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 REPLY BRIEF

_____

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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). (App. Tab 1).

ARGUMENT IN REBUTTAL[1]

I. RETROACTIVE APPLICATION OF THE 1998 AMENDMENT TO § 775.21, FLA. STAT. (FSPA) TO MR. THERRIEN VIOLATES PROCEDURAL DUE PROCESS.

State argues that the FSPA, despite its legislative findings to the contrary, does not make dangerousness or the threat of recidivism a relevant inquiry which brings it within the safe harbor of *Connecticut Department of Public Safety v. Doe*, 538 U.S.

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[1] Petitioner shall use the same designations as in his initial brief. Respondent's brief shall be designated as "AB" followed by the appropriate page number in parenthesis. All emphasis through boldface lettering is supplied by Petitioner unless the contrary is stated. Petitioner will refer to the appendix by "App."

1 (2003). However, State makes several fallacious arguments to contort the FSPA into the same Megan's Law adopted in Connecticut. First, it argues that FDLE's website which enables internet users to obtain information about registered sexual offenders and predators has the FDLE's caveat that no judgment has been made by it about the level of risk of any particular registered sexual predator. This is evidence that the legislature did not make dangerousness or threat a relevant inquiry. (AB 5-6, 14-15). Although what the FDLE's website contains or does not contain is not part of the record, Mr. Therrien submits that the wording of the disclaimer (App. Tab 2) should be disregarded as irrelevant in answering the certified question. Interestingly,when one goes to the FDLE website and clicks on FDLE's "Legal Brief", the introduction by Commissioner Moore states that the FSPA gives ". . . the public access to information important to their ability **to protect themselves and their families against sexual offenders**. (App. Tab 3).

FDLE is not an agency charged with implementing the FSPA but only in keeping track of an offender's address, adjudications, and his status as either sexual offender or predator. Even if it had some administrative responsibility, its opinion as to whether an offender is dangerous or not or poses more or less risk to the public is of no consequence and not entitled to deference because the FSPA's own legislative findings are unambiguous that offenders are dangerous and are at great risk of

recidivism. *See, Donato v. AT&T*, 767 So. 2d 1146, 1153 (Fla. 2000) (interpretation by FCHR of marital status is not persuasive or binding where use of words, marital status, is unambiguous); *Level 3 Communications, LLC v. Jacobs*, 841 So. 2d 447, 450 (Fla. 2003) (PCS's decision is afforded deference unless clearly unauthorized or erroneous). In the State's answer brief, on numerous occasions, it admits that the FSPA's intent is to notify and warn the public of the whereabouts of "dangerous sex offenders" and of those offenders who pose a risk of harm. (AB 10, 17, 21-22, n.2, and 43). There can be no other logical reason for the legislature to insert registration, community notification and employment restrictions into the FSPA unless it had grave concerns about public safety due to the whereabouts and travels of sexual offenders. In construing legislation, a court must give harmony and meaning to all its parts.

Second, Respondent attempts to avoid the retroactivity issue by arguing that FSPA is procedural. (AB 13-14). This argument also fails. The Florida Legislature itself has determined that laws relating to sexual predators and sexual offenders are substantive in nature. See, § 943.0436(1), Fla. Stat. (2002). Second, the issue of whether the FSPA is procedural or substantive is an academic one based on this court's observation in *State v. Robinson*, 873 So. 2d 1205, 1213 (Fla. 2004), that "[w]e believe the [FSPA] imposes more than a stigma". Further, ". . . designated sexual predators are subject to social ostracism, verbal (and sometimes physical)

abuse, and the constant surveillance of concerned neighbors. These additional limitations implicate more than merely a stigma to one's reputation. Other courts have found that similar registration statutes contained sufficient stigma-plus factors to implicate liberty interests [citing cases]." *Id*. at 1214. Thus, this court held that the designation as a sexual predator is a deprivation of a protected liberty interest. *Id*. Consequently, the FSPA does not deal with procedure or remedies but affects significant liberty interests and rights which are substantive in nature. *See, e.g., Zack v. State*, 753 So. 2d 9, 25 (Fla. 2000) (change in death sentence aggravator was substantive and not to be applied retroactively); *Robinson, supra*, 873 So. 2d at 121; *see also, State v. J. M.*, 824 So. 2d 105, 114-115 (Fla. 2002) (FSPA imposes significant, lifetime, civil disabilities upon a person designated a sexual predator which makes it inappropriate for application to juvenile adjudications).

