

S-12150

IN THE SUPREME COURT FOR THE STATE OF ALASKA

JOHN DOE (A pseudonym),)
)
Appellant,)
)
vs.)
)
STATE OF ALASKA,)
)
Appellee.)
) Supreme Ct. No. S-12150
Trial Ct. No. 3AN-05-04434 CI

A CIVIL MERIT APPEAL FROM THE
FINAL JUDGMENT OF THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT, AT ANCHORAGE
THE HONORABLE CRAIG F. STOWERS, JUDGE

BRIEF OF APPELLANT

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MARILYN MAY, CLERK

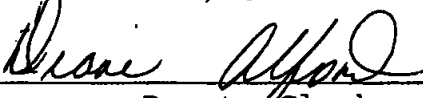

Deputy Clerk

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Alaska Constitution
art. I, § 12 (pre-1994)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

Alaska Constitution
art. I, § 12 (current)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.

Alaska Constitution
art. I, § 22

The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section.

1994 Alaska Session Laws ch. 41, § 1 :

The legislature finds that

- (1) sex offenders pose a high risk of reoffending after release from custody;
- (2) protecting the public from sex offenders is a primary governmental interest;
- (3) the privacy interests of persons convicted of sex offenses are less important than the government's interest in public protection; and

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(4) release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety.

1998 Alaska Session Laws ch. 106, § 25(a) & (c)

APPLICABILITY. (a) A sex offender or child kidnapper with, before the effective date of this Act, (1) one conviction for an aggravated sex offense, (2) two or more convictions for a sex offense or child kidnapping, or (3) one conviction for a child kidnapping and one conviction for a sex offense, regardless of whether the offender or kidnapper has been unconditionally discharged from that conviction or convictions, shall register under AS 12.63.010, as amended by secs. 7--11 of this Act, by the 60th day after the effective date of this Act. A sex offender or child kidnapper with only one conviction for a sex offense that is not an aggravated sex offense or only one conviction for a child kidnapping, and who was unconditionally discharged from that offense before July 1, 1984, does not have to register under this Act. A sex offender or child kidnapper with only one conviction for a sex offense that is not an aggravated sex offense or only one conviction for a child kidnapping who was required to register under sec. 12, ch. 41, SLA 1994, shall continue to register as provided by AS 12.63.010, as amended by secs. 7--11 of this Act.

1998 Alaska Session Laws ch. 81, § 22

"APPLICABILITY OF SECTIONS 15 AND 16. (a) Except as otherwise provided in this subsection, a sex offender with only one conviction for a sex offense that is a violation of > AS 11.41.460 or > AS 11.61.127 who has been unconditionally discharged from that sex offense before July 1, 1984, is not required to register under or otherwise comply with AS 12.63. A sex offender who has been unconditionally discharged from a sex offense that is a violation of > AS 11.41.460 or > AS 11.61.127 on or after July 1, 1984, but before the effective date of this Act, shall register under and otherwise comply with AS 12.63 by July 1, 1998.

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A sex offender with two or more convictions for a sex offense or more than two convictions of AS 11.41.460 before a person under 16 years of age before the effective date of this Act, regardless of whether the sex offender was unconditionally released from the sex offenses before, on, or after July 1, 1984, who was not required to register under sec. 12, ch. 41, SLA 1994, shall register under and otherwise comply with AS 12.63 by July 1, 1998.

1998 Alaska Session Laws ch., 106, § 25

"APPLICABILITY. (a) A sex offender or child kidnapper with, before the effective date of this Act, (1) one conviction for an aggravated sex offense, (2) two or more convictions for a sex offense or child kidnapping, or (3) one conviction for a child kidnapping and one conviction for a sex offense, regardless of whether the offender or kidnapper has been unconditionally discharged from that conviction or convictions, shall register under > AS 12.63.010, as amended by secs. 7--11 of this Act, by the 60th day after the effective date of this Act. A sex offender or child kidnapper with only one conviction for a sex offense that is not an aggravated sex offense or only one conviction for a child kidnapping, and who was unconditionally discharged from that offense before July 1, 1984, does not have to register under this Act. A sex offender or child kidnapper with only one conviction for a sex offense that is not an aggravated sex offense or only one conviction for a child kidnapping who was required to register under sec. 12, ch. 41, SLA 1994, shall continue to register as provided by > AS 12.63.010, as amended by secs. 7--11 of this Act.

"(b) A conviction for a sex offense or child kidnapping before the effective date of this Act is a sex offense or child kidnapping for purposes of the duration of registration requirement of AS 12.63.020(a), as amended by sec. 12 of this Act.

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"(c) In this section, "aggravated sex offense," "sex offender or child kidnapper," "sex offense," and "child kidnapping" have the meanings given in > AS 12.63.100, as amended by secs. 14--16 of this Act."

Alaska Statute, Sec. 12.55.185(15)

(15) "unconditional discharge" means that a defendant is released from all disability arising under a sentence, including probation and parole;

Alaska Statute Sec. 12.63.010

(a) A sex offender or child kidnapper who is physically present in the state shall register as provided in this section. The sex offender or child kidnapper shall register

(1) within the 30-day period before release from an in-state correctional facility;

(2) by the next working day following conviction for a sex offense or child kidnapping if the sex offender is not incarcerated at the time of conviction; or

(3) by the next working day of becoming physically present in the state.

