IN THE SUPREME COURT OF FLORIDA

THE STATE OF FLORIDA,	)	
	)	
Appellant/Petitioner,	)	
	)	
vs.	)	Case No. SC03-2103
	)	
FERMAN CARLOS ESPINDOLA,	)	
	)	
Appellee/Respondent.	)	
_____ /		

ON APPEAL
FROM THE THIRD DISTRICT COURT OF APPEAL

INITIAL BRIEF OF APPELLANT/PETITIONER

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STATEMENT OF THE CASE AND FACTS

The State appeals a Third District Court of Appeal decision declaring unconstitutional Florida's Sexual Predators Act, Section 775.21, Florida Statutes (the "Act"). Although the United States Supreme Court in *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1 (2003), recently upheld a nearly identical statute, the Third District nevertheless held the Act violated procedural due process.

The Sexual Predators Act.

Florida's Sexual Predators Act was adopted in recognition of the real and substantial threat to public safety posed by persons convicted of serious and/or multiple sexual offenses. The Legislature determined repeat sexual offenders, violent sexual offenders, and sexual offenders who prey on children pose an extreme threat to public safety. Section 775.21(3)(a), Fla. Stat. The Act requires individuals designated as convicted sexual predators, a designation based solely on one or more requisite criminal convictions for qualifying offenses, to register their identities and addresses with law enforcement authorities. All 50 states and the federal government have some form of sexual predator/registration and public disclosure law. Approximately half of those laws, like Florida's (and the law at issue in *Doe*), require registration and public disclosure based solely on the nature of the offense for which the offender has been convicted, not on any current factual finding as to

dangerousness.

The Act provides Florida's citizens with ready access to already public information regarding convicted sexual offenders. This information allows Floridians to educate themselves about the possible presence of convicted sexual offenders in their local communities.

Convicted offenders must register with the Florida Department of Law Enforcement ("FDLE") or the sheriff's office, and with the Department of Highway Safety and Motor Vehicles. Section 775.21(6), Fla. Stat. Registration includes name, social security number and physical, identifying information, including a photograph. *Id.* The convicted sex offender, when registering, must describe the offenses for which he or she has been convicted. *Id.* Upon a change of residence, the convicted offender must report the change, in person, to the Department of Highway Safety and Motor Vehicles within 48 hours. Section 775.21(6)(g), Fla. Stat.

Law enforcement then facilitates public access to the registration information and conviction history of each offender. FDLE makes the registration information available to the public, including the name of the convicted sexual predator, a photograph, the current address, the circumstances of the offenses, and whether the victim was a minor or an adult. Section 775.21(7), Fla. Stat. FDLE also maintains hotline access to the registration information for the benefit of state, local, and federal

law enforcement agencies in need of prompt information. Section 775.21(6)(k), Fla. Stat. The registration list is designated a public record. *Id.* FDLE must make the registration information available to the public through the Internet. Section 775.21(7)(c), Fla. Stat. FDLE's website includes the "Sexual Predator/Offender Database." (www3.fdle.state.fl.us/sexual_predators/). The website enables users to search for information about registered sexual predators or registered sexual offenders[1] by name, county, city or zip code. The website includes cautionary admonitions to the public, explaining that the database classifications are based solely upon qualifying convictions and that "placement of information about an offender in this database is not intended to indicate that any judgment has been made about the level of risk a particular offender may present to others."

Failure to comply with the Act constitutes a third-degree felony. Section 775.21(10)(a), Fla. Stat. Also, it is a third-degree felony for most individuals

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[1] Florida's Sexual Offender Registration Act (SORA), § 943.0435, Fla. Stat., results in similar public notification as under the Sexual Predators Act. The main differences between the two acts are that a single conviction for a serious offense, or two convictions for lesser offenses, will result in registration under the Sexual Predators Act, whereas a single conviction for any of the enumerated sexual offenses will result in registration under SORA. Additionally, the employment restrictions imposed upon those who must register under the Sexual Predators Act do not exist under SORA. FDLE's website contains a joint database for those registered under the two acts, and, when a registered individual's information page is accessed, information is included so that it can be determined whether the individual has registered under the Sexual Predators Act or SORA.

designated as sexual predators to work at schools, day care centers and other places where children regularly congregate. Section 775.21(10)(b), Florida Statutes. The Act further provides immunity "from civil liability for damages for good faith compliance with the requirements of this section or for the release of information under this section. . . ." Section 775.21(9), Fla. Stat.

Case Background and Procedural History.

Ferman Espindola pled guilty to one count of multiple perpetrator sexual battery. (DCA App. 9,17,56).[2] Pursuant to his plea agreement, Espindola was found guilty of the charged offense and was placed on community control for one year, followed by four years of probation. (DCA App. 67-68, 70). He was also required to attend a sex offender program. (DCA App. 71, 73). Adjudication of guilt was withheld. (DCA App. 70).

Before his plea was accepted, Espindola filed a Motion to Declare Florida's Sexual Predators Act unconstitutional, arguing the statute violated the requirements of procedural due process. (DCA App. 42, 46). Espindola claimed the Act failed to

[2] The appeal in the District Court of Appeal was expedited and proceeded without a formal record on appeal. In lieu of the record on appeal, counsel for Espindola provided the Third District with an Appendix consisting of trial court pleadings, transcripts and orders. That Appendix served as the record below, and is referred to herein as "DCA App." The term "App." refers to the Appendix to this Brief.

provide him a hearing at which he could demonstrate "that he is not a danger to the community and that public safety does not require that he register as a sexual predator or that the state notify the public." (DCA App. 46).

