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Groves v. State Appellant's Brief Dckt. 41328

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IN THE SUPREME COURT OF THE STATE OF IDAHO

RBRT GROVES a/k/a ROBERT GROVES,)
)
 Plaintiff/Appellant,)
)
 vs.) Docket No. 41328
)
 STATE OF IDAHO,)
)
 Defendant/Respondent.)

APPELLANT'S BRIEF ON APPEAL

On Appeal from the Fifth Judicial District, County of Jerome
Honorable John K. Butler, presiding

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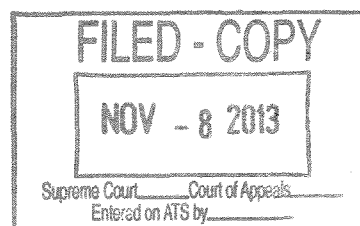


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STATEMENT OF THE CASE

On July 17, 2000, the Appellant was convicted of the felony charge of Lewd Conduct with a Minor under Sixteen, Idaho Code Section 18-1508, in Jerome County Case No. CR-2000-16. The Judgment of Conviction was entered on July 17, 2000. (R. pp. 20-28.) At the time of sentence the Appellant was notified of his duty to register as a sex offender. After completing the Rider Program, the Appellant on January 22, 2001, was placed on probation for a period of ten (10) years. The Appellant was discharged from probation on July 7, 2011.

At the time of entry of the Judgment of Conviction, Idaho Code Section 18-8303 did not contain a definition nor did it refer to the term of "Aggravated Offense". The term and definition for Aggravated Offense was not added until July 1, 2001, and this term was later further amended effective July 1, 2009.

On February 8, 2013, the Appellant filed a Petition to be Released from Registration Requirements pursuant to Idaho Code Section 18-8310. (R. pp. 4-5.) The Petition was supported by an Affidavit of the Appellant. (R. pp. 6-10.)

On February 12, 2013, the District Court entered an Order Denying Hearing and to Show Cause Re: Dismissal of Petition to be Released from Registration Requirements. (R. pp. 11-28.) The Order to Show Cause was issued because on the fact of the Judgment of Conviction, the offense of which the Appellant was convicted as an Aggravated Offense based on the definition effective July 1, 2009 and as such the Appellant did not qualify for the relief sought. On February 26, 2013, the Appellant filed his Response and an Amended Petition and Affidavit to be Released from Registration Requirements. (R.

pp. 29-40.) The Appellant in his response sought to challenge the constitutionality of the amendment of Idaho Code Section 18-8303(1).

On February 28, 2013, the District Court entered its order setting a hearing to determine the constitutionality of the subject amendment of Idaho Code Section 18-8303(1) as concerns the Appellant's Petition to be released from the sex offender registration requirements. (R. pp. 41-43.)

Appellant filed a Legislative History of Idaho Code Section 18-8303 on or about May 6, 2013 (R. pp. 53-60) and a Memorandum in Support of Release from Registration on or about May 24, 2013. (R. pp. 63-78) The State filed a Memorandum in Opposition on or about May 29, 2013. (R. pp. 79-91) with the Appellant filing a Reply Memorandum on or about June 7, 2013. (R. pp. 92-99.)

On June 12, 2013, the District Court issued a Memorandum Decision Re: Constitutionality of 2009 Amendment to Idaho Code Section 18-8303(1) and Judgment of Dismissal with Prejudice. (R. pp. 100-118.) Appellant timely filed a Notice of Appeal. (R. pp. 119-121.)

NATURE OF THE CASE

This is an appeal from the Memorandum Decision Re: Constitutionality of 2009 Amendment to Idaho Code Section 18-8303(1) and Judgment of Dismissal with Prejudice entered by the Honorable John K. Butler on or about June 12, 2013, finding that the 2009 amendment to SORA was constitutional and otherwise enforceable as to the Appellant because the Appellant was convicted of an "aggravated offense", and further finding that the Appellant was not entitled (had no standing) to petition for release from the sex offender registration requirements.

ISSUES ON APPEAL

(1) Whether the Court erred in summarily dismissing the Appellant's Petition on the basis that a retroactive application of SORA amendments did not violate the ex post facto clauses of the United States and Idaho Constitutions;

(2) Whether the Court erred in failing to grant the Appellant an evidentiary hearing thereby violating Appellant's right to due process to be given an opportunity to be heard relative to the punitive nature of the SORA amendments;

ARGUMENT

Given that the majority of this Brief focuses on Idaho Code Sections 18-8310 and 18-8303, it is important for the Court to understand the legislative history of those two Code Sections. Therefore, the Appellant respectfully submits the following legislative history in that regard. In addition, the Appellant asks that this Court take judicial notice, in particular, of the case of *State v. Doe A*, 297 P.3d 885 (Alaska 2013) (wherein the Supreme Court of Alaska found that ASORA was punitive, and that its retroactive application therefore violated the Ex Post Facto Clause of the Alaska Constitution.) as strongly suggestive of the Appellant's stance in this case.

