9-5-2017

State v. Kinney Appellant's Brief Dckt. 44752

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 44752**
Plaintiff-Respondent,	)	
	)	**KOOTENAI COUNTY**
v.	)	**NO. CR 2016-6589**
	)	
ROBERT JOHNSON KINNEY,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

_____

BRIEF OF APPELLANT

_____

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

_____

HONORABLE RICH CHRISTENSEN
District Judge

_____

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STATEMENT OF THE CASE

Nature of the Case

Following a jury trial, the jury found Robert Johnson Kinney guilty of one count of felony sexual battery of a minor. On appeal, Mr. Kinney asserts the district court erred when it failed to dismiss the charge against him on proportionality grounds, because the restrictions imposed on Mr. Kinney by the Idaho sex offender registration statutes constitute cruel and unusual punishment.

Statement of the Facts and Course of Proceedings

The State charged Mr. Kinney by Information with one count of sexual battery of a minor, felony, I.C. § 18-1508A. (R., pp.35-36.) Specifically, the Information charged Mr. Kinney with engaging in genital to genital contact and/or sexual intercourse with B.P.B., a sixteen-year-old minor, where Mr. Kinney was over the age of eighteen and at least five years older than B.P.B. (R., pp.35-36.) Mr. Kinney was twenty-five years old at the time of the alleged sexual contact. (*See* R., p.35.) He entered a not guilty plea. (R., p.41.)

Mr. Kinney later filed a Motion to Dismiss on Proportionality Grounds. (R., pp.68-75.) The motion asked the district court to dismiss the charge of sexual battery. (R., p.68.) Mr. Kinney asserted that, alongside "possible life imprisonment or community supervision, he was facing a "set of laws creating a sex offender registry [he] would be required to comply with for at least ten years." (*See* R., p.69.) Mr. Kinney described some of the requirements imposed by that set of laws, the Sexual Offender Registration Notification and Community Right-to-Know Act, I.C. §§ 18-8301 to 18-8331 (the Act or SORA). (R., pp.69-70.)

Mr. Kinney acknowledged the Idaho Supreme Court had previously held in *State v. Joslin*, 145 Idaho 75, 85-86 (2007), that the sex offender registry was not punishment. (R., p.71.)

He asserted the decision in *Joslin* was premised on the Idaho Supreme Court's prior decision in *Ray v. State*, 133 Idaho 96 (1999). (R., p.71.) Mr. Kinney asserted that in *Ray*, "the Supreme Court was not faced with the pervasive surveillance provided for here, nor the speech restriction the statute contemplates, but rather simply a question of the stigma created by registration." (*See* R., pp.71-72.) Further, "[t]here is no doubt that under the laws as they now are the state seeks to deprive the defendant of his liberties. The requirements for those registered as adult sex offenders are similar if not worse than those imposed on parolees and probationers." (R., p.72 (citation omitted).) Mr. Kinney therefore asserted, "the ruling in *Joslin* was manifestly wrong and should be overruled." (R., p.72.)

Turning to the test for cruel and unusual punishment, Mr. Kinney asserted, "[o]nly eighteen of the fifty states would call what is written in the information in this case a crime." (*See* R., p.72.) Mr. Kinney also quoted the letter from the special concurrence in *Joslin*, where seven members of the jury wrote the district court about their concerns regarding the sentence and sex offender status the defendant would receive in that case. (R., p.73 (quoting *Joslin*, 145 Idaho at 87 (J. Jones, J., specially concurring).)

Mr. Kinney further asserted, "[i]n the international community, most European countries have their age of consent set at sixteen." (R., p.73.) He asserted, "it is difficult to see how making the defendant into a felon and a registered sex offender with the accompanying ruin for his reputation, degradation of his social status, and loss of his liberty can possibl[y] meet any of the goals of sentencing." (R., p.74.) Additionally, Mr. Kinney asserted: "Making him a felon is cruel and unusual. Forcing him to spend the rest of his life labeled a sex offender and thereby losing access to employment, housing, and association, is cruel and unusual." (R., p.74.) Thus, Mr. Kinney asserted, "[t]his Court should find that these statutes violate the ban on Cruel and

Unusual Punishment of the Eighth Amendment to the United States Constitution and Article I §§ 1, 6 of the Idaho Constitution." (R., p.75.)

Mr. Kinney also filed a Motion to Dismiss on Equal Protection Grounds (R., pp.44-55), and a Motion to Dismiss on Substantive Due Process Grounds (R., pp.56-67.)

The district court conducted a hearing on Mr. Kinney's three motions to dismiss. (*See* R., pp.76-77.) Regarding the motion to dismiss on proportionality grounds, Mr. Kinney again recognized Idaho's courts have held the sex offender registry does not constitute punishment. (*See* Tr. July 21, 2016, p.6, Ls.13-25.) Mr. Kinney asserted he had standing to challenge the sex offender registry "because it is an automatic sanction in these cases." (Tr. July 21, 2016, p.7, Ls.1-6.) With respect to the sex offender registry, Mr. Kinney asserted, "[p]erhaps at one point it was nothing more than peoples' names on a list somewhere that people could go find versus what it's become today, which is a massive number of restrictions on peoples' lives that are enforced not only by public opinion but by the law, itself." (Tr. July 21, 2016, p.7, Ls.11-16.) Mr. Kinney asserted, "[a]nd so things have changed quite a bit since the decisions that are cited to in the briefing. We just don't think they should continue to be applicable." (Tr. July 21, 2016, p.7, Ls.16-19.)