With this court's recognition of the significant impairment of liberty interests by the affirmative imposition of lifetime, civil disabilities, the question of whether the FSPA is substantive has been answered and the issue is now whether it is constitutionally permissible to apply it to Mr. Therrien even in the face of the legislature's express intention to do so. *See, Metropolitan Dade County v. Chase Federal Housing Corporation*, 737 So. 2d 494, 499 (Fla. 1999). The opinion below struggled with this issue and certified it to this court as a question of great importance

because of the employment restrictions now imposed on Mr. Therrien. Judge Benton was concerned with a law that has such a wide ranging, devastating effect on personal liberties, especially upon a person who was 16 years old at the time of the commission of the offenses and who, in the eyes of an able trial judge, showed promise of rehabilitation to warrant 5 years of probation, could be retroactively visited upon Mr. Therrien without a hearing to determine or to dispel his potential of being a recidivist or a danger to children. Benton, dissenting, 859 So. 2d at 588, 593. Rather than confront this argument, State then attempts to cabin Mr. Therrien's argument of violation of procedural due process into one of violation of substantive due process. In essence, the State sets up a strawman and knocks it down in approximately nine pages. (AB 15-24). As stated in *Robinson*, the FSPA is ordinarily not an arbitrary and capricious exercise of legislative power without a substantial relation to a legitimate governmental objective unless it is applied to predicate offenses without a sexual content. *Id.* at 1214-1215. Mr. Therrien is not arguing that due process (substantive) bars certain governmental action regardless of the fairness of the procedures used to implement them. *See, e.g., id.* at 1212-1213 (citing cases). What is unconstitutional, is the perfunctory, one-issue hearing of determining whether Mr. Therrien has been convicted of a qualifying offense without a meaningful opportunity to show his law abidingness. *See, Espindola v. State*, 855 So. 2d 1281, 1289-1290 (Fla. 3d DCA

2003). The trial court below, by placing Mr. Therrien on concurrent probation, adhered to § 948.01(2), Fla. Stat. (2003), and the legislative intent that persons who are "not likely to engage in a criminal course of conduct" do not require imprisonment to pay for their crimes. The lack of judicial oversight in designating a person a sexual predator is inconsistent with the judge-based determinations extant throughout Florida's statutory schemes especially in death penalty and forfeiture of property rights cases.

Since the writing of Mr. Therrien's initial brief and State's answer brief, the undersigned has discovered opinions from this state and foreign states that promote individualized risk assessment's in Megan's Law before deprivation of liberty interests can take place. *See, Swindle v. State*, __ So. 2d __ 2004 WL 2003356 (Fla. 3d DCA, Sept. 9, 2004); *State v. Guidry*, 105 Hawai'i 222, 96 P. 3d 242 (Ha. August 6, 2004) (likening the Hawai'i Megan's Law to FSPA's that a determination of dangerousness is material to the sexual predator designation because of the finding that sexual predators present an extreme to the public safety, *citing Espindola v. State*, 855 So. 2d 1281, 1290 (Fla. 3d DCA 2003)); *Coe v. Sex Offender Registry Board*, 812 N.E. 2d 913, 918-919 n.7 (Mass. August 3, 2004) (holding that the petitioner received due process through notice and a fair hearing prior to dissemination of information on the internet as required by *Doe v. Atty. Gen.*, 686 N.E. 2d 1007 (1997), and by statute in

which the government must prove by a preponderance of the evidence and that specific, individualized findings to support an offender's risk classification); *Slansky v. Nebraska State Patrol*, 685 N.W. 2d 335, 354-355 (Neb. July 16, 2004) (under Nebraska's Megan Law, putative sexual predator received notice and a hearing in which he could contest his classification as a level 3 offender so as to avoid registration and notification requirements).

State v. Guidry bears a closer look because it discusses Hawai'i's Megan's Law as closely resembling the FSPA and because it distinguishes *Connecticut v. Doe*. 96 P. 3d at 251-252 (*citing, Espindola, supra*). Most importantly, the *Guidry* court used the Hawai'i constitution as a basis for affording broader rights to its citizens than the federal constitution in distancing Hawai'i from *Connecticut v. Doe*. *Id*. at 252, n.23. The Hawai'i statute also finds that offenders who prey on children and recidivists are an extreme threat to public safety. *Id*. at 252, citing 1997 Haw. Sess. L. Act 316 § 1 at 749; see also, § 775.21(3)(c) for the same language. Hawai'i was also concerned with the risk of re-offending, like Florida. *Id*. The *Guidry* court catalogued other restrictions similar to Florida in notifying authorities of change of address. *Id*. at 253. The Hawai'i Supreme Court held that, in the face of these restrictions concerning registration, there is a great risk of erroneous deprivation of liberty interests because of the total lack of safeguards. *Id*. at 1253. The *Guidry* court

held that, under the Hawai'i constitution, a hearing was necessary to show continuing threat to the community in which the government has the burden of proving by a preponderance of the evidence of the need for continued registration. *Id*. at 254-255.

