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Groves v. State Respondent's Brief Dckt. 41328

IN THE SUPREME COURT OF THE STATE OF IDAHO

RBRT GROVES, a.k.a. ROBERT GROVES, Plaintiff/Appellant, vs. STATE OF IDAHO, Defendant/Respondent.	)	Docket No. ~~4138~~ 41328

RESPONDENT'S BRIEF

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

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I. STATEMENT OF THE CASE

This matter is before the Court on Plaintiff/Appellant, Robert Groves' (hereafter "Groves") Appeal from the district court's Judgment of Dismissal (and underlying Memorandum Decision re: constitutionality of 2009 amendment to IDAHO CODE § 18-8303(1)), filed June 22, 2013. R. Vol. 1, pp. 100-118.

On January 17, 2013, Groves signed an affidavit under oath stating that he was qualified to be relieved from the sex offender registration requirement. R. Vol. 1, pp. 6-7. He filed a petition to be released from sex offender registration requirements on February 8, 2013. R. Vol. 1, pp. 4-5.

On February 11, 2013, the district court issued an Order denying his petition, based upon IDAHO CODE § 18-8303(1). R. Vol. 1, pp. 11-28. The district court allowed Groves to seek reconsideration of the district court's decision at that time. R. Vol. 1, p. 12.

On February 26, 2013, Groves signed another affidavit under oath in support of an amended petition to be released from the registration requirement. R. Vol. 1, pp. 31-32. This time Groves included a paragraph alleging at the time he entered a guilty plea, he had been told that he would only have to register (as a sex offender) for a period of ten (10) years.[1] *Id.* at 32. Groves also filed his initial response to the district court's order alleging for the first time, on reconsideration, that the 2009 Amendment was in violation of the *Ex Post Facto* Clause of the United States Constitution. R. Vol. 1, pp. 34-40.

The district court then set a hearing on the issue of the constitutionality of the amendment

[1] He does not give any names of who told him this, nor does the criminal judgment conviction contain any indication that his plea was entered upon his consideration of this fact.

to IDAHO CODE § 18-8303(1) for May 6, 2013. R. Vol. 1, p. 42.[2] On May 6, 2013, the district court held a hearing by phone. On May 6, 2013, Groves submitted the Petitioner's Legislative History of IDAHO CODE § 18-8303, to the court and to the Prosecutor's Office; but he failed to serve the same on the Sex Offender Registry ("SOR"). R. Vol. 1, pp. 53-60. During the hearing, the court asked the parties for further briefing on the issue of the constitutionality of the amendment to IDAHO CODE § 18-8303(1). R. Vol. 1, pp. 61-62.

The parties submitted their briefs as requested. R. Vol. 1, pp. 63-99. The district court then ruled on the matter as set forth above.

II. STANDARD OF REVIEW

The interpretation of a statute is a question of law over which this Court exercises free review." *Smith v. Washington County Idaho*, 150 Idaho 388, 247 P.3d 615, 617 (2010), *citing Doe v. Boy Scouts of Am.*, 148 Idaho 427, 430, 224 P.3d 494, 497 (2009). "When [this] Court must engage in statutory construction, it has the duty to ascertain the legislative intent, and give effect to that intent." *State v. Forbes*, 152 Idaho 849, 275 P.3d 864, 866 (2012), *citing State v. Rhode*, 133 Idaho 459, 462, 988 P.2d 685, 688 (1999).

Whether a law is civil or criminal is a matter of statutory construction. *State v. Johnson*, 152 Idaho 41, 266 P.3d 1146 (2011) *citing Smith v. Doe*, 538 U.S. 84, 92, 123 S.Ct. 1140 (2003). "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.'" *Smith*, 538 U.S. at 93-94, 123 S.Ct at 1147.

[2] During the interim, the SOR appeared through counsel to notify the court of Groves' ineligibility due to the sex offense he was convicted of, to wit: IDAHO CODE § 18-1508.