The court orally denied the motion to declare the Sexual Predators Act unconstitutional, and subsequently entered a written order finding Espindola to be a sexual predator under Fla. Stat. § 775.21. (DCA App. 55, 77). Espindola moved to quash this order and renewed his constitutional challenge to the Sexual Predators Act. (DCA App. 79, et seq.). The trial court again rejected these arguments. (DCA App. 2, 106).

On appeal, the Third District issued an initial opinion concluding the Act violated the requirements of procedural due process: ". . . we find 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*, 2003 Fla. App. LEXIS 270, 28 Fla. L. Weekly D222 (Fla. 3d DCA January 15, 2003).

The State filed Motions for Rehearing, Certified Question, and Rehearing En Banc. During the pendency of those motions, the State filed a Supplement advising the Court of the recent opinions from the Supreme Court of the United States in *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1 (2003), and *Smith v. Alaska*,

538 U.S. 84 (2003). The State also provided opinions from other Florida District Courts of Appeal which had reached a contrary conclusion on the same issue during the pendency of the motions for rehearing.

The Third District denied the State's motions for rehearing and rehearing en banc and issued a revised opinion. *Espindola v. State*, 850 So. 2d 1288, 1290 (Fla. 3d DCA 2003). While addressing the recent decision of the United States Supreme Court, the lower court still concluded Florida's Sexual Predators Act violated the requirements of procedural due process. (App. 1, et seq.) The Court certified conflict with a decision of the Second District Court of Appeal, *Milks v. State*, 848 So. 2d 1167 (Fla. 2d DCA 2003), *rev. granted*, 859 So. 2d 514 (Fla. 2003). In a partial concurrence and partial dissent, Judge Cope concluded that the provisions of the Act which resulted in the procedural due process violation could be severed.

The State sought and obtained an order staying the issuance of the mandate pending review in this Court. The State timely filed a Notice to Invoke Discretionary Jurisdiction/Notice of Appeal, commencing the instant proceedings.[3]

[3] As the decision of the lower court declares a state statute invalid and certifies that there is a conflict with a decision of another district court of appeal, the notice sought to invoke, alternatively, this Court's discretionary review authority under Rule 9.030(a)(2)(B)(vi), Fla.R.App.P., and this Court's appellate jurisdiction, under Rule 9.030(a)(1)(A)(ii), Fla.R.App.P.

SUMMARY OF ARGUMENT

The lower court erred in finding that the Florida Sexual Predators Act violates principles of procedural due process absent an evidentiary hearing on the question of the individual's current dangerousness. In *Doe*, the United States Supreme Court held, in the context of a virtually identical act, that where the registration and public notification provisions of the act flow automatically from the fact of a prior conviction, procedural due process does not entitle the convicted person to such an evidentiary hearing. All of Florida's District Courts of Appeal, other than the Third District, have recognized and followed this holding.

Additionally, even if *Doe* were distinguishable, there would still be no requirement for an evidentiary hearing to render the act constitutional. Procedural due process rights exist only if there is a viable property or liberty interest at stake. Harm to one's "reputation" qualifies as such an interest only if the "stigma-plus" test of *Paul v. Davis*, is satisfied. A "stigma" does not exist when the information is both truthful and otherwise public. Any consequences flow from the fact of conviction, not from registration and publication. Additionally, the factors identified by the lower court--registration, deprivation of tort remedies, and restrictions on employment in settings with children--do not qualify as plus factors.

ARGUMENT

I. THE ACT DOES NOT VIOLATE PROCEDURAL DUE PROCESS.

Florida's Sexual Predators Act requires simply that individuals designated as sexual predators, based on one or more requisite criminal convictions for qualifying offenses, register their identities and addresses with law enforcement authorities. The Act applies to individuals convicted of serious and/or multiple sexual offenses. Individuals convicted of enumerated capital, life, or first degree felonies, or attempts thereof, are designated automatically as sexual predators. Section 775.21(4)(a)(1)a, Fla. Stat. Individuals convicted of any other enumerated felonies are designated as sexual predators only if "the offender has previously been convicted of or found to have committed, or has pled nolo contendere or guilty to, regardless of adjudication, any violation of the enumerated sexual offenses." Section 775.21(4)(a)1.b, Fla. Stat. Therefore, registration and public disclosure are based solely on the nature of the offense for which the offender has been convicted, not on any current factual finding as to dangerousness.

Connecticut Dep't of Public Safety v. Doe, 538 U.S. 1 (2003) controls this case. *Doe* holds that the absence of a judicial hearing does not violate principles of procedural due process when the facts sought to be proved or disproved at the

hearing are irrelevant to the judicial determination.

Even if *Doe* did not apply to Florida's Act, no procedural due process violation exists because the Act does not implicate any protected liberty interest. There is no "stigma" from the publication of truthful factual information consisting of an individual's convictions for sexual offenses. The offender's reputation flows directly from the offender's own criminal conduct.

A. *Doe* Compels Reversal.

The United States Supreme Court rejected recently a procedural due process challenge to Connecticut's sex offender registration act in *Connecticut Dep't of Public Safety v. Doe*, 538 U.S. 1 (2003). As in Florida, under Connecticut's Act, individuals convicted of enumerated sex offenses are obligated to register with law enforcement, and their names, residences and convictions are posted on an Internet website maintained by the State. The Connecticut Act operates in the same manner as Florida's - the duty to register and the availability of the information on the Internet flow automatically from the conviction for the enumerated offense. Neither statute provides for any judicial determination of the individual's current or future dangerousness to the public. As in this case, the procedural due process challenge in *Doe* was based on the failure of the act to provide for a judicial determination of

current dangerousness, with an opportunity for the individual to contest that fact.

