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

REPLY BRIEF OF PETITIONER

JAMES MARION MOORMAN
Public Defender

ANTHONY C. MUSTO
Special Assistant Public Defender
Florida Bar No. 207535
Office of the Public Defender
P. O. Box 9000 – Drawer PD
Bartow, FL 33831
863-534-4200

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

INTRODUCTION

Petitioner Everett Ward Milks relies upon the Introduction and Statement of the Case and Facts set forth in his initial brief.

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.

B Procedural Due Process

1 Liberty or Property Interest

The question of whether the Sexual Predators Act interferes with a liberty or property interest was answered in the affirmative by this court in *State v. Robinson*, 29 Fla. L. Weekly S112 (Fla. Mar. 18, 2004),[1] a case decided after the filing of both Mr. Milks' initial brief and the state's answer brief. In *Robinson*, this court, finding the "stigma-plus" test discussed in Mr. Milks' initial brief was met, stated, *id.* at S114 (footnote omitted):

> Robinson's designation as a "sexual predator" certainly constitutes a stigma. No one can deny that such a designation affects one's good name and reputation. *See, e.g., Doe No. 1 v. Williams*, 167 F. Supp. 2d 45, 51 (D. D.C. 2001) (noting that "[i]t is beyond dispute that public notification pursuant to the [District of Columbia's Sexual Offender Registration Act] results in stigma"), *rev'd in part on other*

[1] In *Robinson,* this court affirmed the decision in *Robinson v. State*, 804 So. 2d 451 (Fla. 4th DCA 2001), a case discussed and relied upon by Mr. Milks in his initial brief.

grounds sub nom. Does 1-5 v. Williams, No. 01-7162, 2003 WL 21466903 (D.C. Cir. Jun. 19, 2003). The interest in one's reputation alone, however, is not a liberty interest and thus "the frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts" does not by itself constitute a harm sufficient to be afforded the protections of due process. *Paul v. Davis*, 424 U.S. 693, 701 (1976). Such a stigma must be coupled with "more tangible interests such as employment" or altered legal status to establish entitlement to these protections. *Id*. at 701, 708-709.

We believe the Act imposes more than a stigma. As outlined above, under the Act, a person designated a sexual predator is subject to life-long registration requirements. *See* § 775.21(5), Fla. Stat. (Supp. 1998). Further, as another court has noted, "[t]hese statutes create no mere informational reporting requirement, the violation of which is punished with a small fine." *Giorgetti v. State*, 821 So. 2d 417, 422 (Fla. 4th DCA 2002), *approved*, 29 Fla. L. Weekly S95 (Fla. Mar. 4, 2004). To the contrary, the failure of a designated sexual offender to comply with these and other requirements of the Act constitutes a third-degree felony. § 775.21(10). Moreover, a designated sexual offender is prohibited from seeking certain tort remedies, *see* § 775.21(9), and from working "where children regularly congregate." § 775.21(10)(b). Finally, we cannot ignore that designated sexual predators are subject to social ostracism, verbal (and sometimes physical) abuse, and the constant surveillance of concerned neighbors. These additional limitations implicate more than merely a stigma to one's reputation. Other courts have found that similar registration statutes contained sufficient stigma-plus factors to implicate liberty interests. *See, e.g., State v. Bani,* 36 P.3d 1255, 1264 (Haw. 2001); *Doe v. Attorney General*, 686 N.E.2d 1007, 1012-13 (Mass. 1997); *Noble v. Bd. of Parole*, 964 P.2d 990, 995-96 (Or. 1998). We therefore hold that the designation as a sexual predator constitutes a deprivation of a protected liberty interest.

Thus, it is clear that this question has been resolved by this court in the manner urged by Mr. Milks in his initial brief. Further discussion of this aspect of this issue is unnecessary.

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

The state has not contested the fact that Mr. Milks received no process at all, nor has it disputed Mr. Milks' position 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. Thus, in the wake of *Robinson*, the state's argument boils down to its contention that this court should employ reasoning similar to that expressed in *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed. 2d 98 (2003).