Moreover, when reviewing the constitutionality of a statute, the Court exercises free review. *Idaho Schs. For Equal Educ. Opportunity v. State* (*ISEEO IV*), 140 Idaho 586, 590, 97 P.3d 453 (2004). To prevail, a challenger must show that the statute is "unconstitutional as a whole, without any valid application." *Id.* The Court should make "every presumption [ ] in favor of the constitutionality of the statute, and the burden of establishing the unconstitutionality of a statutory provision rests upon the challenger." *Id.* The party challenging a statute bears the burden of proving it unconstitutional. *Id.*

To succeed on a facial challenge, one must demonstrate that under no circumstance is the statute valid. *State v. Korsen,* 138 Idaho 706, 69 P.3d 126, 132 (2003). To prove a statute is unconstitutional "as applied," the party challenging the constitutionality of the statute must demonstrate that the statute, as applied to the defendant's conduct, is unconstitutional.

III. ISSUES ON APPEAL

The SOR does not take exception to how Groves' formulates the first issue on appeal. However, Groves either misstates or is incorrect in his assumption as to the second issue on appeal. As in this case, because the district court reached the correct conclusion that IDAHO CODE § 18-8303(1) was constitutionally sound, by law Groves was disqualified from petitioning for release from the sex offender registration requirement. Therefore, an evidentiary hearing would have been improper.

IV. ARGUMENT

Groves' acknowledges that the Idaho legislature "has attempted to enact a regulatory

scheme that is civil and non-punitive."[3] He argues nevertheless that at the time he was sentenced and as the sex offender registration law was written at that time, "he could expect to petition for release from registration after a period of ten (10) years. However, subsequent to his plea and sentencing, the Legislature amended IDAHO CODE §§ 18-8310 and 18-8303 at least twice to create a situation that basically eliminated Petitioner's chance to petition for release from the registration requirements."[4] The amendments that led to the current IDAHO CODE § 18-8303 and IDAHO CODE § 18-8310 now categorizes IDAHO CODE § 18-1508 as an aggravated offense that precludes release from sex offender registration. Groves argues that the amendments to IDAHO CODE §§ 18-8303 and 18-8310 are punitive and therefore unconstitutional both on their face and as applied to him, and as such, offend the *Ex Post Facto* Clause and are therefore unconstitutional.[5]

Groves maintains that his "primary focus, and allegation of unconstitutionality, rely primarily upon the fact that the State of Idaho *has taken away rights* from him that he previously had the benefit of."[6] (emphasis in Appellant's Brief).

However, this Court is well versed in the amendments to IDAHO CODE §§ 18-8303 and 18-8310 as well as the series of Idaho appellate court cases that have addressed issues involving alleged rights of due process and *ex post facto* challenges to Idaho's sex offender registration laws: *See*, *Ray v. State,* 133 Idaho 96, 100–101, (1999) (holding sex offender registration is not a direct consequence of a guilty plea. The purpose of Idaho's registration statute is not punitive,

[3] *See*, Appellant's Brief, p. 12 ¶ 3.
[4] *Id.*, pp. 1, 5, 6 and 19.
[5] *Id.* at 11, 19 and 20.
[6] *Id.*, pp. 5, 6, 10 and 23.

but remedial.); *State v. Gragg,* 143 Idaho 74, 137 P.3d 461 (Ct.App. 2005) (holding Sexual Offender Registration and Notification and Community-Right-to-Know Act did not constitute *ex post facto* law; legislature intended the Act as a civil scheme, rather than criminal scheme, and the effects of the Act, which included public access to certain registry information and posting of that information on the internet, were not so punitive as to override the legislative intent.); *Smith v. State*, 146 Idaho 822, 203 P.3d 1221 (2009) (concluding the duty to register as a sex offender is triggered simply by reason of conviction for a specified crime, but classification as a violent sexual predator ("VSP") is based upon a factual determination of probable future conduct, i.e., that the offender poses a high risk of committing an offense or engaging in predatory sexual conduct.) *State v. Johnson*, 152 Idaho 41 (2011), determining *inter alia,* 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; and *Bottum v. Idaho State Police, Bureau of Criminal Identification*, 154 Idaho 182, 296 P.3d 388 (2013) (concluding . . . the 2009 amendment is expressly declared to be retroactive, we need not address whether applying the amendment to Mr. Bottum would, as he contends, attach a new disability in respect to transactions or considerations already past).

