IN THE SUPREME COURT OF FLORIDA

JOHN RICHARD THERRIEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC03-2219

RESPONDENT'S SUPPLEMENTAL ANSWER BRIEF

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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. This supplemental brief is submitted in accordance with the Court's order of November 30, 2004.

SUMMARY OF ARGUMENT

Florida's Sexual Predators Act cannot reasonably be construed as a criminal statute that is subject to *ex post facto* clause analysis. This Court has held that the far more burdensome Jimmy Ryce Act is civil and regulatory, not punitive, and therefore immune from the *ex post facto* clause.

Moreover, the Supreme Court of the United States has held that an Alaska statute, quite similar to Florida's, is not punitive and therefore does not violate the *ex post facto* clause, even though it, like Florida, has retroactive application.

All Florida courts and almost all the courts of other states have held similar Megan's Laws[1] are not punitive and not subject to the prohibition against *ex post facto* laws.

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[1] Megan's laws are named in memory of Megan Kanka, a seven year old New Jersey girl who was sexually assaulted and murdered by a neighbor twice previously convicted of sexual offenses.

ARGUMENT

ISSUE I

DOES THE FLORIDA SEXUAL PREDATORS ACT VIOLATE THE PRINCIPLE THAT CRIMINAL STATUTES CANNOT BE EX POST FACTO? (Restated)

A. STANDARD OF REVIEW

A constitutional question generally is reviewed *de novo*.

B. THE FLORIDA SEXUAL PREDATORS ACT

Section 775.21, the Florida Sexual Predators Act (FSPA) 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 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.

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. §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.

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. §775.21(7), Fla. Stat. The information is placed on FDLE's website,[2] which 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), Fla. Stat.

C. THE LOWER COURT'S RULING

In its opinion, Therrien v. State, 859 So. 2d 585, 587 (Fla. 1st DCA 2003) the First District Court of Appeal did not consider, nor had the parties argued, whether section 775.21, Florida Statutes was a criminal statute and, therefore, subject to *ex post facto* analysis. The Court did hold, however, that the statute could be retroactively applied. The parties herein

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

already have briefed this issue in the context of a civil, regulatory statute.

D. MERITS

The State agrees generally with the proposition Petitioner advances: The FSPA, as a civil and regulatory statute, does not and in fact cannot violate the prohibition against *ex post facto* laws. It is not, and never has been held to be, a criminal statute. Similar laws, however, have been held not to violate the *ex post facto* clause.

A principal example is the Jimmy Ryce Act, under which the State may commit certain identified individuals to custody for treatment as sexually violent predators. §§ 394.190-394.931, Fla. Stat. Despite the fact that the ultimate result in such cases is indefinite confinement in a secure facility, this Court has acknowledged that such a statute is civil, not punitive and not subject to the *ex post facto* clause. Westerheide v. State, 831 So. 2d 93, 103 (Fla. 2002).

Considering that the FSPA is substantially less onerous or burdensome than the Jimmy Ryce Act – the FSPA requires registration by and notification of the presence of persons who have been convicted of serious sex crimes and does not otherwise restrict their liberty – it is logical that it is not punitive, either. There is substantial authority for that proposition and almost no contrary authority.

A. Smith v. Doe Controls.

As Petitioner notes in his supplemental brief, the *ex post facto* issue for Florida's sexually violent predator statute was foreclosed when the Supreme Court of the United States decided Kansas v. Hendricks, 521 U.S. 346 (1997), given that the federal and Florida *ex post facto* clauses are identical. Art. I, §9, U.S. Const.; Art. I, §10, Fla. Const. Thus, Smith v. Doe, 538 U.S. 84 (2003) conclusively established that sex offender registration and notification laws are not *ex post facto*.

In Smith the court analyzed an Alaska statute that required certain sex offenders to register with the state and permitted state authorities to disseminate information about these persons, including their names, addresses, places of employment, vehicle license and identification numbers, particular crimes and photographs to the public over the internet. Alaska Code 12.63.010, 18.65.087. Alaska also made it a crime to fail to register. Alaska Code 11.56.835, 11.56.840.

The court noted that the ultimate question was whether the statutory scheme was punitive. 538 U.S. at 92. That inquiry had two facets: First, what did the legislature intend to do? Second, if the intent was to create civil proceedings, then was what was created either punitive in purpose or effect? Id. The court noted that those challenging the Alaska law had to demonstrate the "clearest proof" that it was punitive, once it was found that the legislature enacted it with an intent that it be regulatory. 538 U.S. at 92.

