IN THE SUPREME COURT OF FLORIDA

JOHN RICHARD THERRIEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC03-2219

RESPONDENT'S ANSWER BRIEF

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

ROBERT R. WHEELER
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 0796409

THOMAS H. DUFFY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 470325

OFFICE OF THE ATTORNEY GENERAL
PL-01, THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 EXT. 4595
(850) 922-6674 (FAX)

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, John Richard Therrien, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of one volume, which will be referenced according to the respective number designated in the Index to the Record on Appeal. “IB” will designate Petitioner’s Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

In March of 1997, Petitioner was charged by information as an adult with sexual battery by a person under 18 upon a person under 12 (count one), and with lewd and lascivious act on a child (count two). I, 1. The information alleged that Petitioner, then 16 years old, had during November of 1996 digitally penetrated and also had fondled the same 9-year-old girl. I, 1.

In August of 1997 Appellant and the State entered a plea agreement wherein Appellant would plead no contest to the reduced charge of attempted sexual battery in count one and as

charged in count two; there was no agreement as to sentence. I, 3-6.

The sentencing guidelines called for a sentence of between 142.5 and 85.5 months imprisonment, but Circuit Judge John Kuder, over the State's objection, entered a downward departure sentence of 11 months 15 days in the county jail (suspended) and five years probation; adjudication of guilt was withheld. I, 7-12, 13-14, 15. Sentence was imposed on August 25, 1997.

Approximately three years later, on September 29, 2000, the State filed and then on October 6, 2000, amended a motion to have Petitioner designated a sexual predator under Florida's Sexual Predators Act (the Act), which is found at section 775.21, Florida Statutes. I, 16-17; 18-19. Petitioner opposed the motion on three grounds: one, that a 1998 amendment of the Act was to be given prospective application only; two, that the State could not ask for sexual predator designation when the act in effect at the time of the plea did not permit it; and, three, that the Act violated separation of powers. I, 20-26.

After a hearing and the submission of memoranda of law, Judge Kuder entered an order on August 7, 2001 designating Petitioner a sexual predator. I, 88-101.

Petitioner appealed to the First District Court of Appeal, which considered three rounds of briefing, the supplemental briefs being submitted to address the issue of procedural due process, which had not been raised initially, and ultimately affirmed on all grounds in an opinion that focused all its

analysis on the procedural due process issue. Therrien v. State, 859 So. 2d 585 (Fla. 1st DCA 2003).

The following question was certified as being of great public importance:

> Whether the retroactive application of the permanent employment restrictions of section 775.21(10)(b), Florida Statutes (2000), to a defendant convicted and qualified as a sexual predator, without a separate hearing on whether such defendant constitutes a danger or threat to public safety, violates procedural due process.

859 So. 2d at 588. The First District Court of Appeal also noted potential conflict with Espindola v. State, 855 So. 2d 1281 (Fla. 3d DCA 2003). 859 So. 2d at 587.

This Court accepted jurisdiction provisionally on June 10, 2004.

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 Connecticut Department of Public Safety v. Doe, 538 U.S. 1 (2003), 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. §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. §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. §775.21(7)(c), Fla. Stat.

FDLE's website includes the "Sexual Predator/Offender Database."[1] The website enables users to search for information about registered sexual predators or registered sexual offenders 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. §775.21(10)(a), Fla. Stat. Also, it is a third-degree felony for most individuals designated as sexual predators to work at schools, day care centers and other places where children regularly congregate. §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. . . ." §775.21(9), Fla. Stat.

[1] Found at www3.fdle.state.fl.us/sexual_predators/ on the World Wide Web.

SUMMARY OF ARGUMENT

ISSUE I: The Florida Sexual Predator Act is not unconstitutional because, by amendment it was made retroactive. Retroactive application of a regulatory statute is permissible when the statute gives notice that it is to be so applied. The Act expressly applies to all persons who committed certain crimes after October 1, 1993.

To the extent that Petitioner attempts to argue procedural due process, this Court should reject that argument. Procedural due process generally must be raised as applied to an individual, and as-applied challenges must be made to the trial court. Petitioner expressly waived this argument below. Even if he had not, the Act would not violate substantive due process.

ISSUE II: The Act does not violate procedural due process. The United States Supreme Court opinion in Connecticut Dep't of Public Safety v. Doe, 538 U.S. 1 (2003) controls. Doe held that a similar Connecticut statute, under which designated sex offenders were required to register as such and were identified on a website, did not violate due process for failure to provide a hearing on the issue of dangerousness. The only concern under the statute was, the Court held, whether the individual had been convicted of certain crimes; dangerousness was not an issue. As to the fact that Petitioner will be prohibited from seeking certain employment, the principle of prohibiting sex criminals from living or near children.

ISSUE III: There are no useful distinctions between Florida's act and those approved by the United States Supreme Court.

ARGUMENT

ISSUE I

DOES THE 1998 AMENDMENT TO SECTION 775.21, FLORIDA STATUTES, VIOLATE SUBSTANTIVE RIGHTS? (Restated)

A. JURISDICTION

This Court has discretionary jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution, the court below having certified a question as being of great public importance. The Court also has jurisdiction pursuant to article V, section 3(b)(3), inasmuch as the decision below expressly and directly conflicts with Espindola.