It is worth noting that the Idaho Supreme Court found that "The Court of Appeals opinion in *Gragg* is thoughtful and its holding is correct." *State v. Johnson*, 152 Idaho 41, 45, 266 P.3d 1146, 1150 (2011). *Gragg*, relied heavily on the United States Supreme Court decision in *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140 (2003).

Seeing no cogent reason why the Idaho Supreme Court would depart from its' line of reasoning in these cases, including reliance on *Smith v. Doe*, and considering application of the doctrine of *stare decisis*, the SOR will rely upon the same.

a. SORA is retroactive.

The Idaho appellate courts have consistently held that the Sexual Offender Registration Notification and Community Right–to–Know Act (SORA), codified as IDAHO CODE §§ 18-8301 through 18-8326, applies retroactively to persons who had been convicted of specified crimes before the statute was enacted. *See, Ray v. State,* 133 Idaho 96, 982 P.2d 931 (1999); *State v. Gragg,* 143 Idaho 74, 137 P.3d 461 (Ct.App. 2005); *State v. Johnson*, 152 Idaho 41, 266 P.3d 1146 (2011); *Bottum v. Idaho State Police, Bureau of Criminal Identification*, 154 Idaho 182, 296 P.3d 388, 389-390 (2013) (SORA is expressly retroactive, therefore does not violate IDAHO CODE § 73-101).

Groves does not dispute that the holding of *Smith v. Doe* has been reversed or overruled.

b. SORA is not punitive.

In *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140 (2003), the United States Supreme Court considered for the first time a claim that a sex offender registration and notification law constitutes retroactive punishment forbidden by the *Ex Post Facto* Clause of the United States Constitution. The Court acknowledged that the framework for this inquiry is well established:

> We must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Kansas v. Hendricks,* 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory

> scheme is " 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' " *Ibid.* (quoting *United States v. Ward,* 448 U.S. 242, 248–249, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)). Because we "ordinarily defer to the legislature's stated intent," *Hendricks, supra,* at 361, 117 S.Ct. 2072, " 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," *Hudson v. United States,* 522 U.S. 93, 100, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (quoting *Ward, supra,* at 249, 100 S.Ct. 2636); see also *Hendricks, supra,* at 361, 117 S.Ct. 2072; *United States v. Ursery,* 518 U.S. 267, 290, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996); *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 365, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984).

Smith, 538 U.S. 84, 123 S.Ct. at 1146-1147.

In *State v. Johnson*, 152 Idaho 41, 266 P.3d 1146 (2011), the Idaho Supreme Court stated with approval, the Legislature's classification of Johnson's offense as an "aggravated offense," subsequent to his guilty plea, was an exception to the general understanding that SORA is nonpunitive. As Groves notes properly, the Idaho Supreme Court did not directly hold; whether SORA violated the *Ex Post Facto* Clause, i.e.; whether despite the legislature's stated intent was remedial in nature; or whether the effects of SORA were so clearly punitive that they overrode the Legislature's stated purpose. *Johnson*, 152 Idaho at 45, 266 P.3d at 1150.

Johnson did, however, unequivocally describe how the Idaho Supreme Court viewed the exact question raised by Groves in the present case. The Court in *Johnson*, based its view by basing its stamp of approval upon the United States Supreme Court's opinion in *Smith v. Doe* and the Idaho Court of Appeals decision in *State v. Gragg*, 143 Idaho 74, 137 P.3d 461 (Ct.App. 2005). The Idaho Court of Appeals in *Gragg*, aligned its determination with the U.S. Supreme Court's reasoning in *Smith v. Doe*. The *Smith* Court made its *ex post facto* analysis of Alaska's sex offender registration law upon the seven factor "intent-effects" test from *Kennedy v.*

Mendoza–Martinez, 372 U.S. 144, 168–169, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963).

