IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-2103

THE STATE OF FLORIDA,

Appellant/Petitioner,

-vs-

FERMAN CARLOS ESPINDOLA,

Appellee/Respondent.

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
THIRD DISTRICT

BRIEF OF APPELLEE/RESPONDENT

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INTRODUCTION

The state has appealed the lower court's ruling that "in the absence of a provision allowing for a hearing to determine whether the defendant presents a danger to the public sufficient to require registration and public notification, the Florida Sexual Predators Act violates procedural due process." *Espindola v. State*, 855 So. 2d 1281, 1290 (Fla. 3d DCA 2003).

STATEMENT OF FACTS

This case begins in South Beach. Ferman Espindola, [redacted] and Laura Aravena were at a club called "Blue" (A. 5, 7, 101).[1] [redacted] brought Laura a "Long Island Iced Tea" (A. 5, 7, 101). She drank a little bit of the drink and Ferman finished it (A. 101). One or two minutes later Ferman fell down unconscious (A. 102). Laura was also feeling dizzy and disoriented (A. 5, 7). Laura believes that the drink was drugged (A. 102).

All three people then left the club (A. 5, 7, 102). [redacted] took Laura and Ferman to an unknown hotel and checked into a room (A. 7). Laura then also lost consciousness (A. 102). When Laura regained consciousness, [redacted] and Ferman were allegedly having sexual intercourse with her (A. 5-6, 8).

The state charged [redacted] and Ferman with sexual battery of a physically incapacitated victim by multiple perpetrators (A. 9-24).[2] Although the state filed identical charges against [redacted] and Ferman, their danger to the community is markedly

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[1]In this brief, the symbol "A." followed by a numeral will indicate the page number in the appendix filed in the Third District Court of Appeal. Because the appeal in that court was expedited, that court entered an order accepting the appendix as the record on appeal.

[2]Originally Ferman and [redacted] were charged under separate informations (A. 9-12, 13-16). The state then filed two amended informations joining Ferman and [redacted] as defendants (A. 17-20, 21-24). The two amended informations appear to be identical in every respect except for the date.

different. Laura remains afraid of [redacted] and thinks that he might hurt or sexually assault someone else (A. 101). She believes that other people should be warned about what he did in this case (A. 101). Her feelings about Ferman, however, are entirely different:

> Q: . . . . I am going to ask you some questions about both Ferman and [redacted]. First, are you afraid of Ferman Espindola?
>
> A: No, not at all.
>
> Q: Are you afraid that he might hurt anyone else?
>
> A: No.
>
> Q: That he might sexually assault someone else?
>
> A: No.
>
> Q: Do you think other people should be warned about what happened in this case?
>
> A: Ferman? No.

(A. 100).

After briefly recounting the events of the evening, Laura concluded:

> Q: Is there anything else you would want to say about whether or not you think Ferman is dangerous or dangerous to the community or anything else you want to say on the record?
>
> A: Yeah. He's a nice person. He was my friend. And if the State had nothing to say, I still want to be his friend, because he's a very good person and we

> never—never—after this we never had problems with him. I'm talking about my boyfriend and I, because we have a very good relationship with him.

(A. 102-03).

The state did not seek the standard stay-away order in this case (A. 34). The assistant state attorney explained:

> The State had the opportunity to speak to the victim. Mr. Garcia spoke to the victim in this case and she said the Mr. Espindola is by far the — she was drugged by the codefendant who Mr. Espindola has produced since, I think, and the victim — she has called Mr. Espindola repeatedly. She called the State Attorney's Office — she's not afraid of Mr. Espindola. She considers him still a friend.

(A. 34-35).

Pleading guilty to a multiple perpetrator sexual battery, however, would automatically result in Ferman being declared a "sexual predator" under the Florida Sexual Predators Act. Accordingly, he filed a motion to declare that act unconstitutional as a violation of procedural due process (A. 42-54). The trial court denied that motion (A. 55) before completing the plea (A. 38–40, 60-68).

Ferman then resolved his case by pleading guilty in exchange for a withhold of adjudication[3] and one year community control followed by four years of probation

[3]An apparent clerical error resulted in the trial court entering an adjudication of guilt (A. 109). A motion will be filed in the trial court to correct that error.

(A. 56-59). The trial court later entered an order finding Ferman a sexual predator and noting: "The Defendant is subject to community and public notification" (A. 77). The trial court denied a motion to quash that order on the same constitutional grounds (A.79-81, 106).

Although Ferman agreed to assist the prosecution of [redacted] case (A. 57), the state subsequently entered a nolle prosequi in that case. Thus, Ferman is branded for life a "sexual predator," while [redacted] is free to return to South Beach and buy someone else a Long Island Iced Tea without a word of public warning.

STATEMENT OF THE CASE

After the trial court denied the motions to declare the statute unconstitutional and to quash the order declaring him a "sexual predator," Ferman appealed to the Third District Court of Appeal. In January 2003, that court reversed, holding the statute unconstitutional because procedural due process requires a hearing. *See Espindola v. State*, 28 Fla. L. Weekly D222 (Fla. 3d DCA Jan. 15, 2003).

Approximately a month later, while the case was pending the state's motion for rehearing, the United States Supreme Court issued its opinion in *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003). The state filed a supplemental motion for rehearing based on that case.

The Third District Court of Appeal reconsidered its opinion in light of that decision, but noted that "[u]nlike the Connecticut statute, which makes no determination that an offender is dangerous, [the Florida Sexual Predator Act] *specifically* provides that sexual predators 'present an extreme threat to the public safety.' §775.21(3)(a), Fla. Stat." *Espindola v. State*, 855 So. 2d 1281, 1290 (Fla. 3d DCA 2003). Thus, the court reaffirmed its previous ruling and noted conflict with *Milks v. State*, 848 So. 2d 1167 (Fla. 2d DCA 2003). This appeal/petition for review follows.

THE ACT IN QUESTION

Ferman was declared a "sexual predator" under the Florida Sexual Predators Act, codified at section 775.21, Florida Statutes. A brief overview of that Act is necessary to a determination of its constitutionality.