The Alaska law was passed with an intent to be civil, the court said, relying on the fact that the legislature

> expressed the objective of the law in the statutory text itself. The legislature found that "sex offenders pose a high risk of reoffending," and identified "protecting the public from sex offenders" as the "primary governmental interest" of the law. 1994 Alaska Sess. Laws ch. 41, § 1. The legislature further determined that "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety." *Ibid*.

Id. at 93. Thus, the legislature had expressed a preference for the civil label, the court noted. Id.

In Florida, the legislative intent at least equally apparent. Section 775.21(3) states, in relevant part:

> (3) Legislative findings and purpose; legislative intent.–
>
> (a) **Repeat sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety.** . . . This makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant.
>
> * * *
>
> (c) The state has a compelling interest in protecting the public from sexual predators and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual predators to register and for requiring community and public notification of the presence of sexual predators.
>
> (d) It is the purpose of the Legislature that, upon the court's written finding that an offender is a sexual predator, in order to protect the public, it is necessary that the sexual predator be registered with the department and that members of the community and the public be notified of the sexual predator's presence. **The designation of a person as a sexual**

> **predator is neither a sentence nor a punishment but simply a status resulting from the conviction of certain crimes. . . .**

(Emphasis supplied.)

The Smith court rejected the argument that because the Alaska statute, like Florida's Act, was enacted for the protection of the public it was punitive.

> As the Court stated in *Flemming v. Nestor*, [363 U.S. 603 (1960)] rejecting an ex post facto challenge to a law terminating benefits to deported aliens, where a legislative restriction "is an incident of the State's power to protect the health and safety of its citizens," it will be considered "as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment." 363 U.S., at 616, 80 S.Ct. 1367 (citing *Hawker v. New York*, 170 U.S. 189 (1898)).

538 U.S. at 93-94.

The Smith court also noted that the inclusion of the Alaska law within the state's criminal procedure statute was not dispositive and did not alter the conclusion that the intent was civil. 538 U.S. at 95. Not unlike title 12 of the Alaska Code, section 775 Florida Statues is something of a hodgepodge, and includes such provision as the limited adoption of the common law of England, rules for construing criminal statutes, the insanity defense, abrogation of the defense of clergy doctrine, a distinction between what acts are not public offenses and which ones are, abrogation of the voluntary intoxication defense, restitution ("in addition to punishment"), public service, and registration of convicted felons and career

offenders.[3] As the Smith court noted of the Alaska statute: "Although some of these provisions relate to criminal administration, they are not in themselves punitive." The court concluded that the intent was not punitive. 538 U.S. at 96.

In analyzing whether the purpose or effect of the act was punitive, the Smith court relied on the factors set out in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963) as a "useful framework." 538 U.S. at 97. The court commented that only five of the seven named factors from Mendoza-Martinez were helpful:

> The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.

Id.

As to the first factor, the Court considered, and rejected, the notion that sex offender registration was akin to "shaming" punishments from Colonial days, such as the stock, the pillory or the dunking stool. Id. at 97, 98. Such punishments, even when they did not involve physical pain or discomfort were dissimilar to what Alaska does (as well as Florida), i.e., disseminate public information. Id. at 98-99. Similarly, registration has never been considered punishment.

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[3] §§775.01, 775.02, 775.021, 775.027, 775.03, 775.04, 775.051, 775.089, 775.091, 775.13, 775.26, 775.261, Fla. Stat.

Next, the court considered "how the effects of the Act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." Id. at 99-100. The court noted that there was no physical restraint "so [it] so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint." Id. at 100. It also pointed out that occupational debarment had been held to be nonpunitive. Id., citing Hudson v. United States, 522 U.S. 593, 104 (1997) (banking), De Veau v. Braisted, 363 U.S. 144, (1960) (working as a union official); Hawker v. New York, 170 U.S. 189 1002 (1898) (practicing medicine). "The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences." Id. The court continued:

> The Court of Appeals sought to distinguish *Hawker* and cases which have followed it on the grounds that the disability at issue there was specific and "narrow," confined to particular professions, whereas "the procedures employed under the Alaska statute are likely to make [respondents] completely unemployable" because "employers will not want to risk loss of business when the public learns that they have hired sex offenders." 259 F.3d, at 988. This is conjecture. Landlords and employers could conduct background checks on the criminal records of prospective employees or tenants even with the Act not in force.

