11-22-2017

State v. Kinney Respondent's Brief Dckt. 44752

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 44752**
Plaintiff-Respondent,	)	
	)	**Kootenai County Case No.**
v.	)	**CR-2016-6589**
	)	
ROBERT JOHNSON KINNEY,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

HONORABLE RICHARD S. CHRISTENSEN
District Judge

LAWRENCE G. WASDEN
Attorney General
State of Idaho

PAUL R. PANTHER
Deputy Attorney General
Chief, Criminal Law Division

TED S. TOLLEFSON
Deputy Attorney General
Criminal Law Division
P. O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEYS FOR PLAINTIFF-RESPONDENT

BEN P. McGREEVY
Deputy State Appellate Public Defender
322 E. Front St., Ste. 570
Boise, Idaho 83702
(208) 334-2712

ATTORNEY FOR DEFENDANT-APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

STATUTES

CONSTITUTIONAL PROVISIONS **PAGE**

OTHER AUTHORITIES

STATEMENT OF THE CASE

Nature of the Case

Robert Johnson Kinney appeals from the judgment entered upon the jury verdict finding him guilty of Sexual Battery of a Minor. On appeal, Kinney argues that requiring him to register as a sex offender pursuant to the Sexual Offender Registration Notification and Community Right-to-Know Act ("Sexual Offender Registration Act" or "SORA")[1] constitutes cruel and unusual punishment in violation of the Idaho and United States Constitutions.

Statement of Facts and Course of Proceedings

At approximately 3:00 a.m. Officer Cannon walked up to a car parked near the rear of a motel. (R., pp. 78-79.) As Officer Cannon approached the car a minor female ("B.B.") exited from the back of the car and began crying. (Id.) Officer Cannon then identified the male in the backseat of the car as 25-year-old Kinney. (Id.) Kinney initially denied having a sexual relationship with 16-year-old B.B. (Id.) Officer Cannon received consent to view the text messages between B.B. and Kinney. (Id.) Officer Cannon became concerned because "it was obvious Kinney showed very strong controlling behavior over [B.B.]." (R., p. 14.) The text messages showed Kinney had previously sent B.B. a picture of his erect penis. (Id.) Kinney's text messages repeatedly instructed B.B. to "prove" her love by sending him photographs. (Id.) Kinney's text messages also repeatedly accused B.B. of cheating on him. (Id.)

[1] The full acronym for the "Sexual Offender Registration Notification and Community Right-to-Know Act" (see I.C. § 18-8301) is rarely used and the act is more commonly referred to as the "Sexual Offender Registration Act" or "SORA."

After Officer Cannon saw these text messages, Kinney admitted to having sex with B.B. (R., pp. 14, 79.) The state charged Kinney with the Sexual Battery of a Minor in violation of Idaho Code § 18-1508A. (R. pp. 35-36.)

Prior to trial, Kinney moved to dismiss the Information on the grounds the crime of Sexual Battery of a Minor violated both the equal protection clause and substantive due process. (R., pp. 44-67.) Kinney also moved to dismiss on the grounds that the requirement he register as a sex offender was a disproportionate punishment for the crime and constituted cruel and unusual punishment that violated the Eighth Amendment of the United States Constitution and Article I, § 6, of the Idaho Constitution. (R., pp. 68-75.) The district court entered a written order denying Kinney's motions to dismiss. (R., pp. 78-89.)

The district court determined that registration requirements of SORA do not constitute cruel and unusual punishment. (R., pp. 79-82.) The district court held that the Idaho Supreme Court's decision in State v. Joslin, 145 Idaho 75, 175 P.3d 764 (2007), is dispositive. (Id.) Applying Joslin, the district court found that Idaho's SORA was "not punitive" but "remedial." Id. The district court also applied United States Supreme Court precedent which held that an "involuntary commitment requirement for violent sexual offenders" was "non-punitive." (R., p. 81 (quoting Kansas v. Hendricks, 521 U.S. 346 (1997).) The district court concluded that "[i]t is likely more of an offense to liberty to be involuntarily committed than anything that may await [Kinney] pursuant to the allegation in this matter." (Id.)

> Based on prevision 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. Defendant's motion to dismiss on proportionality grounds is denied.

(R., pp. 81-82.)