Mr. Kinney also asserted, "[t]he fact that it's automatic rather than being discretionary with the judge, for example, is something that I think is really abominable in a case such as this one where you have a man who is being charged with having conduct that wouldn't be again sanctionable in . . . a majority of states." (Tr. July 21, 2016, p.8, Ls.1-8.) He asserted, "[a]nd the Court doesn't even have the ability to look at the circumstances, you know, look at a psychosexual evaluation and look at a polygraph and say, 'Is there any reason to say that for the

next ten years at least this young man should have to bear this burden?'" (Tr. July 21, 2016, p.8, Ls.8-13.)

The district court subsequently entered a Memorandum Decision and Order on Defendant's Motions to Dismiss. (R., pp.78-89.) The district court determined, "*Joslin* appears to be dispositive of Defendant's claim that Idaho's Sex Offender Registration statute violates the Eighth Amendment's prohibition on cruel and unusual punishment. The Court explained the registration requirement is not punitive, it is remedial." (R., p.81 (citing *Joslin*, 145 Idaho at 85-86).) Additionally, the district court quoted *Smith v. State*, 146 Idaho 822 (2009), where the Idaho Supreme Court held the legislative intent behind the sex offender registry was "to protect the public through the dissemination of information," rather than punishment. (R., p.86 (quoting *Smith*, 146 Idaho at 839).) The district court also observed, "the United States Supreme Court upheld a Kansas involuntary commitment requirement for violent sexual offenders on the same basis, finding that the statute was 'non-punitive.'" (R., p.81 (quoting *Kansas v. Hendricks*, 521 U.S. 346 (1997)).)

Thus, the district court determined, "[b]ased on previous decisions of the United States and Idaho Supreme Courts Defendant's argument fails. Idaho's Sex Offender Registry is not punitive and, therefore, cannot be construed to violate the prohibitions on cruel and unusual punishment." (R., pp.81-82.) The district court denied Mr. Kinney's motion to dismiss on proportionality grounds. (R., pp.82, 88.) The district court also denied his motion to dismiss on equal protection grounds (R., pp.87-88), and his motion to dismiss on substantive due process grounds (R., pp.84, 88).[1]

[1] On appeal, Mr. Kinney does not challenge the district court's denials of his motion to dismiss on equal protection grounds and his motion to dismiss on substantive due process grounds.

The case proceeded to a jury trial. (*See* R., pp.99-110.) B.P.B. testified during the trial. (*See* R., pp.100-01.) B.P.B. testified she and Mr. Kinney had sexual intercourse on multiple occasions over a period of about five months. (*See* Tr. Aug. 16, 2016, p.68, L.1 – p.69, L.25.)

Coeur d'Alene Police Department Officer Cannon testified that, around three in the morning one day, he found Mr. Kinney and B.P.B. in a car parked in a hotel parking lot. (*See* Tr. Aug. 16, 2016, p.92, L.25 – p.98, L.20.) He testified Mr. Kinney initially denied anything inappropriate had happened between him and B.P.B. (*See* Tr. Aug. 16, 2016, p.100, Ls.7-14.) The officer testified Mr. Kinney consented to a search of his cellphone's text messages. (*See* Tr. Aug. 16, 2016, p.100, L.15 – p.101, L.4.) Officer Cannon testified he found text messages relating to Mr. Kinney and B.P.B. having sexual intercourse. (*See* Tr. Aug. 16, 2016, p.101, L.5 – p.104, L.4.) The officer testified Mr. Kinney, upon being confronted with the text messages, admitted to having sexual intercourse with B.P.B. (*See* Tr. Aug. 16, 2016, p.102, L.11 – p.103, L.4.)

Mr. Kinney elected to not testify in his own defense. (*See* Tr. Aug. 17, 2016, p.137, Ls.1-21.) At the conclusion of the trial, the jury found Mr. Kinney guilty of sexual battery. (R., p.111.)

Before sentencing, Mr. Kinney filed a Motion to Reconsider Motion to Dismiss on Proportionality Grounds. (R., pp.155-56.) Mr. Kinney's first ground for the motion to reconsider was "there is a possibility that Motions to Dismiss on the grounds that a penalty is unconstitutional are not ripe for adjudication until there has been a conviction." (R., p.155.) As for the second ground, Mr. Kinney asserted, "the Sixth Circuit has recently found that SORA [Sex Offender Registration Act] as it exists in Michigan in Mich. Comp. Laws § 28.723, *et seq.*, is punitive." (R., p.155 (citing *John Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016)).)

Mr. Kinney asserted, "Michigan's SORA is substantially the same as Idaho's. This Court should find the Sixth Circuit persuasive and rule in accord." (R., p.155.) Alternatively, Mr. Kinney requested the district court "hold I.C. § 18-8306 unconstitutional as it applies to this case and therefore not order the defendant to register or that his information be collected by law enforcement or submitted to the Idaho State Police and the central registry." (R., pp.155-56.)

The district court imposed a unified sentence of seven years, with two years fixed, and retained jurisdiction.[2] (R., pp.173-74.)

After sentencing, the district court conducted a hearing on the motion to reconsider the motion to dismiss on proportionality grounds. (*See* R., p.177.) Mr. Kinney asked the district court to rely on the briefing in the motion. (Tr. Dec. 28, 2016, p.4, Ls.7-25.) The district court noted "there might be some, what defense counsel may believe as, persuasive authority; but there's no authority that requires the court to change its decision that has been presented to the court." (Tr. Dec. 28, 2016, p.5, Ls.14-18.) The district court found "nothing new in the motion brought by the defense in this matter to reconsider its position, and therefore the motion is denied." (Tr. Dec. 28, 2016, p.5, Ls.20-23; *see* R., p.189-90.)