(b) A sex offender or child kidnapper required to register under (a) of this section shall register with the Department of Corrections if the sex offender or child kidnapper is incarcerated or in person at the Alaska state trooper post or municipal police department located nearest to where the sex offender or child kidnapper resides at the time of registration. To fulfill the registration requirement, the sex offender or child kidnapper shall

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(1) complete a registration form that includes, at a minimum,

(A) the sex offender's or child kidnapper's name, address, place of employment, date of birth;

(B) each conviction for a sex offense or child kidnapping for which the duty to register has not terminated under AS 12.63.020, date of sex offense or child kidnapping convictions, place and court of sex offense or child kidnapping convictions, whether the sex offender or child kidnapper has been unconditionally discharged from the conviction for a sex offense or child kidnapping and the date of the unconditional discharge; if the sex offender or child kidnapper asserts that the offender or kidnapper has been unconditionally discharged, the offender or kidnapper shall supply proof of that discharge acceptable to the department;

(C) all aliases used;

(D) driver's license number;

(E) description, license numbers, and vehicle identification numbers of motor vehicles the sex offender or child kidnapper has access to regardless of whether that access is regular or not;

(F) any identifying features of the sex offender or child kidnapper;

(G) anticipated changes of address; and

(H) a statement concerning whether the offender or kidnapper has had treatment for a mental abnormality or personality disorder since the date of conviction for an offense requiring registration under this chapter;

(2) allow the Alaska state troopers, Department of Corrections, or municipal police to take a complete set of the sex offender's or child kidnapper's fingerprints and to take the sex offender's or child kidnapper's photograph.

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(c) If a sex offender or child kidnapper changes residence after having registered under (a) of this section, the sex offender or child kidnapper shall provide written notice of the change by the next working day following the change to the Alaska state trooper post or municipal police department located nearest to the new residence or, if the residence change is out of state, to the central registry.

(d) A sex offender or child kidnapper required to register

(1) for 15 years under (a) of this section and AS 12.63.020(a)(2) shall, annually, during the term of a duty to register under AS 12.63.020, on a date set by the department at the time of the sex offender's or child kidnapper's initial registration, provide written verification to the department, in the manner required by the department, of the sex offender's or child kidnapper's address and notice of any changes to the information previously provided under (b)(1) of this section;

(2) for life under (a) of this section and AS 12.63.020(a)(1) shall, not less than quarterly, on a date set by the department, provide written verification to the department, in the manner required by the department, of the sex offender's or child kidnapper's address and any changes to the information previously provided under (b)(1) of this section.

(e) The registration form required to be submitted under (b) of this section and the annual or quarterly verifications must be sworn to by the offender or kidnapper and contain an admonition that a false statement shall subject the offender or kidnapper to prosecution for perjury.

(f) In this section, "correctional facility" has the meaning given in AS 33.30.901.

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Alaska Statute Sec. 12.63.020

(a) The duty of a sex offender or child kidnapper to comply with the requirements of AS 12.63.010 for each sex offense or child kidnapping

(1) continues for the lifetime of a sex offender or child kidnapper convicted of

(A) one aggravated sex offense; or

(B) two or more sex offenses, two or more child kidnappings, or one sex offense and one child kidnapping; for purposes of this section, a person convicted of indecent exposure before a person under 16 years of age under AS 11.41.460 more than two times has been convicted of two or more sex offenses;

(2) ends 15 years following the sex offender's or child kidnapper's unconditional discharge from a conviction for a single sex offense that is not an aggravated sex offense or for a single child kidnapping if the sex offender or child kidnapper has supplied proof that is acceptable to the department of the unconditional discharge; the registration period under this paragraph

(A) is tolled for each year that a sex offender or child kidnapper

(i) fails to comply with the requirements of this chapter;

(ii) is incarcerated for the offense or kidnapping for which the offender or kidnapper is required to register or for any other offense;

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(B) may include the time a sex offender or child kidnapper was absent from this state if the sex offender or child kidnapper has complied with any sex offender or child kidnapper registration requirements of the jurisdiction in which the offender or kidnapper was located and if the sex offender or child kidnapper provides the department with proof of the compliance while the sex offender or child kidnapper was absent from this state; and

C) continues for a sex offender or child kidnapper who has not supplied proof acceptable to the department of the offender's or kidnapper's unconditional discharge for the sex offense or child kidnapping requiring registration.

(b) The department shall adopt, by regulation, procedures to notify a sex offender or child kidnapper who, on the registration form under AS 12.63.010, lists a conviction for a sex offense or child kidnapping that is a violation of a former law of this state or a law of another jurisdiction, of the duration of the offender's or kidnapper's duty under (a) of this section for that sex offense or child kidnapping. As a part of the regulations, the department shall require the offender or kidnapper to supply proof acceptable to the department of unconditional discharge and the date it occurred.

Alaska Statute Sec. 12.63.030

(a) If a sex offender or child kidnapper notifies the department that the sex offender or child kidnapper is moving from the state, the department shall notify the Federal Bureau of Investigation and the state where the sex offender or child kidnapper is moving of the sex offender's or child kidnapper's intended address.

(b) If a sex offender or child kidnapper fails to register or to verify the sex offender's or child kidnapper's address and registration under this chapter, or the department does not know the location of a sex offender or child kidnapper required to register under this chapter, the department shall immediately notify the Federal Bureau of Investigation.

