IN THE SUPREME COURT OF FLORIDA

JOHN RICHARD THERRIEN,

Petitioner,

v.

CASE NO.: SC03-2219
LOWER TRIBUNAL NO.: 1DO1-3403

THE STATE OF FLORIDA,

Respondent.
_____/

_____

PETITIONER'S INITIAL BRIEF

_____

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS i

INTRODUCTION 1

STATEMENT OF THE FACTS 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 5

ARGUMENT 8

I. AMENDMENT OF FSPA, A CIVIL, REGULATORY STATUTE, WHICH BROADENS THE CRITERIA FOR SEXUAL PREDATOR STATUS MUST BE DECLARED UNCONSTITUTIONAL WHEN RETROACTIVELY APPLIED TO IMPOSE PERMANENT EMPLOYMENT RESTRICTIONS. 8

II. THE FSPA HEARING ON DESIGNATION DOES NOT GIVE MR. THERRIEN A MEANINGFUL OPPORTUNITY TO SHOW HE IS NOT A DANGER TO SOCIETY AND DEPRIVES HIM OF PROCEDURAL DUE PROCESS 16

III. FSPA AFFECTS MR. THERRIEN'S LIBERTY INTERESTS NOT IMPLICATED BY CONNECTICUT'S OR ALASKA'S VERSIONS OF MEGAN'S LAW. 24

CONCLUSION 27

CERTIFICATE OF SERVICE 28

CERTIFICATE OF TYPE SIZE AND STYLE 29

TABLE OF CITATIONS

Cases — Page

Angell v. State, 712 So. 2d 1132 (Fla. 2d DCA 1998) 10

Burgos v. State, 765 So. 2d 967 (Fla. 4th DCA, 2000) 12

Coblentz v. State of Florida, 775 So. 2d 359 (Fla. 2d DCA 200),
rev. denied 789 So. 2d 344 (Fla. 2001) 10,12

Collie v. State, 710 So. 2d 1000 (Fla. 2nd DCA 1998),
rev denied, 722 So. 2d 192 (Fla. 1998), *cert. denied*, 525 U.S. 1058 (1998) 11

Connecticut Department of Public Safety v. Doe, 538 U.S.1,
123 S.Ct. 1160, 155 L. Ed. 2d 98 (2003) 5, 14, 24, 25

Department of Law Enforcement v. Real Property, 588 So. 2d 957
(Fla. 1991) 18, 19

Doe #1 v. Williams, 167 F. Supp. 2d 45 (D.D.C. 2001) reversed,
2003 WL 21466903 (D.C. Cir. 2003) 16

Doe v. Attorney General, 426 Mass. 136, 686 N.E. 2d 1007, 1012 (1997) . . . 17, 23

Doe v. Pataki, 3 F. Supp. 2d 456 (S.D. N.Y. 1998) 16

Doe v. Pryor, 61 F. Supp 2d 1224 (M.D. Ala 1999) 16

Espindola v. State, 855 So. 2d 1281 (Fla. 3rd DCA) 14, 16

Fletcher v. State, 699 So. 2d 346 (Fla. 5th DCA 1997) 11

Freeland v. State, 832 So. 2d 923 (Fla. 1st DCA 2002) 12

Giorgetti v. State, 821 So. 2d 417(Fla. 4th DCA 2002) 12

Givens v. State, So. 2d 813 (Fla. 2d DCA 2003) 12

Goad v. State,__So. 2d__, 2003 WL 545857 (Fla. 2003) 21

Goss v. Lopez, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975) 5, 25

Gupton v. Village Key and Saw Shop, 656 So. 2d 475 (Fla. 1995) 10, 11

Hassen v. State Farm Mutual Automobile Insurance Company,
674 So. 2d 106 (Fla. 1996) 10, 11

J. B. v. Florida Department of Children and Family Services,
768 So. 2d 1060 (Fla. 2000) 17, 19

Jackson v. State, 807 So. 2d 684 (Fla. 2d DCA 2002) 13

Kansas v. Hendricks, 521 U.S. 346 (1997) 11

Key Citizens for Responsible Government, Inc. v. Florida Keys Aqueduct Authority, 795 So. 2d 940 (Fla. 2001) 19, 20

Matthews v. Eldridge, 424 U.S. 319, 348 (1976) 14

McKibben v. Mallory, 293 So. 2d 48 (Fla. 1974) 11

Metropolitan Dade County v. Chase Federal Housing Corporation,
737 So. 2d 494 (Fla. 1999) 13, 15

Noble v. Board of Parole, 327 Or. 485, 964 P. 2d 990(1998) 16

Paul v. Davis, 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) 5, 25

R.H.B. v. J.B.W., 826 So. 2d 346 (Fla. 2nd DCA, 2002) 19

Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140,
155 L. Ed. 2d 164 (2003) 5, 7, 14, 24, 25

State v. Bani, 97 Hawaii 285, 36 P. 3d 1255 (2002) 16

State v. Curtin, 764 So. 2d 645 (Fla. 1st DCA, 2000) 12

State v. J.M., 824 So. 2d 105 (Fla. 2002) 21

State v. Robinson, ___So. 2d__, 2004 WL 524922
(Fla. 2004) 10, 11, 13, 14, 17, 27