The legislative findings describe sexual predators: "Repeat sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present *an extreme threat to the public safety*. Sexual offenders are *extremely likely to use physical violence and to repeat their offenses* . . . ." § 775.21(3)(a), Fla. Stat. (2003) (emphasis supplied). The Florida statute goes on to specifically declare that the "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" the Act at issue here. § 775.21(3)(b), Fla. Stat. (2003).

Under the Act, the only determination the trial court was permitted to make before deciding whether Ferman Espindola is a "sexual predator" is if he had the prerequisite criminal conviction. *See State v. Curtin*, 764 So. 2d 645 (Fla. 1st DCA 2000). A single conviction for a multiple perpetrator sexual battery of a physically incapacitated victim automatically qualified Ferman as a "sexual predator." *See* § 775.21(4)(a), Fla. Stat. (2003) (a single capital, life, or first-degree felony violation of chapter 794 automatically qualifies the person as a "sexual predator");

§ 794.011(4)(a), Fla. Stat. (2003) (sexual battery on a physically incapacitated victim is a first degree felony); § 794.023(2)(b), Fla. Stat. (2003) (reclassifying all first degree sexual batteries as life felonies if committed by multiple perpetrators).

"[T]he Act is mandatory and affords no discretion to the trial judge to designate an individual a sexual predator if the statutory criteria are established." *Kelly v. State*, 795 So. 2d 135, 137 (Fla. 5th DCA 2001). "Under the Act, the sole criterion for determining whether a defendant must be designated a 'sexual predator' is whether the defendant was convicted of a qualifying offense." *State v. Robinson*, 29 Fla. L. Weekly S112, S114 (Fla. Mar. 18, 2004). Neither Ferman nor his attorney were present when the trial court signed the order declaring him to be a "sexual predator" (A. 2). A person does not have the right to be present when the court imposes that designation. *See Burkett v. State*, 731 So. 2d 695, 698 (Fla. 2d DCA 1998). One appellate court referred to the trial court's decision as "perfunctory." *See Thomas v. State*, 716 So. 2d 789, 790 (Fla. 4th DCA 1998).

Once the trial court declared Ferman a "sexual predator," that declaration automatically triggered registration and public notification requirements. *See* § 775.21(4)(a), Fla. Stat. (2003). Ferman must register twice, once with the Department of Law Enforcement ("FDLE") or, alternatively, the sheriff's office, and once with the Department of Highway Safety and Motor Vehicles ("DMV"). *See* § 775.21(6)(a), (e) & (f), Fla. Stat. (2003). Ferman must personally go to the offices

to complete the registration. *See id*. He must provide, *inter alia*, the following current information: name, age, race, sex, date of birth, height, weight, hair and eye color, a photograph, address of legal residence,[4] address of any current temporary residence, and "a brief description of the crime or crimes committed by the offender." § 775.21(6)(a), Fla. Stat. (2003). He must also provide genetic material. *See id*. At the DMV, Ferman also had to submit to being photographed. *See* § 775.21(6)(f)(1), Fla. Stat. (2003).

The Act authorizes the DMV to give that photograph to the FDLE for the purpose of public notification. *See* § 775.21(6)(g), Fla. Stat. (2003). The Act also requires the FDLE to take the registration information and photograph and place it on an internet site for worldwide distribution. *See* § 775.21(7)(c), Fla. Stat. (2003). The site contains a search engine allowing anyone to search by name or location. *See* http://www3.fdle.state.fl.us/sexual_predators. A more advanced search engine allows searches by eighteen other types of information. *See id.* Search results show pictures, addresses, and current custody status. *See id*. Clicking on "view flyer" next to any search result produces a flyer containing the words "registered sexual predator" (in

[4]If the person's residence is a motor vehicle or mobile home, the person must provide the vehicle identification number, license tag number, and physical description. If the person's residence is a boat, the person must provide the hull identification number, manufacturer's serial number, and other identifying information. *See* § 775.21(6)(a)1&(f)1, Fla. Stat. (2003). Neither of these provisions apply to Ferman.

bold) over a picture of the person followed by the person's name, a more detailed physical description, and the type of offense for which the person was convicted, and the victim's age and gender. *See id.* Anyone can then print that flyer.

The county sheriff also has a statutory duty to provide the same information to the public through other means. *See* § 775.21(7)(a), Fla. Stat. (2003). In Miami-Dade County, *The Miami Herald* publishes supplements featuring pictures and this same information. The Act grants broad immunity for anyone involved in good faith implementation of the Act. *See* § 775.21(9), Fla. Stat. (2003).

Ferman must appear in person at a DMV office to notify the DMV of any change of residence. *See* § 775.21(6)(g), Fla. Stat. (2003). The DMV then forwards this information to FDLE, which publishes it on the website. *See id.* If Ferman plans to move out-of-state, he or she must inform the DMV 48 hours before leaving. *See* § 775.21(6)(i), Fla. Stat. (2003). Ferman must continue to update the registration information "for the duration of his or her life," although a person may petition the court for relief if after 20 years he or she has never been *arrested* for *any* subsequent felony *or misdemeanor*. *See* § 775.21(6)(*l*), Fla. Stat. (2003).

Failure to comply is a third-degree felony. *See* § 775.21(10)(a), Fla. Stat. (2003). Additionally, the statute prohibits Ferman from working "at any business, school, day care center, park, playground or other place where children regularly congregate." § 775.21(10)(b), Fla. Stat. (2003).

SUMMARY OF THE ARGUMENT

Ferman Espindola is not a dangerous "sexual predator," and if the statute gave him a hearing to prove that, he would prevail. Procedural due process requires that he have such an opportunity. The basic procedural due process test asks whether a liberty or property interest is involved, and, if so, whether the procedures used were adequate. This Court established that the Florida Sexual Predator Act interferes with a liberty interest in *State v. Robinson*, 29 Fla. L. Weekly S112, S114 (Fla. Mar. 18, 2004), and the statute provides no procedure at all. Therefore, the Act violates procedural due process.

The state relies on *Connecticut Department of Pubic Safety v. Doe*, 538 U.S. 1 (2003), which held that procedural due process did not require hearings on dangerousness because the Connecticut law in question was unrelated to dangerousness. Whatever the situation in Connecticut, the Florida law is based on legislative findings that "sexual predators present an extreme threat to public safety." Even without such an explicit finding, however, the point and purpose of the Act are to warn citizens of dangerous persons. Mr. Espindola is not such a person, and procedural due process gives him to right to a hearing to prove it.