Mr. Kinney filed a Notice of Appeal timely from the district court's Judgment and Sentence Retaining Jurisdiction. (R., pp.178-82.)

[2] At the sentencing hearing, the district court told Mr. Kinney: "I have no control over the matter of whether or not you have to register as a sex offender. . . . I am bound by the law. We are a nation of laws and therefore that is something you'll have to do and I have no control over." (Tr. Nov. 23, 2016, p.39, L.22 – p.40, L.3.)

ISSUE

Did the district court err when it failed to dismiss the charge against Mr. Kinney on proportionality grounds?

ARGUMENT

The District Court Erred When It Failed To Dismiss The Charge Against Mr. Kinney On Proportionality Grounds

A. Introduction

Mr. Kinney asserts the district court erred when it failed to dismiss the charge against him on proportionality grounds. Contrary to the district court's determination, Idaho's SORA violates the United States and Idaho constitutional prohibitions against cruel and unusual punishment. The Act is punitive, and the previous decisions of the Idaho Supreme Court holding otherwise are manifestly wrong and should be overturned. The punishment imposed by the Act is cruel and unusual, because it is grossly disproportionate to Mr. Kinney's offense.

B. Standard Of Review

The Idaho Supreme Court has held, "[b]oth constitutional questions and questions of statutory interpretation are questions of law over which this Court exercises free review." *Stuart v. State*, 149 Idaho 35, 40 (2010). "There is a presumption in favor of the constitutionality of the challenged statute or regulation, and the burden of establishing that the statute or regulation is unconstitutional rests upon the challengers." *Id.* An appellate court is obligated to seek an interpretation of a statute that upholds its constitutionality, and should exercise its judicial power to declare legislative action unconstitutional only in clear cases. *Id.*

C. Idaho's SORA Violates The Constitutional Prohibitions Against Cruel And Unusual Punishment

Mr. Kinney asserts Idaho's SORA violates the constitutional prohibitions against cruel and unusual punishment. The restrictions imposed by the Act constitute punishment, and those Idaho Supreme Court decisions holding the Act is not punitive are manifestly wrong and should

be overturned. The punishment imposed by SORA in this case is grossly disproportionate to Mr. Kinney's offense.

The United States Constitution and Idaho Constitution both prohibit cruel and unusual punishments. U.S. Const. Art. VIII; Idaho Const. Art. I, § 6. The Idaho Supreme Court has held that, under the Eighth Amendment to the United States Constitution, the test for whether a punishment is cruel and unusual focuses on whether the punishment is "grossly disproportionate." *See State v. Brown*, 121 Idaho 385, 394 (1992) (citing *Harmelin v. Michigan*, 501 U.S. 957, 1004-05 (1991) (Kennedy, J., concurring in part and concurring in the judgment)). The *Brown* Court observed the Court had previously held that, under the Idaho Constitution, "a criminal sentence is cruel and unusual punishment only when it is out of proportion to the gravity of the offense committed, and such as to shock the conscience of reasonable people." *Id.* (alteration and internal quotation marks omitted). The Court held, "[t]his traditional Idaho constitutional rule focusing on the gravity of the offense is well established and appropriate and is essentially equivalent to the 'grossly disproportionate' test used by Justice Kennedy's opinion in *Harmelin*." *Id.* Thus, based on Idaho Supreme Court precedent, the analysis for the United States and Idaho constitutional prohibitions against cruel and unusual punishment appears to be the same.

The Idaho Supreme Court has held, "[t]o determine whether a sentence is cruel and unusual, this Court engages in a two-part inquiry." *State v. Adamcik*, 152 Idaho 445, 486 (2012). "First, this Court must 'make a threshold comparison of the crime committed and the sentence imposed to determine whether the sentence leads to an inference of gross disproportionality.'" *Id.* (quoting *Brown*, 121 Idaho at 394). "Where no inference of a gross disproportionality can be made, 'there is no necessity to make any further proportionality review.'" *Id.* (quoting *Brown*,

121 Idaho at 394). "However, '[i]f an inference of such disproportionality is found [the Court] must conduct a proportionality analysis comparing [the defendant's] sentence to those imposed on other defendants for similar offenses.'" *Id.* (quoting *State v. Olivera*, 131 Idaho 628, 632 (Ct. App. 1998)).

1. SORA Is Punitive

As a preliminary matter, Mr. Kinney asserts SORA is punitive. Mr. Kinney acknowledges the Idaho Supreme Court has previously held the Act is not punitive, but asserts those decisions are manifestly wrong and should be overturned.

For SORA to come within the purview of the constitutional prohibitions against cruel and unusual punishments, the restrictions imposed by the Act must constitute punishment. To determine whether a sex offender registration law constitutes punishment, a court must first "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *See Smith v. Doe*, 538 U.S. 84, 92 (2003) (internal quotation marks omitted). According to the United States Supreme Court in *Smith v. Doe*, "[i]f 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." *Id.* (alteration and internal quotation marks omitted). Because an appellate court will "ordinarily defer to the legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (citation and internal quotation marks omitted).