B. PRESERVATION

Petitioner preserved this issue for appellate review as regards retroactive application of the statute; he expressly did not raise a substantive due process claim, however. I, 20-23.

C. STANDARD OF REVIEW

This issue presents a pure question of law, to be reviewed *de novo*.

D. THE TRIAL COURT'S DECISION

Circuit Judge John Kuder's order designated Petitioner a sexual predator. I, 88-101.

E. THE APPELLATE COURT'S DECISION

The First District Court of Appeal affirmed the trial court's decision, rejecting all five arguments made by Petitioner, and

certifying to this court the following question as being of great public importance:

> Whether the retroactive application of the permanent employment restrictions of section 775.21(10)(b), Florida Statutes (2000), to a defendant convicted and qualified as a sexual predator, without a separate hearing on whether such defendant constitutes a danger or threat to public safety, violates procedural due process.

859 So. 2d at 588.

F. MERITS

The certified question should be answered in the negative. Retroactive application of a regulatory statute is permissible when the statute gives notice that it is to be so applied. The Act expressly applies to all persons who committed certain crimes after October 1, 1993.

To the extent that Petitioner attempts to argue procedural due process, this Court should reject that argument.

1. The Sexual Predators Act Applies Retrospectively.

Petitioner contends that the 1998 (and present) version of the Florida Sexual Predator Act does not apply to him because it affects substantive rights. The State respectfully disagrees. In fact the legislature *may* impair substantive rights, so long as it does so expressly, as happened here. Section 775.21(4) reads, in pertinent part:

> (4) Sexual predator criteria.–
>
> (a) For a current offense committed on or after October 1, 1993, upon conviction, an offender shall be designated as a "sexual predator' under subsection (5), and subject to registration under subsection (6)

> and community and public notification under subsection (7) if:
>
> 1. The felony is:
>
> a. A capital, life, or first-degree felony violation, or any attempt thereof, of s. 787.01 or s. 787.02, where the victim is a minor and the defendant is not the victim's parent, or of chapter 794, s. 800.04, or s. 847.0145 . . . .

Thus, the legislature intended for all persons who committed certain sex crimes – including attempted sexual battery of a child less than 12 years old by a person less than 18 – to be subject to the registration and notification provisions of the Sexual Predator Act, so long as they committed the crimes after October 1, 1993.

It also is apparent, from subsection 5(c), that the fact that sexual predator status need not be declared at the time of sentencing.

> If the Department of Corrections, the department [of Law Enforcement], or any other law enforcement agency obtains information which indicates that an offender meets the sexual predator criteria but the court did not make a written finding that the offender is a sexual predator as required in paragraph (a), the Department of Corrections, the department, or the law enforcement agency shall notify the state attorney who prosecuted the offense for offenders described in subparagraph (a)1., or the state attorney of the county where the offender establishes or maintains a residence upon first entering the state for offenders described in subparagraph (a)2. The state attorney shall bring the matter to the court's attention in order to establish that the offender meets the sexual predator criteria.

The legislature clearly intended that anyone who could be designated a sexual predator, should be. This approach, of

course, is utterly consistent with the legislature's aim in passing the statute, which was to give Florida's citizens fair warning of the presence of dangerous people in their midst. §775.21(3), Fla. Stat.

This Court has succinctly stated the relevant statutory construction principles:

> In summarizing our methods of statutory construction, we have often recited:
>
> > [L]egislative intent controls construction of statutes in Florida. Moreover, "that intent is determined primarily from the language of the statute [and] ... [t]he plain meaning of the statutory language is the first consideration." *St. Petersburg Bank and Trust Co. v. Hamm*, 414 So. 2d 1071, 1073 (Fla. 1982) (citation omitted). This Court consistently has adhered to the plain meaning rule in applying statutory and constitutional provisions. As we recently explained:
> >
> > > Florida case law contains a plethora of rules and extrinsic aids to guide courts in their efforts to discern legislative intent from ambiguously worded statutes. However, "[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning." It has also been accurately stated that courts of this state are "without power to construe an unambiguous statute in a way which would extend, modify, or *limit*, its express terms or its *reasonable and obvious implications*. To do so would be an abrogation of legislative power." *Holly* [*v. Auld*], 450 So. 2d [217] at 219 [(Fla. 1984)] (citations omitted, emphasis added).
>
> *Public Health Trust of Dade County v. Lopez*, 531 So. 2d 946, 948-49 (Fla. 1988) (citations omitted) (footnote omitted).

Florida Dept. of Bus. & Prof. Regulation, Div. of Pari-Mutuel Wagering v. Investment Corp. of Palm Beach, 747 So. 2d 374, 382-83 (Fla. 1999).

Thus, since this statute is plain and unambiguous, Petitioner's discussion as to whether the amendment impinged on substantive rights or imposed substantive duties is misplaced. The statute clearly makes sexual predator status applicable to him, and it is inappropriate to look further to divine legislative intent. Anyone convicted of certain crimes after October 1, 1993, is subject to the registration and notification provisions of the statute irrespective of when their sentencing hearing took place or what the Sexual Predators Act provided at the time their criminal activity took place.