State, DOC v. Goad, 754 So. 2d 95 (Fla. 1st DCA 2000) 11

Stogner v. California, 539 U.S. 607, 123 S. Ct. 2446
156 L. Ed. 2d 544 (2003) 15

Therrien v. State, 859 So. 2d 585 (Fla. 1st DCA 2003) 1, 10, 13, 15, 17, 23, 24

Wisconsin v. Constanineau, 400 U.S. 433, 91 S. Ct. 507,
27 L. Ed. 2d 515 (1971) 5, 25

Statutes

§§ 402.305(2)(a) and (b), Fla. Stat. (2002) 23

§ 775.21(3)(a), Fla. Stat. (1999) 24

§ 775.21(3)(b), 3., 4., and 5, Fla. Stat. 24

§775.21(4)(a), Fla. Stat. (2000) 15

§775.21(4)(c), Fla. Stat. (1995) 8, 9, 10

§ 775.21 (2001), Fla. Stat. (Florida Sexual Predator Act) . . . . . Passim

§ 775.21(5)(a)(1), Fla. Stat. 14

§ 775.21(5)(c), Fla. Stat. 20

§ 775.21(6), Fla. Stat. 10

§ 775.21 (6)(a)1, Fla. Stat. 3, 20

§775.21(6)(a) 2, Fla. Stat. 3

§ 775.21(6)(e), Fla. Stat. 3, 26

§§ 775.21(10)(a) and (b), Fla. Stat. 3, 10

§ 775.21(10)(b), Fla. Stat. (2000) 1, 24

§ 943.0435, Fla. Stat. 12, 13

Alaska Sexual Offender Registration Act (ASORA) 6, 25, 26

Ky. Rev. Stat., Ann. §17.570 (Michie 1999) 22

Mont. Code Ann. §46-23-509 (2002) 19, 22

N.Y. Correc. Law §168-l & n (McKinney 2002) 22

Wyo. Stat. Ann. §7-19-303(c) (Michie 1999) 22

Other Authorities

U.S. Const. amend. XIV 4

Art. I § 9, Fla. Const. 4

Wayne A. Logan, *A Study In "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 Buff. Crim. L. Rev 593 (2000) 22

Wayne A. Logan, *Liberty Interests in the Preventative State: Procedural Due Process and Sex Offender Community Notification Laws,* 89 J. Crim. Law & Criminology 1167 (1999) 22

INTRODUCTION

The First District Court of Appeal has certified the following question as one of great 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.**

Therrien v. State, 859 So. 2d 585, 588 (Fla. 1st DCA 2003).

STATEMENT OF THE FACTS[1]

Mr. Therrien was charged as a minor and prosecuted in adult court under a two count information alleging violation of § 794.011(2), Fla. Stat., a life felony, sexual battery of a victim less than 12 when the defendant is less than 18 years of age. The second count charged Mr. Therrien with violation of § 800.04, Fla. Stat., a felony of the second degree, lewd and lascivious assault on a child under the age of 16 years. The information charges the offenses as having taken place in November, 1996. (R.

[1] Mr. Therrien will refer to the record on appeal using the same designations as in the First District.

1). Mr. Therrien was arrested on March 7, 1997. (Progress Case Docket). After discovery, a negotiated plea was signed by Mr. Therrien on August 20, 1997. (R. 3-5). At the sentencing hearing on August 25, 1997, the trial court departed from the sentencing guidelines, without an appeal by State, and sentenced Mr. Therrien upon a plea of nolo contendere to attempted sexual battery by a person under 18 years of age upon a person under 12 years of age, a felony of the second degree, and to lewd and lascivious assault upon a child less than 16 years of age in violation of § 800.04, which is also a felony of the second degree. (R. 3-5, 7-8). The trial court imposed a sentence of withholding adjudication of guilt on each count and placing Mr. Therrien on 5 years probation, suspending a county jail sentence of 11 months, 15 days. The probation on each count ran concurrently. (R. 11-12).

Three years later, on September 29, 2000, State filed a motion for an order finding that Mr. Therrien qualifies as a sexual predator. (R. 17). Shortly thereafter, on October 7, 2000, State filed an amended motion for entry of an order finding that Mr. Therrien qualifies as a sexual predator, citing to §775.21, Fla. Stat. (amended October 1, 1998), Florida Sexual Predator Act (FSPA) that a person qualifies as a sexual predator if convicted of an attempt of a life felony if the victim is a minor and the defendant is not the victim's parent. (R. 18-19).

Under FSPA, § 775.21 (2001), a sexual predator must register with the Department of Corrections (DOC) and provide name, social security number, legal residence and place of employment. § 775.21 (6)(a)1. The DOC may require other information such as non-privileged legal treatment records and genetic markers. § 775.21 (6)(a)2. A sexual predator not in custody, such as Mr. Therrien, must provide a photograph and fingerprints to his local Sheriff who then provides this information to the DOC. § (6)(e). The sexual predator must also register at a driver's license office of the DHSMV and identify himself as a sexual predator. § (6)(f)1. The DOC then places this information on the internet for public inspection. §§ (6)(k)1 and 2 and (7)(c). Moreover, local law enforcement, once it becomes aware of the presence of a designated sexual predator, must notify the members of the community where the sexual predator lives, as well as day care centers and schools, within a one mile radius of the predator's residence. § (7)(a) and (d). The predator's name, address and specifics of his offense are also disseminated to the public. § (7)(a)1-5. Mr. Therrien is subject to this registration and notification for life until 20 years elapses and then he may petition a circuit court for removal of the designation if he meets certain criteria. § (6)(l). Finally, Mr. Therrien may not work or volunteer where children regularly congregate. § (10).