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Alaska Statute Sec. 12.63.100

In this chapter,

(1) "aggravated sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

(i) sexual assault in the first degree;

(ii) sexual assault in the second degree;

(iii) sexual abuse of a minor in the first degree; or

(iv) sexual abuse of a minor in the second degree; or

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under AS 11.41.410, 11.41.434, or a similar law of another jurisdiction;

(2) "child kidnapping" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit kidnapping;

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(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit kidnapping if the victim was under 18 years of age at the time of the offense; or

C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under AS 11.41.300, or a similar law of another jurisdiction, if the victim was under 18 years of age at the time of the offense;

(3) "conviction" means that an adult, or a juvenile charged as an adult under AS 47.12 or a similar procedure in another jurisdiction, has entered a plea of guilty, guilty but mentally ill, or nolo contendere, or has been found guilty or guilty but mentally ill by a court or jury, of a sex offense or child kidnapping regardless of whether the judgment was set aside under AS 12.55.085 or a similar procedure in another jurisdiction or was the subject of a pardon or other executive clemency; "conviction" does not include a judgment that has been reversed or vacated by a court.

(4) "department" means the Department of Public Safety;

(5) "sex offender or child kidnapper" means a person convicted of a sex offense or child kidnapping in this state or another jurisdiction regardless of whether the conviction occurred before, after, or on January 1, 1999;

(6) "sex offense" means

(A) a crime under AS 11.41.100(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit a sexual offense, or a similar offense under the laws of the other jurisdiction; in this subparagraph, "sexual offense" has the meaning given in AS 11.41.100(a)(3);

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(B) a crime under AS 11.41.110(a)(3), or a similar law of another jurisdiction, in which the person committed or attempted to commit one of the following crimes, or a similar law of another jurisdiction:

- (i) sexual assault in the first degree;
- (ii) sexual assault in the second degree;
- (iii) sexual abuse of a minor in the first degree; or
- (iv) sexual abuse of a minor in the second degree;

(C) a crime, or an attempt, solicitation, or conspiracy to commit a crime, under the following statutes or a similar law of another jurisdiction:

- (i) AS 11.41.410 -- 11.41.438;
- (ii) AS 11.41.440(a)(2);
- (iii) AS 11.41.450 -- 11.41.458;
- (iv) AS 11.41.460 if the indecent exposure is before a person under 16 years of age and the offender has a previous conviction for that offense;
- (v) AS 11.61.125 or 11.61.127;
- (vi) AS 11.66.110 or 11.66.130(a)(2) if the person who was induced or caused to engage in prostitution was 16 or 17 years of age at the time of the offense; or
- (vii) former AS 11.15.120, former 11.15.134, or assault with the intent to commit rape under former AS 11.15.160, former AS 11.40.110, or former 11.40.200;

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(7) "unconditional discharge" has the meaning given in AS 12.55.185.

Alaska Statute Sec. 18.65.087

(a) The Department of Public Safety shall maintain a central registry of sex offenders and child kidnappers and shall adopt regulations necessary to carry out the purposes of this section and AS 12.63. A post of the Alaska state troopers or a municipal police department that receives registration or change of address information under AS 12.63.010 shall forward the information within five working days of receipt to the central registry of sex offenders and child kidnappers. Unless the sex offender or child kidnapper provides proof satisfactory to the department that the sex offender or child kidnapper is not physically present in the state or that the time limits described in AS 12.63.010 have passed, the Department of Public Safety may enter and maintain in the registry information described in AS 12.63.010 about a sex offender or child kidnapper that the department obtains from

- (1) the sex offender or child kidnapper under AS 12.63;
- (2) a post of the Alaska state troopers or a municipal police department under this subsection;
- (3) a court judgment under AS 12.55.148;
- (4) the Department of Corrections under AS 33.30.012 or 33.30.035;
- (5) the Federal Bureau of Investigation or another sex offender registration agency outside this state if the information indicates that a sex offender or child kidnapper is believed to be residing or planning to reside in the state or cannot be located;

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(6) a criminal justice agency in the state or another jurisdiction;

(7) the department's central repository under AS 12.62; information entered in the registry from the repository is not subject to the requirements of AS 12.62.160(c)(3) or (4); or

(8) another reliable source as defined in regulations adopted by the department.

(b) Information about a sex offender or child kidnapper that is contained in the central registry, including sets of fingerprints, is confidential and not subject to public disclosure except as to the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description of motor vehicles, license numbers of motor vehicles, and vehicle identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with requirements of AS 12.63 or cannot be located.

(c) Notwithstanding (b) of this section, if a sex offender has been convicted in this state or another jurisdiction of a sex offense identified as "incest," that offense may be disclosed under (b) of this section only as a "felony sexual abuse of a minor" conviction.

(d) The Department of Public Safety

(1) shall adopt regulations to

(A) allow a sex offender or child kidnapper to review sex offender or child kidnapper registration information that refers to that sex offender or child kidnapper, and if the sex offender or child kidnapper believes the information is inaccurate or incomplete, to request the department to correct the information; if the department finds the information is inaccurate or incomplete, the department shall correct or supplement the information;

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(B) ensure the appropriate circulation to law enforcement agencies of information contained in the central registry;

(C) ensure the anonymity of members of the public who request information under this section;

(2) shall provide to the Department of Corrections and municipal police departments the forms and directions necessary to allow sex offenders and child kidnappers to comply with AS 12.63.010;

(3) may adopt regulations to establish fees to be charged for registration under AS 12.63.010 and for information requests; the fee for registration shall be based upon the actual costs of performing the registration and maintaining the central registry but may not be set at a level whereby registration is discouraged; the fee for an information request may not be greater than \$ 10;

(4) shall remove from the central registry of sex offenders and child kidnappers under this section information about a sex offender or child kidnapper required to register under AS 12.63.020(a)(2) at the end of the sex offender's or child kidnapper's duty to register if the offender or kidnapper has not been convicted of another sex offense or child kidnapping and the offender or kidnapper has supplied proof of unconditional discharge acceptable to the department; in this paragraph, "sex offense" and "child kidnapping" have the meanings given in AS 12.63.100.