Id. The court also drew a distinction between probation or parole, which impose substantial impediments in moving from place to place and frequently substantial obligations, such as reporting to a probation or parole officer and maintaining employment. Id. at 101. The Court noted:

> By contrast, offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision. Although registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so. A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense.

Id. at 101-102. The same is true in Florida. While the prohibition against working around children is a factor in Florida's Act[4] that Alaska had not included, this is a very narrow prohibition, and not unreasonable as regards Petitioner, whose crime was attempted sexual battery with a nine-year-old girl. Otherwise, he needs no one's permission to move, to attend school, to seek or discontinue mental counseling, to change jobs, or to behave in the same manner as any other free citizen, with the only proviso being that he notify authorities promptly of such changes.

The next Mendoza-Martinez factor was whether the registration and notification statute filled a traditional role of punishment, and the Court first rejected the idea that simply because having to register and having one's name, address and photograph on the internet as a sex offender might actually deter crimes. 538 U.S. at 102-103. "Any number of governmental programs might deter crime without imposing punishment. 'To hold that the mere presence of a deterrent purpose renders such

[4] §775.21(10)(b), Fla. Stat.

sanctions "criminal" . . . would severely undermine the Government's ability to engage in effective regulation.' *Hudson*, 522 U.S. at 105." 538 U.S. at 102. This principle would apply with equal force in Florida.

The court also rejected the Ninth Circuit's holding that the act was retributive, which had been based on the fact that those who commit less serious offenses must register for a shorter period of time in Alaska. Id. That is not a consideration in Florida, where all must register for at least 10 or 20 years, depending upon when sexual predator designation was ordered. §775.21(6)(*l*).

The Alaska act was not excessive in relationship to its purpose, the court held, noting that the statute had a rational connection to a nonpunitive purpose, specifically public safety, and pointing out that "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." 538 U.S. at 103. Thus, the Alaska statute met the fourth Mendoza-Martinez factor. Florida's statute likewise has the same broad aims (see section 775.21(3)) and should be subject to the same analysis.

Next, the court rejected the Court of Appeals' conclusion that the act was excessive in relation to its goals for not permitting a hearing on future dangerousness and for not limiting access to the information. As to future dangerousness, the Court said:

> 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. The risk of recidivism posed by sex offenders is "frightening and high." *McKune v. Lile*, 536 U.S. 24, 34,(2002); *see also id.*, at 33 ("When 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" (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997))).
>
> The Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences. We have upheld against ex post facto challenges laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment. *See De Veau*, 363 U.S., at 160; *Hawker*, 170 U.S., at 197. As stated in *Hawker*: "Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application...." *Ibid.* The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the Ex Post Facto Clause.

538 U.S. at 103-104. As to the wide dissemination of sex offender information via the internet, the court gave this consideration little weight. "Given the general mobility of our population, for Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment." Id. at 104. Those same principles should apply equally in Florida, whose act is, in these respects, identical.

Finally, the court held:

> The two remaining Mendoza-Martinez factors – whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime – are of little weight in this case. The regulatory scheme applies only to past conduct, which was, and is, a crime. This is a necessary beginning point, for recidivism is the statutory concern. The obligations the statute imposes are the responsibility of registration, a duty not predicated upon some present or repeated violation.

538 U.S. at 105. Again, that language applies forcefully in Florida, as well.

B. No Florida Court Has Considered the Act Criminal

As Petitioner notes, there is unanimity among the District Courts of Appeal that section 775.21 is not a criminal statute. This decision first was reached in 1997 with Fletcher v. State, 699 So. 2d 346, 347 (Fla. 5th DCA 1997) review denied 707 So. 2d 1124 (Fla. 1998). Next, Collie v. State, 710 So. 2d 1000, 1006-1007 (Fla. 2d DCA), review denied, 722 So. 2d 192 (Fla. 1998) reached the same holding as Fletcher. Since then, the Fourth DCA has taken the same viewpoint in Ortega v. State, 712 So. 2d 833, 834 (Fla. 4th DCA 1998) and the Third DCA has agreed in Gonzalez v. State, 808 So. 2d 1265, 1265 n.1 (Fla. 3d DCA 2002). The First DCA appears never to have written an opinion on the issue, though it has reached a conclusion that the parallel reporting and notification statute for sexual offenders, section 943.0435, does not violate the *ex post facto* clause. Freeland v. State, 832 So. 2d 923 (Fla. 1st DCA 2002).