A hearing was held on the amended motion on October 25, 2000, in which the trial court permitted a memorandum of law to be filed by Mr. Therrien's counsel. (Progress Docket Printout). A second hearing took place on March 22, 2001, in which the trial court requested supplemental memoranda of law on the issue as to whether the Florida Sexual Predator Act (FSPA) violated the doctrine of separation of powers. (R. 27-41). An order was entered by the court reserving ruling and setting deadlines for submitting memoranda of law by Mr. Therrien's and State's counsel. (R. 43-44).

A supplemental memorandum of law was submitted by Mr. Therrien on April 15, 2001. (R. 45-81). The State submitted its supplemental memorandum of law on May 22, 2001. (R. 82-87). After reviewing the supplemental memorandum of law, the trial court entered the order under review, on August 7, 2001, finding that Mr. Therrien qualifies as a sexual predator. (R. 88-101). A notice of appeal with the First District Court of Appeal was timely filed. (R. 102).

STATEMENT OF THE CASE

The First District permitted Mr. Therrien to file a supplemental brief raising the issue that the FSPA was unconstitutional as it violated procedural due process guaranteed under Article I, Section 9 of the Florida Constitution and under Fourteenth Amendment of the U.S. Constitution. Mr. Therrien argued that the FSPA gave him

no opportunity to appear at a hearing to show that he is not a danger or a threat to society and that his liberty interests in reputation and employment were taken without due process.

The First District then requested a second set of supplemental briefs with the advent of *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98 (2003) and *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003). On November 25, 2003, the First District Court of Appeal issued its opinion in which it certified a question as one of great public importance as quoted above.

SUMMARY OF ARGUMENT

The First District wrongly applied the recent U.S. Supreme Court decisions to hold that the FSPA does not violate procedural due process. First, *Connecticut Dept. of Public Safety v. Doe*, held only that, under Connecticut's statutory scheme of sexual predator registration and notification, no requirement existed that the sexual offender be currently dangerous or pose any threat of danger. Distinguishing *Paul v. Davis, Wisconsin v. Constanineau,* and *Goss v. Lopez,* the supreme court found no deprivation of procedural due process because Connecticut's version of Megan's Law did not require sexual offender to prove lack of dangerousness, thus, no liberty

interest was implicated. Finally, the supreme court did not even reach the question of substantive due process because it was not asserted below.

By contrast, the FSPA has distinct and express legislative findings that sexual offenders who prey on children present an extreme threat to public safety. The findings use the terms "high level of threat that a sexual predator presents to the public safety" and sets forth a strategy to minimize or remove the risk. Not only are registration and community and public notification a part of FSPA, but Florida's Megan's Law prohibits sexual predators from working with children either for compensation or as a volunteer, which, if violated, is a felony of the third degree. Thus, the liberty interests implicated by these findings require a pre-deprivation hearing. Here, Mr. Therrien is being deprived of his good name and reputation as well as his ability to pursue a livelihood that may require him to come into contact with children or work in a location where children regularly congregate. Procedural due process mandates a hearing to determine if Mr. Therrien poses a danger or threat to society.

Smith v. Doe was also wrongly applied by the First District. In Alaska, the Megan's Law (ASORA) adopted by its legislature does not restrict jobs and activities of sexual offenders, thereby, neither implicating nor touching upon liberty interests. The supreme court also held that the *ex post facto* clause of the federal constitution

would not prevent retroactive application of the ASORA because it is civil in nature. Unlike ASORA, FSPA not only imposes community and public notification and registration, but also restricts the jobs and volunteer activities which Mr. Therrien could pursue as he cannot perform services either for remuneration or as a volunteer in places where children are taught or regularly congregate. Furthermore, *Smith's* holding that Alaska's Megan's Law is civil in nature does not have any impact on Florida's principles of statutory construction in determining the retroactivity of a civil statute. Florida's highest court has held that a civil statute will not be retroactively applied if it creates new obligations, impairs vested rights, or imposes new penalties unless the statute shows a clear intent for retroactive application. Assuming that FSPA is intended to be retroactively applied, it still must pass constitutional muster. FSPA fails to do so.

As described previously, Mr. Therrien committed his offenses and pleaded no contest to the charges of attempted capital sexual battery on a minor as well as lewd and lascivious act involving a minor before the FSPA was amended to make those particular offenses eligible for sexual predator treatment. This amendment is a substantive change to FSPA and imposes new life-long penalties and obligations on Mr. Therrien preventing him from pursuing a livelihood of his choice as well as imposing new obligations of registration in person and notifying authorities of his

whereabouts. These penalties and obligations deprive Mr. Therrien of procedural due process and should not be imposed on him.

Because the requirement for a separate hearing is central to the guarantee of procedural due process in light of the liberty interests at stake, the FSPA must be declared unconstitutional as amended and as applied to Mr. Therrien. This court cannot rewrite the FSPA and impose the requirement of a separate hearing before a trial court finds or designates a person a sexual predator. The only remedy for Mr. Therrien is a holding that the FSPA as amended and as retroactively applied to him is unconstitutional.