Robinson provides guidance as to this question, as well as to the questions encompassed by the preceding section of this brief. As discussed on pages 22-23 of Mr. Milks' initial brief, had Mr. Robinson entered a plea, resulting in the facts of his case not being apparent on the record, and had the state, as it did in the present case, waited some four months to have Mr. Robinson declared a sexual predator, it is likely that Mr. Robinson would have had no recourse under the law. He would have been in the same position as Mr. Milks, barred from a hearing, one that, at least in Mr. Robinson's case, would have shown that he should not have to suffer the burdens imposed by the Sexual

Predators Act. Neither Mr. Robinson's rights, nor those of any other defendant, should be dependant on what facts are apparent from the record. Rather, defendants who pose a danger should be subjected to the act's requirements and those who do not should not. Thus, this court's decision in *Robinson* underscores Mr. Milks' argument in this regard, one that had been based on the district court's decision in *Robinson*, and, more significantly, one to which the state offers no response.

The state recognizes that the Florida legislature made it clear that the registration and notification requirements of the statutory scheme under review were based on the desire to protect the public, and that the Connecticut legislature was silent as to the purpose behind the provisions at issue in *Doe*. Nonetheless, the state maintains on page 15 of its brief that "[t]he legislative purpose motivating the acts in the two jurisdictions appears to be similar; the only difference is that Florida's legislative interest is express and Connecticut's is implied." This argument is sheer speculation by the state. The Connecticut legislature could have just as easily had as its purpose the intent to have that state's requirements constitute punishment for offenders over and above any periods of incarceration or fines. In fact, Mr. Milks would suggest that this ambiguity in essence underlies the decision in *Doe*. Mr. Milks submits that had it been clear that the Connecticut legislature possessed the

same intent as the Florida legislature, the result of *Doe* would have been different. The Court would have concluded that the lack of a hearing violated procedural due process.

The state also asserts that decisions from two other jurisdictions have applied the *Doe* rationale to statutes based on interests similar to that of the Florida legislature. Analysis of the decisions, however, shows the state's reliance on them to be misplaced.

In *Haislop v. Edgell*, 2003 WL 22881539 (W. Va. Dec. 5, 2003), the defendants challenging the provision at issue asserted only a violation of the West Virginia Constitution. Consequently, the court decided the case only within that framework, offering no comments with regard to the federal constitution. In addition, the statement of legislative intent in West Virginia consisted of nothing more than general references to the protection of the public, W. Va. Code § 15-12-1a (2000), the sort that might be in any statute establishing a criminal offense or imposing sanctions on persons convicted of offenses. By contrast, Florida's legislature was quite vociferous and specific, finding that it is necessary for sexual predators to be registered in order to protect the public, Section 775.21(3)(d), Florida Statutes, that repeat sexual offenders present an extreme threat to public safety, Section 775.21(3)(a), Florida Statutes, and that the high threat that

sexual predators present to the public safety provides the state with sufficient justification to implement the strategy of the statutory scheme. *Id*. Moreover, the West Virginia legislature's indications as to the purpose of the statutes there were far less direct than those expressed by their Florida counterpart. Rather than stating that the act it was adopting was itself for the purpose of protecting the public, it made references to "the intent of his article to assist law-enforcement agencies' efforts to protect the public" and to the need "to allow members of the public to adequately protect themselves." W. Va. Code § 15-12-1a (2000). Further, the West Virginia legislature specifically declared that persons subject to the act had "a reduced expectation of privacy." *Id.* In Florida, not only has no such reduced expectation been recognized, but he fact that the right to privacy embraced by the Florida Constitution is much broader than the equivalent right under the United States Constitution, *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998), means that this factor cuts in the opposite direction here than it did in *Haislop.* Finally, it should be realized that there is no indication in *Haislop* that any issue regarding legislative intent was raised or considered.

The other case cited by the state, *Herreid v. State*, 69 P.2d 507 (Alaska App. 2003), dealt with a separation of powers argument, hot a due process claim. 69 P.2d at 508. Although the

court discussed *Doe*, it did so only in the context of rejecting the separation of powers argument and never determined whether *Doe* would apply to a due process contention made against the backdrop of a purpose similar to the one behind Florida's legislation.