The case proceeded to jury trial. (R., pp. 99-110.) The jury found Kinney guilty. (R., p. 111.) Kinney filed a motion to reconsider his motion to dismiss on "proportionality grounds." (R., pp. 155-163.) The district court denied Kinney's motion for reconsideration. (R., pp. 177, 189-190.) The district court entered judgment and sentenced Kinney to seven years with two years fixed. (R., pp. 173-174.) The district court retained jurisdiction. (Id.) Kinney timely appealed. (R., pp. 178-182.)

ISSUE

Kinney states the issue on appeal as:

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

(Appellant's brief, p. 7.)

The state rephrases the issue as:

Has Kinney failed to show that the district court erred when it adhered to controlling Idaho precedent and denied Kinney's motion to dismiss on proportionality grounds?

ARGUMENT

Kinney Has Failed To Show Idaho Precedent Should Be Overturned And Has Failed To Establish That SORA Constitutes Cruel And Unusual Punishment

A. Introduction

Idaho's appellate courts have repeatedly held that requiring a sex offender to register pursuant to SORA does not constitute punishment. Kinney argues that amendments to SORA have changed it from a civil, remedial statutory scheme into a punitive statutory scheme. Based upon these amendments and a Sixth Circuit case, Kinney argues that all the Idaho cases holding that sex offender registration is non-punitive are manifestly unjust and should be overturned. Kinney's argument fails. Even after SORA was amended Idaho's appellate courts have repeatedly held SORA to be non-punitive. Further, the Sixth Circuit case on which Kinney relies is inapplicable to this case and does not constitute reason to overturn controlling Idaho precedent. Kinney has failed to show the Idaho cases are manifestly unjust and has failed to overcome the strong presumption that SORA is constitutionally valid.

B. Standard Of Review

Where the constitutionality of a statute is challenged, the appellate court reviews the district court's decision de novo. State v. Rome, 160 Idaho 40, 42, 368 P.3d 660, 662 (Ct. App. 2016) (citing State v. Cobb, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998); State v. Martin, 148 Idaho 31, 34, 218 P.3d 10, 13 (Ct. App. 2009)). "The party attacking a statute on constitutional grounds bears the burden of proof and must overcome a strong presumption of validity." Id. (citing State v. Korsen, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003), *abrogated on other grounds by* Evans v. Michigan, 568 U.S. 313 (2013);

State v. Cook, 146 Idaho 261, 262, 192 P.3d 1085, 1086 (Ct. App. 2008)). "Appellate courts are obligated to seek an interpretation of a statute that upholds its constitutionality." Id. (citing State v. Manzanares, 152 Idaho 410, 418, 272 P.3d 382, 390 (2012); Martin, 148 Idaho at 34, 218 P.3d at 13).

C. Kinney Has Failed To Show Idaho Precedent Is Manifestly Wrong And Has Failed To Show By The Clearest Proof That The Effect Of Idaho's SORA Is So Punitive As To Override The Legislative Intent

The Eighth Amendment to the United States Constitution provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. The Idaho Constitution likewise prohibits cruel and unusual punishments. See Idaho Const. art. I, § 6; see also State v. Draper, 151 Idaho 576, 599, 261 P.3d 853, 876 (2011) ("[The Idaho Supreme] Court's analysis of whether a sentence violates Article I, Section 6, has traditionally tracked the U.S. Supreme Court's Eighth Amendment jurisprudence." (citations omitted)). The district court ruled, based upon Idaho Supreme Court precedent, that Idaho's SORA does not violate the Eighth Amendment or the Idaho Constitution because the registration requirements of SORA are not punishment. (R., pp. 79-82 (citing State v. Joslin, 145 Idaho 75, 85-86, 175 P.3d 764, 774-775 (2007); Smith v. State, 146 Idaho 822, 839, 2003 P.3d 1221, 1238 (2009).) Relying on a Sixth Circuit decision, Kinney argues that Idaho precedent should be overturned as manifestly wrong and Idaho's SORA should be declared "punishment" and thus subject to Eighth Amendment scrutiny. (See Appellant's brief, pp. 10-22 (citing Does #1-5 v. Snyder, 834 F.3d 696 (6th Cir. 2016).)

"When there is controlling precedent on questions of Idaho law 'the rule of stare decisis dictates that we follow it, 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.'" State v. Grant, 154 Idaho 281, 287, 297 P.3d 244, 250 (2013) (citing Greenough v. Farm Bureau Mut. Ins. Co. of Idaho, 142 Idaho 589, 592, 130 P.3d 1127, 1130 (2006); Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990)). Idaho's appellate courts have repeatedly held that requiring a convicted sex offender to register as such does not constitute "punishment."