Petitioner's argument ignores the crucial distinction between statutes that have no express statement as to applicability and those that do. Generally, it is true that statutes apply prospectively only, which explains the holdings in Hassen v. State Farm Mutual Automobile Insurance Company, 674 So. 2d 106 (Fla. 1996) (construing subrogation statute as regards uninsured motorist insurance coverage) and Gupton v. Village Key and Saw Shop, 656 So. 2d 475 (Fla. 1995) (construing statute governing non-compete clauses in employment contracts).

As to Coblentz v. State, 775 So. 2d 359 (Fla. 2d DCA 2000), rev. denied 789 So. 2d 344 (Fla. 2001) and Angell v. State, 712 So. 2d 1132 (Fla. 2d DCA 1998), Petitioner's rationale for relying on this authority is unclear, inasmuch as both cases

express a viewpoint held by the Second District Court of Appeal that a post-conviction challenge to sexual predator designation should proceed through a separate civil proceeding. Coblentz, 775 So. 2d at 360; Angell, 712 So. 2d at 1132.

To the extent that those cases may give the impression that there is a relationship between the date of sentencing and the date that sexual predator designation was imposed, the 1998 amendment to the Act puts any such argument to rest, as the only relevant date is October 1, 1993. §775.21(4)(a), Fla. Stat.

Collie v. State, 710 So. 2d 1000 (Fla. 2d DCA), cert. denied 525 U.S. 1058 (1998) is likewise misconstrued by Petitioner. IB at 11. The statute that the Collie court construed did not expressly make its provisions applicable back to 1993. The current statute does so; thus, the discussion in Collie involving McKibben v. Mallory, 293 So. 2d 48 (Fla. 1974) is inapplicable here.

Petitioner argues that even though the Act is a civil, regulatory statute, it is substantive, and not procedural. For this proposition he relies, in part, on a single sentence from State v. Curtin, 764 So. 2d 645 (Fla. 1st DCA 2000). IB at 12. He has taken this sentence out of context and misconstrued the court's use of the word "substantive."

The issue in Curtin was whether the statement of legislative intent in subsection 775.21(3)(a) limited sexual predator designation "to violent or repeat offenders and those who commit sex crimes against children . . . ." 764 So. 2d at 646. The

First District Court of Appeal resolved this issue by stating: "We find, contrary to respondent's argument, that there is no ambiguity in this section regarding the substantive criteria for a court's finding of an offender's status as a sexual predator." Id. at 647.

The "substantive criteria" the court was referring to are those set out in subsection 775.21(4). Those were "substantive" – i.e., the criteria the legislature had established – compared with the broader and more general statement of legislative intent. Calling those the "substantive criteria" does not mean that the court found that the statute was substantive as opposed to procedural.

Petitioner also argues that the court below was incorrect in concluding that the statute could be applied retrospectively because it did not violate procedural due process. IB at 13-14. He speculates that if the First District Court of Appeal had been able to read this Court's opinion in State v. Robinson, 873 So. 2d 1205 (Fla. 2004) its result would have been different. IB at 13-14.

Not only does this assertion misapprehend the narrowness of the Robinson decision – which was based solely on the Act as applied to those guilty of kidnaping but whose crimes had no sexual component – and also misses the salient point of Connecticut Department of Public Safety v. Doe, 538 U.S. 1 (2003). In that case the United States Supreme Court considered whether Connecticut's sex offender registration act violated

procedural due process in the context of a liberty interest in reputation. The Supreme Court held, in essence, that it did not matter whether it did or not, because dangerousness was not material under Connecticut's statute. 538 U.S. at 7.

Robinson embraced the holding in Doe. En route to its narrow decision, the Court stated: "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**." 873 So. 2d at 1212 (emphasis added). It is that finding, by this Court, which brings Florida's act directly within the ambit of Doe. In Doe the Supreme Court rejected the procedural due process argument that the aggrieved offender was entitled to a hearing to determine current dangerousness because "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." 538 U.S. at 7 (citations omitted). As evidenced by this Court's holding in Robinson, Florida's Act applies solely by virtue of the qualifying conviction. As such, determinations of current dangerousness are not required by the Act, and the failure to provide for a hearing for such a determination does not constitute a denial of procedural due process.

Thus, the language from Robinson upon which Petitioner relies concerning the liberty interest in reputation would have had no effect on the court below because that question is not pertinent in deciding whether a statute violates procedural due process, and procedural due process and separation of powers were the constitutional grounds upon which Petitioner had challenged the statute.

2. The Act Does Not Violate Substantive Due Process.

To the extent Petitioner attempts (IB at 12-15) to argue substantive due process – a position he expressly forsook below, 859 So. 2d at 587, n. 3 – that argument is not persuasive.

At the outset, it should be noted that such a claim would have to be on a theory of facial constitutionality, inasmuch as it was not raised below and therefore could not be made under an "as-applied" theory. Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1983).

This provision is problematical for Petitioner. 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 argument that the sexual predator designation improperly stigmatized someone, assuming, *arguendo*, it could be true in some circumstances, would be demonstrably untrue in others. For instance, the employment restrictions set forth in section 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 sections 775.21(4)(a)1. b. and 775.21(10)(b). Subsection (4)(a)1.b includes enumerated qualifying offenses of sections 825.1025 and 847.0135, neither of which qualifies for the employment restrictions that are a fundamental part of Petitioner's complaint. Individuals may also be unemployable in the enumerated occupations for reasons independent of the employment restrictions in section 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 that is at the heart of Petitioner's argument.