(e) The name, address, and other identifying information of a member of the public who makes an information request under this section is not a public record under AS 40.25.100 -- 40.25.220.

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(f) When a sex offender or child kidnapper registers under AS 12.63, the Department of Public Safety shall make reasonable attempts to verify that the sex offender or child kidnapper is residing at the registered address. Reasonable attempts at verifying an address include sending certified mail, return receipt requested, to the offender or kidnapper at the registered address. The department shall make reasonable efforts to locate an offender or kidnapper who cannot be located at the registered address.

(g) The department, at least quarterly, shall compile a list of those persons with a duty to register under AS 12.63.010 who have failed to register, whose addresses cannot be verified under (f) of this section, or who otherwise cannot be located. The department shall post this list on the Internet and request the public's assistance in locating these persons.

Alaska Statute 33.30.241

Sec. 33.30.241. Effect of judgment of conviction on civil rights.

(a) A person who is convicted of a felony involving moral turpitude as defined in AS 15.60.010 is disqualified from voting in a state or municipal election until the person's unconditional discharge.

(b) A person who is convicted of a felony is disqualified from serving as a juror until the person's unconditional discharge.

(c) In this section "unconditional discharge" has the meaning given in AS 12.55.185 .

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JURISDICTION

Final judgment was entered by the trial court on 15 November 2005 and distributed pursuant to Rule 58.1 of the Alaska Rules of Civil Procedure on 18 November 2005. (Exc. 22). Timely notice of appeal was filed on 13 December 2005 and this Court now has jurisdiction under AS 22.05.010(b).

PARTIES

John Doe, the appellant, is an individual who was allowed to prosecute this matter under pseudonym to protect his identity. (Exc. 7-8). Appellant will be referred to herein as "Doe."

The Appellee is the State of Alaska, and will be referred to herein as "the State." (Exc. 01).

ISSUES PRESENTED FOR REVIEW

This case challenges the constitutionality of the Alaska Sex Offender Registration Act ("ASORA") as applied to John Doe. The issues presented are whether the ASORA infringes on fundamental rights and whether the reasoning in Doe v. Department of Public Safety, 92 P.3d 398 (Alaska 2004) should be extended to determine whether the ASORA represents the least restrictive means available to the State to accomplish the goals intended by the ASORA. (Exc. 01-06).

STATEMENT OF THE CASE

A. Relevant Facts

Doe was convicted of a sexual offense in 1985. (Exc. 78-87). He served all of his sentence, was released to the community and all of his civil rights have been restored. Id. He has successfully reintegrated into the community, established a business, is a respected professional and his name has never been listed on the State's website. (Exc. 80-85), (Exc. 86).

The reason Doe's name has never been listed on the State's internet site is that John Doe is the same John Doe that was designated as John Doe I in Doe v. Otte, 259 F.3d 979 (9th cir. 2001), reversed by Smith v. Doe, 538 U.S. 84 (2003), on remand to, Doe v. Tandeske, 361 F.3d 594 (9th Cir. 2004). Through the course of the proceedings in those cases, an injunction has been in effect continuously since 1994. (Exc. 86-87). Hence, he has never been listed on the State's internet site, and stands to suffer grievous, irreparable loss if the State is allowed to post his picture and personal information on its web site. Id.

B. Proceedings Below

The federal actions, in which Doe was a party, were dismissed by agreement, with the federal court abstaining from exercising jurisdiction over any state law claims. (Exc. 87). That being so,

a complaint was filed in the trial court on 19 January 2005. (Exc. 01). Doe sought an injunction against disclosure and sought a declaratory judgment that the ASORA, as applied to him, denied due process under Article I, Sec. 7 of the Alaska Constitution. (Exc. 01-08).

After briefing and oral argument, the trial court entered a decision denying the injunction on 30 August 2005. (Exc. 09-19). In denying the injunction, the trial court also held that, in light of the irreparable harm to Doe, it would be unjust not to grant a stay pending appeal to this Court. (Exc. 19). In ordering the stay, the trial court directed that the State could not attempt to apply the provisions of the ASORA to Doe pending this appeal. (Exc. 19).

In keeping with the trial court's decision, the parties entered into a stipulation for entry of a final judgment. (Exc. 20). The stipulation recognized that the order denying the injunction fully resolved all issues raised in the complaint, and there was no reason to delay entry of a final judgment or an appeal. Id. The final judgment in favor of the State was entered on 15 November 2005 and this appeal follows. (Exc. 22).

ARGUMENT

I. STANDARD OF REVIEW

The constitutionality of a statute and matters of constitutional or statutory interpretation are questions of law to which this Court applies its independent judgment. Tesoro Petroleum Corp. v. State, 42 P.3d 531, 535 (Alaska 2002). In applying its independent judgment, this Court will adopt the rule of law "that is most persuasive in light of precedent, reason, and policy." State v. Planned Parenthood of Alaska, 35 P.3d 30, 34 (Alaska 2001) (quoting Guin v. Ha, 591 P.2d 1281, 1284 n.6 (Alaska 1979)).

Findings of fact are reviewed for clear error, Vezey v. Green, 35 P.3d 14, 19-20 (Alaska 2001), which requires that great deference be given to the findings of the superior court. Matanuska Elec. Ass'n, Inc. v. Rewire the Bd., 36 P.3d 685, 700-01 (Alaska 2001).