The Idaho Legislature made findings that SORA was necessary to provide public access to information about convicted sex offenders in order to assist the public and law enforcement in the protection of children. See I.C. § 18-8302.

> The legislature finds that sexual offenders present a danger and that efforts of law enforcement agencies to protect their communities, conduct investigations and quickly apprehend offenders who commit sexual offenses are impaired by the lack of current information available about individuals who have been convicted of sexual offenses who live within their jurisdiction. The legislature further finds that providing public access to certain information about convicted sexual offenders assists parents in the protection of their children. Such access further provides a means for organizations that work with youth or other vulnerable populations to prevent sexual offenders from threatening those served by the organizations. Finally, public access assists the community in being observant of convicted sexual offenders in order to prevent them from recommitting sexual crimes. Therefore, 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.

SORA requires individuals convicted of specific sex crimes to register with a central registry. See I.C. §§ 18-8301 – 18-8331. This registration information includes the convicted sex offender's name, address, photograph, fingerprints, etc. See I.C. § 18-8305. SORA makes it a felony for a person subject to registration requirements to apply for or accept employment at a day care center, group day care facility or family day care home or to remain on those same premises. See I.C. § 18-8327. Sex offenders are also limited in the amount of time they can spend at or near schools. See I.C. § 18-8329. An offender, subject to certain restrictions, may petition the district court to be removed from the registration requirement. See I.C. § 18-8310. Idaho cases have repeatedly held SORA to be a civil, remedial statutory scheme and not to constitute punishment.

The first case to address whether SORA is punishment was Ray v. State, 133 Idaho 96, 982 P.2d 931 (1999) (abrogated on other grounds by Padilla v. Kentucky, 559 U.S. 356 (2010); see also Icanovic v. State, 159 Idaho 524, 526, 363 P.3d 365, 367 (2015)). Ray pled guilty to sexual abuse of a minor. Id. at 96, 982 P.2d at 933. Ray filed a petition for post-conviction relief asserting, among other things, that his guilty plea was invalid because the district judge did not inform him, prior to his guilty plea, that he would have to register as a sex offender. Id. After an evidentiary hearing, the district court denied Ray's petition. Id. Ray appealed. Id. The Idaho Supreme Court held the district court did not have to inform Ray of the registration requirement because the Idaho SORA did not constitute a punishment. Id. at 99-101, 982 P.2d at 934-936.

To determine whether the district court had to inform Ray of the registration requirement, the Idaho Supreme Court analyzed whether the SORA registration requirements constituted a "direct" or "collateral" consequence of the guilty plea. Id.

The Idaho Supreme Court found that the "majority view," as articulated by a Washington state case, held a registration requirement is a "collateral" consequence of a guilty plea. See id. (citing State v. Ward, 896 P.2d 1062 (Wash. 1994)). The Ray Court also noted that a California case held that a registration requirement was a "grave and direct consequence of [a] guilty plea." Id. (citing In re Birch, 515 P.2d 12, 17 (Cal. 1973).) However, the Idaho Supreme Court found the Washington Supreme Court's reasoning in Ward more persuasive and held that Idaho's SORA is not punitive, but remedial. Id. The Idaho Supreme Court cited legislative findings that the purpose of Idaho's SORA is to assist communities and local law enforcement. Id. (citing I.C. § 18-8302)). The Court ultimately held that Idaho's SORA does not constitute a punishment. Id. at 100-101, 982 P.2d at 935-936.

> In sum, Idaho's Sexual Offender Registration Act provides an essential regulatory purpose that assists law enforcement and parents in protecting children and communities. Indeed, 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. In holding that sex offender registration is a collateral, not direct, consequence of pleading guilty, we affirm the district judge's denial of Ray's post-conviction petition in this regard.

Id. at 101, 982 P.2d at 936.