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.

Thus, Petitioner is cannot prevail on a facial challenge based on substantive due process.

Even if he could challenge the Act under that theory, his claim would have no merit. In State v. Robinson, 873 So. 2d at 1214, this Court set out the applicable guidelines for substantive due process analysis:

> "[T]he basic test [of substantive due process] is whether the state can justify the infringement of its legislative activity upon personal rights and liberties." *In re Forfeiture of 1969 Piper Navajo*, 592 So. 2d 233, 235 (Fla. 1992). A statute must not be unreasonable, arbitrary, or capricious, and must have a "reasonable and substantial relation" to a legitimate governmental objective. *State v. Saiez*, 489 So. 2d 1125, 1128 (Fla. 1986); *see In re Forfeiture*, 592 So. 2d at 235. The rational relationship test used to analyze a substantive due process claim is synonymous with the reasonableness analysis of an equal protection claim. . . . When a statute encroaches on fundamental constitutional rights, however, the statute also must be narrowly tailored to achieve the state's purpose. *See In re Forfeiture*, 592 So. 2d at 235; 10A Fla. Jur. 2d Constitutional Law § 485 (2003).

(Citations omitted). This Court did not decide that the Act does touch on substantive rights because it found that, as applied to persons designated sexual predators who did not commit a sexual crime, it failed the rational relationship test. 873 So. 2d at 1214.

First, it is clear that the Act, as applied to Petitioner, passes the rational relationship test. Unlike Robinson, who inadvertently took an infant along when he stole her mother's car at gunpoint, Therrien was convicted of two explicitly sexual crimes: attempting to penetrate a nine-year-old girl's vagina with his finger and fondling the same victim in a lewd or lascivious manner. He thus is a person who has "committed or ha[s] attempted to commit sexual or sexually exploitative crimes." Robinson, 873 So. 2d at 1214. The act is rationally related to Petitioner.

Second, neither of the two interests identified here – reputation and potential future employment – incorporates a fundamental right, so there is no need for the statute to be narrowly tailored.

To have a cognizable claim for damage to reputation through state action, one must meet the "stigma-plus" test of Paul v. Davis, 424 U.S. 693 (1976). Even if that test has been met, as Petitioner argues (IB at 11), reputation does not constitute a fundamental right, only a liberty interest. Petitioner points to no case that holds otherwise.

Moreover, 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. 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). 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.

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.

Thus, even if a higher standard of scrutiny were required, the Act is sufficiently narrowly tailored to protect any interest that Petitioner might have. It is only applied when someone is convicted of, or pleads guilty to, one act of very serious sexual misconduct – such as attempted sexual battery on a 9-year-old – or two acts of serious, but less grave, sexual misconduct, such as fondling.

Petitioner is not deprived of any particular trade in which he already had a stake. He has not alleged, and cannot argue

that he has been prohibited from traveling, marrying, fathering and raising children, using contraception, pursuing higher education or associating with any persons. See Washington v. Glucksberg, 521 U.S. 702, 719-720 (1997); Marrero v. City of Hialeah, 625 F. 2d 499, 515-516 (11th Cir. 1980). He may suffer some difficulties – as would anyone with a criminal record – but those would be, at most, civil disabilities, and not deprivations of any fundamental right.

Several courts have considered substantive due process challenges to sex offender registration acts and those courts have consistently rejected such challenges, finding that fundamental liberty interests were not involved or, alternatively, that the registration and notification requirements were not arbitrary and were rationally related to legitimate governmental purposes.

In State v. Druktenis, 2004 N.M. App. LEXIS 11 (N.M. App. Jan. 30, 2004), the New Mexico Court of Appeal, after noting the existence of studies correlating high rates of recidivism among sex offenders as a class,[2] stated that "[d]espite the uncertainty

[2] See also Smith v. Doe, 538 U.S. 84, 103 (2003) ("Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class."); McKune v. Lile, 536 U.S. 24, 32 (200) ("Sex offenders are a serious threat in this Nation"; "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault.")

in this area, based on the importance of the interest in protecting potential victims from sexual assault, we cannot conclude that the legislature acted irrationally when it chose to err on the side of protecting the public in lieu of permitting circuit courts to make individualized determinations regarding sentencing." 2004 N.M. App. LEXIS 11, **59-60. Thus, "[t]he State clearly has a legitimate and compelling interest to match the notification provisions with these crimes in the legislative attempt to minimize the risk of harm to society by those who pose a significant risk of recidivism." Id. at **62. Thus, the registration provisions enable law enforcement to keep track of former offenders and the notification provisions enable members of the public to make their own determinations for their own safety - avoiding potentially dangerous areas, acting more cautiously in such areas.

With respect to employment restrictions, the same court stated that "[n]othing in the United States . . Constitution[] proscribes legislative action merely because the Legislature's conclusions or assumptions are not underwritten by conclusive empirical or statistical data. . . ." Id. at **70. A legislature's "'resort to somewhat overinclusive classifications is legitimate as a prophylactic device to insure the achievement of statutory ends.'" Id.