LEGISLATIVE HISTORY

Effective July 1, 1998, ID LEGIS 411 (1998), more commonly known as the Sex Offender Registration and Notification Act, went into effect. At that time Idaho Code Section 18-8310 read as follows:

18-8310. RELEASE FROM REGISTRATION REQUIREMENTS
—EXPUNGEMENT.

(1) Any person, other than one designated as a violent sexual predator, may, after a period of ten (10) years from the date the person was released from incarceration or placed on parole, supervised release or probation, whichever is greater, petition the district court for a show cause hearing to determine whether the person shall be exempted from the duty to register as a sexual offender. In the petition the petitioner shall:

(a) Provide clear and convincing evidence that the petitioner is not a risk to commit a new violation for any violent crime or crime identified in section 18-8304, Idaho Code;

(b) Provide an affidavit indicating that the petitioner does not have a criminal charge pending nor is the petitioner knowingly under criminal investigation for any violent crime or crime identified in section 18-8304, Idaho Code;

(c) Provide proof of service of such petition upon the county prosecuting attorney for the county in which the application is made; and

(d) Provide a certified copy of the judgment of conviction which caused the petitioner to report as a sexual offender.

The district court may grant a hearing if it finds that the petition is sufficient. The court shall provide at least sixty (60) days prior notice of the hearing to the petitioner and the county prosecuting attorney.

The court may exempt the petitioner from the reporting requirement only after a hearing on the petition in open court and only upon proof by clear and convincing evidence that the petitioner is not a risk to commit a new violation for any violent crime or crime identified in section 18-8304, Idaho Code.

(2) Concurrent with the entry of any order exempting the petitioner from the reporting requirement, the court may further order that any information regarding the petitioner be expunged from the central registry.

The Legislature amended Idaho Code Section 18-8310 in 2000 which had the effect of excluding a *recidivist* from release from registration requirements. As of the time of this amendment, Appellant's right to be free from registration had not been substantially interfered with. Idaho Code Section 18-8310 was amended in 2000 to read as follows (amended section only, effective July 1, 2000):

18-8310. RELEASE FROM REGISTRATION REQUIREMENTS—EXPUNGEMENT.

(1) Any person, other than <<-one->> <<+a recidivist or an offender+>> designated as a violent sexual predator, may, after a period of ten (10) years from the date the person was released from incarceration or placed on parole, supervised release or probation, whichever is greater, petition the district court for a show cause hearing to determine whether the person shall be exempted from the duty to register as a sexual offender. In the petition the petitioner shall:

The Legislature amended Idaho Code Section 18-8310 again in 2001 which had the effect of excluding an offender who has been convicted of an *aggravated*

offense. This Amendment created a new classification of sex offenders. At the time of this Amendment, the Appellant's right to be free of registration had not been substantially affected because the victim of his crime was twelve (12) years of age at the time of the commission of the offense. Idaho Code Section 18-8310 was amended in 2001 to read as follows (amended section only, effective July 1, 2001):

**18-8310. RELEASE FROM REGISTRATION
REQUIREMENTS—EXPUNGEMENT.**

(1) Any person, other than a recidivist<<+, an offender who has been convicted of an aggravated offense,+>> or an offender designated as a violent sexual predator, may, after a period of ten (10) years from the date the person was released from incarceration or placed on parole, supervised release or probation, whichever is greater, petition the district court for a show cause hearing to determine whether the person shall be exempted from the duty to register as a sexual offender.

The Statement of Purpose for the 2001 amendment states as follows:

This legislation, in effect, creates a new category of sex offender, that of the aggravated offender. The legislation accomplishes this by defining the term "aggravated offense" in Idaho Code Section 18-8303. Aggravated offenses are those sex crimes which are of a very serious nature.

The legislation also amends Idaho Code Section 18-8310, which provides for the release of sex offenders from registration requirements. The legislation provides that an individual who is convicted of an aggravated offense may not petition a court to be released from the requirement to register as a sex offender.

In addition to the aggravated offense provisions, the legislation also makes a technical correction to Idaho Code Section 18-8304, by deleting language which is confusing, and which does not describe a chargeable offense.