In Smith v. Doe, 538 U.S. 84, 89 (2003), the United States Supreme Court examined whether the Alaska Sex Offender Registration Act constituted retroactive punishment prohibited by the *ex post facto* clause. To determine whether the Alaska Sex Offender Registration Act was a punishment, the Court needed to first determine if the Alaska Legislature intended to impose a punishment. See id. The Court determined that

Alaska intended to create a civil, non-punitive statutory scheme. Id. at 92-96. Because the Alaska Legislature intended to enact a regulatory scheme that is civil and non-punitive, the Court had to determine whether the statutory scheme was so punitive either in purpose or effect as to negate the legislature's intention to deem it civil. See id. at 89. The Court looked at the "seven factors" outlined in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169 (1963), as non-exhaustive, "useful guideposts" to analyze whether Alaska's Sex Offender Registration Act was so punitive as to negate the legislature's civil intent. See id. The Court determined that five of the Mendoza-Martinez factors were "most relevant" to its analysis. Id.

> The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; [5] or is excessive with respect to this purpose.

Id.[2]

The Court examined these five factors and held that Alaska's Sex Offender Registration Act was not punitive. Id. at 105-106. ("Our examination of the Act's effects leads to the determination that respondents cannot show, much less by the clearest proof, that the effects of the law negate Alaska's intention to establish a civil regulatory scheme. The Act is non[-]punitive.").

[2] The two Mendoza-Martinez factors not considered by Smith v. Doe were "whether it comes into play only on a finding of scienter" and "whether the behavior to which it applies is already a crime[.]" Compare Smith v. Doe, 538 U.S. at 97, with Mendoza-Martinez, 372 U.S. at 168-169. The Court did not consider these two factors because they were "of little weight" to the present case. Smith v. Doe, 538 U.S. at 105.

In State v. Gragg, 143 Idaho 74, 137 P.3d 461 (Ct. App. 2005), the Idaho Court of Appeals applied the framework and factors outlined in Smith v. Doe, to determine whether the registration requirements of Idaho's SORA constitute punishment. The state charged Gragg with failing to register as a sex offender. Id. at 75, 137 P.3d at 462. Gragg moved to dismiss the information on the grounds the registration requirement of Idaho's SORA was punishment and thus violated the *ex post facto clauses* of the Idaho and United States Constitutions. Id. The district court denied Gragg's motion. Id. Gragg entered a conditional guilty plea and appealed. Id. On appeal, the Idaho Court of Appeals first examined the text and legislative objective of Idaho's SORA. Id. at 76-77, 137 P.3d at 463-464 (citing I.C. § 18-8302[3]). The Idaho Court of Appeals concluded that the Idaho Legislature intended to create a civil scheme and observed "Gragg cites no factors, nor does this Court find any, altering the conclusion that a civil scheme was intended." Id. at 77, 137 P.3d at 464.

Using the framework outlined in Smith v. Doe, supra, the Idaho Court of Appeals then consider whether Gragg had presented the "clearest proof" necessary to "override legislative intent and transform what had been denominated a civil remedy into a criminal penalty." Id. (quoting Smith v. Doe, 538 U.S. at 92) (holding that "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.")). The Idaho Court of Appeals held that the dissemination of sex offender information over the internet and Gragg's inability to get a

[3] Idaho Code § 18-8302 was amended in 2011, after Gragg was decided. See I.C. § 18-8302 (2011 Idaho Sess. Laws, ch. 311 (S.B. 1154).) The language "sexual offenders present a significant risk of reoffense" was changed to "sexual offenders present a danger[.]" See id. The statute is otherwise unchanged.

job did not transform the civil regulatory scheme into a criminal punishment. Id. at 77-78, 137 P.3d at 464-465. The Court of Appeals also compared Idaho's SORA to Alaska's Sex Offender Registration Act (the Act found to be non-punitive in Smith v. Doe) and found that "[w]hile there are differences between Alaska's Act and our own Act, none of these distinctions dictate a difference result." Id. at 78, 137 P.3d at 465.

In State v. Joslin, 145 Idaho 75, 78, 175 P.3d 764, 767 (2007), the Idaho Supreme Court addressed whether Idaho's SORA constitutes cruel and unusual punishment. A jury found Joslin guilty of statutory rape of a 16-year-old girl. Id. On appeal Joslin argued, among other things, that the Idaho SORA constituted cruel and unusual punishment in violation of the Idaho and United States Constitutions. Id. at 85-86, 175 P.3d at 774-775. The Court cited prior Idaho Supreme Court precedent holding that the purpose of Idaho's SORA is "'not punitive, but remedial.'" Id. (quoting Ray v. State, 133 Idaho 96, 100, 982 P.2d 931, 935 (1999).) The Joslin Court concluded regarding Idaho's SORA, "it cannot constitute the infliction of cruel and unusual punishment under our State Constitution." Id. And because SORA is not punishment under Idaho law, it likewise does not constitute punishment under the United States Constitution. Id. (citing Smith v. Doe, 538 U.S. 84 (2003)).