Art. I, § 9, Fla. Const. guarantees due process of law. This court can interpret due process more broadly than the federal Supreme Court did in *Doe*. *See, Traylor v. State*, 596 So. 2d 957, 962-963 (Fla. 1992) (each right in § 9, Declaration of Rights, is to be construed to achieve the primary goal of individual autonomy with reference to Florida's own particular history and developing law). Like Hawai'i, this court can and should apply Florida's concept of procedural due process in a manner consistent with individual autonomy and Florida's own development of procedural due process. Florida's experience is to give fair notice and meaningful hearing before a liberty interest is deprived. Under the FSPA, dangerousness or risk of recidivism is central to its operation. Before a person's liberty interests are impaired or deprived, Florida's due process clause requires a judge-driven hearing on the relevant issue of danger and risk of harm to others.

This court and other courts have recognized the far-reaching effects of the sexual predator designation. State's argument (AB 20) that Mr. Therrien has not shown that he has been denied employment opportunities either as a volunteer or for compensation in places where children regularly congregate is specious because Mr.

Therrien would have to commit a crime in order to do so. Florida's constitutional concept of due process cries out for a meaningful and fair hearing to be afforded to Mr. Therrien.

II. FSPA'S PERFUNCTORY, "ONE ISSUE" HEARING IS NEITHER A MEANINGFUL NOR FAIR OPPORTUNITY FOR MR. THERRIEN TO PRESERVE HIS LIBERTY INTERESTS.

State's argument boils down to this: trial courts cannot be trusted to make individualized risk assessments to protect the public because it may lead to inconsistent outcomes. (AB 30). State ignores this court's precedent in *Dept. of Law Enforcement v. Real Property*, 588 So. 2d 957 (Fla. 1991), which was quoted at length in Mr. Therrien's initial brief as to what procedural due process means under the Florida Constitution. To quote again from this court, "it contemplates that the defendant shall be given fair notice [citation omitted] and afforded a real opportunity to be heard and defend [citation omitted] in an orderly procedure, before judgment is rendered against him." *Id*. at 960. On several occasions, this court has applied the concepts of due process enunciated in *FDLE v. Real Property* and employed the three prong test in determining what process is constitutionally required where liberty and property interests are subject to forfeiture. *See, J.B. v. Florida Dept. of Children*

and Family Services, 768 So. 2d 1060 (Fla. 2000); *The Citizens for Responsible Government, Inc. v. Fla. Keys Aquaduct Authority*, 795 So. 2d 940 (Fla. 2001).

Difficult questions are routinely decided by the trial courts of Florida in the exercise of their discretion. The FSPA throws down a dragnet that sweeps up liberty interests from those not threatening to prey on children or women. State's argument, when taken to its fullest extent, means that whenever society is confronted with a danger, the best solution is enact a law that tramples on everyone's substantive rights equally. However, this court has not stood back and allowed the legislature to react to society's problems in a manner which violates procedural due process. In fact, State's argument that individualized hearings would leave a trail of divergent results is exactly why this case is being brought before this court.

Here, Mr. Therrien, being a 16 year old at the time of the commission of his offenses, having committed his offenses against a minor in a familial setting, and after having successfully served five years probation, is now saddled with the prospect of a lifetime of community and public notification, registration, and restriction on his employment; all of which was initiated three years after he so pleaded and two years after the amendment by the Florida legislature making one of his offenses a qualifying conviction. Without a hearing, the risk of erroneous deprivation of Mr. Therrien's liberty interests is great. Other states employ a individualized risk assessment as

described above. *See, Slansky v. Nebraska State Patrol, supra*; *Coe v. Sex Offender Registry Board, supra*, and *State v. Guidry, supra*. Connecticut has certain "opt out" provisions which the FSPA does not and permits a trial judge to grant exemptions to registration and notification if not required for public safety. See, Souter, concurring, *Connecticut v. Doe*, 123 S. Ct. at 1165-1166.