The Supreme Court rejected the procedural due process challenge because the determination of dangerousness was irrelevant under the Connecticut Act. As a matter of procedural due process, the Court held there is no entitlement to a hearing for the purpose of determining a fact that is irrelevant to the statutory scheme:

> In cases such as *Wisconsin v. Constantineau* . . . and *Goss v. Lopez* . . . we held that due process required the government to accord the plaintiff a hearing to prove or disprove a particular fact or set of facts. But in each of these cases, the fact in question was concededly relevant to the inquiry at hand. Here, however, the fact that respondent seeks to prove - that he is not currently dangerous - is of no consequence under Connecticut's Megan's Law. . . . [Therefore, E]ven if respondent could prove that he is not likely to be currently dangerous, Connecticut has decided that the registry information of *all* sex offenders--currently dangerous or not--must be publicly disclosed.

Doe, 538 U.S. at 7 (citations omitted). The Court noted that the disclaimer on the website explicitly states that an offender's alleged nondangerousness simply does not matter. *Id.*

Florida's Act operates in the same manner as Connecticut's. Moreover, the FDLE website carries the same disclaimer as in Connecticut. Therefore, *Doe* compels the conclusion that Florida's Act does not violate procedural due process.

Florida's First, Second and Fourth Districts have held, based on *Doe*, that Florida's Act does not violate procedural due process requirements. *See Milks v. State*, 848 So. 2d 1167 (Fla. 2d DCA 2003) (reporting requirements of Florida's Act, like Connecticut's, are determined solely by defendant's conviction for specific crime, and Florida, like Connecticut, may decide to give public access to information about all convicted sex offenders, currently dangerous or not, without a hearing) *rev. granted*, 859 So. 2d 514 (Fla. 2003); *Reyes v. State*, 854 So. 2d 816, 817 (Fla. 4th DCA 2003) ("We can discern no reason not to apply the [*Doe*] reasoning here."); *Therrien v. State*, 859 So. 2d 585 (Fla. 1st DCA 2003) ("Appellant's conviction is the only material fact necessary for the imposition of the requirements of section 775.21."). The Fifth District appears to have followed suit in a recent per curiam citation opinion that simply cites *Doe*. *Zaveta v. State*, 856 So. 2d 1058 (Fla. 5th DCA 2003). The Third District thus stands alone in its refusal to apply *Doe* to Florida's Sexual Predators Act.

Additionally, three district courts of appeal have rejected the same procedural due process challenge to a similar act, § 943.0435, Florida Statutes, the Sex Offender Registration Act, which operates in the same manner as the Sexual Predators Act, but with different qualifying convictions. *DeJesus v. State*, 2003 Fla. App. LEXIS 18728, 28 Fla. L. Weekly D2845 (Fla. 4th DCA Dec. 10, 2003); *Givens v. State*, 851 So. 2d

813 (Fla. 2d DCA 2003); *Johnson v. State*, 795 So. 2d 82 (Fla. 5th DCA 2000).

Furthermore, courts from many other jurisdictions have relied on *Doe* to find that procedural due process does not require judicial hearings on dangerousness when the applicable statutes predicate sex offender registration and community notification solely on a qualifying conviction, and not on dangerousness.[4]

The Third District attempts to circumvent the principles of *Doe* based on legislative findings set forth in the Act. The Third District found the State's reliance on *Doe* "misplaced" because Florida's Act "*specifically* provides that sexual predators "present an extreme threat to the public safety. § 775.21(3)(1), Fla. Stat." *Espindola*, 855 So. 2d at 1290.

The Florida Legislature did set forth its findings in the Act, and those findings serve as the rationale for the automatic designation of predators under the Act. The Legislature, in a subsection entitled "Legislative Findings and Purpose; Legislative Intent," found that "[r]epeat sexual offenders, sexual offenders who use physical

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[4] *See, e.g., Chalmers v. Gavin*, 2003 U.S. Dist. LEXIS 20461 (N.D. Tex. Nov. 13, 2003) (Texas); *Ex Parte Robinson*, 116 S.W.3d 794 (Tex. Crim. App. 2003) (same); *Gunderson v. Hvass*, 339 F.3d 639 (8th Cir. 2003) (Minnesota), *cert. denied*, 2004 U.S. LEXIS 364 (2004) ; *John Does v. Williams*, 2003 U.S. App. LEXIS 12570 (D.C. Cir. June 19, 2003) (District of Columbia); *Herreid v. Alaska*, 69 P.3d 507 (Ala. 2003) (Alaska); *Illinois v. D.R.* (*In re D.R.)*, 794 N.E. 2d 888 (Ill. App. 2003) (Illinois); *Illinois v. J.R.* (*In re J.R.*), 793 N.E. 2d 687 (Ill. App. 2003) (same); *Haislop v. Edgell*, 2003 W. Va. LEXIS 167 (W. Va. Dec. 5, 2003) (West Virginia).

violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety." Section 775.21(3)(a), Fla. Stat. While Connecticut's Act does not contain similar express legislative findings, it 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. The legislative purpose motivating the acts in the two jurisdictions appears to be similar; the only difference is that Florida's legislative intent is express and Connecticut's is implied. Importantly, both acts make their requirements applicable regardless of whether the particular individual is found to be dangerous; it is sufficient in both cases that the individual is a member of a class of offenders that is perceived as presenting a danger. Thus, although the Third District noted a "distinction" between the Connecticut and Florida acts, it is a distinction without any legal significance.