The *Smith v. Doe* Court also held that "[w]hether a statutory scheme is civil or criminal is first of all a question of statutory construction. We consider the statute's test and its structure to

determine the legislative objective." *Id.* (citation and internal quotation marks omitted). Here, the Idaho Legislature in SORA declared, "this state's policy is to assist efforts of local law enforcement agencies to protect communities by requiring sexual offenders to register with local law enforcement agencies and to make certain information about sexual offenders available to the public as provided in this chapter." I.C. § 18-8302. Based on the language of Section 18-8302, the Idaho Supreme Court has held the purpose of the Act is not punitive. *Smith v. State*, 146 Idaho 822, 839 (2009) (holding the legislative findings in Section 18-8302 "evince the intention to protect the public through the dissemination of information"); *Ray v. State*, 133 Idaho 96, 100 (1999), *abrogated on other grounds by Padilla v. Kentucky*, 559 U.S. 356 (2010) ("The purpose of Idaho's registration statute is not punitive, but remedial.").

However, with respect to the effects of SORA, the Idaho Supreme Court's holdings that the Act is not punitive are manifestly wrong. The Idaho Supreme Court in *State v. Joslin*, 145 Idaho 75 (2007), held, "[t]he requirement that sexual offenders register does not impose punishment." *Joslin*, 145 Idaho at 86. The Court in *Joslin*, based on its prior decision in *Ray*, held "'[t]he purpose of Idaho's registration statute is not punitive, but remedial.' It 'provides an essential regulatory purpose that assists law enforcement and parents in protecting children and communities.'" *Id.* (quoting *Ray*, 133 Idaho at 100-01). The *Joslin* Court held, "[t]herefore, it cannot constitute the infliction of cruel and unusual punishment under our State Constitution. Since it is not punishment under Idaho law, it would not constitute the infliction of punishment under the Constitution of the United States." *Id.* (citing *Smith v. Doe*, 538 U.S. 84).

In *Ray*, the Idaho Supreme Court also held, "Idaho's Sexual Offender Registration Act provides an essential regulatory purpose that assists law enforcement and parents in protecting children and communities." *Ray*, 133 Idaho at 101. The *Ray* Court held, "the fact that

registration brings notoriety to a person convicted of a sexual offense does prolong the stigma attached to such convictions. However, the fact of registration is not an additional punishment; it does not extend a sentence. Rather, registration provides an information system that assists in the protection of communities." *Id.*

Based in part on *Ray*, the Idaho Supreme Court in *Smith v. State* similarly held, "the imposition of additional registration requirements for offenders deemed VSPs [violent sexual predators] in Idaho is also non-punitive." *See Smith v. State*, 146 Idaho at 839; *see also State v. Gragg*, 143 Idaho 74, 78 (Ct. App. 2005) ("Gragg has not shown that the effects of sex offender registration under the Act are so punitive as to override the legislative intent to create a civil, regulatory scheme.").

Mr. Kinney asserts *Smith v. State*, *Joslin*, and *Ray* are manifestly wrong and should be overturned. The rule of stare decisis dictates that an appellate court must follow controlling precedent "unless it is manifestly wrong, unless it has been 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." *State v. Humpherys*, 134 Idaho 657, 661 (2000) (internal quotation marks omitted).

Smith v. State, *Joslin*, and *Ray* are manifestly wrong in light of the changes to Idaho's SORA enacted after *Ray* was decided in 1999. As shown above, the analysis in *Smith v. State* and *Joslin* was heavily indebted to *Ray*, without really considering any changes to the Act. However, important changes to the Act made since 1999 include:

- The duty to update registration information now includes a requirement to appear in person, added in 2011 with the enactment of the new version of I.C. § 18-8309. *See* 2011 Idaho Sess. Laws, ch. 311, § 9.

- I.C. § 18-8327, a section generally prohibiting sex offender registrants from working at or being on the premises of day care facilities, was added in 2004. *See* 2004 Idaho Sess. Laws, ch. 270, § 1.
- I.C. § 18-8329, which generally prohibits sex offender registrants from being on the premises of any school building or school grounds, "[k]nowingly loiter[ing] on a public way within five hundred (500) feet of the property line of school grounds" when children are present and involved in a school activity, and "[r]esid[ing] within five hundred (500) feet of the property on which a school is located," was enacted in 2006. *See* 2006 Idaho Sess. Laws, ch. 354, § 1.
- In 2001, public access to information on the sex offender registry under I.C. § 18-8323, which had been by written request only, shifted to the Internet. *See* 2001 Idaho Sess. Laws, ch. 195, § 1.

Mr. Kinney submits that because of these and other changes enacted since 1999, SORA is now punitive in effect. The United States Supreme Court in *Smith v. Doe* held that, in analyzing the effects of a statute, "we refer to the seven factors noted in *Kennedy v. Mendoza-Martinez*, [372 U.S. 144, 168-69 (1963)], as a useful framework." *Smith v. Doe*, 538 U.S. at 97. The *Smith v. Doe* Court noted the factors had their origin, in part, from Eighth Amendment cases. *Id.* "Because the *Mendoza-Martinez* factors are designed to apply in various constitutional contexts, we have said they are neither exhaustive nor dispositive, but are useful guideposts." *Id.* (citation and internal quotation marks omitted).

In *Mendoza-Martinez*, the seven factors identified by the Court were: (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter,

(4) whether its operation will promote the traditional aims of punishment, (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned. *Mendoza-Martinez*, 372 U.S. at 168-69.

The *Smith v. Doe* Court observed, "[t]he 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." *Smith v. Doe*, 538 U.S. at 97.