Connecticut Department of Pubic Safety v. Doe suggests substantive due process as an alternative analysis. Applying both the substantive due process and irrebuttable presumption (another form of due process) tests reaches the same result,

which is not surprising. The "procedural" and "substantive" shorthands by which lawyers and judges refer to different facets of due process should not alter outcomes or distract from the fundamental fairness that lies at the heart of due process. Thus, this Court should make the choice between the facets of due process based on practical considerations such as what kind of message they deliver to the legislature about how to fix this Act and efficient use of judicial resources. The procedural due process analysis best delivers the crucial message that the problem with this Act is the lack of a hearing, and it also places the burden for making these case-by-case decisions on the trial courts rather than the appellate courts.

ARGUMENT

I.

THE "FLORIDA SEXUAL PREDATORS ACT" VIOLATES PROCEDURAL DUE PROCESS. PROCEDURAL DUE PROCESS REQUIRES A HEARING TO DETERMINE IF FERMAN ESPINDOLA IS A DANGER TO THE COMMUNITY.

Comparing Ferman and [redacted] gives a prime example of why due process requires a hearing and individual determination of dangerousness. Although the state charged both with the same crime, the facts show a significant difference. [redacted] gave Laura a drugged drink, presumably to facilitate a sexual battery (A. 101-02). This premeditated action is the kind of dangerous behavior that might indicate the need for registration and public notice. Ferman, however, also drank from that glass and almost immediately became unconscious, even before Laura (A. 101-02). He obviously was not aware of [redacted]'s plan. Whatever his level of consciousness at the time the state alleges that he also committed a sexual battery, the fact that he was drugged to the point of unconsciousness with a spiked drink intended for Laura raises serious doubts about whether he would ever become involved in such an act again (A. 102). Laura does not consider him dangerous and even considers him a friend (A. 102-03). As the Third District Court of Appeal noted: "Although she remains afraid of the co-defendant, the victim has testified that she does not fear the defendant, and even considers him a friend. Based on this testimony, the state did not seek the standard 'stay-away' order in this case." *Espindola v. State*, 855 So. 2d 1281, 1283

(Fla. 3d DCA 2003).

The unusual circumstances leading to this case therefore significantly diminish the risk of Ferman committing any future sex crimes. Those same facts, however, demonstrate that [redacted] may pose a quite serious risk. Without a hearing for Ferman to demonstrate that he is not a danger to public safety[5] and, more generally, to sort the non-dangerous Fermans of this world from the dangerous [redacted], the Act manifestly violates procedural due process. *See* U.S. Const. amend. V & XIV, §1; Art. I, §§ 2 & 9, Fla. Const.

As the court below noted, the procedural due process analysis of these statutes is straightforward: Courts "examine procedural due process questions 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 Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989).

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[5]Contrary to the state's suggestion, Ferman has always denied that he is sexually dangerous (A. 54, 80). An allegation of the falsity of the state's stigmatizing statement is all that is necessary: "The Supreme Court has required only that a plaintiff raise the issue of falsity regarding the stigmatizing charges—not prove it—in order to establish a right to a name-clearing hearing. . . . The truth or falsity of the charges would then be determined at the hearing itself. If [someone] had to prove the falsity of the charges *before* he could obtain a hearing, there would be no need for the hearing." *Brandt v. Board of Cooperative Educ. Serv.*, 820 F.2d 41, 43-44 (2d Cir. 1987) (*citing Codd v. Velger*, 429 U.S. 624, 627-28 (1977) (requiring only that the person asking for the hearing "challenge the substantial truth of the material in question")).

This Court already decided the first issue in *State v. Robinson*, 29 Fla. L. Weekly S 112 (Fla. Mar. 18, 2004). That case involved an as-applied challenge under substantive due process to this same Act. While the holding in that case was narrow—it violates due process to label someone a "sexual predator" who never committed a sexual crime—the first step of this analysis is the same for substantive or procedural due process. *Robinson* necessarily affirmed the reasoning of the Third District Court of Appeal below determining that the Act in question affects a constitutionally protected liberty interest.

In *Robinson*, this Court held that the Act in question affects a person's liberty interest in reputation by applying the "stigma plus" test of *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), and *Paul v. Davis*, 424 U.S. 693 (1976):

> Robinson's designation as a "sexual predator" certainly constitutes a stigma.[7] 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 grounds sub nom. Does 1-5 v. Williams*, No. 01-7162, 2003 WL 21466903 (D.C. Cir. June 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, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (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, 708-09.
>
> 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 predator 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*, 97 Hawai'i 285, 36 P.3d 1255, 1264 (Haw. 2001); *Doe v. Attorney General*, 426 Mass. 136, 686 N.E.2d 1007, 1012-13 (Mass. 1997); *Noble v. Bd. of Parole*, 327 Or. 485, 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.
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> ---
>
> [7] A "stigma" is "[a] mark or token of infamy, disgrace, or reproach." *The American Heritage Dictionary of the English Language* 1702 (4th ed. 2000).

Robinson, 29 Fla. L. Weekly at S114. This Court's reasoning is indistinguishable from the lower court's opinion. *See Espindola*, 855 So. 2d at 1287-89.

The second part of the procedural due process test is uncontested by the state. As the lower court held: "It is undisputed that the defendant here was provided *no* process as [the Florida Sexual Predator Act] requires an automatic determination of 'sexual predator status' if one of the enumerated crimes has been committed." *Espindola*, 855 So. 2d at 1289.

The state therefore must fall back on the United States Supreme Court's ruling in *Connecticut Department of Pubic Safety v. Doe*, 538 U.S. 1 (2003), which assumed *arguendo* that the stigma plus test could be satisfied and went on to hold that: "Plaintiffs who assert a right to a hearing under the Due Process Clause must show that the facts they seek to establish in that hearing are relevant under the statutory scheme." 538 U.S. at 8. Thus, a hearing to determine the current dangerousness of persons subject to Connecticut's sexual offender law was unnecessary because Connecticut disavowed that those subject to its law were currently dangerous. *Id*. at 4, 7.