The Legislature's amendment of Idaho Code Sections 18-8310 and 18-8303 now precludes any offender who was convicted of the charge of lewd and lascivious conduct, when the victim is less than twelve (12) years of age. Idaho Code Section

18-8303 was amended to include the definition of an "aggravated offense" as:

“Aggravated offense” means any of the following crimes as set forth in section 18–8304, Idaho Code: 18–1508 (lewd conduct, when the victim is less than twelve (12) years of age); 18–4003(d) (murder committed in the perpetration of rape); 18–6101 (rape, but excluding section 18–6101(1) where the victim is at least twelve (12) years of age or the defendant is eighteen (18) years of age or younger); 18–6108 (male rape); and 18–6608 (forcible sexual penetration by use of a foreign object).

Idaho Code Section 18-8310 was amended again in 2009 to read as follows

(effective July 1, 2009):

18–8310. Release from registration requirements—Expungement

(1) Any person, other than a recidivist, an offender who has been convicted of an aggravated offense, or an offender designated as a violent sexual predator, may, after a period of ten (10) years from the date the person was released from incarceration or placed on parole, supervised release or probation, whichever is greater, petition the district court for a show cause hearing to determine whether the person shall be exempted from the duty to register as a sexual offender. In the petition the petitioner shall:

- (a) Provide clear and convincing evidence that the petitioner is not a risk to commit a new violation for any violent crime or crime identified in section 18–8304, Idaho Code;
- (b) Provide an affidavit indicating that the petitioner does not have a criminal charge pending nor is the petitioner knowingly under criminal investigation for any violent crime or crime identified in section 18–8304, Idaho Code;
- (c) Provide proof of service of such petition upon the county prosecuting attorney for the county in which the application is made and upon the central registry; and
- (d) Provide a certified copy of the judgment of conviction which caused the petitioner to report as a sexual offender.

(2) The district court may grant a hearing if it finds that the petition is sufficient. The court shall provide at least sixty (60) days' prior notice of the hearing to the petitioner, and the county prosecuting attorney and the central registry. The central registry may appear or participate as a party.

(3) The court may exempt the petitioner from the reporting requirement only after a hearing on the petition in open court and only upon proof by clear and convincing evidence and upon written findings of fact and conclusions of law by the court that:

(a) The court has reviewed the petitioner's criminal history and has determined that petitioner is not a recidivist, has not been convicted of an aggravated offense or has not been designated as a violent sexual predator; and

(b) The petitioner is not a risk to commit a new violation for any violent crime or crime identified in section 18-8304, Idaho Code.

(4) Concurrent with the entry of any order exempting the petitioner from the reporting requirement, the court may further order that any information regarding the petitioner be expunged from the central registry.

Idaho Code Section 18-8303 was also amended to read as follows:

“Aggravated offense” means any of the following crimes as set forth in section 18-8304, Idaho Code: 18-1506A (ritualized abuse of a child); 18-1508 (lewd conduct, when the victim is less than twelve (12) years of age); 18-4003(d) (murder committed in the perpetration of rape); 18-4502 (first-degree kidnapping committed for the purpose of rape, committing an infamous crime against nature, committing any lewd and lascivious act upon any child under the age of sixteen years or for purposes of sexual gratification or arousal); 18-4503 (second degree kidnapping where the victim is an unrelated minor child and the kidnapping is committed for the purpose of rape, committing an infamous crime against nature, committing any lewd and lascivious act upon any child under the age of sixteen years or for purposes of sexual gratification or arousal); 18-6101 (rape, but excluding section 18-6101(1) where the victim is at least twelve (12) years of age or the defendant is eighteen (18) years of age or younger); 18-6108 (male rape); and 18-6608 (forcible sexual penetration by use of a foreign object); 18-8602(1) (sex trafficking); and any other offense set forth in section 18-8304, Idaho Code, if at the time of the commission of the offense the victim was below the age of thirteen years.

Finally, in 2011, Idaho Code Section 18-8310 was amended to read as follows:

§ 18–8310. Release from registration requirements--Expungement

(1) Any person Registration under this act is for life; however, any offender, other than a recidivist, an offender who has been convicted of an aggravated offense, or an offender designated as a violent sexual predator, may, after a period of ten (10) years from the date the person offender was released from incarceration or placed on parole, supervised release or probation, whichever is greater, petition the district court for a show cause hearing to determine whether the person offender shall be exempted from the duty to register as a sexual offender. If the offender was convicted in Idaho, the offender shall file his or her petition in the county in which he or she was convicted. If the offender was convicted in a jurisdiction other than Idaho, then the offender shall file his or her petition in the county in which he or she resides. In the petition the petitioner shall:

(a) Provide clear and convincing evidence that the petitioner is not a risk to commit a new violation for any violent crime or crime identified in section 18–8304, Idaho Code has completed any periods of supervised release, probation or parole without revocation;

(b) Provide an affidavit indicating that the petitioner does not have a criminal charge pending nor is the petitioner knowingly under criminal investigation for any violent crime or crime identified in section 18–8304, Idaho Code;

(c) Provide proof of service of such petition and supporting documents upon the county prosecuting attorney for the county in which the application is made and upon the central registry; and

(d) Provide a certified copy of the judgment of conviction which caused the petitioner to report as a sexual offender;

(e) Provide clear and convincing evidence that the petitioner has successfully completed a sexual offender treatment program;

(f) Provide an affidavit demonstrating that the petitioner has no felony convictions during the period for which the petitioner has been registered; and

(g) Provide an affidavit demonstrating that the petitioner has committed no sex offenses during the period for which the petitioner has been registered.

(2) The county prosecuting attorney and the central registry may submit

evidence, including by affidavit, rebutting the assertions contained within the offender's petition, affidavits or other documents filed in support of the petition.

(3) The district court may grant a hearing if it finds that the petition is sufficient. The court shall provide at least sixty (60) days' prior notice of the hearing to the petitioner, the county prosecuting attorney and the central registry. The central registry may appear or participate as a party.

(4) The court may exempt the petitioner from the reporting registration requirement only after a hearing on the petition in open court and only upon proof by clear and convincing evidence and upon written findings of fact and conclusions of law by the court that:

(a) The petitioner has complied with the requirements set forth in subsection (1) of this section;

(b) The court has reviewed the petitioner's criminal history and has determined that the petitioner is not a recidivist, has not been convicted of an aggravated offense or has not been designated as a violent sexual predator; and

(c) It is highly probable or reasonably certain the petitioner is not a risk to commit a new violation for any violent crime or crime identified in section 18-8304, Idaho Code.

(5) Concurrent with the entry of any order exempting the petitioner from the reporting registration requirement, the court may further order that any information regarding the petitioner be expunged from the central registry.

The Legislature's final amendment to Idaho Code Section 18-8303 had the affect of excluding all of those persons who were convicted of lewd and lascivious conduct without reference to the previous exception which would apply should the victim be less than twelve (12) years of age. It is at this time in SORA's history that the Appellant's right to be free from registration was taken from him. The Legislature's final amendment to Idaho Code Section 18-8303 took place in the year 2011, with the Code Section now reading as follows:

18-8303. DEFINITIONS. As used in this chapter:

(1) "Aggravated offense" means any of the following crimes: 18-1506A (ritualized abuse of a child); 18-1508 (lewd conduct); 18-4003(d) (murder committed in the perpetration of rape); 18-4502 (first-degree kidnapping committed for the purpose of rape, committing an infamous crime against nature, committing any lewd and lascivious act upon any child under the age of sixteen years or for purposes of sexual gratification or arousal); 18-4503 (second degree kidnapping where the victim is an unrelated minor child and the kidnapping is committed for the purpose of rape, committing an infamous crime against nature, committing any lewd and lascivious act upon any child under the age of sixteen years or for purposes of sexual gratification or arousal); 18-6101 (rape, but excluding section 18-6101(1) where the victim is at least twelve years of age or the defendant is eighteen years of age); 18-6108 (male rape, but excluding section 18-6108(1) where the victim is at least twelve years of age or the defendant is eighteen years of age); 18-6608 (forcible sexual penetration by use of a foreign object); 18-8602(1) (sex trafficking); and any other offense set forth in section 18-8304, Idaho Code, if at the time of the commission of the offense the victim was below the age of thirteen years or an offense that is substantially similar to any of the foregoing offenses under the laws of another jurisdiction or military court or the court of another country.

APPLICATION OF SORA

An ex post facto law is a law "passed after the occurrence of a fact or commission of an act which retrospectively changes the legal consequences or relations of such fact or deed." *In Re Estate of Blodgett*, 147 P.3d 702, 711 (Alaska 2006) quoting BLACK'S LAW DICTIONARY 520 (5th ed. 1979). It is the Appellant's contention that the legislative amendments set forth above *substantially* change the legal consequences of his conviction in violation of his constitutional rights.

As the United States Supreme Court set forth in *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) "the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them." If the legislature dubbed the

statute civil but enacted it with the intent to punish, and it would punish with retroactive effect, the law offends the Ex Post Facto Clause. *Smith v. Doe*, 538 U.S. 84, 92 (2003).