As Mr. Kinney asserted before the district court, *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), provides persuasive authority for why SORA is now punitive. In *Does #1-5*, the plaintiffs asserted the retroactive application to them of amendments to Michigan's sex offender registration act amounted to an ex post facto punishment prohibited by the Constitution. *Id.* at 698. The United States Court of Appeals for the Sixth Circuit reversed the district court's determination that Michigan's sex offender registration act was not an ex post facto law, and held the Michigan act imposed punishment. *Id.* at 705-06.

Looking at the five most-relevant factors identified in *Smith v. Doe*, the *Does #1-5* Court decided that while the Michigan act "is not identical to any traditional punishments, it meets the general definition of punishment, has much in common with banishment and public shaming, and has a number of similarities to parole/probation." *Id.* at 703. The Sixth Circuit then decided the act imposed direct restraints on personal conduct, and its restrictions were far more onerous than those the United States Supreme Court had considered in *Smith v. Doe*. *Id.* at 703-04. The *Does #1-5* Court gave the traditional aims of punishment factor little weight, because the

incapacitation, retribution, and deterrence goals of punishment could largely also be described as civil and regulatory. *Id.* at 704.

The Sixth Circuit in *Does #1-5* then observed, "the record before us provides scant support for the proposition that [the Michigan act] in fact accomplishes its professed goals." *Id.* at 704. There was evidence that offense-based public registration had no impact on recidivism, one statistical analysis concluded laws like the Michigan act actually increased the risk of recidivism, and the Michigan act made "no provision for individualized assessments of proclivities or dangerousness." *Id.* at 704-05. The *Does #1-5* Court also decided the negative effects of the Michigan act "are plain on the law's face," and "[t]he punitive effect of these blanket restrictions thus far exceed even a generous assessment of their salutary effects." *Id.* at 705.

Thus, the Sixth Circuit held the actual effect of the Michigan act was punitive. *Id.* The *Does #1-5* Court was careful to note its holding was in agreement with other courts confronting similar laws. *Id.* (citing *Doe v. State*, 111 A.3d 1077, 1100 (N.H. 2015); *State v. Letalien*, 985 A.2d 4, 26 (Me. 2009); *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004 (Okla. 2013); *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009); *Doe v. State*, 189 P.3d 999, 1017 (Alaska 2008)).

Here, consideration of the five most-relevant factors identified in *Smith v. Doe* reveals that Idaho's SORA, much like the Michigan act examined by the Sixth Circuit in *Does #1-5*, is now punitive.

a. History And Traditions

On whether SORA inflicts what has been regarded in our history and traditions as punishment, while the Act "has no direct ancestors in our history and traditions, its restrictions do meet the general, and widely accepted, definition of punishment offered by legal philosopher H.L.A. Hart." *See Does #1-5*, 834 F.3d at 701. This is because the Act "(1) involves pain or other consequences typically considered unpleasant; (2) it follows from an offense against legal rules; (3) it applies to the actual (or supposed) offender; (4) it is intentionally administered by people other than the offender; and (5) it is imposed and administered by an authority constituted by a legal system against which the offense was committed." *See id.* (citing H.L.A. Hart, *Punishment and Responsibility* 4-5 (1968)).

Following the Sixth Circuit's reasoning in *Does #1-5*, SORA also "resembles, in some respects at least, the ancient punishment of banishment." *See id.* This is because "its geographical restrictions are . . . very burdensome, especially in densely populated areas." *See id.* Namely, the restrictions generally prohibiting registrants being on the premises of any school building or school grounds, knowingly loitering on a public way within five hundred (500) feet of the property line of school grounds when children are present and involved in a school activity, or residing within five hundred (500) feet of the property on which a school is located, are significant burdens. *See* I.C. § 18-8329. Because of these school zone restrictions, sex offenders "are forced to tailor much of their lives around these school zones, and . . . they often have great difficulty in finding a place where they may legally live or work." *See Does #1-5*, 834 F.3d at 702.[3]

[3] To an extent, the requirements of SORA "also resemble traditional shaming punishments." *See Does #1-5*, 834 F.3d at 702. In *Smith v. State*, the Idaho Supreme Court held the statutory scheme for designation as a violent sexual predator (VSP) under the Act was constitutionally

The Act "also resembles the punishment of parole/probation." *See id.* at 703. The United States Supreme Court in *Smith v. Doe* held the statute at issue there was ultimately unlike parole/probation because, unlike parolees, "offenders subject to the Alaska statute are free to move where they wish and to live and work as other citizens, with no supervision." *See Smith v. Doe*, 538 U.S. at 101. In contrast to the statute in *Smith v. Doe*, and much like the Michigan act in *Does #1-5*, registrants under the current form of SORA "are subject to numerous restrictions on where they can live and work and, much like parolees, they must report in person, rather than by phone or mail." *See Does #1-5*, 834 F.3d at 703. Specifically, the Act restricts where registrants may live with respect to school zones, I.C. § 18-8329, as well as with respect to residential dwellings with other registrants, I.C. § 18-8331. Further, the Act currently prohibits registrants from working at day care facilities. I.C. § 18-8327. As for reporting in person, the Act requires registrants to appear in person to meet the periodic registration requirement,

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infirm, because it did not comport with constitutional standards of procedural due process. *Smith v. State*, 146 Idaho at 839-40. A VSP designation had been based on a determination that "the offender continues to 'pose a high risk of committing an offense or engaging in predatory sexual conduct.'" *Id.* at 826 (quoting I.C. § 18-8303(15) (2009)).