Florida can make no such disavowal. *Robinson* noted the concerns for public safety embodied in this Act:

> The statute contains a statement of its findings and intent. They include the following:
>
> > (a) Repeat sexual offenders, sexual offenders who use physical violence, and *sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety.* Sexual offenders are extremely likely to use physical violence and to repeat their offenses, and most sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. *This makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant.*
> >
> > (b) *The 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....
> >
> > (c) *The 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.
>
> § 775.21(3), Fla. Stat. (Supp.1998) (emphasis added). These findings clearly express the Act's purpose of protecting the public, and especially children, from predatory sexual activity.

Robinson, 29 Fla. L. Weekly at S113.

The fact that Florida's act rests on the "high level" and "extreme threat to

public safety" distinguishes it from Connecticut's, as the Third District Court of Appeal explained:

> Unlike the Connecticut statute, which makes no determination that an offender is dangerous, [the Florida Sexual Predator Act] specifically provides that sexual predators "present an extreme threat to the public safety." § 775.21(3)(a), Fla. Stat. As a result of this "threat," the legislature has justified its mandate that "sexual predators" follow its registration and notification requirements, as well as the employment restrictions contained in [the Florida Sexual Predator Act]. See § 775.21(3)(b). Accordingly, we find that the determination of "dangerousness" is of import to [the Florida Sexual Predator Act], and that the State's reliance on *Conn. Dep't of Pub. Safety v. Doe, infra,* is misplaced.

Espindola v. State, 855 So. 2d 1281, 1290 (Fla. 3d DCA 2003). The construction of a state statute by a state court is of course binding on any federal court. *See, e.g.*, *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). None of the other District Courts of Appeal considered the differences between the Connecticut and Florida statutes. *See Zaveta v. State*, 856 So. 2d 1058 (Fla. 5th DCA 2003); *Reyes v. State*, 854 So. 2d 816 (Fla. 4th DCA 2003); *Milks v. State*, 848 So. 2d 1167 (Fla. 2d DCA), *rev. granted*, 859 So. 2d 514 (Fla. 2003).

Of the out-of-state cases the state cites for support, *Herreid v. State*, 69 P.3d 507 (Ct. App. Alaska 2003), involves a separation of powers challenge, not a due process challenge. *Haislop v. Edgell*, 2003 WL 22881539 (W. Va. Dec. 5, 2003), follows *Connecticut Department of Pubic Safety v. Doe* without any discussion or

acknowledgment of any legislative findings, let alone language such as in the Florida statute.[6] The same is true of the Texas and Illinois cases cited.[7]

The state now seeks to avoid this obvious distinction between the Connecticut

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[6]The (undiscussed) legislative findings from the West Virginia statute do not contain the same "extreme threat to public safety" language as the Florida Statute:

> § 15-12-1a. Intent and findings
>
> (a) It is the intent of this article to assist law-enforcement agencies' efforts to protect the public from sex offenders by requiring sex offenders to register with the state police detachment in the county where he or she shall reside and by making certain information about sex offenders available to the public as provided in this article. It is not the intent of the Legislature that the information be used to inflict retribution or additional punishment on any person convicted of any offense requiring registration under this article. This article is intended to be regulatory in nature and not penal.
>
> (b) The Legislature finds and declares that there is a compelling and necessary public interest that the public have information concerning persons convicted of sexual offenses in order to allow members of the public to adequately protect themselves and their children from these persons.
>
> (c) The Legislature also finds and declares that persons required to register as sex offenders pursuant to this article have a reduced expectation of privacy because of the state's interest in public safety.

W. Va. Code § 15-12-1a.

[7]The states also cites a Minnesota case, but the text of that case specifically notes that Minnesota has no public notification requirements, and therefore no stigma. *See Gunderson v. Hvass*, 339 F.3d 639, 644 (8th Cir. 2003).

and Florida laws by claiming that Connecticut may have dissembled in its presentation to the United States Supreme Court: "[I]t is nevertheless reasonable to infer that the Connecticut legislature passed its version of the registration and community notification law based on a belief that offenders convicted of enumerated sexual offenses pose a danger to the public." (State's brief at 13).

If the state is correct in this supposition, then the rule in *Connecticut Department of Pubic Safety v. Doe* would have been the same, but the result would have been the opposite—if those subjected to the registration and public notification law are dangerous, procedural due process would require a hearing before making that determination.

Ultimately, *Connecticut Department of Pubic Safety v. Doe* is based on a factual assumption: that sexual offenders in Connecticut are not dangerous. The Florida Legislature removed all doubt that this is not true in Florida.[8] Even without the Legislature's explicit statement, however, such a concept is inherent in the very nature of the public notifications. The state's argument to the contrary is divorced from

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[8] The FDLE's litigation-inspired disclaimer on its website cannot reverse the clear legislative intent. "Administrative agencies have the authority to interpret the laws which they administer, but such interpretation cannot be contrary to clear legislative intent." *Abramson v. Florida Psychological Ass'n*, 634 So. 2d 610, 612 (Fla. 1994). Additionally, the FDLE disclaimer is not carried by all of the local law enforcement and public media warnings distributed in the schools and local newspapers throughout Florida. *See* § 775.21(7)(a), Fla. Stat. (2003).

cultural reality. Pictures in a post office are not of fine, upstanding citizens, nor are children pictured on the back of milk cartons safe at home with their families. Pictures labeled "sexual predator" distributed by schools and child care centers and posted around neighborhoods are warnings of danger.

Likewise the state's argument is divorced from the actual operation of this Act. The state claims that the Act is doing nothing more than disseminating information that is already public. This claim, however, omits half the Act—the part that requires *registration*. The purpose of the registration is to give the state information and images that it does not otherwise have. Without the information and images gathered during registration, no information for public notification would exist other than the records of prior convictions. The purpose of this Act is not to open dusty old court files for public inspection—the Public Records Act already does that.