Whether a law is civil or criminal is a matter of statutory construction. *Id.* In the case of *Doe*, the Court found that Alaska's version of SORA, on its face, created a regulatory mechanism for sexual offender regulation for the legitimate purpose of protecting Alaska's citizens. *Id.* at 93.

In *Smith v. Doe*, 538 U.S.84 (2003) the U.S. Supreme Court applied the multifactor "intent-effects" test in their ex-post facto examination. *Id.* at 92. In assessing a statute's effects the U.S. Supreme Court has provided seven (7) factors that "may provide some guidance." *U.S. v. Ward*, 448 U.S. 242, 249 (1980).

Based upon Idaho case law, the Appellant acknowledges that the Legislature has attempted to enact a regulatory scheme that is civil and non-punitive. Therefore, Appellant will focus upon the statutes' effects to determine whether they are punitive even though Appellant asserts SORA is unconstitutional both on its face, and in its application.

1. Affirmative disability or restraint

The first factor addressed concerns whether the sanction involves an affirmative disability or restraint. Appellant would assert that the amendments to SORA restrained him from changing residences or employment. As set forth in *State v. Doe*, 189 P.3d 999 (2008) "the argument that registered sex offenders are free to change jobs and residences calls to mind Anatole France's view of the majestic quality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread."

Doe, at footnote 68.

Appellant asserts that SORA imposes significant affirmative obligations and a severe stigma on every person to whom it applies. First, SORA compels affirmative post discharge conduct (mandating registration, re-registration, disclosure of public and private information, and updating of that information) under threat of prosecution. Idaho Code Section 18-8301 et. Seq. The duties are significant and intrusive, because they compel offenders to contact law enforcement agencies and disclose information, some of which is otherwise private, most of it for public dissemination. Furthermore, the time periods associated with SORA are intrusive.

Appellant alleges that SORA exposes registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism. In the decision reversed in *Smith*, the Ninth Circuit observed that "[b]y posting [registrants'] names, addresses, and employer addresses on the internet, the Act subjects [registrants] to community obloquy and scorn that damage them personally and professionally." *Doe I v. Otte*, 259 F.3d 979, 987 (9th Cir. 2001). The Ninth Circuit observed that the practical effect of this dissemination is that it leaves open the possibility that the registrant will be denied employment and housing opportunities as a result of community hostility. *Id* at 988. As Justice Souter noted in concurring in *Smith*, "there is significant evidence of onerous practical effects of being listed on a sex offender registry." *Smith* at 109. There have been reports of incidents of suicide by and vigilantism against offenders on state registries. *Doe* at footnote 81.

2. Sanctions that have historically been considered punishment

This Court should next examine "whether [the statute's effects have] historically been regarded as a punishment." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). SORA does not expressly impose sanctions that have been historically considered punishment because registration acts such as SORA are of fairly recent origin, courts addressing this issue have determined that there is no historical equivalent to these registration acts. *Smith* at 97. Some courts have instead considered whether the acts are analogous to the historical punishment of shaming; these courts have concluded that they are not. *Otte* at 989. But the dissemination provision at least resembles the punishment of shaming (*E.B. v. Verniero*, 119 F.3d 1077, 1115-19 (3rd Cir. 1997) and the registration and disclosure provisions "are comparable to conditions of supervised release or parole." *Smith* at 115. And these provisions have effects like those resulting from punishment. The fact that SORA's registration reporting provisions are comparable to supervised release or parole supports a conclusion that ASORA is punitive.

3. Finding of scienter

Third, this Court should consider "whether [the statute] comes into play only on a finding of scienter." *Mendoza-Martinez* at 168. The obligations of SORA are not imposed solely upon the finding of scienter. SORA also applies to strict liability offenses, such as statutory rape, that the law deems sufficiently harmful to effectively assume scienter. Idaho Code Section 18-8301 et. Seq. But even though SORA applies to a few strict liability offenses, it overwhelmingly applies to offenses that require a finding of scienter for conviction. *Id.* The few exceptions do not imply a non-punitive effect, given the assumption of scienter for those exceptions and the fact that a

reasonable-mistake-of-age defense is allowed in a charge of statutory rape.