The Idaho Supreme Court reaffirmed the remedial, non-punitive nature of Idaho's SORA in Smith v. State, 146 Idaho 822, 838-839, 203 P.3d 1221, 1237-1238 (2009). Based upon Smith's history of violent deviant sexual behavior the Sexual Offender Classification Board (the "Board") classified Smith as a violent sexual predator ("VSP"). Id. at 824, 203 P.3d at 1223-1224. Smith challenged the procedure by which the Board classified him as a VSP. Id. After deciding that the Board's procedures were

constitutionally inadequate, the Court examined whether Smith received ineffective assistance of counsel. See id. at 833-835, 203 P.3d at 1232-1234. Smith argued, among other things, that his counsel was ineffective because he failed to advance claims that Smith's VSP designation violated his rights to not be subject to an *ex post facto* law and double jeopardy. Id. at 838-839, 203 P.3d at 1237-1238. Smith argued that the VSP designation "imposes an additional punishment upon him for a crime for which he had already been punished." Id. at 838, 203 P.3d at 1237. The Court determined this argument was "without merit." Id. The Idaho Supreme Court examined a United States Supreme Court decision, Kansas v. Hendricks, 521 U.S. 346 (1997). Id. In Hendricks, the United States Supreme Court held that Kansas' Sexually Violent Predator Act, which required designated sexual predators to be civilly committed for long term care, was "non-punitive and civil in nature." Id. (citing Hendricks, 521 U.S. at 369). The United States Supreme Court based its decision, in part, on the Kansas Legislature's intent that the commitment be civil and not punitive. Id. (citing Hendricks, 521 U.S. at 361). The Idaho Supreme Court then examined the Idaho legislative findings and found that Idaho's SORA is also not punitive. Id. at 838-839, 203 P.3d 1237-1238. The Court had "little difficulty" determining that Idaho's SORA registration requirements were non-punitive when Kansas' involuntary confinement of sexually violent predators was determined to be non-punitive. Id. at 839, 203 P.3d at 1238.

> These legislative findings evince the intention to protect the public through the dissemination of information. Unlike Kansas's act, Idaho's SORA Act does not require the confinement of those individuals designated as violent sexual predators. Rather, Idaho's act imposes additional registration requirements to enhance public awareness of the potential danger posed by certain offenders. Given the Supreme Court of the United States' determination that the involuntary commitment of individuals designated

> sexually violent predators is a non-punitive exercise of the state's valid police power, we have little difficulty in concluding that the imposition of additional registration requirements for offenders deemed VSPs in Idaho is also non-punitive.

Id. The Court also noted that this holding is consistent with prior Idaho precedent holding that Idaho's SORA is not punitive but remedial. Id. (citing Ray, 133 Idaho at 101, 982 P.2d at 935-936; Gragg, 143 Idaho 74, 137 P.3d 461).

In 2011, the Idaho Supreme Court again held that SORA is regulatory in purpose and non-punitive. State v. Johnson, 152 Idaho 41, 45, 266 P.3d 1146, 1150 (2011). The 2009 Amendments to SORA were intended only as "technical amendments and updates." Id. (quoting Statement of Purpose, H.R. 178, 60th Leg., 1st Reg. Sess. (Idaho 2009)).

> SORA has changed little since this Court considered it in *Ray* and since the Court of Appeals considered it in *Gragg*. The presently codified SORA findings in I.C. § 18–8302 are nearly identical to the version we evaluated in *Ray*. This Court has thus already concluded that SORA is regulatory in purpose. Furthermore, the Court of Appeals' analysis in *Gragg* aptly demonstrated that SORA, generally, is nonpunitive in effect.

Johnson, 152 Idaho at 45, 266 P.3d at 1150 (internal citation omitted); see also State v. Hardwick, 150 Idaho 580, 582-583, 249 P.3d 379, 381-382 (2011) (Idaho Legislature intended SORA to be remedial and not punitive).