At least two other state registration and notification acts have similar legislative intent language, and those states' acts have been held to be immune from a procedural due process challenge. *See Herreid v. Alaska*, 69 P. 3d 507 (Ala. 2003); *Haislop v. Edgell*, 2003 W. Va. LEXIS 167, at *8 (W. Va. Dec. 5, 2003). Both the Alaska and West Virginia acts were prefaced by legislative findings comparable to those in the Florida Act. *See* Ch. 41, § 1, Alaska Session Laws (1994) ("sex offenders pose a high

risk of reoffending after release from custody"); W. Va. Code § 15-12-1a (2000) (legislative purpose was to protect public from individuals convicted of sexual offenses).

If a legislative finding could generate an entitlement to a hearing on due process grounds, this result would likely cause legislators to keep their "findings" silent. Judicial analysis which motivates legislators to conceal their findings in order to minimize the likelihood of successful legal challenges to legislation would ultimately deprive the public of an understanding of the legislative process and thus undermine the democratic process.

B. The Act Does Not Implicate a Constitutionally Protected Interest.

Even if this Court concludes that Doe is not dispositive, the Act still does not violate principles of procedural due process because there is no protected liberty interest at stake. Procedural due process safeguards are constitutionally required only when state action implicates a constitutionally protected interest in life, liberty or property. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989).

The Supreme Court addressed the question of whether a person's interest in one's reputation qualifies as a constitutionally protected liberty interest in *Paul v. Davis*, 424 U.S. 693 (1976). In *Paul*, the Louisville Police Department distributed

flyers identifying individuals who had been arrested for shoplifting as being active shoplifters. The flyers were accompanied by photographs of the individuals. Davis, who had been included on one such flyer even though the shoplifting charge against him was dismissed, filed a complaint setting forth a procedural due process claim, asserting that the "active shoplifter" designation would inhibit him from entering business establishments and impair his future employment opportunities. 424 U.S. at 697.

The Court rejected the proposition that "reputation alone, apart from some more tangible interest such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." 424 U.S. at 701. Ultimately, the Court held that "any harm or injury to [a reputation] interest, even where as here inflicted by an officer of the State, does not result in a deprivation of any "liberty" or "property" recognized by state or federal law . . . ." 424 U.S. at 712. A defamatory statement by a state official was therefore not actionable under the due process clause absent some other harm caused by the statement. The requirement of additional harm represents a "plus factor," and it must be caused by the defamatory statement. This "stigma-plus" test has been construed and applied by hundreds of state and federal appellate court opinions.

The *Paul* opinion distinguished its earlier decision in *Wisconsin v.*

Constantineau, 400 U.S. 433 (1971), where the "posting" of information pursuant to state statute regarding excessive drinking by named individuals led to the inability of those individuals to obtain alcoholic beverages. In discussing *Constantineau*, the *Paul* Court acknowledged the "drastic effect of the 'stigma' which may result from defamation by the government. . . ." 424 U.S. at 701. However, the *Paul* Court did "not think that such defamation, standing alone, deprived Constantineau of any 'liberty' protected by the procedural guarantees of the Fourteenth Amendment." 424 U.S. at 709. Rather, in *Constantineau* it was the deprivation of a right previously held under state law–-the right to purchase alcoholic beverages–-"which, combined with the injury ***resulting from the defamation***, justified the invocation of procedural safeguards." *Id.* at 708-9. (emphasis added). Thus, the stigma referred to in *Paul* is one which requires that one's reputation be defamed.

1. <u>The Act Does Not Impose Any Stigma</u>

The publication of truthful information regarding the fact of a defendant's conviction for sexual offenses does not result in a stigma. Espindola has not asserted that any of the information listed as to him on FDLE's website is erroneous. He has not contested the listing of his qualifying offenses, the information regarding the gender or age of the victim, his current status with the Department of Corrections, his current residence or the current physical identifying information. Yet the lower court

nevertheless concluded that the "stigma" requirement is met in this case because the publication of information regarding an individual's prior convictions for enumerated sexual offenses conveys the message that the person is dangerous. According to the court, this implied message that the person is dangerous is perceived as impugning the individual's reputation.[5]

The opinion below ignores the context of *Paul v. Davis.* Under *Paul*, the constitutionally protected reputation interest arises only in the context of ***defamatory*** statements regarding that interest. Thus, the stigma must stem from statements as to one's reputation that are **false**. A reputation is not stigmatized if the publications regarding the reputation are not false. *See Codd v. Velger*, 429 U.S. 624 (1977) (rejecting plaintiff's due process claim based upon wrongful dismissal without a hearing, where plaintiff did not allege that basis for dismissal was false). The information published under the Act is truthful information - the individual's name,

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[5] Addressing the question of stigma, the Third District summarily found that "[t]he act of being publicly labeled, pursuant to FSPA, a 'sexual predator' clearly results in a stigma." *Espindola*, 855 So. 2d at 1287. The court cited *Doe v. Pataki*, 3 F. Supp. 2d 456, 467-68 (S.D.N.Y. 1998), quoting that case for the proposition that "'the community notification provisions of the Act will likely result in their being branded as convicted sex offenders who may strike again and who therefore pose a danger to the community. . . . [S]uch widespread dissemination of the above information is likely to carry with it shame, humiliation, ostracism . . . .'" 855 So. 2d at 1287.

other identifying factors, and the prior convictions. The truthful publication of an individual's conviction of a crime does not state a claim for defamation. Restatement (Second) of Torts, § 581A, comment c (1977) (when a statement is "a specific allegation of the commission of a particular crime, the statement is true if the plaintiff did commit that crime."); *Barnett v. Denver Publishing Co., Inc.*, 36 P.3d 145, 147-48 (Colo. App. 2001), *rev. denied*, 2001 Colo. LEXIS 1015 (Colo. Dec. 17, 2001), *cert. denied*, 535 U.S. 1056 (2002). Thus, because there has been no defamatory publication, there is no stigma.