II. THE HOLDING IN DOE V. DEPARTMENT OF PUBLIC SAFETY, 92 P.3D 398 (ALASKA 2004) SHOULD BE APPLIED AND EXTENDED TO PROTECT DOE FROM BEING SUBJECTED TO AN UNCONSTITUTIONAL STATUTORY SCHEME THAT IMPOSES DUTIES, INVADES FUNDAMENTAL RIGHTS AND DENIES DUE PROCESS OF LAW IN VIOLATION OF ARTICLE I, SEC. 7 OF THE ALASKA CONSTITUTION.

1. The Trial Court's Decision.

The trial court concluded that Doe would suffer irreparable harm if forced to register and if his personal information were

released to the public. (Exc. 12). Nonetheless, the trial court denied an injunction, holding it was bound by Patterson v. State, 985 P.2d 1007 (Ak. App. 1999) (Exc. 13); and by the fact that this Court's decision in Doe v. Department of Public Safety, was limited in application to those individuals whose convictions were set aside. (Exc. 14-18). In reaching its conclusions, the trial court recognized that "[i]t is not inconceivable that the Alaska Supreme Court could expand the limited Doe holding to encompass plaintiff's circumstances," but the trial court was not free to craft a new rule that would abrogate Patterson. (Exc. 18).

Because the relief sought was not available before the trial court, and because an appeal to this Court was anticipated, the trial court granted an injunction pending appeal which prevents enforcement of the ASORA as to Doe pending this appeal. (Exc. 19). The trial court may have been correct in concluding it lacked the power to grant the requested relief; however, to the extent its decision can be read to mean that Doe v. Department of Public Safety could not be extended to encompass Doe and others like him, the trial court was wrong.

The trial court was wrong because set-aside recipients are not the only previously convicted individuals who regain the right to be left alone, and they are not the only previously convicted

individuals who regain all of their fundamental rights that are entitled to the full protections of the due process.

In light of this Court's decision in Doe v. Department of Public Safety, 92 P.3d 398 (Alaska 2004), it is unreasonable to contend that a previously convicted individual, who has fully reintegrated into the community, no longer has the right to privacy. Id., 92 P.3d at 409. It would be insupportable to suggest these individuals no longer have the right to be left alone. Id. See also Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (The right to be let alone is "the most comprehensive of rights and the right most valued by civilized men."). If these untenable propositions are adopted by this Court, not only would the individual then be subject to mandatory reporting to the police and loss of significant constitutional liberties, he could be subject to diminished expectations under other constitutional provisions aimed at safeguarding fundamental rights.

Contrary to the State's position, and the apparent belief of the trial court, the right to be left alone, and the right of privacy are not rights afforded only to those individuals who have had their convictions set aside. (Exc. 18-19). Rather, they are rights afforded to all citizens. This must include those who have

completed all of their sentences, and reintegrated into the community because, like Doe, many of these individual have become the object of respect, rather than fear or loathing. See Abraham v. State, 585 P.2d 526, 531 (Alaska 1978) (describing the right, under the Alaska Constitution, to reintegration as a free citizen). They have had all of their civil rights restored and they are free citizens; which must mean they have the same freedoms as other citizens, and not just those freedoms the legislature decides to define or extend. Id. Doe, like many others subjected to these draconian provisions, has reintegrated and lives a lawful productive life as a free citizen of this State. Id. (Exc. 78-87). He has become a productive member of society and by the very nature of having been released unconditionally he has had all of his civil rights restored. (Exc. 78-87). *Alaska Stat. 12.55.185(15); Alaska Stat. 33.30.241.*

2. Relevant Facts About John Doe

More than twenty years have passed since John Doe was convicted of intra-family sexual abuse and sentenced to incarceration. (Exc. 78-79). At that time, he was found to be an excellent candidate for rehabilitation, posing little or no threat to the public. (Exc. 78-84). He was sentenced by the three-judge sentencing panel, who also concluded that he had an excellent

prospect for rehabilitation, that he posed little or no threat and that he had a low risk for reoffense. Id. He was released from prison in 1990 to serve out a period of mandatory parole and supervised probation. (Exc. 80). Citing his compliance with treatment program requirements, the Alaska Board of Parole released him two years early to serve out the remainder of his supervised probation. (Exc. 49). He has long since completed his probation, and has been unconditionally discharged, with all of his civil rights restored. (Exc. 80). He is not a pedofile, and treating professionals stated it was unlikely that he would commit another offense. (Exc. 71, fn. 1).

Doe has successfully rehabilitated, he has remarried, he has established a business, and he has reunited with his children, including the victim of his offense. (Exc. 80-81). Both Doe and his wife work in a professional capacity and both are respected members of the community. (Exc. 81-83). That being so, his fundamental rights are not diminished and his fundamental rights are just as important as those of an individual whose conviction was set aside. Doe v. Department of Public Safety, 92 P.3d 398 (Alaska 2004).

3. The ASORA Infringes On Fundamental Rights

Among the rights infringed by the ASORA is the right under Article I, § 12 of the Alaska Constitution to seek to be reintegrated into society, and to seek to become the object of respect, rather than the object of fear or loathing by their fellow citizens. Abraham v. State, 585 P.2d 526, 531 (Alaska 1978). This right to seek reintegration as a full member of society is a right guaranteed by the Alaska Constitution and protected by due process. Ferguson v. Department of Corrections, 816 P.2d 134, 139-140 (Alaska 1991). Although the constitutional provision conveying this right was amended in 1994, (18th Legislature's Legislative Resolve No. 58) the right remains. Alaska Stat. 12.55.005 (2000); Mathis v. Sauser, 942 P.2d 1117, 1124 (Alaska 1997) (citing Ferguson).