In 2014, the Idaho Court of Appeals also determined that the 2001 and 2009 Amendments to SORA did not change SORA from a civil and non-punitive act into a punitive act. State v. Groves, 156 Idaho 552, 556-557, 328 P.3d 532, 536-537 (Ct. App. 2014) (Court of Appeals determined that the Supreme Court's SORA analysis in Johnson was dicta because Johnson was decided on a jurisdictional question; however, the Court of Appeals found the SORA analysis persuasive and applied it in Groves).

Kinney argues that Smith v. State, Joslin, and Ray are manifestly wrong because of amendments to SORA since Ray was decided in 1999. (See Appellant's brief, pp. 12-13.) Kinney points to the following four amendments as indicating that Idaho's SORA is punitive in nature:

> The duty to update registration 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.

(See Appellant's brief, pp. 12-13.) Kinney's arguments are without merit.

The amendments cited by Kinney occurred between 2001 and 2006. Contrary to Kinney's assertion on appeal, the "in person" registration requirement was not added in 2011, but was added in 2005. See 2005 Idaho Sess. Laws, ch. 233 (H.B. 97); I.C. § 18-8307(5)(b) (2005). The Idaho appellate courts have addressed SORA after all these amendments were enacted and have held SORA to be non-punitive. See, e.g., Johnson, 152 Idaho at 45, 266 P.3d at 1150. In 2011, the Idaho Supreme Court held that SORA has changed "little" since Ray and Gragg were decided and it was non-punitive. Id.

> SORA has changed little since this Court considered it in *Ray* and since the Court of Appeals considered it in *Gragg*. The presently codified SORA findings in I.C. § 18–8302 are nearly identical to the version we evaluated in *Ray*. *Compare* 1998 Idaho Sess. Laws 1276 *with* I.C. § 18–8302 (Supp.2011). This Court has thus already concluded that SORA is regulatory in purpose. Furthermore, the Court of Appeals' analysis in *Gragg* aptly demonstrated that SORA, generally, is nonpunitive in effect.

Id. (internal footnote omitted). More recently, the Idaho Court of Appeals reiterated: "[a] long line of Idaho cases have upheld SORA over ex post facto challenges." Knox v. State, No. 44807, 2017 WL 4321282, at *3 (Idaho Ct. App. Sept. 29, 2017) (quoting Groves, 156 Idaho at 555, 328 P.3d at 535). "This Court has 'concluded that the effects of sex offender registration are not so punitive as to override the legislative intent to create a civil, regulatory scheme.'" Id. (quoting Groves, 156 Idaho at 555, 328 P.3d at 535)). Therefore, contrary to Kinney's argument on appeal, the Idaho appellate courts have addressed SORA since the initial decision in Ray.

Even if the individual amendments are considered, they do not amount to clear evidence that the SORA statutory scheme is so punitive either in purpose or effect as to negate the legislature's intent to deem it civil. The "in person" registration requirement was addressed by the Idaho Court of Appeals in Gragg. See Gragg, 143 Idaho at 78, 137 P.3d at 465 (citing I.C. § 18-8307(5)(b)[4]). The Court held that Idaho's SORA requirement to register in person is not "the equivalent of an affirmative disability to such a level as to constitute punishment." Id.

[4] The "in person" annual registration requirement set forth in Idaho Code 18-8307(5)(b) and referenced in Gragg required the registrant to appear in person within 10 days of mailing the registration. See I.C. § 18-8307(5)(b) (2005). In 2006, the time period was changed to 5 days and was changed from "annual registration" to simply "registration" and was re-codified as I.C. § 18-8307(5)(c). See 2006 Idaho Sess. Laws, ch. 178 (S.B. 1332). These changes do not affect the Gragg Court's conclusions.

The 2004 amendment, prohibiting sex offenders from working at, or remaining on the premises of, a day care center likewise does not amount to the "clearest proof" necessary to change the civil nature of Idaho's SORA to a punishment. See I.C. § 18-8327. The United States Supreme Court has held that "occupational debarment" is non-punitive. See Hudson v. United States, 522 U.S. 93, 104 (1997) ("First, neither money penalties nor debarment has historically been viewed as punishment."); see also Smith v. Doe, 538 U.S. at 100. Kinney has failed to show that these limited restrictions on employment constitute punishment.