The *Smith v. State* Court described the label of VSP as "a 'badge of infamy' that necessitates due process protections." *Id.* at 827. The Court also noted that while "[n]on-VSP offenders may petition a court for relief from the duty to register after a period of ten years . . . a VSP has no right to such relief. Thus, for an offender designated as a VSP, the scarlet letters are indelible." *Id.*

After *Smith v. State*, the Idaho Legislature removed the sexual offender classification board's authority to designate sex offenders as VSPs. *See* 2011 Idaho Sess. Laws, ch. 311, § 13. However, the Idaho State Police website on SORA currently features a list of twenty-eight VSPs. Idaho State Police, Idaho SOR, List of Violent Sexual Predators, https://isp.idaho.gov/sor_id/SOR?form=6&typ=vsp&page=1&sz=1536 (last accessed Sept. 5, 2017).

Further, the Act still provides that an offender designated as a VSP may not petition the district court for a show cause hearing to determine if the offender should be exempted from the duty to register as a sexual offender. *See* I.C. § 18-8310(1). Thus, at least with respect to those offenders designated as VSPs, the ignominy under SORA "flows not only from the past offense, but also from the statute itself." *See Does #1-5*, 834 F.3d at 703.

I.C. § 18-8307(5)(c),[4] and now also requires them to appear in person if they change their name, street address or actual address, employment, or student status, I.C. § 18-8309(1).

As with the Michigan act, *see Does #1-5*, 834 F.3d at 703, failure to comply can be punished by imprisonment under SORA, not unlike a revocation of parole. *See* I.C. § 18-8311. Additionally, "while the level of individual supervision is less than is typical of parole or probation, the basic mechanism and effects have a great deal in common." *See Does #1-5*, 834 F.3d at 703. Thus, the history and tradition factor weighs in favor of SORA being punitive. *See id.*

b. Affirmative Disability Or Restraint

On whether SORA imposes an affirmative disability or restraint, the current version of the Act requires much more than the version of the Act examined in *Ray*. As discussed above, the Act currently regulates "where registrants may live, work, and 'loiter'." *See Does #1-5*, 834 F.3d at 703. Those restrictions "put significant restraints on how registrants may live their lives." *See id.* Further, considering registrants must now appear in person for both periodic registration and status updates, SORA imposes "direct restraints on personal conduct." *See id.* Because the restrictions imposed by the Act are far more onerous than those in the earlier version of the Act considered by the Idaho Supreme Court in *Ray*, this factor weighs in favor of the Act being punitive. *See id.* at 704 ("[The Michigan act's] restrictions are again far more onerous than those considered in [*Smith v. Doe*], and this factor too therefore weighs in Plaintiffs' favor.").

[4] The Act has had some form of an in-person annual or periodic registration requirement since its enactment in 1998. *See* 1998 Idaho Sess. Laws, ch. 411, § 2.

c. Traditional Aims Of Punishment

On whether SORA promotes the traditional aims of punishment, it appears the Act advances three of the "four objectives of criminal punishment: (1) protection of society, (2) deterrence of the individual and the public generally, (3) possibility of rehabilitation, and (4) punishment or retribution for wrongdoing." *See also State v. Toohill*, 103 Idaho 565, 568 (Ct. App. 1982) (articulating the four objectives of criminal punishment recognized in Idaho).

Akin to the Michigan act in *Does #1-5*, *see* 834 F.3d at 704, the Act seeks to incapacitate sex offenders by keeping them away from opportunities to reoffend. *See* I.C. § 18-8302 (finding by the Idaho Legislature that public access to certain information about sex offenders "assists the community in being observant of convicted sexual offenders in order to prevent them from recommitting sexual crimes"). The Act "is retributive in that it looks back at the offense (and nothing else) in imposing its restrictions, and it marks registrants as ones who cannot be fully admitted into the community." *See Does #1-5*, 834 F.3d at 704. Additionally, the Act would, at least, "serve[] the purpose of general deterrence." *See id.* However, as the Sixth Circuit noted, "many of these goals can also rightly be described as civil and regulatory." *Id.* Thus, this factor should be given little weight as to whether SORA is punitive. *See id.*

d. Rational Relation To A Non-Punitive Purpose

On whether SORA has a rational relation to a non-punitive purpose, the United States Supreme Court in *Smith v. Doe* described this factor as a "'[m]ost significant' factor in our determination that the statute's effects are not punitive." *Smith v. Doe*, 538 U.S. at 102 (quoting *United States v. Ursery*, 518 U.S. 267, 290 (1996)). The express legislative purpose of the Act is "to assist efforts of local law enforcement agencies to protect communities by requiring sexual

offenders to register with local law enforcement agencies to make certain information about sexual offenders available to the public . . . ." I.C. § 18-8302.

However, the empirical studies presented to the Sixth Circuit in *Does #1-5* cast significant doubt on the level of risk of recidivism posed by sex offenders, and on whether sex offender registration laws like SORA actually protect society. *See Does #1-5*, 834 F.3d at 704-05. The *Does #1-5* Court noted, "[o]ne study suggests that sex offenders (a category that includes a great diversity of criminals, not just pedophiles), are actually *less* likely to recidivate that other sorts of criminals." *Id.* at 704 (citing Lawrence A. Greenfield, *Recidivism of Sex Offenders Released from Prison in 1994* (2003)).