Specifically, the Act requires registration to gather *current* photographs, *current* addresses, and *current* physical descriptions. *See* § 775.21(6)(a), (e) & (g), Fla. Stat. (2002). The Act then requires public distribution of this *current* biographical information married with the *past* conviction(s). *See* § 775.21(6)(g), (h) & (k), (7)(a) & (c), Fla. Stat. (2002). A world of difference exists between "Mr. X had a conviction for a sexual offense back in 199_ or 198_," and "Mr. X had a conviction for a sexual offense, *and* this is his current photograph, *and* this is where he lives." A reasonable person receiving the latter warning would understand that the person is

currently dangerous to the public. Indeed, that is the point and purpose of the Act. No other purpose could be imagined for publishing someone's current photograph and address in conjunction with past criminal convictions. The implication is that the person is a danger to do so again and that the public needs to "watch out" for that person.[9]

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[9]Although mooted by this Court's holding in *Robinson*, the state's brief materially misstates the law of "defamation by implication." The state quotes only half of the rule set forth in one of the leading federal cases. The full quotation reads:

> [I]f a communication, viewed in its entire context, merely conveys materially true facts from which a defamatory inference can reasonably be drawn, the libel is not established. *But if the communication, by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant intends or endorses the defamatory inference, the communication will be deemed capable of bearing that meaning.*

White v. Fraternal Order of Police, 909 F.2d 512, 520 (D.C. Cir. 1990) (emphasis added). The second (omitted) sentence is the rule that would apply in this case given the legislative language quoted above and the very structure of the Act itself.

Note that Florida law is different than the federal law discussed in *White*. *White* requires evidence of speaker's intent; Florida law looks to the reasonable listener's understanding. *Cf. Franklin Prescriptions, Inc. v. The New York Times Co.*, 267 F. Supp. 2d 425, 435 n.5 (E.D. Penn. 2003) (distinguishing *White* because Pennsylvania defamation law focuses on meaning of statement as viewed by reasonable person). In Florida defamation law, the "language used should be construed as the common mind would naturally understand it" and "it is enough if the natural or necessary result of the imputation is to hold one up to public hatred, contempt or ridicule." *Richard v. Gray*, 62 So. 2d 597, 598 (Fla. 1953). Under Florida law, "innuendo may be properly used to point the meaning of the words alleged to have been spoken, in view of the occasion and circumstances, whether appearing in the words themselves, or extraneous prefatory matters alleged in the declaration. Should there be some unexpressed base and vile meaning to words superficially innocent, innuendo may be

Judge Cope's suggestion in his separate opinion below to simply replace the "sexual predator" label with a more neutral term would not eliminate the problem. *See* 855 So. 2d at 1291-92 (Cope, J., concurring and dissenting). Even if the legislature changed the term to "omnivorous biped" (i.e., a human), the mere fact that the government is warning the public about this specific human is sufficient to trigger procedural due process (at least when coupled with the lifetime registration requirements and criminal penalties for failure to do so). To paraphrase William Shakespear's immortal line, a rose by any other name would have just as many thorns and be just as dangerous.

The state, however, may be making an even more radical claim—that regardless of the fact the Act is all about warning the public of persons who are currently dangerous, the formal requirement for labeling someone a "sexual predator" is "solely [based] on a qualifying conviction, and not on dangerousness." (State's brief at 12). This claim, if accepted, would be the death knell of all procedural due process. Under such a rule, the state could always eliminate procedural due process through defining the requirements to avoid a hearing. For instance, in one of the most famous procedural due process cases to come out of Florida, *Fuentes v. Shevin*, 407

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supplied to give the full impact of the accusation." *Campbell v. Jacksonville Kennel Club, Inc.*, 66 So. 2d 495, 498 (Fla. 1953) (citations and internal quotations omitted). A reasonable person receiving a "sexual predator" warning notice would understand the warning to mean that the person in currently dangerous.

U.S. 67 (1972), the elements of the statute granted a writ of replevin "on the bare assertion of the party seeking the writ that he is entitled to one." *Id*. at 73. Under the state's argument, if the element of a "bare assertion" was met, no further process would be due.

Of course, courts have rejected such arguments. Instead of such a formalistic approach, the United States Supreme Court has stated "we look to substance, not to bare form, to determine whether constitutional minimums have been honored." *Bell v. Burson*, 402 U.S. 535, 541 (1971). *Bell* involved a Georgia driver's license revocation after a traffic accident. Although the statutory scheme was concerned with liability, the license could be revoked without any showing of liability. The Court held that "[s]ince the statutory scheme makes liability an important factor in the State's determination to deprive an individual of his license, the State may not consistently with due process, eliminate consideration of that factor in its prior hearing." *Id*. Note that *Connecticut Department of Pubic Safety v. Doe* also uses this "statutory scheme" language. *See* 538 U.S. at 8.

Similarly, in *Vitek v. Jones*, 445 U.S. 480 (1980), Nebraska attempted to defend placing a prisoner into a mental health hospital without a hearing by relying on the formal elements in its statute requiring only a psychologist or physician to make a finding that the person should be in such a hospital. "Nebraska's reliance on the opinion of a designated physical or psychologist for determining whether the

conditions warranting a transfer exist neither removes the prisoner's interest from due process protection nor answers the question of what process is due under the Constitution." *Id.* at 491; *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1984) (holding that "once it is determined that the Due Process Clause applies, the question remains what process is due. The answer to that question is not to be found in the Ohio [or any other state's] statute.") (citation and internal quotation omitted); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (noting that "any other conclusion would allow the State to destroy at will virtually any state-created property interest" or, by extension, liberty interest.).[10]

Thus, as the lower court concluded, "this total failure to provide for a judicial hearing on the risk of the defendant's committing future offenses, makes [the Act] violative of procedural due process, and therefore unconstitutional." *Espindola*, 855 So. 2d at 1290.