As fundamental rights were not implicated, the substantive due process question was whether the statute was rationally related to a legitimate governmental purpose. Id. at **100. The test is

one which is highly deferential to the state legislature. Id. at **105. Legislative determinations of what is reasonably necessary for the public health, safety and welfare of the general public should not be interfered with absent a clear case of abuse. Id. The legislative action was valid since it did not rest on grounds wholly irrelevant to the achievement of the State's objective. Id. at 108. Similarly, the presumption of recidivism as to the notification-triggering crimes was not wholly arbitrary. Id.

While the opinion from the New Mexico appellate court is clearly one of the most analytical, thoughtful and thorough opinions, courts from across the country have also been reaching the same conclusions. See, Doe v. Tandeske, 361 F. 3d 594 (9th Cir. 2004) (rejecting substantive due process challenge to Alaska registration act because it did not implicate any fundamental rights); In re J.R., 793 N.E. 2d 687 (Ill. App. 2003) (registration and notification provisions of Illinois act were rationally related to legitimate governmental purposes and thus did not violate substantive due process principles); In re J.W., 787 N.E. 2d 747 (Ill. 2003) (same, concluding that no fundamental rights were involved and rational basis test therefore applied); Gunderson v. Hvass, 339 F. 3d 639 (8th Cir. 2003) (finding that Minnesota act did not implicate any fundamental rights and act has rational relationship to legitimate governmental purpose); Montalvo v. Snyder, 207 F. Supp. 2d 581 (E.D. Ky. 2002) (summarily rejecting substantive

due process challenge to federal registration and community notification requirements); In the Interest of: Ronnie A., 585 S.E. 2d 311 (S.C. 2003) (no substantive due process violation as lifelong registration requirement is rationally related to legitimate governmental purpose); Ballard v. Chief of Federal Bureau of Investigation, 2004 U.S. Dist. LEXIS 1095 (W.D. Va. Jan. 20, 2004) (rejecting substantive due process challenge in the absence of any protected liberty interest).

ISSUE II

DOES THE SEXUAL PREDATORS ACT VIOLATE PROCEDURAL DUE PROCESS? (Restated)

A. JURISDICTION

This Court has discretionary jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution, the court below having certified a question as being of great public importance. The Court also has jurisdiction pursuant to article V, section 3(b)(3), inasmuch as the decision below expressly and directly conflicts with Espindola.

B. PRESERVATION

Petitioner raised this issue below, thus preserving it for appellate review.

C. STANDARD OF REVIEW

This issue presents a pure question of law, to be reviewed *de novo*.

D. THE TRIAL COURT'S DECISION

Circuit Judge John Kuder's order designated Petitioner a sexual predator. I, 88-101.

E. THE APPELLATE COURT'S DECISION

The First District Court of Appeal affirmed the trial court's decision, rejecting all five arguments made by Petitioner, and certifying to this court the following question as being of great public importance:

> Whether the retroactive application of the permanent employment restrictions of section 775.21(10)(b), Florida Statutes (2000), to a defendant convicted and qualified as a sexual predator, without a separate hearing on whether

> such defendant constitutes a danger or threat to public safety, violates procedural due process.

859 So. 2d at 588.

F. MERITS

The certified question should be answered in the negative. The registration and notification provisions in Florida's Act are constitutionally valid under Connecticut Dep't of Public Safety v. v. Doe, 538 U.S. 1 (2003) since, in Florida, 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.

1. Doe Compels Affirmance.

Connecticut Dep't of Public Safety v. Doe 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.

At issue in Doe was a procedural due process challenge to Connecticut's sex offender registration act. 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 non-dangerousness 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.

In addition to the court below, Florida's Second, Fourth and Fifth 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"); Miller v. State, 861 So. 2d 1283 (Fla. 5th DCA 2004). The Third District's Espindola opinion 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, 862 So. 2d 847 (Fla. 4th DCA 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. 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).

Inasmuch as Doe held that all the process due potential sexual predators is a determination of whether they have been convicted of the requisite predicate offenses, the three-part test set out in Key Citizens for Responsible Government, Inc. v. Florida Keys Aqueduct Authority, 795 So. 2d 940, 948 (Fla. 2001), should be viewed in the context that the Doe opinion mandates, i.e., that dangerousness does not enter into the calculation. The “private interest” in avoiding dissemination of stigmatizing information that Petitioner avers is his, actually is of no legal

consequence. That being the case, there is no risk of an erroneous deprivation of that interest.

The third prong of the Key Citizens test merits some discussion, in the context of Petitioner's argument that it would not disadvantage the government if, before one was designated a sexual predator, a hearing was held to determine dangerousness. In fact, the government has a strong interest in having all persons who have been convicted at least once of a very serious sexually related felony (capital sexual battery, for example) or a felony sex-offense recidivist[3] having their names, addresses and other pertinent information available to the public, and in informing those nearby to where such persons reside of their presence in the community.