4. The traditional aims of punishment

This Court should next examine "whether [the statute's] operation will promote the traditional aims of punishment — retribution and deterrence." *Mendoza-Martinez* at 168. But SORA's application to a broad spectrum of crimes regardless of their inherent or comparative seriousness suggests that such retributive and deterrent effects are not merely incidental to the statute's regulatory purpose. Every person convicted of a sex offense must provide the same information, and the state publishes that information in the same manner, whether the person was convicted of a misdemeanor or an unclassified felony. SORA's only differentiation is in the frequency and duration of a person's duty to register and disclose. *Mendoza-Martinez* at 168. But at any given moment the registration list does not distinguish those individuals the state considers to pose a high risk to society from those it views as posing a low risk. SORA determines who must register based *not* on a particularized determination of the risk the person poses to society but rather on the criminal statute the person was convicted of violating. SORA's registration and unlimited public dissemination requirements provide a deterrent and retributive effect that goes beyond any non-punitive purpose and that essentially serves the traditional goals of punishment

SORA applies only to those "convicted" of specified offenses. Idaho Code 18-8310. Defendants charged with sex offenses but who plead out to non-sex offenses such as coercion or simple assault do not have to register even though they may have engaged in the same conduct as individuals who do have to register. *Id.* Likewise, even convicted

defendants whose convictions are overturned for reasons other than insufficiency of evidence of guilt do not have to register despite having engaged in the same conduct. *Id.* An adult who commits a crime of lewd and lascivious conduct, but whose conviction is overturned due to an illegal search, does not have to register. *Id.* Finally, SORA does not require registration for those charged with sex offenses but acquitted, even though they may have engaged in the same conduct as convicted sex offenders and might even be found civilly liable under a lesser standard of proof. *Id.*

In other words, SORA fundamentally and invariably requires a judgment of guilt based on either a plea or proof under the criminal standard. It is therefore the determination of guilt of a sex offense beyond a reasonable doubt (or per a knowing plea), not merely the fact of the conduct and potential for recidivism, that triggers the registration requirement. Because it is the criminal conviction, and only the criminal conviction, that triggers obligations under SORA, this Court should conclude that SORA is punitive in effect. *Smith* at 115.

It is significant that SORA's scope is broad; it encompasses a wide array of crimes that vary greatly in severity. Moreover, SORA provides no mechanism by which an "aggravated" offender can petition the state or a court for relief from the obligations of continued registration and disclosure. "Offenders cannot shorten their registration or notification period, even on the clearest determination of rehabilitation or conclusive proof of physical incapacitation." *Smith* at 117. Hypothetically, John Doe successfully completed a treatment program and was granted early release from mandatory parole. A court granted him legal custody of his minor daughter based on its determination that he

was successfully rehabilitated and posed a very low risk of re-offending. Despite this evidence of rehabilitation, SORA requires Doe to register and requires the state to publicly disseminate his personal information for the rest of his life. See SORA generally. Under ex post facto analysis this Court should conclude that the statute's chosen means are excessive in relation to the statute's purpose because the statute is also underinclusive. SORA only applies to those convicted of specified offenses. *Id.* It therefore excludes from its requirements individuals who may have committed the same acts and may pose threats to the public but who avoided conviction by pleading to a lesser charge or whose convictions were overturned. This fact should clearly illustrate that SORA has a punitive effect. SORA also imposes obligations that, for ex post facto purposes, are excessive in relation to the state's legitimate public safety interest. It is significant that the registration and re-registration requirements are demanding and intrusive and are of long duration. See Idaho Code Section 18-8301 et. Seq. Finally, the provisions authorizing or requiring the state to disseminate the information are sweeping.

As stated in *Doe*:

Summing up the effects under the seven factors, we conclude that ASORA's effects are punitive, and convincingly outweigh the statute's non-punitive purposes and effects. We recognize that several of the factors seem closely related, and that discussion of one may overlap discussion of another. Nonetheless, it is not the mere number of factors that leads us to our conclusion, but our assessment of those factors and their relative weight. Six of those factors lead us to disagree, respectfully but firmly, with the Supreme Court's analysis and its ultimate conclusion that ASORA is not penal. Our decision is consistent with what we consider to be the compelling comments of dissenting justices in *Smith* and with the majority of the Ninth Circuit Court of Appeals panel that, before reversal, discerned an ex post facto violation under federal law.

Doe at 1018.

The Appellant acknowledges that the Idaho Courts have previously held that SORA “provides an essential regulatory purpose that assists law enforcement and parents in protecting children and communities.” *Ray v. State*, 133 Idaho 96, 101 (1999). It is important to note that the case of *Ray* was decided before any of the legislative amendments to SORA.

The Idaho Courts have considered ex post facto challenges to SORA in more recent cases. See *State v. Gragg*, 143 Idaho 74 (2005), *State v. Johnson*, 152 Idaho 41 (2011). In the case of *State v. Johnson*, the Court discussed ex post facto challenges to SORA, however, ultimately vacated the case for lack of jurisdiction. As such, the issue presented to this Court by Appellant has not been decided in the State of Idaho.