The Sixth Circuit also stated, "[e]ven more troubling is evidence in the record supporting a finding that offense-based public registration has, at best, no impact on recidivism." *Id.* "In fact, one statistical analysis in the record concluded that laws such as [the Michigan act] actually *increase* the risk of recidivism, probably because they exacerbate risk factors for recidivism by making it hard for registrants to get and keep a job, find housing, and reintegrate into their communities." *Id.* at 704-05 (citing J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & Econ. 161, 161 (2011)). The Sixth Circuit further related that nothing presented in the record in *Does #1-5* "suggests that the residential restrictions have any beneficial effect on recidivism rates." *Id.* at 705. Additionally, the *Does #1-5* Court faulted the Michigan act for making "no provision for individualized assessments of proclivities or dangerousness. . . ." *Id.*

This Court should adopt the conclusions of the Sixth Circuit in *Does #1-5* on the rational relation to a non-punitive purpose factor, considering those conclusions are soundly based on empirical studies. *See id.* at 704-05; *cf. State v. Almaraz*, 154 Idaho 584, 593 (2013) ("The New

Jersey Supreme Court recently undertook a very thorough examination of the current state of scientific research regarding eyewitness identification . . . . We agree with the New Jersey Supreme Court and find that this extensive research convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification.").

Those empirical studies indicate that, at best, the efficacy of statutes such as SORA is unclear. *See Does #1-5*, 834 F.3d at 705. At worst, statutes like the Act actually increase the risk of recidivism, thus making our communities less safe. *See id.* at 704-05. It cannot be said that the Act is rationally related to the non-punitive purpose of protecting our communities. Thus, unlike in *Smith v. Doe*, *see* 538 U.S. at 102, this factor weighs in favor of the Act being punitive.

e. Excessiveness

On whether SORA is excessive with respect to its non-punitive purpose, like the Michigan act in *Does #1-5*, "the negative effects are plain on the law's face." *See Does #1-5*, 834 F.3d at 705. The Sixth Circuit concluded the Michigan act "puts significant restrictions on where registrants can live, work, and 'loiter,' but the parties point to no evidence in the record that the difficulties the statute imposes on registrants are counterbalanced by any positive effects." *Id.* The many similarities between the Michigan act and SORA in its current form indicate the Act likewise suffers from a lack of any positive effects. Further, "[t]he requirement that registrants make frequent, in-person appearances before law enforcement . . . appears to have no relationship to public safety at all." *See id.* As the Sixth Circuit decided regarding the Michigan act, the punitive effects of the Act's restrictions "far exceed even a generous assessment of their salutary effects." *See id.*

In sum, just as the Sixth Circuit and many other courts have held regarding similar sex offender registry statutes, the actual effect of Idaho's current SORA is punitive. *See id.* Mr. Kinney submits that he has shown by the "clearest proof" that the Act in fact inflicts punishment. *See Smith v. Doe*, 538 U.S. at 92. In light of the changes to SORA since 1999 that have made it punitive, *Smith v. State*, *Joslin*, and *Ray* are manifestly wrong and should be overturned.

2. The Punishment Imposed By SORA Is Cruel And Unusual

Having shown SORA is punitive, Mr. Kinney asserts the punishment imposed by the Act in his case is cruel and unusual. The first part of the cruel and unusual punishment inquiry, as explained above, is for the Court to "make a threshold comparison of the crime committed and the sentence imposed to determine whether the sentence leads to an inference of gross disproportionality." *Adamcik*, 152 Idaho at 486 (internal quotation marks omitted). "Where no inference of a gross disproportionality can be made, there is no necessity to make any further proportionality review." *Id.* (internal quotation marks omitted). "However, if an inference of such disproportionality is found, the Court must conduct a proportionality analysis comparing the defendant's sentence to those imposed on other defendants for similar offenses." *Id.* (alterations and internal quotation marks omitted).

a. The Punishment Imposed By SORA Is Grossly Disproportionate

Mr. Kinney submits the punishment imposed by SORA on him is grossly disproportionate to the gravity of his offense. Here, Mr. Kinney was charged with sexual battery, on account of having had sexual relations with B.P.B. (*See* R., p.68.) During the trial, B.P.B. testified she had sexual intercourse with Mr. Kinney about thirty to thirty-nine times.

(*See* Tr. Aug. 16, 2016, p.69, Ls.14-25.) Officer Cannon testified that after he confronted Mr. Kinney with the text messages, Mr. Kinney ultimately estimated he had sexual intercourse with B.P.B. more than ten times. (*See* Tr. Aug. 16, 2016, p.102, L.11 – p.103, L.4.) While some of the text messages Mr. Kinney sent to B.P.B. could be described as coercive (*see* Presentence Report (*hereinafter,* PSI, pp.6-12)),[5] she did not testify Mr. Kinney ever used physical force on her (*see generally* Tr. Aug. 16, 2016, p.64, L.12 – p.81, L.11).

The presentence report explained the context of Mr. Kinney's relationship with B.P.B. was that while Mr. Kinney was "recovering from his recent divorce, being kicked out of his mother's house and the loss of his children, he found a coworker who showed an interest in his military service and would listen to him." (*See* PSI, p.54.) Although the presentence investigator wrote Mr. Kinney displayed impulsivity, lack of remorse, exploitive motivations, and controlling behavior in his relationship with B.P.B. (*see* PSI, p.54), the presentence report also stated the instant offense is his first felony conviction (PSI, pp.44, 54).