ARGUMENT

I. AMENDMENT OF FSPA, A CIVIL, REGULATORY STATUTE, WHICH BROADENS THE CRITERIA FOR SEXUAL PREDATOR STATUS MUST BE DECLARED UNCONSTITUTIONAL WHEN RETROACTIVELY APPLIED TO IMPOSE PERMANENT EMPLOYMENT RESTRICTIONS.

When Mr. Therrien entered his plea of no contest to the charges, as set forth in State's amended motion to find him a sexual predator, §775.21(4)(c), Fla. Stat. (1995), provided as follows:

> For a current offense committed on or after October 1, 1996, 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 meets the criteria of former Sections 775.22(2) and 775.23(2), specifically, the felony is:

* * *

b. any second degree or greater felony violation of Chapter 794, s. 800.04..., and the offender has previously been convicted of or found to have committed or has plead nolo contendere or guilty to, regardless of adjudication, any violation of s. 794.011(2), (3), (4), (5), or (8) s. 794.023, S. 800.04, s. 827.071, s. 827.071, s. 847.0133, or s. 847.0145, or a similar law of another jurisdiction;

* * *

On October 1, 1998, §4(c) was changed substantially to read as follows:

* * *

1. The felony meets the criteria of former ss. 775.22(2) and 775.23(2), specifically, the felony is:

a. A capital, life, or first degree felony violation of s. 787.01 or 787.02, where the victim is a minor and the defendant is not the victim's parent, or of Chapter 794 or s. 847.0145, or a violation of a similar law of another jurisdiction;

b. An attempt to commit a capital, life or first degree felony violation of chapter 794, where the victim is a minor, or a violation of a similar law of another jurisdiction; or

c. Any second degree or greater felony violation of s. 787.01 or s. 787.02, where the victim is a minor and the defendant is not the victim's parent; chapter 794; s. 796.03; s. 800.04; s. 825.1025(2)(b); s. 827.01; or s. 847.0145; or

> a violation of a similar law of another jurisdiction, and the offender has previously been convicted of or found to have committed, or has pled nolo or guilty to, regardless of adjudication, any violation of s. 787.01 or 787.02, where the victim is a minor and the defendant is not the victim's parent; s. 794.011(2), (3), (4), (5), or (8); s. 794.023; s. 796.03; s. 800.04; s. 825.1025; s. 827.071; s. 847.0133; s. 847.0135; or s. 847.0145, or a violation of a similar law of another jurisdiction.

Amended §4(c) broadens the criteria for sexual predator status by adding §775.21(4)(c) 1a. And b. which permits sexual predator status for those offenses without a predicate conviction. *Therrien*, 859 So. 2d at 586. The First District described the civil disabilities that Mr. Therrien, if designated a sexual predator must endure. He must register with the FDLE within 48 hours of entering a county to take up residence. 859 So. 2d at 586, citing §775.21(6). His name, appearance, address, details of the offenses and whether the victim is a minor is disclosed to the public by local law enforcement. *Id.*, citing §775.21(10)(b). This court has also cataloged the numerous restrictions on a person's liberty once designated a sexual predator. *State v. Robinson*, ___So. 2d__, 2004 WL 524922, *4 (Fla. 2004). When an amendment has the effect of imposing new obligations and penalties, this court has refused to apply the amendment retrospectively. *See, Hassen v. State Farm Mutual Automobile Insurance Company*, 674 So. 2d 106 (Fla. 1996); *Gupton v. Village Key and Saw Shop*, 656 So. 2d 475 (Fla. 1995). As FSPA is a civil, regulatory statute, then

amendments to it must be given prospective application. *See, Coblentz v. State of Florida*, 775 So. 2d 359 (Fla. 2d DCA 200), *rev. denied* 789 So. 2d 344 (Fla. 2001); *Angell v. State*, 712 So. 2d 1132 (Fla. 2d DCA 1998).

Substantive provisions which are not present in preceding versions of the FSPA should not be retroactively applied to Mr. Therrien. *See, Collie v. State*, 710 So. 2d 1000, 1006-1008 (Fla. 2nd DCA 1998), *rev denied*, 722 So. 2d 192 (Fla. 1998), *cert. denied*, 525 U.S. 1058 (1998). The *Collie* court quoted from *McKibben v. Mallory*, 293 So. 2d 48 (Fla. 1974) for the proposition that when re-enacted provisions are deemed to have been in operation continuously from the original enactment, additions or changes are treated as amendments effective from the time the new statute goes into effect. *Id.* at 1007. The substantive provisions broadening the criteria for designating a person a sexual predator had not been enacted at the time that Mr. Therrien either committed the offense or was sentenced. Therefore, the October 1, 1998 version of §4(c)1.b. cannot be retroactively applied to Mr. Therrien because it exposes him to new obligations or new penalties under *State v. Robinson, Hassen* and *Gupton*.

It should be noted that no Florida court has construed the FSPA as a sentencing option or criminal punishment statute. The First District, as well as the Second, Fourth and Fifth District Courts of Appeal, have observed that the sexual predator notification and registration requirement are part of civil, regulatory statutes so as to

avoid *ex post facto* implications. *See, State, DOC v. Goad*, 754 So. 2d 95, 98 (Fla. 1st DCA 2000) (citing *Kansas v. Hendricks*, 521 U.S. 346 (1997) and *Fletcher v. State*, 699 So. 2d 346, 347 (Fla. 5th DCA 1997)); *Burgos v. State*, 765 So. 2d 967 (Fla. 4th DCA, 2000); *Coblentz v. State of Florida*, 775 So. 2d 539 (Fla. 2nd DCA, 2000), *rev. denied*, 789 So. 2d 344 (Fla. 2001).