In essence, the state's argument comes down to asserting that due process does not require a hearing because the legislature did not provide for one. This self-fulfilling approach would eviscerate the concept of due process and allow the legislature, not the federal or state constitution, to determine what procedures due process encompasses. Under the state's logic, no hearing would be required if the legislature decided to expand the list of persons required to register as sexual predators to include not just those convicted of the enumerated crimes, but also those charged with them, or arrested for them, or even accused of them in situations in which no arrest is made. Clearly, at some point, the constitutional guarantee of due process must come into play and override the concept that the only process due is the process the legislature decides to allow. Mr. Milks submits that at the very minimum, when it is not even disputed that the legislative purpose is to protect the public, the constitutional guarantee must provide a procedure that allows persons who are not a danger to the public to escape the 21st century scarlet letter that the Sexual

Predators Act imposes. The act's failure to provide such a procedure thus renders it invalid.

C Substantive Due Process

Although taking no issue with Mr. Milks' observation that in the district court he challenged the Sexual Predators Act on "due process" grounds, thereby not excluding either procedural or substantive due process from his argument, the state alleges that Mr. Milks' substantive due process claim was not raised in that tribunal. It offers no explanation for its contention that phrasing an argument in terms of "due process" should somehow be deemed to refer only to procedural due process. Also, the state offers no response to the reasons asserted in Mr. Milks' initial brief with regard to why the substantive due process argument should be reviewed by this court regardless of whether it is said to have been raised in the district court. Rather, the state points to the fact that the United States Supreme Court in *Doe* did not consider the issue and urges this court to take the same approach. The state's position fails to recognize that Mr. Doe "expressly disavow[ed]" any reliance on substantive due process. 538 U.S. at ___, 123 S.Ct. at 1165, 155 L.Ed. 2d at 105. This was a far cry from simply not raising the issue in the appellate court. It was a determination by Mr. Doe that he did not want the issue considered. Thus, to have considered the issue in *Doe* would have been to do so in essence over the objection of the affected individual and in the absence of argument on the question by that person. The facts here are very different. Far

from disavowing the argument, Mr. Milks embraces it, asserts it, and maintains that it was encompassed by his argument in the district court. Clearly, under such circumstances, the approach taken by the United States Supreme Court provides no guidance as to how this court should proceed.

The state also notes that when substantive due process issues turn on factual questions, they should be raised at the trial level. No such factual questions exist here, however. Mr. Milks' argument applies to every person required to register. He asserts no facts unique to the present case that would call for a decision applicable just to him or to some group lesser in number than the total group affected by the statutes. Moreover, prior precedent from this court regarding consideration of issues related to the issues forming the basis for jurisdiction, as detailed in n. 9 on pages 24-26 of Mr. Milks' initial brief, supports consideration of this issue. Thus, this court should reach the merits of the substantive due process issue.

As to the merits, the state asserts the information to be disseminated is a matter of public record. This argument ignores the fact that some of the information, notably current addresses and social security numbers are not public information except through operation of the Sexual Predators Act. It also ignores the fact that, as concluded in the quotation set forth on page 16 of Mr. Milks' initial brief from *Doe v. Attorney General*, 426

Mass. 136 at 142-143, 686 N.E.2d 1007 at 1012 (1997), the aggregation and dissemination of publicly available information can constitute a violation of the right to privacy. The application of such reasoning would seem particularly appropriate with regard to a statutory scheme of the sort under review, one that presents the compiled information in a manner that carries with it a connotation of dangerousness but no procedure to avoid attaching that connotation to persons who actually pose no danger.

The state asserts on page 41 of its brief that the court in *In re J.R.*, 341 Ill.App.3d 784, 275 Ill.Dec. 916, 793 N.E.2d 687 (Ill. App. 1 Dist. 2003), rejected substantive due process challenges to a "similar act." In fact, the act at issue in that case was not very similar at all. It did not allow for widespread dissemination of the information provided by registrants and the approach taken by the Illinois courts was predicated on the limited amount of dissemination allowed. Under the Illinois act, the information was available only to a "person when that person's safety may be compromised for some reason relating to the juvenile sex offender." 793 N.E.2d at 694, quoting *In re J.W.*, 204 Ill.2d 50, 272 Ill.Dec. 561, 787 N.E.2d 747, 760 (Ill. 2003), citing 730 ILCS 152/120(e)(West 2000). As stated in *J.W.*, 787 N.E.2d at 760 (footnote omitted):

> Consequently, information concerning a juvenile sex offender may be disseminated to a member of the public only if that person's safety might be compromised for some reason and only in the appropriate discretion of the appropriate agency's or department's discretion. Information concerning juvenile sex offenders is not available over the Internet. We find, therefore, that the extremely limited dissemination of the information concerning juvenile sex offenders supports a finding that the registration of juvenile sex offenders is a reasonable means of protecting the public.