In a letter attached to the presentence report, Mr. Kinney's great-aunt, Darlene Carr, stated Mr. Kinney had been oxygen-deprived during his birth, suffered a degree of brain damage, and had had learning difficulties throughout his life. (PSI, pp.104-05.) At the sentencing hearing, Mr. Kinney's mother, Tamara Norlander, stated that while her son "is a very kind person, he's not the brightest." (Tr. Nov. 23, 2016, p.9, Ls.16-20.) Ms. Norlander also told the district court Mr. Kinney had left the military only because he made a mistake with his time to reenlist. (*See* Tr. Nov. 23, 2016, p.9, L.25 – p.10, L.5.) Ms. Norlander indicated Mr. Kinney's mental age was not equivalent to his physical age, and at the time of his relationship with B.P.B.,

[5] All citations to the PSI refer to the 105-page PDF version of the Presentence Report and attachments.

he was struggling with "[l]osing everything with the military and his wife and trying to deal and find his place in civilian life." (*See* Tr. Nov. 23, 2016, p.14, L.21 – p.15, L.8.) She stated her son "was very lonely and vulnerable." (Tr. Nov. 23, 2016, p.15, L.9.) According to Ms. Norlander, "the weight of this crime is really hard for me to, you know, think that he was vulnerable and there was one person that held out their hand to him and he accepted it, and that makes it really hard, and I have a hard time with it, but I know the law is the law, and that's why we're here." (Tr. Nov. 23, 2016, p.16, L.24 – p.17, L.4.)

The punishment imposed by SORA is grossly disproportionate to the gravity of the above offense. The Act would impose significant restrictions on where Mr. Kinney may live, work, and even loiter. *See, e.g.*, §§ 18-8307(5), 18-8309, 18-8327 and 18-8329. He would be forced to register for at least ten years, if not for life. *See* I.C. § 18-8310(1). As Mr. Kinney asserted before the district court, registering as a sex offender would mean he would lose "access to employment, housing, and association." (*See* R., p.74.) In the words of the Sixth Circuit, Mr. Kinney would be branded as a "moral leper[] solely on the basis of a prior conviction," consigned "to years, if not a lifetime, of existence on the margins . . . ." *See Does #1-5*, 834 F.3d at 705. Considering his lack of a prior record, his non-use of physical force, his mental faculties, and his vulnerability at the time the relationship with B.P.B. started, the punishment imposed by the Act on Mr. Kinney is grossly disproportionate to the gravity of his offense.

b. A Proportionality Analysis Comparing Mr. Kinney's Punishment Imposed By SORA To Those Imposed On Other Defendants For Similar Offenses Confirms His Punishment Is Grossly Disproportionate

Because Mr. Kinney has established an inference of gross disproportionality, the Court must "conduct a proportionality analysis comparing the defendant's sentence to those imposed on other defendants for similar offenses." *See Adamcik*, 152 Idaho at 486. Mr. Kinney submits

this proportionality analysis confirms his punishment imposed by SORA is grossly disproportionate.

A comparison of Mr. Kinney's punishment with possible punishments in other jurisdictions indicates his punishment is grossly disproportionate. As Mr. Kinney noted before the district court, "[o]nly eighteen of the fifty states would call what is written in the information in this case a crime." (*See* R., p.72.) In some states, the offense at issue here would only be a misdemeanor. (*See* R., p.72.) Further, Mr. Kinney asserted the age of consent in many European countries is sixteen. (*See* R., p.73.) That also suggests Mr. Kinney's punishment for having sexual relations with a sixteen-year-old minor is grossly disproportionate.

Additionally, Mr. Kinney referenced the letter from the special concurrence in *Joslin*, a case from Idaho. (*See* R., p.72.) In *Joslin*, the defendant had sexual intercourse with a sixteen-year-old minor when he was nineteen. *Joslin*, 145 Idaho at 78. The defendant was found guilty of statutory rape after a jury trial. *Id.*

Justice Jim Jones wrote in the *Joslin* special concurrence that, "following the verdict and prior to sentencing, nine of the jurors wrote to the sentencing judge to express sympathy for the Defendant and to request leniency in his sentence." *Id.* at 86 (J. Jones, J., specially concurring). One of the letters, signed by seven jurors, stated those jurors understood the defendant "will be labeled as a sex offender and this label will be placed on his record and will follow him for the rest of his life. We do not believe that [the defendant] is a sex offender or that he should be labeled as such." *Id.* The seven jurors also wrote, "[w]e are now aware of how the law reads, how it defines statutory rape and the possible punishments that could be invoked. We feel that the law is antiquated and the letter of the law should not be applied in this case." *Id.* at 86-87.

Mr. Kinney asserts the concerns of the seven Idaho jurors in the *Joslin* letter are applicable in his case as well.

Thus, a proportionality analysis comparing Mr. Kinney's punishment imposed by SORA to those imposed on other defendants for similar offenses confirms his punishment is grossly disproportionate. Mr. Kinney asserts the punishment imposed by the Act in his case is therefore cruel and unusual. *See Adamcik*, 152 Idaho at 486. The district court's orders denying Mr. Kinney's Motion to Dismiss on Proportionality Grounds and his Motion to Reconsider Motion to Dismiss on Proportionality Grounds should be vacated.

CONCLUSION

For the above reasons, Mr. Kinney respectfully requests that this Court vacate the district court's orders denying his Motion to Dismiss on Proportionality Grounds and his Motion to Reconsider Motion to Dismiss on Proportionality Grounds, and remand the case to the district court for further proceedings.

DATED this 5th day of September, 2017.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of September, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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