The Appellant in this matter was sentenced for the felony offense of Lewd Conduct with a Minor Child Under the Age of Sixteen, on January 22, 2001. The sentence was five to ten years and the Appellant was placed on probation for a period of ten (10) years. He was thereafter discharged from probation on July 7, 2011. At the time of sentencing, the Appellant was required to register as a sex offender pursuant to Idaho Code Section 18-8310, and continues to register as a sex offender.

On February 8, 2013, Appellant filed a petition with the District Court to be exempted from the duty to register. The District Court denied a hearing on February 12, 2013, but allowed Appellant fifteen (15) days in which to show cause why the Petition should not be dismissed. The reasons for the initial denial of Appellant’s Petition according to the District Court was that the offense that forms the basis of Appellant’s conviction (Lewd Conduct, Idaho Code Section 18-1508) as a matter of law is an

Aggravated Offense. Idaho Code Section 18-8303(1). And, of course, pursuant to Idaho Code Section 18-8303(1) does provide, in relevant part, that:

Registration under this act is for life; however, any offender, other than a recidivist, an offender who has been convicted of an aggravated offense, or an offender designated as violent sexual predator, may, after a period of ten (10) years from the date the offender was released from ...supervised release or probation, ...petition the district court for a show cause hearing to determine whether the offender shall be exempted from the duty to register as a sexual offender...”.

However, as indicated in the brief history of law set out above, at the time the Appellant pled guilty in this matter, i.e., May 22, 2000, as well as at the time he was sentenced, i.e., July 17, 2000, the only sex offenders excluded from an opportunity to be exempted from the requirement to register were violent sexual predators. However, subsequent to the Appellant’s change of plea and sentencing, in fact approximately eleven (11) years later, Idaho Code Section 18-8310 was amended to provide that any offender who has been convicted of an “aggravated offense” could not petition to be exempted from the duty to register. It defined an “aggravated offense” to include lewd conduct without the previously iterated exceptions for victims less than twelve (12) years of age.

In 2011, as set forth above, the legislature amended the definition of “aggravated offense to include lewd conduct as an aggravated offense, regardless of the age of the victim. This is the law that was applied by the present Court in determining to initially deny Appellant’s Motion to be exempt from this statute.

So, it is obvious that the Court has applied the latest amendment to Idaho Code Section 18-8310 retroactively to the Appellant which, at least initially, elicit ex post facto considerations.

According to the Court in *State v. Forbes*, 152 Idaho 849, 275 P.3d 864 (2012), said Court has already addressed the issue of whether the amendment is retroactive, holding that the Legislature, by implication, intended the amendment to apply to offenders who have already been granted a withheld judgment. *State v. Hardwick*, 150 Idaho at 582-583, 249 P.3d at 381-82.

However, the real question then becomes whether retroactive application of the amendment(s) violates the ex post facto clauses of the United States Constitution and the Idaho Constitution.

Ex post facto laws are prohibited by article I, section 9, clause 3 of the United States Constitution and by article I, section 6 of the Idaho Constitution. *Hardwick*, 150 Idaho at 581, 249 P.3d at 380 (quoting *Wheeler v. Idaho Dept. Of Health and Welfare*, 147 Idaho 257, 262, 207 P.3d 988, 993 (2009)). The ex post facto clauses prevent the enactment of “any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed. ... *Wheeler*, 147 Idaho 257, 262, 207 P.3d 988, 993 (2009) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169-70, 46 S.Ct. 68, 69, 70 L.Ed. 216, 217-18 (1925)).

This Court has already addressed this issue in *Hardwick* 150 Idaho at 581-83, 249 P.3d at 380-82, holding that retroactive application of the amendment was not punitive, and, therefore, not an ex post facto law because it effectuated the Legislature’s non-punitive purpose for enacting the Sex Offender Registration Notification and Community Right-to-Know Act, which was “to protect communities by requiring sexual offenders to register with local law enforcement agencies, [regardless if they were previously subject to a withheld judgment], and to make certain information about sexual offenders available to the public. ...” Ch. 411, § 2, 1998 Idaho Sess. Laws 1275, 1276. Where this Court has previously interpreted a statute, the “rule of stare decisis dictates that [this Court] follow [controlling precedent] ..., unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice.” *Houghland Farms, Inc. v. Johnson*, 119 Idaho 72,

77, 803 P.2d 978, 983 (1990). Because *Hardwick* was decided after the district court rendered its decision in this case, the district court addressed this issue without the benefit of *Hardwick*.