The ASORA infringes on the ability to reintegrate and become a full member of society because it keeps the individual under the watchful eye of the State for the rest of his life and it makes him a suspect to his neighbors, employers, and creditors. AS 12.63.010-100. The ASORA places the individual in a subclass of citizen, whose rights are seriously infringed and diminished. Id.

Doe also has a specific right of privacy guaranteed by the Alaska Constitution. Alaska Const. art. I, § 22; Breeze v. Smith, 501 P.2d 159, 168 (Alaska 1972). This specific right of privacy was created in the 1970's when the State, using federal grant funds, was developing the Alaska Justice Information System, ["AJIS"] a computerized database of information on the criminal history of individuals. *Inf. Op. Att'y Gen. 663-86-0479, pp. 18-23 (Dec. 10, 1986).*

Fearful that such a system was the precursor of a "Big Brother" governmental information bureaucracy, legislators responded with Article I, § 22, which was overwhelmingly approved by the voters. Inclusion of the right to privacy was intended to exert control over public disclosure of criminal records and other governmental records, and to avoid similar potential abuses with all future systems. *Inf. Op. Att'y Gen. 663-86-0479, pp. 18-23 (Dec. 10, 1986).*

The ASORA infringes on the right of privacy by intruding on Doe's right of association, by forcing him to disclose his home address and have it published on the internet, and by forcing him to allow governmental intrusion into his daily life. See Lewis, *The Jacob Wetterling Crimes Against Children & Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the*

Right to Privacy and Substantive Due Process, 31 Harv. C.R.-C.L. L. Rev. 89 (Winter 1996).

In Doe v. Poritz, 662 A.2d 367, 411 (N.J. 1995), the New Jersey Supreme Court observed that, "if the information disclosed under the Notification Law were, in fact, freely available, there would be no need for the law." This observation recognizes the inherent difference between making information available as to a particular person that another person has an interest in diligently investigating, and publishing a list of persons with a recommendation that they be regarded with suspicion as dangerous. The court analogized the privacy concern to that which would be implicated by the publication of rap sheets, citing United States Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989). Id. at 409-10.

In Reporters Committee, the Supreme Court noted:

In exposing those various bits of information to the public, the Notification Law links various bits of information--name, appearance, address, and crime--that otherwise might remain unconnected...We believe a privacy interest is implicated when the government assembles those diverse pieces of information into a single package and disseminates that package to the public, thereby ensuring that a person cannot assume anonymity--in this case, preventing a person's criminal history from fading into obscurity and being wholly forgotten.

Reporters Committee, 489 U.S. at 763 n.15. The Court concluded:

[T]here is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.

Id. at 764.

The type of information disseminated is also significant. In Foritz, the New Jersey Supreme Court was particularly concerned about the dissemination of sex offenders' addresses, stating:

Where as a result of the information disclosed under the Notification Law, plaintiff may be exposed to uninvited harassment, we conclude that disclosure of plaintiff's home address, particularly when coupled with the other information disclosed, implicates a privacy interest.

Poritz, 662 A.2d at 409. Similarly, in United States Department of Defense v. Federal Labor Relations Authority, 114 S. Ct. 1006 (1994), the Supreme Court held that dissemination of addresses of public employees to their unions violated their privacy interests, despite the fact that said information is often available through public sources such as telephone books and voter registries.

The ASORA violates the right of privacy by providing for the collection and collating of criminal histories, and then posting that information on the internet with the intended label, "dangerous sex offender." It also requires posting of the individuals home address, his address and place of employment, and the information regarding vehicles available to the offender.

These are the very evils Alaska's right of privacy was intended to prevent, and the ASORA makes it worse by forcing the individual to gather and collate the information on behalf of the State. AS 12.63.010-100.

Doe also has the right to be let alone. See, Carey v. Brown, 447 U.S. 455, 470-471 (1980); See generally Lewis¹, The Jacob Wetterling Crimes Against Children & Sexually Violent Offender Registration Act: An Unconstitutional Deprivation of the Right to Privacy and Substantive Due Process, 31 Harv. C.R.-C.L. L. Rev. 89 (Winter 1996). Encompassed within this important right is the right to be free from unwarranted governmental suspicion, and the right to be free from government initiated intrusions from the public, including intrusions through vigilantism. *Lewis, supra*.

¹ There are documented incidents of vigilante action taken against sex offenders. See Doe v. Pataki, 940 F. Supp. 603, 609 (S.D.N.Y: 1996), describing incidents in New Jersey where released sex offenders were condemned by community leaders, held prisoner in their own homes, locked out of their homes, terminated from their jobs, physically attacked, and driven out of town. In one of these incidents members of the public attacked and injured the wrong man in the mistaken belief he was a sex offender. Because of the resulting publicity from this incident, the man lost his business and his family suffered harassment and ridicule. Id. See also Note, The Scarlet Letter Branding: A Constitutional Analysis of Community Notification Provisions in Sex Offender Statutes, 47 DRAKE L. REV. 635, 636 (1999).

This includes the right to personal safety. Lewis, 31 Harv. C.R.-C.L. L. Rev. at 106-07.