As this Court stated in Gwong v. Singletary, 683 So. 2d 109, 112 (Fla. 1996), cert. denied 519 U.S. 1142 (1997), a law must be more than retrospective in application to be considered *ex post facto*. A second requirement is that the law must "alter[] the definition of criminal conduct or increase[] the penalty by which a crime is punishable." Id. The Florida Sexual Predator Act does neither.

First, relative to the issues in this case, the Act does not alter the definition of criminal conduct after such conduct has occurred. It sets out certain required and prohibited acts, but those are not at issue here, inasmuch as Petitioner has not been charged with committing any crimes that were created after he entered his plea, or after the conduct that led to his conviction.

Second, the duties and burdens placed upon individuals such as Petitioner do not increase the penalty for his crime, which was attempted capital sexual battery. They merely are new obligations, and while they arguably may have some stigmatizing effect, as this Court discussed in State v. Robinson, 873 So. 2d 1205, 1213 (Fla. 2004), they are not intended either to punish those designated or to control the behavior of those who have not committed such crimes. Rather they are intended to have the effect of keeping track of those convicted of serious sex crimes and recidivist sex offenders, and of warning the public of such persons' presence. Appellant's penalty was not increased by having to register.

3. Courts in Other Jurisdictions Overwhelmingly Agree

Virtually every state and federal court to consider the issue has ultimately come to the conclusion that their state's Megan's laws are not punitive and are therefore not subject to the *ex post facto* clause.[5] No court has so held since Smith, except for the Pennsylvania Supreme Court's decision in Commonwealth v. Williams, 832 A.2d 962 (Pa. 2003) and some lower appellate court cases from that State that follow the precedent Williams laid

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[5] Lee v. State, 2004 Ala. Crim.App.Lexis 158 (Ala., Aug. 27, 2004); State v. Hawkins, 39 P.3d 1126 (Ak. 2002), see also, Smith v. Doe; State v. Helmer, 53 P. 3d 1153 (Ariz. App. 2002); Williams v. State, 91 S.W.3d 68 (Ark. 2002); Alva v. State, 92 P.3d 311 (Cal. 2004); People v. Stead, 66 P.3d 117 (Col. 2002); State v. Kelly, 770 A.2d 908 (Conn. 2001); Helman v. State, 784 A.2d 1058 (Del. 2001); In re W.M., 851 A.2d 431 (D.C. App. 2004); Denson v. State, 600 S.E.2d 645 (Ga. 2004); State v. Guidry, 96 P.3d 245 (Haw. 2004); Ray v. State, 982 P.2d 931 (Idaho 1999); People v. Corneilus, 2004 Ill.Lexis 2034 (Ill. Dec. 2, 2004); Spencer v. O'Connor, 707 N.E.2d 1039 (Ind. App. 1999); In re Detention of Garren, 620 N.W.2d 275 (Iowa 2000), Hyatt v. Commonwealth, 72 S.W.3d 56 (Ky. 2002); State v. Patin, 842 So.2d 322 (La. 2003); Corbin v. Chitwood, 145 F.Supp.2d 92 (D.-Me. 2001) (Maine statute); Young v. State, 806 A.2d 233 (Md. 2002); People v. Pennington, 610 N.W.2d 608 (Mich. App. 2000); State v. Manning, 532 N.W.2d 244 (Minn. App. 1995); State v. Mount, 78 P.3d 829 (Mont. 2003); Welvaert v. State Patrol, 684 N.W.2d 327 (Neb. 2004); Nollette v. State, 46 P.3d 87 (Nev. 2002) (registration is not part of sentence); Doe v. Poritz, 662 A.2d 367 (N.J. 1995); State v. Druktenis, 86 P.3d 1050, 1062 (N.M. App. 2004); M.G. v. Travis, 236 A.D.2d 163 (N.Y. App. 1997); Doe v. Pataki, 120 F.23d 1263 (2d Cir. 1997) (New York statute); State v. Burr, 598 N.W. 2d 147 (N.D. 1999); State v. Cook, 700 N.E.2d 570 (Ohio 1998); State v. McNab, 51 P.3d 1249 (Ore. 2002); Meinders v. Weber,, 604 N.W.2d 248 (S.D. 2000); State v. Gibson, 2004 Tenn.Crim.App.Lexis 1084 (Dec. 9, 2004); Rodriquez v. State, 93 S.W.3d 60 (Tex.Cr.App. 2002); Femedeer v. Haun, 227 F.3d 1244 (10th Cir. 2000) (Utah statute); State v. Ward, 869 P.2d 10-62 (Wash. 1994); Hensler v. Cross, 538 S.E.2d 330 (W.Va. 2001).

down. A close reading of the opinion, however, shows its inappropriateness here.

