powers clause.

Likewise, in *Seabrook v. State*, 629 So. 2d 129, 130 (Fla. 1993), the court rejected a separation of powers argument as it pertained to habitual offender sentencing, but did so because of a determination that a trial judge does have the discretion not to impose such a sentence. Inherent in this conclusion is the fact that if the discretion did not exist, the sentencing scheme would have violated the separation of powers clause.

Further, in *Wooten v. State*, 332 So. 2d 15, 17-18 (Fla. 1976), a claim that the legislative imposition of a requirement that judges adjudicate defendants guilty in certain cases ran afoul of the separation of powers doctrine was not accepted

because the same requirement had been adopted by this court in a procedural rule.

In *Kelly*, the Fifth District relied on the fact that "the designation [as a sexual predator] is neither a sentence nor a punishment" and the fact that "a sanction that requires imposition of a mandatory sentence does not violate the separation of powers clause" in rejecting the argument now being made by Mr. Milks. 795 So. 2d at 138. That court's analysis, however, ignores some important factors. First, "depending upon the manner in which it is applied," the statutory provision relating to the dissemination of sexual predator information, "may be considered punitive as there are no procedural safeguards to protect against the unnecessary dissemination of personal information." *Collie*, 710 So. 2d at 1010, n. 9. Second, as previously discussed in this brief, the statute fails to provide for a hearing on the danger issue. Thus, the statute at issue here does not deal with a situation in which a court is merely directed to apply a mandatory sentence when the facts demonstrate that a defendant falls within a group contemplated by the legislature as being the appropriate recipients of that sentence. To the contrary, defendants here can fall outside of that group, and have no opportunity to extricate themselves from it. Thus, the general rule of law relied upon in *Kelly* is not applicable to the sexual predator designation process.

CONCLUSION

Based upon the foregoing argument and authorities, Mr. Milks respectfully submits this court should reverse the decision of the Second District Court of Appeal in this cause and direct that court to reverse the order finding him to be a sexual predator and to remand the matter to the trial court with directions to allow him to complete his sentence and not be required to comply with the requirements of Florida's Sexual Predators Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded to Charles Crist, Attorney General, Concourse Center #4, 3507 E. Frontage Rd., Ste. 200, Tampa, FL 33607 this ___ day of _____, 2003.

_____
ANTHONY C. MUSTO

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
ANTHONY C. MUSTO