Individual hearings in each case would lead, inevitably, to uneven and inconsistent outcomes and, undoubtedly, would result in the public not being informed that someone who either committed one gravely serious sex crime or of a felony recidivist sex-criminal being among them. Inasmuch as the purpose of the Act is protection of the public, and not to

[3] The fact that Florida includes only felony sex offenses as qualifying events distinguishes it from State v. Bani, 36 P.3d 1255 (2002). Bani had been convicted of a crime that in Florida would be misdemeanor battery. He was accused of twice grabbing a 17-year-old girl on her buttocks while asking her if she wanted to go to a party; he said, and other witnesses agreed, that he had been drinking heavily. He was sentenced to two days time served in jail, a $300 fine and alcohol evaluation and treatment. 36 P.3d at 1257.

publicize lists of dangerous persons,[4] individualized hearings would reduce the Act's effectiveness.

Petitioner also cites as "proof" of the Act's due process failings this Court's opinion in State v. J.M., 824 So. 2d 105 (Fla. 2002). J.M. merely held that the Act is not applicable when a juvenile is prosecuted as an adult but punished as a juvenile. Such individuals are not "convicted" under the definition found in section 775.21(2)(c), Florida Statutes. 824 So. 2d at 109. Inasmuch as Petitioner was sanctioned as an adult, and not as a juvenile, the Act expressly applies to him under J.M., and that opinion expresses no view that the process granted defendants who are punished as adults was in any way deficient.

2. Employment Restrictions

Petitioner relies on Judge Benton's dissent below to argue that the employment restrictions in section 775.21(10) elevate the need for a hearing on dangerousness. IB at 23-24. In light of this argument it should be noted that our society has, independently of the Sexual Predators Act, long believed that

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[4] Petitioner misreads section 775.21(5)(c), Florida Statutes, construing it to speculate that the State "could bring another action to designate Mr. Therrien a sexual predator if new evidence were uncovered showing him to be a danger." IB at 20. Petitioner's concern arises from his blindly reading dangerousness into the Act. All this subsection does is to permit authorities who discover someone who "fell through the cracks" at sentencing but who meets the criteria for sexual predator status (i.e., the requisite convictions) to rectify the mistake.

convicted sex offenders, and other convicted offenders as well, should not work or live in the vicinity of places where children congregate.

For example, section 1012.32(2)(a), Florida Statutes prohibits those convicted of crimes involving moral turpitude from employment in public schools. If it is discovered that someone already hired has actually been convicted, the statute allows for a hearing on the issue, but does not allow candidates to have such a hearing.

Similarly, section 402.305(2)(a), Florida Statutes, prohibits employment in licensed child care facilities, unless an express exemption is granted at a hearing where the applicant must show by clear and convincing evidence that he or she should not be disqualified. §435.07(3), Fla. Stat. Sections 435.03 and 435.04, Florida Statutes, have similar restrictions on those whose employment requires background screening and those who seek employment in positions of trust. This is a substantially higher burden than Petitioner's view, designated sexual predators would not, apparently, have the burden of proving they were not dangerous and, if they did, would not have to prove it except by the greater weight of the evidence. See, also, Calhoun v. Department of Health & Rehabilitative Services, 500 So. 2d 674 (Fla. 3d DCA 1987) (rejecting due process challenge to section 402.305).

Moreover, section 948.30(1)(b), Florida Statutes (2004) places restrictions on residence for convicted sex offenders and

offenders on conditional release. 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. §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.

3. Espindola Should Not Be Accepted As Florida Law.

The Third District's Espindola opinion, which along with Judge Benton's dissent in this case form much of the support for Petitioner's position, was wrongly decided, and this Court should reject its reasoning. It appears that the Espindola court, confronted with two United States Supreme Court opinions that utterly undermined the logic and rationale of its earlier opinion, attempted on rehearing to distinguish those cases on facts that are not related to the constitutional principles that the United States Supreme Court relied upon, and amount to distinctions with absolutely no difference.

Each United States Supreme Court case pertains directly to whether section 775.21 is constitutionally deficient for failing

to provide for a hearing to determine the defendant's future dangerousness before he was included on the list of predators, and individually and collectively those decisions demonstrate that such defendants have no constitutional right to a hearing on whether they belong on the sexual predator registry or whether police had to notify their communities of their presence.

The Espindola court ignored the Doe's holding, set out above, that dangerousness was not material under a Megan's Law like Connecticut or Florida's. 538 U.S. at 7. The Espindola court misconstrued this vital language in Doe and ignored its obvious import by attempting to distinguish the Florida act from the Connecticut law.

> Unlike the Connecticut statute, which makes no determination that an offender is dangerous, FSPA 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 FSPA. See § 775.21(3)(b). Accordingly, we find that the determination of "dangerousness" is of import to FSPA, and that the State's reliance on *Conn. Dep't of Pub. Safety v. Doe, infra*, is misplaced.

855 So. 2d at 1290.

This reasoning is specious. The opinion confuses the rationale of the statute with whether "dangerousness" is an important factor in whether a specific individual predator is actually dangerous. The provision cited, section 775.21(3)(a), Florida

Statutes, is not a requirement under the Act. It is nothing more than a statement of legislative intent; it was a legislative finding. Subsection (3) is entitled "Legislative findings and purpose; legislative intent." Section 775.21(3)(a) states, as one of those legislative findings:

> 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 costs of sexual offender victimization to society at large, while incalculable, clearly exorbitant.

While this is what the legislature believes to constitute a rational basis for the promulgation of the legislation, it is not material to any finding that must be made by the judiciary. The judiciary is required to find only the existence of the qualifying conviction(s).