In the present case, of course, the dissemination of the information relating to Mr. Milks is hardly "limited." Rather, dissemination is widespread and mandated and the information, posted on the internet, is easily available to anyone.

Additionally, it should be recognized that the decision in *J.R.* relied upon *J.W.*, and, in that case, the individual required to comply with the registration requirements did not argue that the Illinois law affected a fundamental right. 787 N.E.2d at 757. By contrast, Mr. Milks does present such an argument. Moreover, because one of the fundamental rights asserted, the right to privacy, is much broader under the Florida Constitution than under its federal counterpart, *Von Eiff,* that aspect of this issue could not have been dealt with by the Illinois courts.

Given the foregoing factors, it is apparent that neither *J.R.* nor *J.W.* have any applicability here.

Perhaps the most significant conclusion that can be drawn from the state's discussion of substantive due process is one

that arises not from what the state says, but from what it does not say. Specifically, the state does not dispute the fact that it has no legitimate interest in imposing the act's burdens on individuals who are not dangers to the community.[2] It does not dispute that the act impacts on fundamental rights. It does not dispute that the legislature could have employed a less restrictive alternative. It does not even dispute that individuals are being treated in a fundamentally unfair manner under the act. The state's silence as to these points speaks loudly. It makes clear that most of the factors set forth in *Westerheide v. State*, 831 So. 2d 93, 104 (Fla. 2002), and discussed on page 26 of Mr. Milks' initial brief, point to the conclusion that the act violates substantive due process. Indeed, the state does not assert that *any* of the *Westerheide* factors supports a contrary conclusion.

[2] On page 40 of its brief, the state points to the fact that Mr. Milks agrees that the desire to protect the public is "certainly laudable." Indeed, it is. Imposing the burdens of the act on persons who do not present a danger, however, is far from "laudable." It is irresponsible. It is deplorable. And, most importantly, insofar as far as the present case is concerned, it renders the act unconstitutional.

D Equal Protection/Irrebuttable Presumption

On page 44 of its brief, the state relies on the fact that the Fourth District Court of Appeal in ***Raines v. State***, 805 So. 2d 999, 1002 (Fla. 4th DCA 2001), indicated that without question, the state has an interest in protecting the public from sexual offenders. The state ignores the fact that because the offense in ***Raines*** did not involve a sexual component, the court found that, even though it was an offense for which registration as a sexual offender was required, the "rational basis" between the operative fact and the ultimate fact presumed was "lost." 805 So. 2d at 1003. The same rationale is equally compelled when defendants pose no danger to the public. Yet, under the Sexual Predators Act, such defendants are not given the opportunity for a hearing on the issue of dangerousness. This results in defendants such as the ones in ***Raines***, and, as discussed in Section B of this brief, ***Robinson,*** to be able to properly avoid being unfairly maligned, while defendants in cases in which the facts are not apparent are automatically subjected to the extensive burdens of the act regardless of whether the necessary rational basis exists. The state's reliance on ***Raines*** therefore is based on a superficial analysis that does not withstand closer scrutiny.

E Separation of Powers

Once again, the most significant aspect of the state's argument is what is not said. The state relies on *Kelly v. State*, 795 So. 2d 135 (Fla. 5th DCA 2001), but does not analyze that case, instead merely quoting from it at length. In his brief, however, Mr. Milks recognized *Kelly*, noted that the act does not provide for a hearing on the danger issues, and argued that the Fifth District did not consider the fact that, as noted in *Collie v. State*, 710 So. 2d 1000, 1010, n. 9 (Fla. 2d DCA 1999), the dissemination of sexual predator information under the act "may be considered punitive as there are no procedural safeguards to protect against the unnecessary dissemination of personal information." By not addressing this argument, the state had not addressed the crux of Mr. Milks' position.

CONCLUSION

Based upon the foregoing argument and authorities, Mr. Milks respectfully submits that relief as requested in his initial brief should be granted.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender

ANTHONY C. MUSTO
Special Assistant Public Defender
Florida Bar No. 207535
Office of the Public Defender
P. O. Box 9000 – Drawer PD
Bartow, FL 33831
863-534-4200

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 7th day of April, 2004.

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