Further, the information made available under the Act does not impose any stigma since it consists of truthful information which is already public. Information regarding convictions for sexual offenses is already available in either court files in the Clerk's Office or in the public records of the county's Official Records Books. Facilitating access to already public information is neither defamatory nor stigmatizing. Such facilitation via the Internet simply provides Florida's citizens an effective means to review information relevant to their public safety.

Based upon this reasoning, the Washington Supreme Court has concluded that publication of information regarding a sex offender's prior convictions did not result in any stigma. *In re Meyer*, 16 P.3d 563 (Wash. 2001). A federal district court in Michigan came to the same conclusion, rejecting the proposition that a stigma ensued

from publishing information in a registry on the Internet regarding sex offenders' prior convictions:

> The Court rejects the Doe and Roe plaintiffs' attempt to establish a transgression of a protected liberty interest. While the plaintiffs' claim that widespread dissemination of information concerning their conviction of a sex offense will result in a loss of liberty, ***plaintiffs ignore the inescapable fact that such information is already a matter of public record***. The Court fails to discern how plaintiffs can claim deprivation of a liberty interest resulting from dissemination of information already the subject of public record.

Akella v. Michigan Dep't of State Police, 67 F. Supp. 2d 716, 728-29 (E.D.Mich. 1999) (emphasis added). Many other courts have similarly found no constitutional interest in reputation where the information made available to the public consisted solely of truthful information regarding the offender's criminal history. *See, e.g.*, *Patterson v. State*, 985 P.2d 1007, 1017 (Alaska Ct. App. 1999); *People v. Logan*, 705 N.E. 2d 152, 160-61 (Ill. Ct. App. 1998); *In the Matter of Wentworth*, 651 N.W. 2d 773, 778 (Mich. App. 2002); *Lanni v. Engler*, 994 F. Supp. 849, 855 (E.D. Mich. 1998); *Doe v. Kelley*, 961 F. Supp. 1105, 1112 (W.D. Mich. 1997); *Illinois v. J.R. (In re J.R.)*, 793 N.E. 2d 687, 699-700 (Ill. App. 2003).

The Supreme Court recently concurred with the foregoing analysis as applied to the Alaska Sex Offender Registration Act. *Smith v. Doe*, 538 U.S. 84 (2003). As

part of the analysis of whether the Alaska statute was "punitive" for purposes of ex post facto analysis, the Court rejected the notion that the "shaming" of a person constitutes punishment. The Court's reasoning is directly applicable to the question of whether any stigma exists or whether stigma flows from the publication of truthful information:

> . . . Punishments such as whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public. Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community. . . . By contrast, ***the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public.***

538 U. S. at 98 (emphasis added). Similarly, the Court observed that the process of making the information available to the public on an Internet website was "more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality." *Id.* at 99. To whatever extent there was stigma, it derived from the convicted offender's own conduct. The consequences flow from the fact of conviction.

Although the foregoing points were made by the Court in the context of

evaluating whether the Act's requirements were punitive, the Court's analysis is equally applicable in the context of consideration of whether a protected interest exists in one's reputation. A convicted sex offender cannot satisfy the requirements of the stigma-plus test of *Paul v. Davis.* *Smith v. Doe* establishes that there is no stigma from the dissemination to the public of truthful information regarding a sex offender's conviction. Moreover, there is nothing inherently defamatory in the dissemination of such information already readily available in other public records. Thus, any "stigma" that exists stems from the already public fact of a prior conviction.

The lower court's opinion attempts to circumvent the reasoning of *Smith v. Doe* by stating that Florida's Act goes further than the Alaska Act by, in addition to making the information available to the public on the Internet, directing the local sheriff or chief of police to "notify members of the community and the public "as deemed appropriate by local law enforcement personnel and the department." *Espindola*, 855 So. 2d at 1288; § 775.21(7)(b), Fla. Stat. That direction, however, is a distinction without legal significance. First, since any stigma flows from the fact of the underlying conviction itself, it is immaterial whether a member of the public learns of the information through the website or through notice provided by the local law enforcement office. Second, although the procedure may increase the number of people who actually see the information, the existence of any "stigma" does not depend on the number of people

who actually see or have access to the information. Finally, the statutory provision in question is not mandatory, as it gives local law enforcement officers discretion to determine the appropriate manner in which they should act. Indeed, there is no claim herein that local law enforcement authorities did anything beyond what was already made available on FDLE's website.

The Third District found that the sexual predator designation implies the individual is dangerous, and that this implication alone supports the conclusion that the defendant is defamed, and hence constitutionally stigmatized. However, as the relevant case law establishes, an implication, without more, is generally insufficient to support a claim for defamation. *See, e.g.*, *White v. Fraternal Order of Police*, 909 F. 2d 512, 520 (D.C. Cir. 1990) ("If 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."); *see also* W. Page Keeton, Prosser & Keeton on the Law of Torts § 116, at 117 (5th ed. Supp. 1988) (same).

Finally, for those individuals who are designated sexual predators as a result of having two or more convictions for enumerated offenses, there could not possibly be any "defamatory stigmatization" from making such information available on the internet. Such individuals, by virtue of repeat offenses, have already demonstrated their dangerousness through their own recidivism. Thus, for repeat offenders the

dangerousness is demonstrated by the recidivism which has already occurred. Since no defamatory stigmatization could exist, the first prong of the stigma-plus test would not be established, and there would be no entitlement to any form of procedural due process prior to making such public records information available over the internet.