Although State may concede that the FSPA is a civil, regulatory statute and not a statute of criminal punishment, it may argue that it is procedural in nature and thereby can be applied retroactively. *See, Freeland v. State*, 832 So. 2d 923 (Fla. 1st DCA 2002) (citing cases). However, the criteria for determining a sexual predator is substantive in nature, see, *State v. Curtin*, 764 So. 2d 645 (Fla. 1st DCA, 2000). The First District in *Curtin*, even though it rejected the contentions of the putative sexual predator, announced: "[w]e 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." 764 So. 2d at 647.

The FSPA is not a mere reporting statute, but imposes criminal penalties for failure to follow its restrictions on liberty. *See, Giorgetti v. State*, 821 So. 2d 417, 422 (Fla. 4th DCA 2002). Moreover, the cases cited by *Freeland* had more to say about whether the FSPA and Florida's Sexual Offender act were criminal punishment statutes and not subject to the *ex post facto* clause, than whether the provisions of the

FSPA were procedural or substantive. *See*, *Givens v. State*, So. 2d 813, 815-816 (Fla. 2d DCA 2003) (holding that the sexual offender registration in § 943.0435 was not criminal punishment subject to ex post facto considerations)[2]. The employment restrictions imposed on Mr. Therrien are substantive in nature. This court recognized in *Robinson* that labeling Mr. Therrien or any person as a predator is stigmatizing. 2004 WL 524922, *5. The label of predator coupled with tangible interests such as employment or altered legal status can lead to protections afforded by due process. *Id*. This court observed that the life-long registration requirements which subject a person to prosecution for a third degree felony for failure to adhere to these requirements coupled with a life-long restriction from working "where children regularly congregate" and the general opprobrium that accompanies the designation are more than adequate to establish stigma - plus factors infringing on liberty interests. *Id*. at *6, (citing to FSPA and cases). Consequently, this court held that the designation of sexual predator is a deprivation of "a protected liberty interest." *Id*.

Assuming that the FSPA clearly shows an intent to be applied retroactively, this court must still, as noted by the First District in its opinion below, determine as a

[2] The registration and notification requirements of FSPA and sexual offender registration under § 943.0435 are identical. *See*, *Jackson v. State*, 807 So. 2d 684 (Fla. 2d DCA 2002).

second step, "whether retroactive application is constitutionally permissible." 859 So. 2d at 587, (quoting from *Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So. 2d 494, 499 (Fla. 1999)). The First District's opinion in this case bottomed its decision that the FSPA should be retrospectively applied to Mr. Therrien because it was constitutionally permissible to do so relying on *Connecticut v. Doe* and *Smith v. Doe*, *Id.* at 588. However, the First District did not have the benefit of this court's analysis that the FSPA implicates liberty interests worthy of protection under due process guarantees. This court in *Robinson* alluded to the hearing prescribed in the FSPA to designate one a sexual predator as a "perfunctory step" on the way to designation. 2004 WL 524922, *5. The Third District in *Espindola v. State*, 855 So. 2d 1281, 1284 (Fla. 3d DCA), *review pending* (oral argument set October 7, 2004) observed that "the sole determination being made by the trial court, before designating a person a 'sexual predator' is whether that person had the prerequisite criminal conviction," citing § 775.21(5)(a)(1), Fla. Stat. The Third District in *Espindola* emphasized that, under *Matthews v. Eldridge*, 424 U.S. 319, 348 (1976), procedural due process requires a government to act in a fair manner when there is a deprivation of a constitutionally protected interest, and held that the "total failure to provide for judicial hearing on the risk of defendant's committing future

offenses" violates procedural due process and requires the FSPA be held unconstitutional. 855 So. 2d at 1289-1290 (citing cases).

Judge Benton in dissenting from the opinion below makes the reasoned argument that the retroactive application of the FSPA to Mr. Therrien takes away his liberty interests in pursuing employment that others similarly situated are able to undertake and that he should be given the opportunity to present evidence that he would not pose a threat to public safety. 859 So. 2d at 592. He further observed that the intent of the legislature to make the FSPA retroactive manifested itself in an amendment, adopted after Mr. Therrien entered his plea of nolo contendere, which provided that the FSPA is applicable to offenses occurring after October 1, 1993. *Id.* at 592 (citing § 775.21(4)(a), Fla. Stat. 2000)). Citing to *Stogner v. California*, 539 U.S. 607, 123 S. Ct. 2446, 2460-61, 156 L. Ed. 2d 544 (2003), Judge Benton further reasoned that both the Florida and federal constitutions protect Mr. Therrien against unfair retroactivity when it would cause a deprivation of a liberty interest. *Id.* at 593. The perfunctory hearing which normally would have taken place as part of the sentencing hearing does not afford Mr. Therrien his guarantees under the state and federal due process clauses to show a judge that someone in his position would not pose a threat to public safety or be a danger to society. *Id.* Thus, the retroactive

application of substantive provisions of the FSPA is constitutionally impermissible under *Metro Dade County v. Chase Federal, supra*.