Groves further advances assertions under the *Kennedy-Mendoza* seven factors test. Appellant's Brief at 14-16. In support of his claim he cites to an Alaska Supreme Court's decision in *Smith v. Doe*, 189 P.3d 999 (2008). *Id.* The Alaska Supreme Court based its decision, not on the U. S. Constitution or the Idaho Constitution, but rather on Alaska's Constitution. Even then, the Alaska Supreme Court acknowledged that the federal courts had found no *ex post facto* violation under the United States Constitution. *Smith*, 189 P.3d at 1002.

The Idaho Supreme Court, in recognizing the uniqueness of Idaho's Constitution, held "Article I, § 16 of the Idaho Constitution provides, in relevant part: 'No ... ex post facto law ... shall ever be passed.' Similarly, Article I, § 10, cl. 1, of the United States Constitution prohibits a state from passing an 'ex post facto law.'

Our state Supreme Court has recognized that the two constitutional provisions may not necessarily be of the same scope or subject to exactly the same interpretation. *See Quinlan v. Idaho Commission for Pardons and Parole,* 138 Idaho 726, 731, 69 P.3d 146, 151 (2003); *State v. Lindquist,* 99 Idaho 766, 769, 589 P.2d 101, 104 (1979).

However, our appellate courts have traditionally cited the two constitutional provisions together without "recognition of the possibility of a difference in scope or analysis." *State v. Gragg*, 143 Idaho 74, 75, 137 P.3d 461, 462 (Ct. App. 2005).[7] As stated before, it is

[7] Citing *Lovelace,* 140 Idaho at 77, 90 P.3d at 302; *State v. O'Neill,* 118 Idaho 244, 246–47, 796 P.2d 121, 123–24 (1990); *State v. Mee,* 102 Idaho 474, 483, 632 P.2d 663, 672 (1981), *overruled on other grounds by State v. Elisondo,* 114 Idaho 412, 757 P.2d 675 (1988); *State v. Byers,* 102 Idaho 159, 166, 627 P.2d 788, 795 (1981); *Wolf v. State,* 99 Idaho 476, 480, 583 P.2d 1011, 1015 (1978); *State v. Nickerson,* 132 Idaho 406, 411–12, 973 P.2d 758, 763–64 (Ct.App.1999); *LaFon v. State,* 119 Idaho 387, 389, 807 P.2d 66, 68 (Ct.App.1991); *Mellinger v. Idaho*

instrumental to note that the Idaho Supreme Court declared, "The Court of Appeals opinion in *Gragg* is thoughtful and its holding is correct." *State v. Johnson*, 152 Idaho 41, 45, 266 P.3d 1146, 1150 (2011).

1. Affirmative Disability or Restraint.

Groves' claims an affirmative disability or restraint upon him as: "restrained from changing residences or employment" ... "compels post discharge conduct (mandating registration, re-registration, disclosure of public and private information, and updating of that information) under threat of prosecution" ... "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" ... "the time associated with SORA are intrusive," and that "SORA exposes registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism." *See generally*, Appellant's Brief.

Groves' claim is unpersuasive for three reasons. First, he fails to give recognition to IDAHO CODE § 18-8326, which was enacted to protect him from the harm he alleges. This statute balances the interests of the offender with that of the state.

Secondly, in *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140 (2003), the United States Supreme found the same argument Groves' is making to be unpersuasive:

> The Act imposes no physical restraint, and so does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint.

Department of Corrections, 114 Idaho 494, 498, 757 P.2d 1213, 1217 (Ct.App.1988); *State v. Scroggie,* 110 Idaho 103, 113, 714 P.2d 72, 82 (Ct.App.1986); *Almada v. State,* 108 Idaho 221, 224, 697 P.2d 1235, 1238 (Ct.App.1985)."

> *Hudson,* 522 U.S., at 104, 118 S.Ct. 488. The Act's obligations are less harsh than the sanctions of occupational debarment, which we have held to be nonpunitive. See *ibid.* (forbidding further participation in the banking industry); *De Veau v. Braisted,* 363 U.S. 144, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960) (forbidding work as a union official); *Hawker v. New York,* 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898) (revocation of a medical license). The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences.
>
> The [9th Circuit] 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. The record in this case contains no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords.
>
> Although the public availability of the information may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination provisions, but from the fact of conviction, already a matter of public record. The State makes the facts underlying the offenses and the resulting convictions accessible so members of the public can take the precautions they deem necessary before dealing with the registrant.