2. <u>There Are No Plus Factors</u>

After finding "stigma" in the instant case, the Third District found that one or more "plus factors" existed under the *Paul v. Davis* "stigma-plus" test. After enumerating the "plus factors" asserted by Espindola herein - registration requirements, employment prohibitions, and inability to pursue tort remedies, the court simply "agrees" that those are qualifying "plus factors," merely citing *Paul* and *Collie v. State*, 710 So. 2d 1000, 1012 (Fla. 2d DCA 1998), for the proposition that employment restrictions are a "plus factor." *Espindola*, 855 So. 2d at 1288. In support of its conclusion the lower court also cites opinions from Hawaii, Oregon and Massachusetts. *Id.* at 1288-89, nn.19, 20, 21.[6]

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[6] These opinions refer to other possible plus factors as well - e.g., effect on association with neighbors, choice of housing, vigilantism, verbal and physical harassment. Espindola did not raise these as qualifying plus factors in either the trial court or the district court of appeal. Espindola argued only that the registration requirements, employment restrictions, and limitations on tort remedies were qualifying plus factors. The lower court's opinion never states that it is finding any of the other factors noted in out-of-state opinions in the instant case or that they are valid plus factors under the stigma-plus test.

However, *Paul v. Davis* requires that there be a causal connection between the defamatory stigma and the consequential plus factor. *Paul v. Davis* made this point through its discussion of *Wisconsin v. Constantineau*, *supra*. In *Constantineau*, a state statute authorized "posting," which consisted of forbidding the sale or delivery of alcoholic beverages to those who had been determined to become hazards to themselves or others, by reason of their "excessive drinking." The "plus factor" in *Constantineau*, as explained by the Court in *Paul*, was the limitation of the individual's prior right to purchase liquor as a result of being labeled a problem drinker. 424 U.S. at 708-09. This plus factor was caused by defamatory and stigmatizing posting of the individual as being one who drinks excessively and who constitutes a hazard. Thus, as *Paul* noted, in such cases as *Constantineau*, "a right or status previously recognized by state law was distinctly altered or extinguished," ***"as a result of the state action complained of."*** 424 U.S. at 711 (emphasis added). Thus, the *Paul* Court viewed the plus factor in *Constantineau* as being based on "the fact that the governmental action taken in that case deprived the individual of a right previously held under state law." 424 U.S. at 708. In recognition of the causal link requirement established by *Paul*, the Eleventh Circuit Court of Appeals has construed *Paul* to hold "that in order to be actionable, ***the stigmatizing statement had to***

deprive the person of a right held under state law." *Howe v. Baker*, 796 F.2d 1355, 1360 (11th Cir. 1986) (emphasis added).

Thus, the plus factor must involve the deprivation of an entitlement or an expectation created by state law. The term "changing legal status" as that term is used in *Paul* refers to the impact of the alleged defamation in *Constantineau*. *Paul*, 424 U.S. at 708. In *Constantineau*, the alleged defamation resulted in the loss of the right to buy alcoholic beverages — a right available to all other citizens except those listed by public officials as problem drinkers. In short, the *Constantineau* plaintiff lost a state-created expectation as a result of an administrative fiat. Since reputation itself is not a protected liberty or property interest, viewing a plus factor as anything but the deprivation of an entitlement could result in requiring a due process hearing when no protected property or liberty interest is affected.

The alleged plus factors herein were not caused by any allegedly defamatory and stigmatizing publication. For example, registration, which exists independently of Internet publication, is not a consequence of a defamatory publication. Rather, registration is a requirement imposed on those who have been convicted of serious and/or multiple sexual offenses. Thus, registration is caused by the individual's own criminal conduct, not any defamatory publication. The same principle holds true as to the other factors. The lower court erroneously divorces the plus factors from the

allegedly defamatory, stigmatizing statement proceeding on the premise that as long as there is a stigma and a plus factor, even if not causally linked, the stigma-plus test is satisfied.

a. Employment restriction is not a plus factor.

A convicted sexual offender is not barred from certain employment under the Act because of a defamatory and stigmatizing publication. Rather, the convicted offender's employment is restricted as a result of the prior criminal conduct. In *Paul*, the Court recognized the possibility that the police flyer, which identified Davis as an active shoplifter, might impair Davis's employment prospects. 424 U.S. at 697. That, however, was not sufficient to implicate employment as a qualifying plus factor. *Id.* at 712. The subsequent decision of *Siegert v. Gilley*, 500 U.S. 226 (1991), involved an arguably even more direct connection between conduct by the government and an individual's actual employment. Siegert had been employed as a psychologist in a federal government facility. Upon learning that his supervisor was preparing to terminate his employment, Siegert resigned, but sought employment elsewhere within the government. His new position required "credentialing" from his former employer, and the former supervisor, in turn, provided a highly negative evaluation. This resulted in the denial of the required credentials as well as a rejection for the position Siegert had sought. The Court recognized that the negative evaluation could damage Siegert's

reputation and impair his future employment prospects. 500 U.S. at 234. That, however, did not suffice to state a claim for denial of due process. *Id.* at 233-34.