II. THE FSPA HEARING ON DESIGNATION DOES NOT GIVE MR. THERRIEN A MEANINGFUL OPPORTUNITY TO SHOW HE IS NOT A DANGER TO SOCIETY AND DEPRIVES HIM OF PROCEDURAL DUE PROCESS.

In *State v. Bani*, 97 Hawaii 285, 36 P. 3d 1255, (2002), the Hawaii Supreme Court reviewed a sexual predator statute involving registration and notification of similar breadth to the FSPA. Hawaii held that procedural due process concerns were implicated and that the petitioner's liberty and property interests were deprived without due process. *Bani* observed that the petitioner's reputation and standing in the community will be undermined as well as other tangible interests will suffer serious harm because of registration as a sex offender. Potential employers and landlords will be concerned about employing or renting to him. *Id*. at 1264-1265. The Third District in *Espindola* has reached the same conclusions. 855 So. 2d at 1288-1289. Other courts have also decided that a Megan's Law statutory scheme significantly infringe on liberty interests relating to employment and adverse economic consequences requiring guarantee of procedural due process. *See*, *Doe #1 v. Williams*, 167 F. Supp. 2d 45, 51 (D.D.C. 2001) reversed, 2003 WL 21466903 (D.C. Cir. 2003); *Doe v. Pryor*, 61 F. Supp 2d 1224, 1231-1232 (M.D. Ala 1999); *Doe v. Pataki*, 3 F. Supp. 2d 456, 468 (S.D. N.Y. 1998); *Noble v. Board of Parole*, 327 Or.

485, 496, 964 P. 2d 990, 995-996 (1998); *Doe v. Attorney General*, 426 Mass. 136, 686 N.E. 2d 1007, 1012 (1997).

The FSPA implicates liberty interests as this court held in *State v. Robinson*. His only defense to the designation is to prove that he is not the person who has pleaded no contest to the predicate offenses. There is no opportunity for Mr. Therrien to show that he is not a danger to society, that he would not present a future threat to repeat sexual offenses, that he is married and a father, and that he is living a normal, productive life as a citizen of Florida.[3] Due to the extreme burdens that would be imposed upon him by notification and registration under the Sexual Predator Act, fundamental fairness cries out for Mr. Therrien to receive a meaningful, evidentiary hearing. He suffers a loss of reputation, the ability to earn a living of his choice and the right to live and to raise children without the stigma being attached to him or to his progeny of that of a sexual predator.

Florida has long recognized the importance of procedural due process when liberty and property is at stake. In *J. B. v. Florida Department of Children and Family Services*, 768 So. 2d 1060 (Fla. 2000), this court held that the termination of parental rights of a putative father in a dependency proceeding in which he was given

[3] This passage is contained in Mr. Therrien's first supplemental brief filed with the First District and was quoted by Judge Benton in dissent. 859 So. 2d at 592-593.

twenty-four hours notice of advisory hearing did not comport with Florida's constitutional right to due process. In explaining its holding, this court quoted from *Department of Law Enforcement v. Real Property*, 588 So. 2d 957, 960 (Fla. 1991) as follows:

> The basic due process guarantee of the Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Art. I § 9, Fla. Const. Substantive due process under the Florida Constitution protects the full panoply of individual rights from unwarranted encroachment by the government. To ascertain whether the encroachment can be justified, courts have considered the propriety of the state's purpose; the nature of the party being subjected to state action; the substance of that individual's right being infringed upon; the nexus between the means chosen by the state and the goal it intended to achieve; whether less restrictive alternatives were available; and whether individuals are ultimately being treated in a fundamentally unfair manner in derogation of their substantive rights. . . .
>
> Procedural due process serves as a vehicle to ensure fair treatment through the proper administration of justice where substantive rights are at issue. Procedural due process under the Florida Constitution guarantees to every citizen the fight to have that course of legal procedure which has been established in our judicial system for the protection and enforcement of private rights. It contemplates that the defendant shall be given *fair notice [ ] and afforded a real opportunity to be heard and defend* [ ] in an orderly procedure, before judgment is rendered against him.
>
> The manner in which due process protections apply vary with the character of the interests and the nature of the

> process involved. There is no single, inflexible test by which courts determine whether the requirements of procedural due process have been met. *Id.* at 960. (emphasis added) (citations omitted).

Id. at 1063-1064. Similarly in *R.H.B. v. J.B.W.*, decided after *J. B. v. Florida Department of Children and Family Services, supra*, the Second District Court of Appeal held that it was a denial of due process not to give the father notice of a hearing scheduled to determine temporary child support before entering an income deduction order. *See, R.H.S. v. J.B.W.*, 826 So. 2d 346, 351 (Fla. 2nd DCA, 2002) quoting from *Key Citizens for Responsible Government, Inc. v. Florida Keys Aqueduct Authority*, 795 So. 2d 940, 948 (Fla. 2001)). In *Key Citizens*, this court quoted again from *FDLE v. Real Property, supra*, and employed a three prong test in determining what process is constitutionally required in the context of a bond validation proceeding. *Id.*, 795 So. 2d at 948. The three factors are:

> (1) The private interests that will be affected by the official action;
>
> (2) The risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safe guards; and
>
> (3) The government's interest. [Citations omitted].

Id. at 948-949.