The error of Espindola's conclusion can be discerned from the fact that compliance with Doe could be achieved simply by deleting the legislative findings and legislative intent. A legislature is not required to set forth its intent and findings; it rarely does. Thus, the message sent by Espindola is that the legislature should simply keep quiet - let the basis for the legislation be unstated, implied, *sub silentio*, rather than be stated candidly, as the candid statement of intent invites the type of rebuke in which the Espindola court indulged

itself. Whether a sex offender registration law contains in a preamble, a section or one of its subparts, the rationale or purpose for its passing, is unrelated to, and does not control, whether inclusion of one's name on such a registry implicates procedural due process.

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.

The legislative finding that supports the legislation, implicates the very same substantive due process issue which the Supreme Court, in Doe, held to be the only legitimate question. If a legislature can make that type of determination, in compliance with substantive due process principles, the statute is valid and a procedural due process hearing on dangerousness is an irrelevancy. Espindola has confused materiality under the statute, for what must be established in the judiciary, with legislative intent and legislative findings.

The fact that Connecticut's law contains no rationale for its passage does not mean that the law was passed for something other than public safety. Indeed, that would appear to be the

only valid purpose for such laws – and was presumed to be so by the Doe court.

> "Sex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32, 122 S.Ct. 2017, 153 L.Ed.2d 47 (2002) (plurality opinion). "[T]he victims of sex assault are most often juveniles," and "[w]hen convicted sex offenders reenter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sex assault." *Id.*, at 32-33. **Connecticut, like every other State, has responded to these facts by enacting a statute designed to protect its communities from sex offenders and to help apprehend repeat sex offenders.**

538 U.S. at 4 (emphasis provided). The Espindola court's attempt to distinguish the Florida Sexual Predator Act on the grounds that it was based on dangerousness and Connecticut's was not – and that this was a crucial difference in Doe – is sheer sophistry. Florida's law cannot be unconstitutional simply because the Legislature provided some guidance for interpreting it.

The elements of Florida's act make it clear that an individual qualifies for the designation based solely upon the requisite one or two qualifying convictions for sexual offenses. §775.21(4)(a), Fla. Stat. If the convictions exist, the individual must be designated a sexual predator. There is no requirement of a finding of dangerousness.

The simple fact is this: The Connecticut law automatically required the inclusion on a state-maintained list the names, addresses and other pertinent information of everyone convicted of certain specified sex crimes. The Florida law does the same.

Doe held that the Connecticut law was constitutional, despite not permitting a hearing on dangerousness, because dangerousness was "not material to the State's statutory scheme." 538 U.S. at 6. Florida's law is like Connecticut's in that registration automatically and unfailingly is required upon conviction. Thus, Doe (which noted that sex offenders were considered dangerous) applies equally in Florida and all other states with similar statutes.

The Espindola court also distinguished another Megan's Law case, Smith v. Doe, 538 U.S. 84 (2003), by finding that the Florida statute involves more than dissemination of accurate information through a website.

> Under FSPA, the information regarding an offender's "sexual predator" status is not only a part of the public record and internet database (as it is in Alaska, Smith's state of origin)
>
> > but the sheriff of the county or the chief of police of the municipality where the sexual predator ... maintains a permanent or temporary residence shall notify members of the community and the public....
>
> §775.21(7)(a), Fla. Stat. These notification requirements, which mandate affirmative action on the part of law enforcement, go well beyond the mere posting of information in Smith which the Supreme Court found to be merely "passive." *Smith*, 123 S.Ct. at 1153 (stating that "[t]he notification is a passive one: An individual must seek access to the information."). Thus, the "stigma" here not only from an offender's conviction but also comes from the active dissemination of this conviction and other information by law enforcement.

855 So. 2d at 1288.

The United State Supreme Court language upon which the Espindola court pounced to make its point – analogizing websites to official archives – was not the decisive point in the Smith decision and is inapplicable in the context of whether procedural due process demands a hearing. Instead, the high court was explaining how the wide dissemination of sexual predator information on the a website – where a person's name, photograph, and criminal activity are available to any person in the world with a computer and internet access – were not "shaming" and therefore not punishment. 538 U.S. at 97-98. The Court stated:

> Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused. The publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism. In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.
>
> The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.

> The State's Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record. An individual seeking the information must take the initial step of going to the Department of Public Safety's Web site, proceed to the sex offender registry, and then look up the desired information. The process is 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. The Internet makes the document search more efficient, cost effective, and convenient for Alaska's citizenry.

Id. at 98-99.

The Espindola court's reference to "active dissemination" – meaning that police agencies are required to notify the public that a sexual predator has moved into the community – is a misguided attempt to find a distinction where none exists. Information about an individual does not appear on the website by itself, after all; someone must place it there. Law enforcement personnel in Alaska – and in Florida, and all other states with similar statutes – must actively disseminate the information that appears on the website, gathering it from diverse sources, putting it in a proper format, and taking whatever steps are necessary that it can be accessed via the internet.