The Pennsylvania Supreme Court found that the registration, notification and counseling requirements of the state's sexually violent predator law[6] were not punitive. 832 A.2d at 985. The Pennsylvania court conducted much the same type of Mendoza-Martinez analysis as the United States Supreme Court had done (though it considered all seven factors) and reached the same conclusions. The court did, however, find that the enforcement provisions of the Pennsylvania law were excessive and, therefore, constituted punishment. 832 A. 2d at 985. The court's rationale for this finding was based on the fact that a person was subject to lifetime incarceration simply for failing to register. The court stated:

> While it is understandable that the General Assembly would wish to provide a means of enforcing its registration and address verification scheme, the method it has chosen involves recognized punitive measures (incarceration and probation) that carry a possible lifetime term. As such measures are manifestly in excess of what is needed to ensure compliance, they must be considered punitive, and thus, unconstitutional insofar as they purport to apply to "individuals subject

[6] Pennsylvania applies SVP status at the time of sentencing for certain predicate offenses, based on the outcome of a hearing at which the State must prove, by clear and convincing evidence, that the defendant meets the statutory criteria. If so, the person is not confined for treatment, as in the Jimmy Ryce Act, but, rather, is subject, for his or her lifetime, to the law's registration, notification and counseling requirements. 42 Pa.C.S. §9795.4; Williams, 832 A.2d at 966-967.

> to registration under section 9795.1(b)(3)," that is, sexually violent predators.

Id. (footnote omitted).

Like Pennsylvania, Florida has an enforcement provision in the FSPA, section 775.21(10), which makes it a third-degree felony not to comply with all the registration and notification requirements (subsection (a)) and also makes it a third-degree felony for any sexual predator to work "at any business, school, day care center, park, playground, or other place where children regularly congregate . . . ."

The important factor to note here is that Florida's maximum penalty for non-compliance is only five years in prison, rather than life in prison. Inasmuch as some enforcement mechanism is essential in such a statute – otherwise, there would be no motivation for sexual predators not on probation to register or to notify authorities when they move – Florida has not chosen an unduly harsh approach.

As the Smith court noted, those challenging a statute on *ex post facto* grounds must show that an otherwise civil regulatory statute is actually criminal and punitive, by "the clearest proof." 538 U.S. at 92. Inasmuch as the Alaska statute that the court approved had a similar enforcement mechanism, making it either a or a "Class A Misdemeanor" (for a first offense) or a "Class C Felony" (for subsequent offenses) for sex offenders not to register. Alaska Code 11.56.835, 11.56.840. Inasmuch as a Class C felony has a maximum term of five years, Alaska Code

12.55.125 and a Class A misdemeanor has a maximum term of one year, Alaska Code 12.55.135, the punishments are roughly equivalent.

As the Smith court noted, courts are not to second-guess such legislative decisions: "The excessiveness inquiry of our ex post facto jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective." 538 U.S. at 105.

Clearly in this instance the legislature chose a reasonable method of enforcing those parts of the FSPA that are intended to protect the public. As noted above, without some adverse consequence for failing to register and to notify authorities of address changes, sexual predators would have no incentive to keep their information up to date. By placing them at risk of going to prison, for a significant but not unreasonable period of time, the legislature provided that incentive.

Finally, it should be emphasized that Petitioner is not being subjected at present for failing to register or for otherwise violating subsection 10 of the FSPA, which was in effect in November of 1996 when he committed the crime to which he entered his plea. See Ch. 96-388, §60, Laws of Fla. Thus, those provisions are not *ex post facto* to him, and, moreover, that issue is not ripe. The main point is that the presence of criminal penalties within the statute does not render it

punitive for *ex post facto* analysis, and the fact that the penalty is relatively mild means the statute is not excessive, and distinguishes it from the Pennsylvania law discussed above.

4. Petitioner's Supplemental Brief

In his Supplemental Initial Brief, Petitioner devotes all most all his space to rearguing issues already fully briefed by the parties: Whether the 1998 amendment to the FSPA should be given retrospective or prospective application and whether retrospective application violates due process. Inasmuch as these issues do not involve the *ex post facto* clause, the State urges the Court to disregard the points and authorities in Petitioner's Supplemental Initial Brief except for those in section I. The State relies on its previously filed Answer Brief.

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 Street, Room 411, Pensacola, FL 32501 by MAIL on December 20, 2004.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

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

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