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 SUPPLEMENTAL REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CITATIONS ii

INTRODUCTION 1

ARGUMENT IN REBUTTAL 1

I. AS FLORIDA SEXUAL PREDATOR ACT (FSPA) IS NOT A STATUTE OF CRIMINAL PUNISHMENT, IT IS NOT SUBJECT TO *EX POST FACTO* ANALYSIS 1

II. PROSPECTIVE APPLICATION OF A SUBSTANTIVE AMENDMENT TO THE FSPA IS AN APPROPRIATE ARGUMENT. 4

CONCLUSION 5

CERTIFICATE OF SERVICE 6

CERTIFICATE OF TYPE SIZE AND STYLE 7

TABLE OF CITATIONS

Cases **Page**

Cabrera v. State, 884 So. 2d 482 (Fla. 5th DCA 2004) 3, 4

Doe v. State, 92 P. 3d 398 (Alaska 2004) 2, 3

Smith v. Doe, 538 U.S. 884 (2003) 2, 5

State v. Hayden, 773 N.E. 2d 502 (Ohio 2002) 4

State v. J.M., 824 So. 2d 105 (Fla. 2002) 1

State v. Pasqua, 811 N.E. 2d 601 (Ct. App. Oh., 2004) 4

State v. Robinson, 873 So. 2d 1205 (Fla. 2004) 1

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

INTRODUCTION

State has taken the court's direction to file supplemental briefs on the "ex post facto issue" in a literal sense. However, State then asks this court to ignore Mr. Therrien's arguments regarding the prospective application of a substantive amendment to the FSPA. Mr. Therrien will address both of these arguments in turn.

ARGUMENT IN REBUTTAL

I. AS FLORIDA SEXUAL PREDATOR ACT (FSPA) IS NOT A STATUTE OF CRIMINAL PUNISHMENT, IT IS NOT SUBJECT TO *EX POST FACTO* ANALYSIS.

Both Mr. Therrien and State agree that FSPA is not a statute of criminal punishment and therefore not subject to *ex post facto* arguments regarding retroactive application of a substantive amendment. However, State, in its Supplemental Answer Brief (SAB), asserts two statements requiring rebuttal so as to preserve Mr. Therrien's arguments in seeking an affirmative answer to the certified question. State still argues the FSPA only concerns registration and notification of sexual offenders which does not otherwise impinge upon their liberty interests. (SAB, 4). However, as this court has held in *State v. Robinson*, 873 So. 2d 1205 (Fla. 2004) and *State v. J.M.*, 824 So. 2d 105 (Fla. 2002), the sexual predator designation constitutes a stigma with concomitant loss of liberty interests and imposes stringent civil disabilities. State's suggestion that the sexual predator designation does not restrict liberty and, therefore, is relatively benign does not

square with this court's view of the legal and social consequences stemming from the sexual predator label.

Secondly, State hopes to drape the flag of Alaska around the FSPA in arguing that the holding in *Smith v. Doe*, 538 U.S. 84 (2003), finding that the Alaska Sexual Offender Registration Act (SORA) is a civil regulatory scheme (SAB, 9-10), applies to the FSPA even when the Alaska SORA does not limit employment opportunities. However, the pursuit of employment and business opportunities is a constitutional right long recognized by this court's precedents. As reflected by the authorities cited in Mr. Therrien's initial supplemental brief and those cited by Judge Benton, dissenting, *Therrien v. State*, 859 So. 2d 585, 589-591 (Fla. 1st DCA 2003), the right to earn a living and to pursue a business are constitutionally protected rights, which when coupled with community notification, becomes problematical in its exercise when one is burdened with the sexual predator label. Furthermore, the highest court in Alaska has, since *Smith v. Doe*, found the simple registration and notification provisions of SORA to deprive registrants of significant liberty interests. When applying its own state constitution, the supreme court held that the SORA should not be imposed on an offender whose conviction was "set aside" before the enactment of the law. *Doe v. State*, 92 P. 3d 398, 410-412 (Alaska 2004). The court was concerned with a law that compels post discharge (set aside) conduct under threat of criminal prosecution when the purpose of the set aside program is

to give offenders an opportunity to prove their rehabilitation and low threat to commit crimes again. Requiring compliance with SORA thwarts this policy. 92 P. 3d at 408-409. Similarly, the trial court in placing Mr. Therrien on probation followed legislative policy when it created probation for offenders who show evidence of amenability to rehabilitation. Labeling Mr. Therrien a sexual predator also thwarts Florida legislative policy.

As did Mr. Therrien, State points out a number of foreign jurisdictions which hold that their version of Megan's Laws are not punitive, not requiring *ex post facto* consideration. (SAB, 14-15). Although Mr. Therrien agrees that the FSPA is not a statute of criminal punishment, the lower courts still differ as to how best to overturn a finding of sexual predator status. Chief Judge Sawaya of the Fifth District concurring in *Cabrera v. State*, 884 So. 2d 482 (Fla. 5th DCA 2004), believes that although the sexual predator designation is more akin to a sentence, it is not part of the sentencing proceedings, nor is the designation the result of a civil proceeding. Sawaya, concurring, 884 So. 2d at 484-491. Because it does not neatly fit into neither the criminal sentencing nor civil remedy arenas, he believes that an unpreserved, erroneous designation should be considered fundamental error in a criminal proceeding to be rectified by direct appeal. *Id*. at 490-491.

Whatever the mode of attacking the designation, the best solution comes from

Ohio. In Ohio, Megan's Law requires a hearing to determine whether a sexual offender is likely to re-offend before community notification is imposed. *See, State v. Hayden*, 773 N.E. 2d 502, 504-505 (Ohio 2002). Consequently, a registered sex offender from the state of Missouri could proffer evidence that he was not likely to re-offend before being designated a sexual predator. *See, State v. Pasqua*, 811 N.E. 2d 601, 605-606 (Ct. App. Oh., 2004). In honoring due process over expediency, Ohio has built into its Megan's Law a hearing mechanism to determine the likelihood of a sexual offender to re-offend. This court must take the same step that Alaska has taken and apply the Florida Constitution to strike down the FSPA.

II. PROSPECTIVE APPLICATION OF A SUBSTANTIVE AMENDMENT TO THE FSPA IS AN APPROPRIATE ARGUMENT.

State ignores Mr. Therrien's arguments in response to this court's invitation to provide supplemental briefs concerning the "ex post facto issue" that the substantive amendment of a civil regulatory statute should only be given prospective application. (SAB, 17). Because the overwhelming majority of state courts, in addition to the U.S. Supreme Court in *Smith v. Doe*, *supra*, have held that a Megan's Law is not a criminal punishment statute, Mr. Therrien submits that it is appropriate to argue that a substantive amendment, which broadens the predicate offenses to brand the stigma of sexual predator on a person who was sixteen years old at the time of offense, is not to be retroactively

applied. The drafter of the November 30th order could have conceived that "ex post facto issues" would encompass retroactivity issues and whether the FSPA is substantive or procedural statute. Mr. Therrien requests the court to consider all of his arguments in his supplemental briefs as necessary in answering the certified question.

CONCLUSION

Although Mr. Therrien and State are in essential agreement that the FSPA is a civil regulatory statute and is not subject to *ex post facto* analysis, Mr. Therrien urges this court to apply any substantive amendment to the FSPA only prospectively and to answer the certified question from the First District Court of Appeal 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 22nd day of December, 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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