Smith v. Doe, 538 U.S. at 100-101.

Finally, IDAHO CODE §§ 18-8306 and 18-8307, provides when and where a person convicted of a certain type of sex offense must register. According to these statutes Groves is only required to appear in person before the county sheriff, of the county in which he resides, once per year (unless he was to move). IDAHO CODE § 18-8307(c). This slight imposition hardly compares to the burden of someone who may be facing a criminal restitution order for supporting five (5) minor children on a monthly basis, until each child turned 18 years of age. *Cf.*

State v. Heredia, 144 Idaho 95 (Idaho 2007).

This Court should not only follow the holding of *Smith v. Doe* in finding that Groves' claim of disability or restraint is without merit, but that his claim is even more meritless because the duty to register is nothing more than a slight imposition. And besides, there are consequences for those who engage in vigilantism against sex-offenders.

Groves erroneously asserts, that the legislature created a new class of sex offenders by amending IDAHO CODE § 18-8303(1). *See*, Appellant's Brief, p. 6. Groves' pins his assertion on *Smith v. State*, 146 Idaho 822, 827, 203 P.3d 1221 (2009). *Id.* at 21. However, the state has not made a factual determination that Groves, as an individual sex offender, poses a high risk of committing an offense or will engage in predatory sexual conduct, as was the case of the violent sexual predator designation in *Smith v. State*, 146 Idaho 822, 828, 203 P.3d 1221, 1227 (2009). Groves' duty to register as a sex offender is triggered simply and exclusively by reason of his conviction of the specified crime of Lewd Conduct With A Minor Under Sixteen, IDAHO CODE § 18-1508, a crime that the Idaho legislature has designated as an aggravated offense. IDAHO CODE § 18-8303(1).

The Idaho Supreme Court further cited with approval, *Smith v. Doe,* 538 U.S. 84, 92, (2003) when the Court discussed whether or not if the burden of a life-time sex offender registration requirement was in violation of an offender's right to due process. The Court stated:

> 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." *Id.* at 103, 123 S.Ct. at 1153, 155 L.Ed.2d at 184. The U.S. Supreme Court has dismissed *ex post facto* claims "imposing regulatory burdens on individuals convicted of crimes without any corresponding risk

> assessment." *Id.* at 104, 123 S.Ct. at 1153, 155 L.Ed.2d at 184. Moreover, **"[t]he 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." *Id.* The fact that a sexual offender, convicted of a certain class of crime, may be required to register for life is not so punitive that it overrides SORA's regulatory purpose.** This is particularly so because the Legislature need not make particularized findings in the regulatory context.

State v. Johnson, 152 Idaho 41, 45-46 (Idaho 2011). (emphasis added).

2. Sanctions that have historically been considered punishment; and

3. Comparison to probation or supervised release.

Groves concedes that "SORA does not expressly impose sanctions that have been historically been considered punishment" and that "courts addressing this issue have determined that there is no historical equivalent to these registration acts."

Groves then argues in the alternative that, "dissemination provision at least resembles the punishment of shaming ... and "the registration and disclosure provisions 'are comparable to the conditions of supervised release or parole.' Groves cites to Justice Stevens' dissenting opinion in *Smith v. Doe* at 115 for support of his assertion. Appellant's Brief at 18.

Notably, the United State Supreme Court rejected these arguments as well:

> Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction. See generally *Johnson v. United States,* 529 U.S. 694, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000); *Griffin v. Wisconsin,* 483 U.S. 868, 107 S.Ct. 3164, 97 L.Ed.2d 709 (1987). 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.

Smith v. Doe, 538 U.S. at 101-102.

4. Traditional aims of punishment.

Groves recognizes that the traditional aims of punishment are retribution and deterrence. Appellant's Brief at 15. He argues that "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 offending" and that the "unlimited public dissemination requirement provide a deterrent and retributive effect that goes beyond any non-punitive purpose and that essentially serves the traditional goals of punishment." *Id.* (emphasis in the original).