As observed by this court in *State v. J.M.* in declining to apply the FSPA to juvenile adjudications, the purpose behind the FSPA is to protect the public from dangerous persons. *See, State v. J.M.*, 824 So. 2d at 114-115; *State v. Robinson*, 873 So. 2d at 1210. As described in State's brief on two occasions (AB 4-5, 27), State tries to transform the FSPA into Connecticut's Megan's Law as described in *Connecticut v. Doe* by referring the FDLE website disclaimer that it has made no judgment as to the dangerousness of individuals listed as sexual predators. However, the FDLE's judgment is immaterial because the Florida legislature has already done so in its legislative findings. The State in its answer brief has also conceded that the purpose of the FSPA is to warn the general public, especially children and women, of dangerous offenders. Inconsistently, the State now wishes to divest itself of these legislative findings despite clear precedence that legislative findings are presumed correct and are evidence of legislative intent. *See, Marvin v. Housing Authority of Jacksonville*, 183 So. 145 (Fla. 1938); *Smithers v. North St. Lucie River Drainage*

District, 73 So. 2d 235 (Fla. 1954). Thus, the dangerousness of a sexual offender is a fact taken as proven by the legislature and is relevant to the designation of sexual predator. Connecticut's reporting statute is of no consequence to this court's resolution of the certified question in the affirmative.

III. FINDINGS BY THE LEGISLATURE THAT SEXUAL OFFENDERS ARE A THREAT AND DANGEROUS MAKES MR. THERRIEN'S POTENTIAL DANGEROUSNESS RELEVANT.

Again, State pins its hopes on distinguishing the import of the U.S. Supreme Court decisions in *Connecticut v. Doe, supra*, and *Smith v. Doe,* 538 U.S. 84 (2003), on the existence of a website that makes a disclaimer contrary to the legislative findings of the Florida legislature. (AB 43-44). As this court must be aware, websites can change based upon whims of government officials or of the designated webmaster for the FDLE. A legislative finding that sex offenders are dangerous, which is the reason why Megan's Law has been enacted in every state of the union, would certainly carry greater weight than a disclaimer by a government bureaucrat. Secretary Moore states in the website that the information provided is for the purpose of families protecting themselves from sexual offenders.

Most importantly, concepts of procedural due process cannot hinge on the vagaries of a webmaster. If this court were to decide that the FSPA does not require

individualized risk assessments and a hearing as to the danger posed by an offender, then would the FDLE feel safe in removing the disclaimer from the website? Without the FSPA's findings of potential danger, why would it be necessary to warn citizens of the presence of sexual predators in their neighborhoods or in restricting their employment opportunities or in requiring registration of or dissemination of their addresses on the internet?

To answer these questions, State's reliance on *Fullmer* is misplaced (AB 43-44) as Michigan's Megan's Law is apparently a notification and registration statute without employment restrictions, loss of tort claim rights or community notification. *Fullmer v. Michigan State Police*, 360 F. 3d 579, 582 (6th Cir. 2004). The *Fullmer* court likened Michigan to Connecticut and ignored legislative findings contrary to Michigan's website. *Id.* Much to the same effect are the cases cited by State from New Mexico, West Virginia, Texas, Illinois, Alaska, and the District of Columbia. (AB 28-29, 43-45). In each of these cases, the courts found similarities their state's Megan's Laws to that of Connecticut to bring them within the umbrella of *Connecticut v. Doe*. However, most of the courts, like Justices Souter and Ginsberg, concurring in *Connecticut v. Doe*, were concerned with the lack of discretionary relief with the courts for undeserving registrants caught up in the Megan dragnet. Souter and Ginsberg, concurring, 123 S. Ct. at 1166; *State v. Druktensis*, 86 P. 3d 1050, 1085

(N.M. 2004) (legislature should have adopted a more discriminating law to eliminate those not likely to re-offend); *Haislop v. Edgell*, 593 S. E. 2d 839, 848-850 (W.Va. 2003) (legislature has the power to amend act to give offenders a way to prove lack of dangerousness).

No judge who cares about fairness of procedures in protecting liberty interests is happy with Megan's Laws that do not allow exemptions or exceptions to be made for those not likely to re-offend or who committed their offenses at a young age and are amenable to rehabilitation. Justice Bell, in the *Espindola* and *Milks v. State* oral argument, related his frustrating experience with the FSPA as applied to a mentally disabled teenager. This court has the power under Art. I, § 9 of the Florida Constitution to declare the FSPA unconstitutional as violative of procedural due process just as the judges in *Espindola* and *Swindle, supra,* and Judge Benton below urge.

CONCLUSION

State has asked this court to answer the certified question in the negative.[2] During oral argument before this court in the *Espindola* and *Milks* appeal on October 7, 2004, State conceded that the FSPA does deprive a person of significant liberty

[2] In its conclusion, State urges the court to answer the certified question in the affirmative, but this is probably a proofreading error. (AB 46).

interests in light of *Robinson*. Because significant liberty interests are at stake, they can only be protected by a hearing in which Mr. Therrien can bring forth evidence that he is not a danger to the public and he need not carry, for the rest of his life, the stigma and disabilities of a sexual predator. The certified question should be answered in the affirmative.

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 8th day of October, 2004.

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CERTIFICATE OF TYPE SIZE AND STYLE

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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