If the state believes Ferman Espindola is a sexual predator, the state is welcome to try to prove its claim, but the statute must first allow for such a hearing to

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[10]Justice Scalia's concurrence in *Connecticut Department of Pubic Safety v. Doe* is an attempt to keep this question alive. Justice Scalia would hold that there was a "categorical abrogation of that liberty interest by a validly enacted statute." 538 U.S. at 8. Justice Scalia does not address any of the contrary precedents cited above, nor does he explain how a statute can abrogate constitutional due process. All of the other justices declined to sign this opinion.

take place.[11]

The original Megan's Law suffered from the identical problem. The state suggests severing the employment and tort liability restrictions to avoid the unconstitutionality of the statute, but the "stigma plus" test is met with the just the registration and public notification provisions. The intense interrelationship between the registration and public notification provisions means that neither portion can be severed from the other in analyzing the constitutionality of the Act. *See State v.*

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[11]This analysis holds whether a "sexual predator" has one prior conviction or two. The Act labels some citizens such as Mr. Espindola a "sexual predator" after one conviction, but other citizens convicted of less serious offenses require two convictions. *Compare* § 775.21(4)(a)1.a., Fla. Stat. (2002) *with* § 775.21(4)(a)1.b., Fla. Stat. (2002). The state then jumps to the conclusion that if a person has two convictions at some point in the past, that person is a "recidivist" and is therefore currently dangerous (State's Brief at 22-23). This argument is wrong for exactly the same reasons as above. At a hearing, the state may have an easier time convincing a judge that someone is currently dangerous if that person has two convictions in the past. Nevertheless, due process still requires a hearing where the state may or may not be able to prove that someone is currently dangerous depending on the facts of any specific case. For instance, given the lengthy prison sentences currently meted out for sexual offenses, anyone serving two such sentences is likely to be 50 to 60 years old. Recidivism rates plummet after age 50 and virtually disappear after age 60. *See* R. Karl Hanson, Age and Sexual Recidivism: A Comparison of Rapists and Child Molesters (2001).

Labeling a person as a "sexual predator" is stigmatizing no matter how many convictions that person has in the past. *See Sibron v. New York*, 392 U.S. 40, 55 (1968) (Noting that "[i]t is impossible for this Court to say at what point the number of convictions on a man's record renders his reputation irredeemable.") If the state can prove the "sexual predator" label is accurate after a hearing, so be it. But procedural due process requires a hearing to decide the issue.

Hilburn, 69 So. 784, 786 (Fla. 1915).[12]

The other theoretical possibility would be for this Court to create a hearing to provide the procedural process due. Although courts in other states have done so, separation of powers principles in Florida prohibit such "judicial legislation." As the court below noted:

> New Jersey's original 'Megan's Law' did not provide for a judicial hearing on the risk of future offenses, but the state's Supreme Court read such a requirement into the statute. *See Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367, 381-85 (1995). Without this judicial amendment to the statute it would have been constitutional. *Id*. at 421-22. We however, cannot judicially amend section 775.21, as that province in Florida is left solely to the legislature. *See State v. Keaton*, 371 So. 2d 86, 89 (Fla. 1979) (courts may not vary the intent of the legislature with respect to the meaning of a statute, in order to render it constitutional).

Id. at 1290 n.24.

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[12]The rule set forth in that case is:

> Where provisions of a statute are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the Legislature intended them as a whole, and if all could not be carried into effect, the Legislature would not pass the residue independently; then, if some parts are unconstitutional, all the provisions which are thus dependent must fall with them. If any of the provisions of the act that are held to be illegal induced to any appreciable extent its passage, the entire act fails in view of the interdependence of the provisions.

See State v. Hilburn, 69 So. 784, 786 (Fla. 1915) (internal citations and quotation marks omitted).

Thus, the correct route is to affirm the Third District Court of Appeal's decision holding that unless and until the legislature authorizes an appropriate hearing, the Florida Sexual Predator Act violates procedural due process.

II.
THE FLORIDA SEXUAL PREDATORS ACT ALSO VIOLATES SUBSTANTIVE DUE PROCESS AND THE DUE PROCESS PROHIBITION ON IRREBUTTABLE PRESUMPTIONS.

Connecticut Department of Pubic Safety v. Doe suggested that the appropriate claim was one under substantive due process, but did not decide the issue because in that case the "respondent expressly disavow[ed] any reliance on the substantive component of the Fourteenth Amendment's protections and maintain[ed], as he did below, that his challenge is strictly a procedural one." 538 U.S. at 8. In an abundance of caution, Mr. Espindola will not disavow this alternative.[13] In any event, a substantive due process analysis reaches the same conclusion as a procedural due process analysis.

A.
THE FLORIDA SEXUAL PREDATOR ACT VIOLATES SUBSTANTIVE DUE PROCESS BOTH FACIALLY AND AS APPLIED.

As this Court held in *Robinson*, Mr. Espindola has a liberty interest in reputation sufficient to trigger due process. *See* 29 Fla. L. Weekly at S114.

[13]"While the constitutional application of a statute to a particular set of facts must be raised at the trial level, a facial challenge to a statute's constitutional validity may be raised for the first time on appeal." *Westerheide v. State*, 831 So. 2d 93, 105 (Fla. 2002).

Substantive due process therefore requires a legitimate state interest. In the text of the Act itself, the legislature specified its interest: "The state has a compelling interest in protecting the public from sexual predators and in protecting children from predator 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." § 775.21(3)(c), Fla. Stat. (2003).

Notably, the legislature did not claim any interest in registration and public notification for persons who are not dangerous. The only interest is in protecting the public and children from those who are dangerous. This corresponds with the legislature's declaration that sexual predators are presently dangerous, as noted above.

While this may be a legitimate state interest, without a hearing to determine dangerousness, the Act in question is not reasonably related to that end.[14] The Act requires registration and public notification of everyone with the certain convictions, whether they are currently dangerous or not. It should go without saying that requiring registration and public notification for persons who are not dangerous is not reasonably related to protecting the public from those who are. "[I]n addition to the requirement that a statute's purpose be for the general welfare, the guarantee of due

[14]The one Florida court to consider this issue failed to consider this second half of the test, concluding its discussion by finding the state had a compelling interest. *See Reyes v. State*, 854 So. 2d 816, 818-19 (Fla. 4th DCA 2003).

process requires that the means selected shall have a reasonable and substantial relation to the object sought to be obtained and shall not be unreasonable, arbitrary, or capricious." *State v. Saiez*, 489 So. 2d 1125, 1128 (Fla. 1986)*; cf. Department of Insurance v. Dade County Consumer Advocate's Office* 492 So. 2d 1032, 1034-35 (Fla. 1986) (where no reasonable relationship to state purpose, statute violated due process).