Groves also notes that those who actually committed the same conduct and who plead to a lesser offense or whose convictions are overturned or who are acquitted do not have to register, despite having committed the same conduct. *Id.* at 15-16. He emphasizes that it is the judgment of guilt/criminal conviction that triggers the obligation to register as a sex offender, and therefore, this Court should conclude that SORA is punitive in its effect. *Id.*

The United State Supreme Court unequivocally disposed of this argument as well:

> Any number of governmental programs might deter crime without imposing punishment. "To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' ... would severely undermine the Government's ability to engage in effective regulation." *Hudson, supra,* at 105, 118 S.Ct. 488; see also *Ursery,* 518 U.S., at 292, 116 S.Ct. 2135; *89 Firearms,* 465 U.S., at 364, 104 S.Ct. 1099.
>
> The [Ninth Circuit] Court of Appeals was incorrect to conclude that the Act's registration obligations were retributive because "the length of the reporting

> requirement appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed." 259 F.3d, at 990. The Act, it is true, differentiates between individuals convicted of aggravated or multiple offenses and those convicted of a single nonaggravated offense. Alaska Stat. § 12.63.020(a)(1) (2000). The broad categories, however, and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective.

Smith v. Doe, 538 U.S. at 102.

The same reasoning applies to the Idaho legislature's determination of which sex offense convictions are reasonably related to the danger of recidivism and that it is the convictions of these felony crimes[8] that warrant requiring the convicted offender to register. *See*, IDAHO CODE § 18-8302.

c. Groves Has Not Been Deprived of Any Rights.

Groves maintains that his "primary focus, and allegation of unconstitutionality, rely primarily upon the fact that the State of Idaho *has taken away rights* from Petitioner that he previously had the benefit of" and that his "primary complaint for relief focuses upon the State of Idaho's action in taking away rights that had been previously granted."[9] He argues that as of the time of his conviction and sentence:

> ***Idaho Code Sections 18-8310 and 18-8303 would have allowed Petitioner, after a period of ten (10) years from the date he was placed on probation, to petition the Court for a Show Cause hearing to determine whether he could be exempted from the duty to register as a sex offender" because his "victim was***

[8] Groves asserts that sex offense convictions that require sex offender registration include misdemeanor sex offenses. This is a misstatement of rule. Most, if not all sex offenses in Idaho are felonies per se. However, the SOR does not differentiate between the two criminal categories when a sex offender who has a foreign conviction is required to register in Idaho . *See*, IDAHO CODE § 18-8304 subparagraphs (b) and (c) and IDAPA Rules 11.10.03 *et seq.*

[9] *Id.*, pp. 5, 6, 10 and 23.

12 years of age at the time he committed the offense."[10] (Appellant's emphasis added).

Whether Groves has a right to due process protections, regarding his desire for an evidentiary hearing to determine whether he is eligible for release from sex offender registration depends on whether his interest in being released from sex offender registration, is within the scope of the liberty or property language of U.S. Const. art. XIV. In other words, for Groves to assert a legitimate entitlement to due process with respect to some possibility that he be released from sex offender registration requirements, he must first establish an interest that triggers the requirement for due process. If he cannot prove he has such an interest, it would be improper for the district court to grant Groves an evidentiary hearing.

The Idaho Supreme Court addressed this issue in *Maresh v. State, Dept. of Health and Welfare ex rel. Caballero*, 132 Idaho 221, 970 P.2d 14 (1998):

> The due process clause of the Fourteenth Amendment "prohibits deprivation of life, liberty, or property without 'fundamental fairness' through governmental conduct that offends the community's sense of justice, decency and fair play." *Moran v. Burbine,* 475 U.S. 412, 432–34, 106 S.Ct. 1135, 1146–48, 89 L.Ed.2d 410 (1986).
>
> ***
>
> To determine whether an individual's due process rights under the Fourteenth Amendment have been violated, a court must engage in a two-step analysis. It must first decide whether the individual's threatened interest is a liberty or property interest under the Fourteenth Amendment. *Schevers v. State,* 129 Idaho 573, 575, 930 P.2d 603, 605 (1996) (citing *Smith v. Meridian Joint Sch. Dist. No. 2.,* 128 Idaho 714, 722, 918 P.2d 583, 591 (1996)); *see also, True v. Dep't of Health and Welfare,* 103 Idaho 151, 645 P.2d 891 (1982) (citing *Goss v. Lopez,* 419 U.S. 565, 95 S.Ct. 729; 42 L.Ed.2d 725 (1975)). Only after a court finds a

[10] *Id.*, pp. 6 and 7.