When applying procedural due process as mandated by the Florida and federal constitutions through the three prong test set forth in *Key Citizens*, this court can readily discern that FSPA fails to satisfy minimum due process concerns. The private liberty interests of Mr. Therrien have been cataloged above. The erroneous deprivation of these liberty interests is at great risk when Mr. Therrien can only contest whether he pleaded to attempted sexual battery by a person less than 18 years of age or a child less than 12 years of age. He has no opportunity to show rehabilitation or his lack of dangerousness. The FSPA has no other procedural safeguards in place to protect Mr. Therrien's liberty interests. Finally, the government's interest in protecting society from sexual predators will be served just as well by allowing persons such as Mr. Therrien to prove that they pose no threat to society. If a judge determines that Mr. Therrien poses no risk of re-offending, then society is just as protected as by the stigma of sexual predator being attached to Mr. Therrien. Further, the FSPA seems to suggest that State could bring another action to designate Mr. Therrien a sexual predator if new evidence were uncovered showing him to be a danger. See, § 775.21(5)(c) ("if . . . obtains information which indicates that an offender meets the sexual predator criteria . . ." [but a finding was not made at sentencing] ". . . the state attorney shall bring the matter to the court's attention . . ."). Indeed, it was Section (5)(c) that was used by State to haul Mr. Therrien into court on October 7, 2000.

As further proof that the perfunctory hearing of FSPA does not satisfy due process, this court has declined to apply the civil disabilities of the FSPA to minors who are adjudicated delinquent of offenses, which if prosecuted as an adult, would qualify them for sexual predator status. *State v. J.M.*, 824 So. 2d 105, 114-115 (Fla. 2002). In *J.M.*, this court emphasizes the differences in public policy behind the juvenile and criminal justice systems. For adults, punishment is the goal; for juveniles, rehabilitation is the key. 824 So. 2d at 114. This court noted the unrebutted expert testimony that J.M. did not fit the profile of a sexual predator. *Id*. If J.M. were designated a sexual predator, this court concluded rehabilitation would be lost. In *Goad v. State*,__So. 2d__, 2003 WL 545857, *3, (Fla. 2003), this court reiterated that the traditional aims of criminal punishment is deterrence and retribution. In the FSPA, the aims are regulatory and remedial by protecting the general public from the extreme threat and danger posed by sexual predators. Therefore, the "one issue" hearing of determining a predicate conviction contemplated by FSPA hardly satisfies due process where an offender cannot show that he is amenable to rehabilitation and does not pose a threat to society.

Professor Wayne Logan, compiled an extensive law review article, reviewing the Megan's Laws of other states. *See, A Study In "Actuarial Justice": Sex Offender Classification Practice and Procedure*, 3 Buff. Crim. L. Rev 593 (2000). He

observed that these laws contain legislative findings which "vastly overstate the capacity of social science to predict the likelihood, frequency, and nature of sex offender recidivism ...". *Id.* at 594-595, n.4 (quoting from FSPA as well as other states' Megan's Laws). He has reviewed schemes from four states which imposed offender notification and registration based on some form of individualized risk assessment. At the time of publication, Kentucky, Montana and New York permitted expert testimony on the issue of risk of recidivism. With the exception of Kentucky, that is still the case. See, Ky. Rev. Stat., Ann. §17.570 (Michie 1999) (repealed April 11, 2000), Mont. Code Ann. §46-23-509 (2002); N.Y. Correc. Law §168-l & n (McKinney 2002). Wyoming leaves the matter of risk assessment entirely in the hands of the trial judge. See, Wyo. Stat. Ann. §7-19-303(c) (Michie 1999). See, Logan, *Id.* at 616-617, n. 108-116. Even before this review of Megan's Laws, Professor Logan had concluded that procedural due process guarantees dictate that there be a hearing to determine dangerousness and the threat to society of the person sought to be designated a sexual predator. See, Wayne A. Logan, *Liberty Interests in the Preventative State: Procedural Due Process and Sex Offender Community Notification Laws,* 89 J. Crim. Law & Criminology 1167, 1192-1197, 1229-1231 (1999).

Not without some irony, Judge Benton commented, when discussing the right to earn a livelihood which cannot be taken without due process of law, that §§ 402.305(2)(a) and (b), Fla. Stat. (2002) allows a childcare worker to show that he is exempt from disqualification and to provide evidence of rehabilitation from the prior criminal conviction which caused disqualification as a childcare worker as well as other evidence showing that he or she is not a present danger if employment is continued. 859 So. 2d at 591. Judge Benton the issue as whether "state and federal constitutions require an opportunity for [Mr. Therrien] to make a showing, if he can, that his employment - - perhaps as a french fry cook, janitor, roofer, or grounds keeper- - would not pose a threat to public safety." *Id*. at 592. By declaring the FSPA unconstitutional, this court can bring individualized risk assessment into Florida's statutory scheme of protecting society form sexual predators and achieve ends that not only satisfies due process but protects society from dangerous offenders who actually prey upon children and women. Massachusetts has decided that such a hearing is necessary to satisfy due process. *Doe v. Attorney General*, *supra*, 686 N.E. 2d at 146. As Judge Benton succinctly put it, the FSPA is unfairly retroactive to Mr. Therrien and ". . . deprives him of a whole spectrum of employment opportunities - - and does so for life - - without affording him a chance to show that he can safely be allowed to work . . .". 859 So. 2d at 593.