The Act's one-size-fits-all approach is even detrimental to its stated goal. Every false warning degrades the effectiveness of true warnings, a truth known at least since Aesop's fable of the "boy who cried wolf." Requiring everyone with certain convictions to register, even if they are not dangerous, dilutes the warnings for those who are dangerous. Thus, the statute works against its stated purpose. Such statutes violate due process. *See Nationwide Mutual Fire Ins. Co. v. Pinnacle Medical, Inc.*, 753 So. 2d 55, 59 (Fla. 2000) (striking down attorney fees provisions in Florida's Motor Vehicle No-Fault Law because they worked contrary to the statute's intent). A one-size-fits-all approach is the essence of arbitrariness. *See Gurell v. Starr*, 640 So. 2d 228 (Fla. 5th DCA 1994) (striking down standard administrative costs schedules).

Additionally, were this Court to construe Mr. Espindola's claim as an "as applied" substantive due process claim, many of the same factors exist in this case as in *Robinson*. In that case, this Court focused on the state's acknowledgment that the

kidnaping Mr. Robinson committed was not sexually related. *See* 29 Fla. L. Weekly at S115. In this case, the state acknowledged the peculiar circumstances by not even asking for the routine order that the defendant stay-away from the victim (A. 34-35). More importantly, the state offered, and the court sentenced Mr. Espindola to, community control followed by probation (A. 56). Probation by definition requires a finding "that the defendant is not likely again to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant presently suffer the penalty imposed by law." § 948.01(2), Fla. Stat. (2003). Applying the Act to label Mr. Espindola a "sexual predator," from whom children and society must be protected, is arbitrary and irrational given the state's agreement that Mr. Espindola is not likely again to engage in a criminal course of conduct.

Thus, the substantive due process analysis yields the same conclusion as this Court's procedural due process analysis: without a hearing to determine whether any particular individual is dangerous, the Act is arbitrary and not reasonably related to the stated purpose of protecting society and children.

B.

THE FLORIDA SEXUAL PREDATOR ACT VIOLATES THE DUE PROCESS PROHIBITION ON IRREBUTTABLE/CONCLUSIVE PRESUMPTIONS.[15]

An alternative due process analysis also yields similar results. The statute creates a conclusive presumption that persons with certain past convictions for sexual offenses are currently dangerous sexual predators. "A presumption is conclusive if a party is not given a reasonable opportunity to disprove either the predicate fact or the ultimate fact presumed. In this instance it is the ultimate fact . . . that the claimant is being foreclosed from disproving." *Recchi American Inc. v. Hall*, 671 So. 2d 197, 200 (Fla. 1st DCA 1996), *opinion approved in its entirety, Recchi American Inc. v. Hall*, 692 So. 2d 153 (Fla. 1997). Conclusive or irrebuttable presumptions violate due process. *See, e.g., State Farm Mutual Automobile Ins. Co. v. Malmberg*, 639 So. 2d 615, 616 (Fla. 1994); *Public Health Trust v. Valcin*, 507 So. 2d 596, 599 (Fla. 1987).[16]

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[15]The case law uses the terms "irrebuttable presumption" and "conclusive presumption" interchangeably.

[16]Justices Souter and Ginsburg on the United States Supreme Court suggest that such an argument can also be made under the Equal Protection Clause. *See Connecticut Dept. of Pub. Safety v. Doe*, 538 U.S. at 9-10 (Souter, J., concurring). Should this Court wish to construe this argument as an Equal Protection argument under the state or federal constitution, Mr. Espindola will not disavow that approach either.

For close to a century, courts have tested such presumptions under a two-part test, the modern version of which this Court stated in *Straughn v. K & K Land Management, Inc.*, 326 So. 2d 421 (Fla. 1976): "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." *Id.* at 424; *see, i.e., Black v. State*, 81 So. 411, 413 (Fla. 1919); *Goldstein v. Maloney*, 57 So. 342, 344 (Fla. 1911).[17]

The Act violates both prongs. The Act fails the first, "rational relationship," prong for the reasons discussed in the substantive due process section above. The Act also fails the second prong because the Act contains no right to rebut the presumption that a past conviction for certain sexual offenses means the person is a dangerous sexual predator. *See, e.g., Miami-Dade County v. Reyes*, 772 So. 2d 24,

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[17]Occasionally, Florida courts articulate the test as a three-part test: "Because this presumption is irrebuttable, the constitutionality of [an Act] under the Due Process Clause must be measured by determining (1) whether the concern of the legislature was reasonably aroused by the possibility of an abuse which it legitimately desired to avoid; (2) whether there was a reasonable basis for a conclusion that the statute would protect against its occurrence; and (3) whether the expense and other difficulties of individual determinations justify the inherent imprecision of a conclusive presumption." *Bass v. General Development Corp.*, 374 So. 2d 479, 484 (Fla. 1979).

This Court has cited both *Bass* and *Straughn*, suggesting that they are different articulations of the same test. This Court has even cited them together, saying: "We find the conclusive presumption invalid for two reasons. First, it violated due process in its failure to provide the adverse party any opportunity to rebut the presumption of negligence." *Public Health Trust v. Valcin*, 507 So. 2d 596, 599 (Fla. 1987) (citing both *Straughn* and *Bass*).

29-30 (Fla. 3d DCA 2000) (holding that an "irrebuttable presumption in favor of the County" regarding the validity of a water bill denied "a reasonable, meaningful, full and fair opportunity to challenge his water bill," thereby violating due process); *Lidsky v. Florida Department of Insurance*, 643 So. 2d 631, 634 (Fla. 1st DCA 1994) ("We hold that the instant statute can meet both tests only if it is construed to allow the presumed fact to be rebutted."); *Chandler v. Department of Health and Rehabilitative Services*, 593 So. 2d 1183, 1184 (Fla. 1st DCA 1992) ("Conclusive presumptions violate the due process clause if they cannot be rebutted in a fair manner."); *B.R. v. Department of Health and Rehabilitative Services*, 558 So. 2d 1027, 1029 (Fla. 2d DCA 1989) (holding that a presumption of child abuse if bruises from paddling last more than 24 hours was an unconstitutional conclusive presumption because the "accused person could not rebut this presumption."); *Enrique v. State*, 408 So. 2d 635, 638 (Fla. 3d DCA 1981) ("Were we to read the statute . . . as creating conclusive presumptions of non-indigency [in certain situations] the statute would be constitutionally infirm.").