> liberty or property interest will it reach the next step of analysis, in which it determines what process is due. *Schevers v. State,* 129 Idaho 573, 575, 930 P.2d 603, 605.
>
> As stated by the United States Supreme Court, "[t]he requirements of procedural due process apply only to the deprivation of interest encompassed by the Fourteenth Amendment's protection of liberty and property." *Board of Regents v. Roth,* 408 U.S. 564, 569, 92 S.Ct. 2701, 2705, 33 L.Ed.2d 548 (1972).
>
> The United States Supreme Court has noted that property interests are "created ... by existing rules, ... such as state law." *Id.* Likewise, this Court has indicated that "determination of whether a particular right or privilege is a property interest is a matter of state law" *Ferguson v. Bd. of Trustees of Bonner Cty. Sch.,* 98 Idaho 359, 564 P.2d 971, 975 (1977) (citing *Bishop v. Wood,* 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976)). Further, determining the existence of a liberty or property interest depends on the "construction of the relevant statutes," and the "nature of the interest at stake." *True,* 103 Idaho at 154, 645 P.2d 891 (citing Tribe, American Constitutional Law, § 10–9, at 515–16 (1978)). Hence, whether a property interest exists can be determined only by an examination of the particular statute or ordinance in question. *Bishop,* 426 U.S. 341, 96 S.Ct. 2074.
>
> ***
>
> A person must have more than an abstract need or desire for a benefit in order to have a property interest therein. *Board of Regents,* 408 U.S. 564, 569, 92 S.Ct. 2701. Further, that person must have more than a unilateral expectation in the benefit; instead, she must have a "legitimate claim of entitlement to it." *Id.* at 577, 92 S.Ct. 2701.

Maresh, 132 Idaho at 225-227, 970 P.2d at 18-20.

"The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Maresch,* 132 Idaho at 226, 970 P.2d at 19, citing *Board of Regents v. Roth,* 408 U.S. 564, 576, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

The language of IDAHO CODE §§ 18-8307 and 18-8310 begin with the presumption that

sex offender registration is for life. Moreover, IDAHO CODE §§ 18-8303 and 18-8310 merely establishes a process by which an eligible sex offender may seek release from sex offender registration. They provide what Groves must show in terms of his evidentiary burden to justify such release. The statutes *do not* create a liberty or property interest that Groves alleges he had already acquired in specific benefits when he was convicted and sentenced.

Rather, Groves had only the hope of being released. "That hope is not a property right and the frustration of such a hope does not trigger the right to a hearing." *Maresch,* 132 Idaho at 226-227, 970 P.2d at 19-20, (citing *Loebeck v. Idaho State Board of Education,* 96 Idaho 459, 461, 530 P.2d 1149, 1151 (1975) (quoting *Perrin v. Oregon State Board of Education,* 15 Or.App. 268, 515 P.2d 409 (1973)).

Therefore, IDAHO CODE §§ 18-8303 and 18-8310 created no legitimate claim of entitlement for Groves or any other registered sex offender to petition for release from sex offender registration. Because there is no right created in the law, the district court acted properly by denying Groves an evidentiary hearing.

V. CONCLUSION

Based on the foregoing, this Court should uphold the district court's opinion in its Memorandum Decision re: Constitutionality of 2009 Amendment to IDAHO CODE § 18-8303(1),

and find that the challenged code section(s) are constitutional and that Groves was not entitled to an evidentiary hearing.

DATED this 4 day of December 2013.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing RESPONDENT'S BRIEF was served on the following on this 4th December 2013 to:

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