There is no legal difference between disseminating information to the entire world via the internet and disseminating it house-to-house via fliers. Both acts spread the word, and if the word is truthful, then there is no prohibition against what has been done. Smith holds that the **dissemination** of truthful – if

stigmatizing – public information (as opposed to simply maintaining files in the county courthouse) is not actionable under the “stigma plus” test and the case law that has grown up around it. The fact that the information may cast someone in an unflattering light does not automatically mean that the government cannot, in the proper instance, disseminate it.

ISSUE III

DO THE EMPLOYMENT RESTRICTIONS IN THE ACT DISTINGUISH IT FROM THE LAWS IN CONNECTICUT AND ALASKA? (Restated)

A. JURISDICTION

This Court has discretionary jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution, the court below having certified a question as being of great public importance. The Court also has jurisdiction pursuant to article V, section 3(b)(3), inasmuch as the decision below expressly and directly conflicts with Espindola.

B. PRESERVATION

To the extent Petitioner is challenging whether the Act provides procedural due process, he raised that issue below.

C. STANDARD OF REVIEW

This issue presents a pure question of law, to be reviewed *de novo* on appeal.

D. THE TRIAL COURT'S RULING

Judge Kuder declared Petitioner a sexual predator. I, 88-101.

E. THE APPELLATE COURT'S DECISION

The First District Court of Appeal affirmed the trial court's decision, rejecting all five arguments made by Petitioner, and certifying to this court the following question as being of great public importance:

> Whether the retroactive application of the permanent employment restrictions of section 775.21(10)(b), Florida Statutes (2000), to a defendant convicted and qualified as a sexual predator, without a separate hearing on whether such defendant constitutes a danger or threat

> to public safety, violates procedural due process.

859 So. 2d at 588.

F. MERITS

The certified question should be answered in the negative. There is no meaningful distinction to be drawn between Florida's act and those construed in Doe and Smith.

Relying upon much the same rationale and methodology as the Espindola court, Petitioner attempts to distinguish Doe and Smith by searching for small differences between the Connecticut and Alaska acts and Florida's. As noted above in the discussion regarding Espindola, these are distinctions without any meaningful difference.

Petitioner notes that the Alaska act "permits a citizen to live and work as other citizens without supervision," and avers that Florida's Act does not. IB at 26. First, Florida's Act imposes no supervision on registered sexual predators (any such would be through the terms of probation). Second, the fact that Florida's Act reasonably prohibits sexual predators from working in places where children regularly congregate (as noted above) does not make it constitutionally distinct from Alaska's. The Smith opinion notes numerous potential difficulties that will be faced by those required to register under Alaska's act, 538 U.S. at 100-101, but despite these civil disabilities found that the act did not violate procedural due process.

Petitioner distinguishes Connecticut's act on the ground that it lacks a statement of legislative intent, and therefore is substantively different from Florida's. This argument was raised in Espindola, and the State reasserts here the same arguments it presented *ante*. In essence, this is a distinction that has no legal or logical validity.

Even if 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 risk 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.

Other jurisdictions have not accepted the distinction Petitioner attempts to draw as a difference. For example, that issue arose in Druktenis, which upheld New Mexico legislation that included, much like Florida's Act, an express legislative finding that "sex offenders pose a significant risk of recidivism." 2004 N.M. App. LEXIS at *18. Notwithstanding that

language, the court found that the statute did not violate procedural due process requirements.

Similarly, the Michigan Sex Offender Registration Act includes an express legislative determination that "'a person who has been convicted of committing an offense covered by this act poses a potential serious menace and danger to the health, safety, morals, and welfare of the people. . .'" Fullmer v. Michigan Department of State Police, 360 F. 3d 579, 582 (6th Cir. 2004). As in the lower court herein, the convicted offender attempted to argue that the foregoing legislative finding regarding the dangerousness of the individuals who qualify for registration distinguished the Michigan act from the Connecticut act at issue in Doe. The federal appellate court expressly disagreed: "Regardless of the language in the statute, the information on the registry's website makes it clear to anyone accessing the registry that all sex offenders convicted after a certain date are listed, without exception. Moreover, there is nothing on the website to indicate that the state has made an individual determination as to a registrant's dangerousness. Hence, the Michigan registry serves the same purpose and has the same effect as its Connecticut counterpart." Id. Thus, regardless of any legislative findings that individuals subject to the registration requirements of the Act are dangerous as a class, the Act requires registration solely by virtue of the qualifying conviction. As a result, Doe

mandates the conclusion that Florida's Act does not violate procedural due process principles.

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).

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the affirmative the decision of the District Court of Appeal reported at 859 So. 2d 585 should be approved, and the order entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Charles V. Peppler, Esq., 14 W. Government St., Room 411, Pensacola, FL 32502 by mail on August 23, 2004.

Respectfully submitted and served,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
ROBERT R. WHEELER
Tallahassee Bureau Chief,
Criminal Appeals
Florida Bar No. 0796409

_____
THOMAS H. DUFFY
Assistant Attorney General
Florida Bar No. 470325

Attorneys for State of Florida
Office of the Attorney General
Pl-01, the Capitol
Tallahassee, Fl 32399-1050
(850) 414-3300 Ext. 4595
(850) 922-6674 (Fax)

[AGO# L03-1-36441]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Thomas H. Duffy
Attorney for State of Florida

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IN THE SUPREME COURT OF FLORIDA

JOHN RICHARD THERRIEN`,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC03-2219

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