Every state in the nation has a "Megan's Law" statute. Unlike Florida, however, many states have individualized determinations of the person's dangerousness. *See, e.g., Nobel v. Board of Parole*, 964 P.2d 990 (Or. 1998); *People v. Roe*, 677 N.Y.S. 895, 898 (N.Y. Nassau County Ct. 1998); *Doe v. Moritz*, 662 A.2d 367, 381-87 (N.J. 1995); *Washington v. Ward*, 869 P.2d 1062, 1070 (Wash.

1994).

Moreover, the legislature has already determined that whether someone is currently sexually dangerous can be determined in a hearing. The law allowing civil commitment for "sexually violent predators" requires a trial court to determine whether the person is "likely to engage in acts of sexual violence." § 394.912(10)(b), Fla. Stat. (2003).[18] That phrase is defined as "the person's propensity to commit acts of sexual violence is of such a degree as to pose a menace to the health and safety of others." § 394.912(4), Fla. Stat. (2003). If this determination is feasible for "sexually violent predators," it is feasible for "sexual predators." This Court has held that "[t]he legislative grant of the right to rebuttal" in an analogous situation "demonstrates that there is a reasonable alternative means of making the determination . . . other than through the utilization of an irrebuttable presumption." *Bass v. General Development Corp.*, 374 So. 2d 479, 485 (Fla. 1979).

Thus, the Act in question creates a conclusive presumption that someone convicted at some point in the past of certain sexual offenses is currently—and for rest of his life—a dangerous sexual predator. That presumption is irrebuttable, and therefore unconstitutional.

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[18]The primary difference between the two statutes is that civil commitment of sexually violent predators also requires a "mental abnormality or personality disorder." § 394.912(10)(b), Fla. Stat. (2003). This additional element is not required for "sexual predators."

* * * *

That the outcome of these substantive due process analyses should be the same as the procedural due process analysis in the first section is not surprising. Which rubric this Court chooses should not make any difference in the outcome of this case. Due process is not some sort of "pea-and-shell" game where in moving between the different aspects of due process, somewhere fundamental fairness disappears. Much more than the federal courts, this Court has recognized that substantive due process and procedural due process are not just distant cousins that happen to share the same last name. They are at least siblings, often twins, and sometimes conjoined twins. As this Court has noted: "While the doctrines of substantive and procedural due process play distinct roles in the judicial process, they frequently overlap. Hence, many cases do not expressly state the distinction between procedural and substantive due process." *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991).

The state and federal constitutions do not protect "substantive due process" nor "procedural due process," merely "due process of law." U.S. Const. amend. V & XIV; Art. I, § 9, Fla. Const. Lawyers and judges use "substantive" and "procedural" as a shorthand way to refer to particular facets of due process. These conventions, however, cannot become ends in themselves, blocking our vision of fundamental fairness. Therefore, because the outcomes should not change, the

decision whether to use a procedural or substantive due process analysis is more a question of judicial manageability and respect toward coordinate branches of government.

Procedural due process is the best rubric under which to analyze this case, as is illustrated by again comparing the situations of Ferman and [redacted]. The real problem with the Act is not that the public should not be warned about [redacted] and similar individuals (substantive due process), but that the Act needs a way of sorting the [redacted] from the Fermans (procedural due process).

Additionally, from a jurisprudential perspective, procedural due process is less troubling than the sometimes oxymoronic "substantive due process." From a separation of powers and judicial restraint perspective, using procedural due process to say, "the state can do this, but we need a hearing first," shows a far greater respect for the coordinate branches of government than using substantive due process to say "you cannot do this." After all, knowing what procedures are necessary is what courts are good at.

Finally, from a judicial resources perspective, an individualized, as-applied substantive due process approach, as used in *Robinson*, is going to lead to appellate courts repeatedly deciding whether it is proper to declare person X a "sexual predator" in situation Y. The problem is that a substantive due process is a question of law, and review is therefore always *de novo*. As the facts in Ferman's case shows, all sorts of

scenarios can and will arise. Pursuant to *Robinson*, the state will have the right to appeal every decision that goes against it to this Court. *See* 29 Fla. L. Weekly at S112.

If, however, this Court were to resolve this case on a procedural due process grounds, and the legislature authorize hearings (as it inevitably would do), the trial courts would resolve the resulting cases, with great deference to trial court findings on review and only discretionary review in this court. Simply put, *Robinson* would never have arisen if the trial court in that case had been able to make a determination in that case that Mr. Robinson was not a threat of committing future sexual offenses.

After the Third District Court of Appeal released the opinion in this case, undersigned counsel received many telephone calls from persons across this state. Based on those telephone conversations, lots of people have stories similar to Mr. Robinson and Ferman, and can therefore make "as applied" substantive due process challenges. A procedural due process approach places the decisions where they should be—in the trial courts making case-by-case determinations.

Therefore, although Mr. Espindola does not disavow a substantive due process claim, procedural due process is a far better vehicle for this Court to explain that the legislature just needs to amend this Act to provide an appropriate hearing.

CONCLUSION

Without a hearing to determine whether a person is a danger to the public, the Florida Sexual Predator violates the due process clauses of the state and federal constititutions.

Respectfully submitted,

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CERTIFICATES

I HEREBY CERTIFY that a true and correct copy of the foregoing brief and accompanying appendix was delivered by mail to Richard L. Polin, Assistant Attorney General, Criminal Division, 444 Brickell Avenue, Suite 950, Miami, Florida 33131, this fifth day of April 2004.

I HEREBY CERTIFY that this brief was printed in 14-point Times New Roman.

_____

JOHN EDDY MORRISON
Assistant Public Defender

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

THIRD DISTRICT

FERMAN CARLOS ESPINDOLA CASE NO. 3D02-1839

Appellant,

-vs- **APPENDIX**

THE STATE OF FLORIDA,

Appellee.
_____/