The ASORA violates this right because the State clearly does not leave the individual alone and it subject him to unwarranted governmental and government sponsored intrusions. Doe v. Department of Public Safety, 92 P.3d at 409-410. The ASORA's effect is significant and overly intrusive. Id. Lewis, *supra*. By threat of prosecution and imprisonment, the ASORA requires a person convicted of a sex offense to gather, collate, verify, and deliver a variety of information about themselves and their crimes to the local state trooper post or police department. Alaska Stat. 12.63.010(b). ASORA even requires registrants to collect and release mental health records and provide information about scars, tattoos, etc. Id. Upon delivery of the information, the individual must allow a photograph to be taken, and provide a set of fingerprints. Id. Once the initial registration is completed, registered persons are required to immediately report a change in their address, or a change in the motor vehicles they drive or to which they have access and if requested, they are required to report to the police station for a new picture. Alaska Stat. 12.63.010(c).

Registrants, like Doe, who fall under the newly defined category of having been convicted of an aggravated sex offense must

resubmit the same information four-times per year for the rest of their lives, or be subject to criminal prosecution and deprivation of liberty. Alaska Stat. 12.63.010(d)(1), 12.63.020(a). These mandatory reporting requirements violate Doe's right to be let alone. Doe v. Department of Public Safety, 92 P.3d at 410-411.

Doe has the right to seek out and engage in employment, and to seek rewards of his own industry. Hampton v. Mow Sun Wong, 426 U.S. 88, 102 n. 23 (1976) (citing Truax v. Raich, 239 U.S. 33, 41 (1915)). The right to pursue employment is likewise fundamental. Id. The ASORA jeopardizes Doe's abilities to secure and maintain employment in several ways. (Exc. 79-85). First, the law's effect on where the person is able to reside will necessarily affect his employment options. Second, the law requires that the public be notified of where the offender works--creating a problem for employers, who may fear either the offender himself or the potential loss of business. Lewis, 31 Harv. C.R.-C.L. L. Rev. at 112 (citing the example of David Lewis, who was fired from his construction job when his employer learned through community notification that he had been previously convicted of molesting high school wrestlers, and who has not been able to find another job since).

By allowing unlimited public dissemination of personal information collected and collated by Doe, the ASORA places Doe at substantial risk of loss of housing, employment and community condemnation. *Alaska Stat. 18.65.087*. Moreover, a scarlet letter attaches when the State places a picture with a host of private information on the Internet with an inscription, "registered sex offender".

4. **There Is No Compelling State Interest In Requiring Doe To Comply With The ASORA And The Offense-Based ASORA Is Not The Least Restrictive Alternative Available To The State.**

Because fundamental rights are infringed by the offense-based ASORA, strict scrutiny must be applied and the ASORA can only survive a constitutional challenge if the state sought to fulfill a compelling state interest and if it was narrowly tailored to achieve that interest with the least restrictive means available to vindicate that interest. *State v. Planned Parenthood*, 35 P.3d 30, 42 (Alaska 2001) (when state action infringes upon fundamental right, state must demonstrate that no less restrictive alternative exists to accomplish its purpose).

In *Doe v. Department of Public Safety*, 92 P.3d 398 (Alaska 2004) this Court held that the ASORA was unconstitutional when applied to a certain category of persons whose convictions had been set aside as a result of successful completion of the probation

requirements under a suspended imposition of sentence ("SIS"). In doing so, this Court held, the ASORA very significantly and directly affected the lives of registrants. Id., at 409. "The ways and extent it does so differ greatly from the lingering consequences of a conviction . . . " Id. This Court held that four features of the Act impose these harmful and onerous new consequences. Id.

First, the ASORA imposes a duty on offenders to register with law enforcement agencies. Id. Second, it requires offenders to disclose extensive personal information, much of which the government would not otherwise have, and much of which is not public. Id. Third, it requires offenders to keep their information current for a certain period (in the case of John Doe he must keep that information current for life). Id. Fourth, it requires the State to maintain a public registry of this private information. Doe v. Department of Public Safety, 92 P.3d at 409. No other free citizen has a duty to contact the police on a quarterly basis and give the authorities personal information such as whether they bought a house and moved, or whether they got a new job, a new car, or whether they grew a beard. In fact free citizens have no duty to contact the police on a regular or even irregular basis, because free citizens have the right to be let alone and to be free from

governmental monitoring. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

The ASORA imposes these burdens and harmful consequences even if the offender lives the life of a free citizen, unsullied by disobedience to societies laws. Abraham v. State, 585 P.2d 526, 531 (Alaska 1978). The burdens under the ASORA include affirmative duties to do things (contact the police, register, disclose and update information), and not merely a duty to refrain from doing things like committing new crimes. Doe v. Department of Public Safety, 92 P.3d at 409-410. The duties are significant and overly intrusive. Id.

This Court has concluded the ASORA has destructive consequences that flow directly from its requirements, and which are generally not experienced as a result of a prior conviction. Id., at 410. These destructive consequences include loss of housing, loss of jobs, loss of friends and associates, loss of individual safety, and loss of feelings of self worth leading to suicide. Id. It is because of the affirmative duties imposed, and the onerous, destructive consequences that flow from the ASORA's application to particular individuals that this Court held the ASORA infringes on fundamental personal liberties, including the right to be let alone. Id., at 410. Because fundamental liberties

are infringed, the State must show a compelling state interest in applying the ASORA and that the least restrictive means available are used to achieve that governmental interest. Doe v. Department of Public Safety, 92 P.3d at 411.²

No compelling state interest is furthered by requiring Doe to comply with the ASORA. (Exc. 78-87). He has had two judicial determinations that he is not a threat, and he has proven to be a productive citizen that has fully reintegrated into society. Id. The State cannot identify any compelling state interest that will be furthered by forcing Doe to comply with the ASORA's draconian requirements. (Exc. 78-87). Doe v. Department of Public Safety, 92 P.3d at 412.