Construing and applying *Paul* and *Siegert* in the context of a claim of defamation against a government actor resulting in a loss of employment by a third party, the First Circuit, in *Aversa v. United States*, 99 F.3d 1200 (1st Cir. 1996), held: "in order to state a cognizable claim that defamation together with loss of employment worked a deprivation of a constitutionally-protected liberty interest, *a plaintiff must allege that the loss of employment resulted from some further action* ***by the defendant*** *in addition to the defamation*." *Id.* at 1216 (emphasis added). The loss of existing or prospective employment by a third party would not, in and of itself, constitute the "plus" factor required under *Paul* to establish a due process violation.[7] Thus, at an absolute minimum, even when employment consequences can serve as a plus factor, there must be an ***actual*** loss of present employment **with the defendant**.

[7] *See also Kelly v. Borough of Sayreville*, 107 F.3d 1073, 1078 (3d Cir. 1997) ("the possible loss of future employment opportunities is patently insufficient to satisfy the requirement imposed by *Paul* that a liberty interest requires more than mere injury to reputation."); *Cannon v. City of West Palm Beach*, 250 F. 3d 1299, 1303 (11th Cir. 2001) (holding that the stigma-plus test was not satisfied based on allegations of a "missed promotion," as there must be allegations of a "discharge or more."); *Hawkins v. Rhode Island Lottery Commission*, 238 F.3d 112, 115 (1st Cir. 2001) (reiterating holding of *Aversa*); *Sturm v. Clark*, 835 F.2d 1009, 1012-13 (3d Cir. 1987) (defamation allegedly resulting in lost business and financial harm was insufficient to constitute plus factor under *Paul*).

While § 775.21(10)(b) bars employment in designated settings where children congregate, such limitations also exist by virtue of other statutes solely as a result of the conviction for the sexual offense. For example, § 1012.32(2)(a), Fla. Stat. (2003), expressly prohibits the employment in public schools of personnel whose fingerprint checks disclose the existence of convictions of crimes involving moral turpitude. Similarly, § 402.305(2)(a), Fla. Stat., in conjunction with § 435.04, Fla. Stat., prohibits the hiring of personnel for licensed child care facilities if such individuals have convictions enumerated in § 435.04. Convicted sex offenders who receive probationary sentences (or community control), are likewise subject to mandatory conditions of sex offender probation. Section 948.03(5), Fla. Stat. Those conditions include a prohibition against living within 1,000 feet of a school, day care center, park, playground, or other place where children regularly congregate. *Id.* The conditions also prohibit employment in the same places as prohibited by the Sexual Predator Act when the victim was a minor. *Id.* The same conditions also apply to those released from incarceration under the conditional release program. Section 947.1405(7), Fla. Stat. Thus, virtually identical employment prohibitions would exist even if the individual is not designated as a sexual predator under § 775.21. Like the conditions on employment imposed by the Act, these conditions are the products of the ***conviction***, not the designation.

Furthermore, for any claim under the stigma-plus test to be viable in the employment context, it must be based on the limitation of rights to ***governmental*** employment; such claims are not viable with respect to ***private employment***. *Pendleton v. City of Haverhill*, 156 F.3d 57, 63 (1st Cir. 1998). In short, the Act's employment prohibitions do not significantly alter any preexisting entitlement under state law or the Constitution.

b. <u>The registration requirement is not a plus factor</u>.

As noted above, the registration requirements of the Act are not caused by any defamatory and/or stigmatizing conduct of the State. Registration therefore does not qualify as a plus factor. Several courts, addressing procedural due process challenges to state registration acts, have concluded that plus factors were not present in those state statutes. *See Illinois v. J.R. (In re J.R.)*, 793 N.E. 2d 687, 696-98 (Ill. App. 2003); *Gunderson v. Hvass*, 339 F.3d 639 (8th Cir. 2003); *see also Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000); *Russell v. Gregoire*, 124 F.3d 1079 (9th Cir. 1997), *cert. denied*, 523 U.S. 1007 (1998).

Furthermore, as with the employment factor, the registration requirement does not alter the individual's entitlements under state law or the Constitution. Even absent the registration requirements of the Act, Espindola would have had comparable

obligations. As a result of the order of community control and probation, Espindola was obligated to comply with mandatory sex offender conditions of probation, in addition to standard conditions of probation. (DCA App. 72-73). Those conditions already obligated Espindola to advise the State of his residence and to obtain approval for any change of residence. As far as records of Espindola's convictions and sentences, and the nature of the offenses, such records exist independently of the registration process, as evidenced by courthouse records, official records of the county, Department of Corrections records, and FDLE records. Additionally, persons residing in Florida must keep the State advised of a current residence in order to obtain drivers licenses or other comparable formal identification, to have children qualify for attendance at local schools, to have employers report withholding of taxes, and to qualify for public insurance benefits. Registration under the Act does not provide the State with any information which it does not otherwise have in its records - records which would exist independent of the Act's registration requirements. With respect to the possibility of having to provide FDLE with "evidentiary genetic markers when available," § 775.21(6)(a)2., Fla. Stat., such a requirement exists by virtue of mandatory conditions of sex offender probation, § 948.03(5)(a)8, Fla. Stat., and mandatory conditions of conditional release for sex offenders, § 947.1405(7)(a)8., Fla. Stat.

c. <u>Tort immunity is not a plus factor.</u>

The final plus factor which the panel opinion alludes to is the statutory limit on the right to pursue certain tort remedies. Under the Act, FDLE, DOC, the Department of Highway Safety and Motor Vehicles, and any law enforcement agency in this state, and the personnel of those departments, as well as other specified public employees and agencies, are "immune from civil liability for damages for good faith compliance with the requirements of this section or for the release of information under this section, and shall be presumed to have acted in good faith in compiling, recording, reporting, or releasing the information. . . ." § 775.21(9), Fla. Stat. As with the other alleged plus factors, this immunity is not caused by any defamatory or stigmatizing action by the State. For that reason alone, the immunity does not constitute a viable plus factor.