III. FSPA AFFECTS MR. THERRIEN'S LIBERTY INTERESTS NOT IMPLICATED BY CONNECTICUT'S OR ALASKA'S VERSIONS OF MEGAN'S LAW.

FSPA contains specific legislative findings that "[r]epeat sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators **who present an extreme threat to the public safety**." (emphasis added). See, § 775.21(3)(a), Fla. Stat. (1999). FSPA also provides that, because of "the high level of threat that a sexual predator presents to the public safety," a particular strategy will be implemented which involves registration, community and public notification, and preventing sexual predators from working either as a paid employee or a volunteer where children will regularly congregate. See, §§ 775.21(3)(b), 3., 4., and 5. Furthermore, the FSPA provides that those who fail to register or who work whether for compensation as a volunteer at any business, school, daycare center, park, playground, or other place "where children regularly congregate" commit felonies of the third degree. See, §§ 775.21(10)(a) and (b).

These civil disabilities and loss of liberty interests imposed on Mr. Therrien from FSPA make the recent U. S. Supreme Court decisions of *Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 123 S. Ct. 1160, 155 L.Ed. 2d 98 (2003), and *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L.Ed. 2d 164 (2003), distinguishable. First, *Connecticut Dept. of Public Safety, supra*, Connecticut's version of Megan's Law,

contained a finding that a registrant under that law had not been determined by any public official of Connecticut to be currently dangerous. *Connecticut Dept. of Public Safety, supra*, 123 S. Ct. at 1163. Facing a challenge that liberty interests were deprived without procedural due process by a line of cases beginning with *Wisconsin v. Constantineau*[4], *Goss v. Lopez*[5], and *Paul v. Davis*[6], the U.S. Supreme Court held that due process would not entitle a registrant to establish a fact, that he is not dangerous, which is not even required to be proven under the Connecticut statute. *Id.* at 1163-1164.

Similarly, Alaska's Megan's Law (ASORA) was determined to be civil in nature and retroactive. *See, Smith v. Doe*, 123 S. Ct. 1140, 1147-1148. However, the Court was applying the *ex post facto* clause of the federal constitution and determined that Alaska in enacting ASORA created a civil, non-punitive statutory scheme. *Id*. at 1149. The court then distinguished *Paul v. Davis* and the stigma plus test by commenting that much of the sexual offender information being given to the public was already a matter of public record and that ASORA was merely disseminating accurate information concerning a criminal record. *Id*. at 1150-1151. Most importantly,

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[4] 400 U.S. 433, 91 S. Ct. 507, 27 L. Ed. 2d 515 (1971)

[5] 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975)

[6] 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976)

ASORA does not ". . . restrain activities sexual offenders may pursue but leaves them free to change jobs or residences." *Id*. at 1151. ASORA permits a registrant to live and work as other citizens without supervision. *Id*. at 1152. Finally, the court observed that the *ex post facto* clause of the federal constitution would not prohibit Alaska from subjecting convicted sexual offenders as a class to registration and public notification as opposed to an individualized determination of their dangerousness. In summarizing its holding, the court only said that Alaska, in establishing a civil regulatory scheme which is non-punitive and retroactive in application, has not violated the *ex post facto* clause concerning criminal conduct. *Id*. at 1152-1153, 1154.

In direct contrast to ASORA, the FSPA does restrict the activities of a registrant both as to work and recreation. See, § 775.21(6)(e) (requiring the sexual predator to register in person either at the Department of Corrections or the local sheriff's office when establishing a permanent or temporary residence, § (6)(f) (requiring registration in person at the driver's license office of the Department of Highway Safety and Motor Vehicles), § (6)(g) (requiring in person registration at time of driver's license renewal or change in residence), and § (10)(b) (sexual predator who has been convicted of certain sexual offenses in Florida or under the similar law in another state, when the victim of the offense was a minor, is prohibited from working either for compensation or as a volunteer at schools, daycare centers, or other places

where children regularly congregate). As FSPA restricts the class of jobs and requires in person registration under certain circumstances, liberty interests are implicated unlike Connecticut and Alaska. As discussed previously, this court has reached the same conclusion in *State v. Robinson*, *supra*. Moreover, unlike Connecticut's Megan's Law, FSPA does make legislative findings that sexual offenders present extreme threats to the public safety which are tantamount to a legislative finding that sexual offenders are dangerous. The label of sexual predator ". . . certainly constitutes a stigma." *State v. Robinson*, 2004 WL 524922, *5. Consequently, under Florida and federal concepts of procedural due process, Mr. Therrien is entitled to a hearing to determine whether he poses a high level of threat or is dangerous before his liberty interests are deprived.

CONCLUSION

The procedural due process guarantee long recognized by Florida courts and embodied in the Florida and federal Constitutions, protect the liberty and property interests of a citizen. The perfunctory one-issue hearing contemplated by the FSPA does not protect those interests in a fair and meaningful way. In order for Mr. Therrien to protect his liberty interests implicated by the designation as a sexual predator, the FSPA must be declared unconstitutional as retroactively applied to him.

A right to meaningful hearing is the only opportunity Mr. Therrien has to clear his name and live the life of a productive citizen. He deserves no less.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Thomas F. Duffy, Assistant Attorney General, Office of the Attorney General, The Capitol, Tallahassee, FL 32399-1050, by U. S. Mail, this 6th day of July, 2004.

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The undersigned attorney hereby certifies that this brief was prepared using a 14 Times New Roman font in accordance with Fla. R. App. P. 9.210(a)(2).

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