Even if the State could identify a compelling State interest, the ASORA fails because it is obviously not the least restrictive means of vindicating that interest. AS 12.63.010-100. The ASORA

². Although the State will argue that Doe v. Department of Public Safety is limited in application to a specific group of individuals (those whose convictions were set aside), that is not the case. The underlying premise of Doe is that if there is evidence that the individual does not present a danger to the public, there was no legitimate reason to support the belief that the individual poses a public danger and thus, the State's interference with his liberty interests would be unjustified. Doe v. Department of Public Safety, 92 P.3d at 412. This Court held that "absent the likelihood Doe will commit new sex offenses, there is no compelling government interest in requiring Doe to do the things ASORA demands." Id.

contains no procedures through which one may escape its requirements, and no procedure is mandated or even available to determine the degree of risk posed by individual registrants before registration and periodic reporting is required or before information is released to the public. Id.

The ASORA, is an extreme example of "offense-based" Megan's laws that are fundamentally different from "offender-based" Megan's laws. Generally speaking, "offender-based" laws carefully calibrate the extent of public notification, if any, to a sex offender's currently assessed dangerousness and eschew exclusive reliance on the offense of conviction. Kansas v. Myers, 923 P.2d 1024 (Kan. 1996), (cert denied 117 S.Ct. 2508 (1997)); Doe v. Attorney General, 715 N.E.2d 37 (Mass. 1999), [individualized hearing required before registration and public notification], E.B. v. Verniero, 119 F.3d 1077, 1107-08 (3rd Cir. 1997). By contrast, "offense-based" statutes, like the ASORA, favor a rigid approach, subjecting all sex offenders to the burdens of registration and humiliation of public notification based solely on past criminal conviction. See Doe v. Department of Public Safety, 92 P.3d at 400-402, (analyzing the ASCRA's requirements). In many cases, the offense is ancient, the offender is rehabilitated and registration and notification harms registrants and infringes upon cherished

liberties without serving any remedial purpose. Id. Generally speaking, the measured offender-based statutes have been well received in the courts while the blunderbuss offense-based statutes have not. Kansas v. Myers, 923 P.2d 1024 (Kan. 1996).

The ASORA is not narrowly tailored, and the State simply cannot make that showing. Other states have narrowly tailored their laws by creating a tiered system, which requires a finding of present day dangerousness before information can be disclosed to the public. Doe v. Attorney General, 715 N.E.2d at 45-47. The State should have the burden of proving by clear and convincing evidence that Doe currently presents a threat to vulnerable populations. Id., See also: E.B. v. Verniero, 119 F.3d 1077, 1107-08 (3rd Cir. 1997), and see Doe v. Attorney General, 686 N.E.2d 1007, 1016 (Mass. 1997)³.

³. In Doe v. Attorney General, 686 N.E.2d 1007, 1016 (Mass. 1997) (Fried, J. Concurring), Justice Fried properly characterized the regulation of the individual as follows:

Registration presents a different and importantly distinct kind of constitutional danger... [it] forces an action on the person required to register. It is a continuing, intrusive, and humiliating regulation of the person himself. To require registration of persons not in connection with any particular activity asserts a relationship between government and the individual that is in principle quite alien to our traditions, a relationship which when generalized has been the hallmark

(continued...)

CONCLUSION

Pasting a scarlet letter on the offender through public notification places the offender at risk of violence, and clearly imposes an affirmative disability and restraint. Examples of violent community response continue to mount and add to the reams of evidence which weigh heavily against criminal registration and public notification. *Jerusalem: A framework for Post-Sentence Sex Offender Legislation, "Perspectives on Prevention, Registration, and the Public's 'Right' to Know;" 48 Vand. L. Rev. 219, 245-46 (1995).* This retributive, stigmatizing community environment has the opposite effect of rehabilitative treatment, which is the second proposed policy goal of these registration laws. *Id.* Public notification laws have created an atmosphere where vigilantism, and public condemnation is the norm, rehabilitation is the exception. *Silva: Dial, 1-900-PERVERT, and Other Statutory Measures That Provide Public Notification of Sex Offenders, 48 SMU. L. Rev. 1962, 1983-84 (1995).* Under the guise of protecting the public, these laws have been the cause homes being burned, *Id.*, at 1983; of

(...continued)
of totalitarian government

beatings, and of families being run out of town. Id., at 1983-1984. Even small children have been harassed merely because their parent was once convicted of crime. Id., p. 1984. Empirical studies show that these laws do not protect the public, they do not reduce the incidence of crime and in fact, they may be part of the cause of the recent rise in criminal activity. Id., pp. 1979-1980. See also *Note: Battling Sex Offenders: Is Megan's Law An Effective Means Of Achieving Public Safety?*, 19 *Seton Hall Leg. Journal* 519, at 546-549 (1995). Finally, there are ever increasing reported incidents of the wrong person being attacked because the public believed a criminal lived at that address. Id., pp. 558-560. The empirical evidence continues to mount and these case histories show that these offense-based registration and public notification laws do indeed infringe on fundamental personal liberties.

This Court's holding in Doe v. Department of Public Safety, should be expanded to protect Doe and others like him. Offender-based Megan's laws achieve the goals intended and are much less intrusive and less restrictive on the individual. Under offender-based Megan's laws, the State would be required to prove present day dangerousness before subjecting the individual to the ASORA's requirements.

Accordingly, this Court should hold that, even if the State has a compelling interest in requiring Doe to comply with the ASORA, the ASORA is not the least restrictive means available to vindicate that interest and thus, as applied to Doe, the ASORA denies due process.

DATED this 28th day of April 2006.

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