Furthermore, Appellant cannot obtain a final dismissal from the original charge under Idaho Code Section 19-2604(1), thereby restoring him to his civil rights. The real question here is do the amendments' alleged, non-punitive purpose trump any contention that the actual effect of Appellant having to continue to register as a sex offender is punitive? In other words, is the Legislature's classification of Appellant's offense as an *aggravated offense* subsequent to his guilty plea, an exception to the general understanding that the Sexual Offender Registration Act is non-punitive?

According to the Statement of Purpose accompanying the 2009 SORA amendments, they were intended only as "technical amendments and updates." State of Purpose, H.R. 178, 60th Leg., 1st Reg. Sess. (Idaho 2009). Because SORA as a whole is regulatory in purpose there is no reason to infer that the Legislature intended these "technical amendments and updates" as anything other than civil and nonpunitive. In order for the 2009 SORA amendments to violate the *ex post facto* clause, despite their civil denomination, we would have to determine that they are nonetheless punitive.

See *State v. Johnson*, 152 Idaho 41, 266 P.3d 1146 (2011).

And further, in addition to the Constitutional *ex post facto* considerations set out above, there are also due process concerns which, if nothing else, would seem to suggest that Appellant is entitled to an opportunity to be heard relative to the punitive nature of the amendment in this particular case. When a person's good name, reputation, honor, or integrity is at stake because of what the Government is doing, notice and an opportunity to be heard (due process) are essential, certainly where the State attaches 'a badge of infamy' to the citizen. *Smith v. State*, 146 Idaho 822, 827, 203 P.3d 1221, 1226 (2009).

How can any court determine the effect, or impact, of the legislative amendments without allowing the Appellant to present evidence and testimony as to impacts upon him?

Appellant asserts that the legislative amendments are unconstitutional on their face, as well as in their application.

It is difficult for Appellant to consider the amendments in question non-punitive in nature when, at the time of his sentencing, he understood that within ten (10) years, he would be able to be exempted from the Sex Offender Registry. Instead, after serving a spotless probation, complying with all requirements of the Court and the Department of Corrections, he has nothing to look forward to but a lifetime of “not being able to be present on the premises of any school building where children under the age of eighteen (18) are present, forbidden to be present on a public road within 500 feet from the property line of school grounds of this state where children under the age of 18 are present, drive within 500 feet of the property in which a school is located, be excluded from any activities where children under the age of eighteen (18) are knowingly going to be present, and not be able to receive or give candy on Halloween, to expect to have his photograph broadcast on public television at least two times per year, and his name and photo printed in the newspaper, as well as not being able to obtain gainful employment as any citizen should be allowed to do.

Appellant realizes that sexual offender registration statutes may not represent ex post facto laws such that they are unconstitutional in themselves. However, amendment of a sexual registration requirement from certain requirements at the time of guilty plea and sentencing, to more extensive deprivation of certain liberties because of Appellant’s

required extended period of registration, i.e., the ten (10) year requirement to a life time requirement, does relegate said amendment to a level that amounts to an ex post facto law violating Appellant's Constitutional Rights.

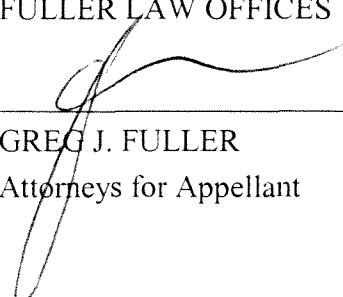
This case is unique in that the Appellant's primary focus, and allegation of unconstitutionality, rely primarily upon the fact that the State of Idaho *has taken away rights* from Appellant that he previously had the benefit of. In fact, Appellant had the right to petition for exemption from the registry for approximately eleven (11) years. While Appellant certainly objects to those changes in the law which have increased the registration burden upon him, his primary complaint for relief focuses upon the State of Idaho's actions in **taking away rights that had been previously granted**.

CONCLUSION

It is Appellant's position that the most recent case law and the "intent-effects" test weigh in favor of Appellant and in finding SORA unconstitutional, both on its face, and based upon its effect. Appellant further asserts that he should be free of ex post facto laws, but, at the very least, that the United States and Idaho Constitutions should operate to protect individual liberties from retroactive infringement. At a minimum, Appellant should have been granted an evidentiary hearing to preserve his due process rights.

DATED This TH6 day of November, 2013.

FULLER LAW OFFICES



GREG J. FULLER
Attorneys for Appellant

CERTIFICATE OF MAILING

I, the undersigned, do hereby certify that on the 6th day of November, 2013, I caused a true and correct copy of the foregoing document to be mailed, United States Mail, postage prepaid, to the following:

Cheryl E. Meade
Deputy Attorney General
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