The 2006 amendment which prohibited sex offenders from being on or residing near school grounds likewise does not constitute punishment. See I.C. § 18-8329. The Sixth Circuit case on which Kinney relies found that the "geographical restrictions" on sex offenders are "very burdensome, especially in densely populated areas." Does#1-5, 834 F.3d at 701-702. The Sixth Circuit based its decision on a map prepared by an expert witness. See id. No such evidence is present in the record before the Court in this case. This is a fatal flaw in Kinney's argument. There is nothing in this record on which this Court can base a finding that any geographical restrictions placed on sex offenders in Idaho are so burdensome as to constitute punishment. This is especially so considering the differences in population density in Idaho versus Michigan. Further, Kinney has failed to account for the various exceptions and exemptions present in Idaho Code § 18-8329, which actually allow a sex offender to be on school grounds under certain circumstances See § 18-8329(2)(a)-(f).

The Appellate Court of Illinois distinguished Does#1-5 on similar grounds. See People v. Parker, 70 N.E.3d 734, 752, appeal denied, 80 N.E.3d 5 (Ill. 2017). The Illinois appellate court concluded:

> Although we agree that the Sixth Circuit's decision in *Does[#1-5]* is a thorough and persuasive analysis of Michigan's sex offender registration law that raises real areas of concern, it nevertheless concerns a different statutory scheme and is not binding on this court. We also note that the record in this case, in which the constitutional claim is raised in the context of a criminal appeal, simply does not contain the extensive demonstration—including maps visually depicting the effects of the Michigan law's geographical restrictions—that was relied on by the Sixth Circuit in *Does[#1-5]* to show the significant punitive effects of the Michigan law.

Id. Kinney has likewise failed to demonstrate by the clearest evidence that any geographic restrictions on sex offender movement imposed by SORA are so burdensome as to override the legislative intent to create a civil, remedial and non-punitive scheme.

Finally, Kinney's argument that posting information on the internet turned Idaho's SORA into a criminal penalty has already been rejected by the Idaho Court of Appeals. See Gragg, 143 Idaho at 78, 137 P.3d at 465. Even if dissemination of sex offender information over the internet is "humiliating" that does not create a criminal penalty. Gragg, 143 Idaho at 77, 137 P.3d at 464 ("Gragg argues that registering as a sex offender is humiliating and dissemination of that information over the Internet acts as a state mandated scarlet letter encouraging public shunning of individuals required to register. This alleged effect of sex offender registration does not lead to a conclusion that the Act creates a criminal penalty, however."). "'Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.'" Id. (quoting Smith v. Doe, 538 U.S. at 99). Kinney has failed to show

that the long line of Idaho cases holding SORA to be civil and non-punitive are so manifestly wrong as to require they all be overturned.

D. Even If SORA Is Considered Punitive It Is Not Cruel And Unusual Punishment And Does Not Violate The Eighth Amendment Or Article 1, § 6 Of The Idaho Constitution

Even if this Court decides that the long line of Idaho cases holding that the registration requirements of Idaho's SORA are non-punitive should be overturned, requiring Kinney to register under Idaho's SORA does not constitute cruel and unusual punishment.[5] Both the Idaho Constitution and United States Constitution prohibit the imposition of cruel and unusual punishments. See U.S. Const. amend. VIII; Idaho Const. art. I, § 6. Whether a sentence violates Article I, Section 6, "has traditionally tracked the U.S. Supreme Court's Eighth Amendment jurisprudence." Draper, 151 Idaho at 599, 261 P.3d at 876. A sentence is cruel and unusual if it is "grossly disproportionate" and is "so out of proportion to the gravity of the offense to shock the conscience of reasonable people." State v. Adamcik, 152 Idaho 445, 485, 272 P.3d 417, 457 (2012) (quoting State v. Grazian, 144 Idaho 510, 517, 164 P.3d 790, 797 (2007)).

> When reviewing a claim of cruel and unusual punishment the Court uses a proportionality analysis limited to cases which are out of proportion to the gravity of the offense committed. The Court compares the crime committed and the sentence imposed to determine whether the sentence is grossly disproportionate. This gross disproportionality test is equivalent to the standard under the Idaho Constitution which focuses on whether the punishment is so out of proportion to the gravity of the offense to shock the conscience of reasonable people. An intra- and inter-jurisdictional

[5] Even if the registration requirements of SORA were found to be unconstitutional Kinney does not explain why such a finding would entitle him to a dismissal of the charge. (See Appellant's brief, pp. 8-26; R. pp. 68-75.) Kinney does not argue on appeal that the crime, Idaho Code § 18-1508A, itself is unconstitional. Any potential remedy for an unconstitional punishment would not involve the dismissal of the charge.