Even if such causation were deemed to exist, the immunity clause does not constitute an alteration in the registrant's legal status under state law or the Constitution. The lower court mistakenly assumes that an individual in Espindola's position would be able to sue the State, its departments, or its employees, for an alleged defamation but for the quoted provision of the Act. However, principles of sovereign immunity of the State, and absolute or qualified immunity of its employees,

which predate the Act, independently bar such causes of action.

The grant of immunity under the Act does not impair any expectations that a sexual offender may have under tort law. It does not, for instance, bar causes of action based on bad faith. Moreover, with respect to defamation, Florida law provides public officials with absolute immunity as to defamation claims when the officials are acting in connection with their official duties. *Goetz v. Noble*, 652 So. 2d 1203, 1204-05 (Fla. 4th DCA 1995); *Skoblow v. Ameri-Manage, Inc.*, 483 So. 2d 809 (Fla. 3d DCA 1986).

Principles of qualified immunity similarly shield government officials from liability for damages "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Jones v. Kirkland*, 696 So. 2d 1249, 1252 (Fla. 4th DCA 1997). Furthermore, general principles of sovereign immunity bar liability of the State for actions done by its employees in bad faith. *Ford v. Rowland*, 562 So. 2d 731, 734 (Fla. 5th DCA 1990). Additionally, with respect to the enforcement of laws and the protection of public safety, there has never been any governmental tort liability regarding discretionary governmental functions. *Department of Health and Rehabilitative Services v. B.J.M.*, 656 So. 2d 906, 911-12 (Fla. 1995); *Trianon Park Condominium Ass'n v. City of Hialeah*, 468 So. 2d 912, 919 (Fla. 1985). Making public records information available to those who seek it through a

governmental program appears to involve classic discretionary, non-tortious governmental conduct. *See Trianon*, 468 So. 2d at 918-19. Thus, independent of the immunity clause of § 775.21(9), no tort liability on the part of the State exists, and there is no alteration of anyone's legal status under state law as a result of § 775.21(9). Therefore, the limited liability protections in the Act do not impair legal entitlements or expectations and do not constitute a plus factor.

C. The Act Is Not Facially Unconstitutional

The lower court appears to hold that the Act is facially unconstitutional. However, a facial challenge to a statute "must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). There are circumstances in which the Act can be validly applied. The court's opinion that the sexual predator designation improperly stigmatized someone, even if arguably true in some circumstances, would be demonstrably untrue in others.

For instance, the employment restrictions set forth in § 775.21(10)(b), apply to enumerated offenses therein, ***but***, the enumerated offenses do not include ***all*** offenses which would result in an individual being designated a sexual predator. *Compare*, § 775.21(4)(a)1.b. and § 775.21(10)(b), Florida Statutes.[8] Individuals may also be

[8] Subsection (4)(a)1.b includes enumerated qualifying offenses of §§ 825.1025 and 847.0135, neither of which qualify for the employment restrictions which are a fundamental part of the panel's analysis.

unemployable in the enumerated occupations for reasons independent of the employment restrictions in § 775.21, thus demonstrating that the Act is not unconstitutional in all of its possible applications. In still other circumstances criminal defendants, as part of their criminal case plea agreements, may acknowledge that they are "dangerous" sex offenders, thereby eliminating any conceivable basis for the defamatory stigma which serves as the linchpin for the Third District's opinion.

Yet another instance where the Act, at a minimum, might remain constitutional absent a hearing to determine dangerousness is in the context of those individuals who are designated sexual predators under the Act as a result of having at least two convictions, thereby demonstrating their actual recidivism.

D. Severability

Even if this Court abides by the conclusion that the Act is facially unconstitutional, the Court should consider whether the problematic provisions are severable. As set forth in *Cramp v. Board of Public Instruction of Orange County*, 137 So. 2d 828, 830 (Fla. 1962):

> When a part of a statute is declared unconstitutional the remainder of the act will be permitted to stand provided: (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one

> without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

As suggested by Judge Cope below, to the extent this Court believes the term "predator" causes a stigma, this term can be excised while leaving the remainder of the Act intact. *Espindola*, 855 So. 2d at 1292. (Cope, J., concurring and dissenting).

Further, to the extent the Court deems the employment restrictions or tort immunity problematic, these provisions could be severed. The Act existed for several years prior to the addition of the employment restrictions in 1996. *See* ch. 96-388, s. 61, Laws of Florida. The legislative purposes set forth in the preliminary portions of the Act[9] make clear the Legislature intended the registration and notification requirements to remain in effect independent of the employment restrictions. This conclusion is corroborated by the fact that other independent statutory provisions effectively limit the ability of convicted sex offenders to obtain employment in settings where children congregate.

Likewise, it would be possible to sever the tort liability limitation since this provision appears to have little, if any, practical effect, as comparable limitations are otherwise in effect as discussed in Section I.B.2.c. of this brief.

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[9] *See* § 775.21(3), Fla. Stat., emphasizing the threat of sexual predators to the public safety, and the justification, based on that threat, for public policies including incarceration, supervision, registration, notification, and employment restrictions.

CONCLUSION

Based on the foregoing, the decision of the lower court should be quashed and this Court should hold that Florida's Sexual Predators Act does not violate the requirements of procedural due process.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant on the Merits was mailed this 9th day of February, 2004, to JOHN EDDY MORRISON, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

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Attorney

CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that the foregoing brief was typed in Times New Roman, 14-point type.

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