> analysis is appropriate only in the rare case where the sentence is grossly disproportionate to the crime committed.

Id. (quoting Grazian, 144 Idaho at 517, 164 P.3d at 797). Kinney argues that requiring him to register pursuant to SORA is grossly disproportionate to his crime because it "would impose significant restrictions on where Mr. Kinney may live, work, and even loiter." (Appellant's brief, p. 24 (citations omitted).) Kinney's argument is without support in the record. Kinney does not cite to any evidence in the record that shows, explains or proves these "significant restrictions." As explained above, Kinney, unlike the plaintiffs in Does#1-5, has not provided this Court with evidence that he would be significantly restricted in any of these areas.

Further, even if Kinney were able to prove these restrictions, these restrictions are not grossly disproportionate and are not so out of proportion to the gravity of the offense so as to shock the conscience of reasonable people. Kinney was 25 years old and the victim, B.B., was 16 years old. (R., pp. 78-79.) Officer Cannon saw B.B exit the car and cry. (R., pp. 78-79.) Officer Cannon became concerned because "it was obvious Kinney showed very strong controlling behavior over [B.B.]." (R., p. 14.) Kinney sent B.B. a picture of his erect penis. (Id.) Kinney repeatedly instructed B.B. to "prove" her love by sending him photographs. (Id.) Kinney also repeatedly accused B.B. of cheating on him. (Id.) A jury found Kinney guilty of Sexual Battery of a Minor in violation of Idaho Code § 18-1508A. (R., p. 111.) B.B.'s father gave testimony as part of Kinney's sentencing. (See 10/21/16 Tr., p. 7, L. 25 – p. 12, L. 16.) As a result of Kinney's offense, B.B. had to go into "full-blown" counseling. (10/21/16 Tr., p. 9, Ls. 13-21.)

> Q. Have you talked to your daughter about how the counseling's going?

A. Yes, I have.

Q. How's it going?

A. She said it's going good. She's trying. She's trying to put it behind her and – but, you know, when you have a man that's sexually assaulting and grabbing you by your ponytail and yelling in your face, and that could have turned out way worst [sic]. You know, you see all these shows on TV, you know. They're not lying about stuff like that. That kind of stuff happens and it just so happens that it happened to my daughter, and it's lucky that it didn't go any further than it did and the cops got him instead.

(10/21/16 Tr., p. 11, Ls. 5-18.) The presentence investigator concluded that Kinney should be placed in custody for a period of retained jurisdiction. (PSI, p. 14 ("Based on the level of assessed risk and need and other protective factors as discussed above, Mr. Kinney appears to be an appropriate candidate for an order of retained jurisdiction program to address assessed criminogenic needs.").) Further, despite substantial evidence and his own admissions to the contrary, Kinney "adamantly" denied having sexual contact with B.B. (See Psychosexual Evaluation, p. 6.) The psychosexual evaluator found that "Mr. Kinney presents with several empirically supported risk factors related to recidivism." (See id., pp. 11-12.) The evaluator concluded that Kinney may continue to seek out sexual relationships with adolescent females. (See id. ("Upon release, future harm may come in the way of seeking out relationships (including sexual) with adolescent females.").) At the sentencing hearing, the district court found some of Kinney's denials in his presentence and psychosexual evaluations disturbing. (R., pp. 171-172.) The district court agreed with the presentence investigator's conclusion and retained jurisdiction. (R., pp. 173-174.)

It is not grossly disproportionate, nor does it shock the conscious that Kinney, who had repeated sexual contact – including intercourse – with a 16-year-old girl, and who was sentenced to incarceration, would be required to register under SORA. Kinney has failed to show Idaho's SORA violates the Eighth Amendment of the United States Constitution or Article I, § 6, of the Idaho Constitution, either generally or as applied in this case.

CONCLUSION

The state respectfully requests that this Court affirm Kinney's conviction.

DATED this 22nd day of November, 2017.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 22nd day of November, 2017, served a true and correct copy of the foregoing BRIEF OF RESPONDENT by emailing an electronic copy to:

BEN P. MCGREEVY
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Ted S. Tollefson
TED S. TOLLEFSON
Deputy Attorney General

TST/dd