IN THE SUPREME COURT OF THE STATE OF ALASKA

KELLEY MAVES,

Appellant,

vs.

STATE OF ALASKA,

Appellee.

Court of Appeals No. S-17492

Trial Court No. 3AN-15-08842 CI

APPEAL FROM THE SUPERIOR COURT
THIRD JUDICIAL DISTRICT AT ANCHORAGE
ERIC A. AARSETH, JUDGE

# BRIEF OF APPELLEE

KEVIN G. CLARKSON
ATTORNEY GENERAL

Hazel C Blum (1605027)
Assistant Attorney General
Office Of Special Prosecutions
310 K Street Ste 601
Anchorage, AK 99501
(907) 269-6250

Filed in the Court of Appeals
of the State of Alaska
December 31st, 2019

MEREDITH MONTGOMERY
CLERK, APPELLATE COURTS

Sarah E. Anderson
Deputy Clerk

VRA CERTIFICATION: I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim or witness to any crime unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes and Regulations

**Other Authorities**

## STATEMENT OF ISSUES PRESENTED

In 1997, Kelley Maves sexually assaulted two women in Colorado within the same week and was charged with two counts of sexual assault. In 1998, Maves pleaded no contest to second and third degree sexual assault, crimes which qualify as sex offenses under the Alaska Sex Offender Registration Act ("ASORA"). In 2015, Maves relocated to Alaska and the Department of Public Safety ("DPS") notified him that he was required to register as a sex offender for life.

1. Did DPS act within the scope of its rule-making authority when, in 1995, it promulgated 13 AAC 09.900(a)(2), which defined a "conviction" for ASORA purposes to include convictions that are later set aside?

2. When Maves pleaded no contest to two Colorado sex offenses, was he "convicted" of those offenses under ASORA?

3. The superior court has not yet issued a decision on attorney's fees in this case. Despite this, is it ripe for this court to rule on attorney's fees at this time?

## STATEMENT OF THE CASE

### Statement of facts

In May 1997, Kelley Maves sexually assaulted two Colorado State University students within the same week and was charged in Colorado with sexual assault in the second[1] and third degree.[2] [R. 251-63, 267-28, 278-81]

In August 1998, Maves pleaded no contest to both offenses. [R. 211] On the felony count (second-degree sexual assault), Maves received a deferred sentence pursuant to Colorado's deferred sentencing statute, Col. Rev. Stat. § 16-7-403, and was placed on probation for four years. [R. 211, 283] On the misdemeanor count (third-degree sexual assault), Maves was sentenced to 60 days in prison.[3] [R. 211]

In July 2002, Maves appeared in court for a status hearing regarding his compliance with the probation conditions for his deferred sentence. [R. 264] The Colorado trial judge determined that Maves was "in compliance" and ordered that Maves's suspended jail sentence be "lifted." [R. 264]

---

[1] That "Kelley Taylor Maves, did unlawfully, knowingly and feloniously inflict sexual penetration on [the victim] and the defendant caused that victim's submission to sexual penetration by a means of sufficient consequence reasonably calculated to cause submission against the victim's will." [R. 267]

[2] That "Kelley Taylor Maves did unlawfully and knowingly subject [the victim] to sexual contact and the defendant knew that the victim did not consent." [R. 268]

[3] Maves' sentence for Count 2 included suspended time, which carried with it a three year term of probation that was separate/additional to the probation regarding his deferred sentence. [R. 266]

In early 2015, Maves moved to Alaska. [At.Br. at 3; *see* R. 297] When the Alaska Department of Public Safety ("DPS") learned that Maves was living in Alaska, it reviewed Maves's criminal record from Colorado and concluded that Maves had been convicted of two prior sex offenses. [R. 297-98] Consequently, DPS determined that Maves must register under the Alaska Sex Offender Registration Act ("ASORA") for life, and notified him of his registration requirement.[4] AS 12.63.010(d)(2). [R. 297-98]

**Course of proceedings**

Maves appealed DPS's decision requiring lifetime registration. [R. 220-22] In his administrative appeal, Maves argued that DPS analyzed his criminal record using a definition of "conviction" that was promulgated *after* the date of his offenses. [*See* R. 221-22] When ASORA was enacted in 1994, the legislature did not specifically define "conviction." However, in 1999, the legislature amended ASORA to define a "conviction" as occurring when a person pleads to or is found guilty of a sex offense, "regardless of whether the judgment was set aside under [Alaska's SIS statute] or a similar procedure in another jurisdiction." AS 12.63.100(3). [*See* R. 220-22]

---

[4] On April 7, 2015, DPS sent Maves a letter via certified mail notifying him that he must register quarterly for life. [R. 297]

In his administrative appeal, Maves contended that DPS relied on the wrong definition of "conviction" in its analysis. [*See* R. 220-21] Had DPS applied the meaning given to "conviction" from 1994 (*i.e.*, before "conviction" was specifically defined), one of Maves's two Colorado offenses would not qualify because the judgment and sentence were later set aside. Applying the 1999 definition of "conviction" retroactively (*i.e.*, to his 1997 offense), Maves argued, increased the penalty for his crime by increasing registration from 15 years to life in violation of the *ex post facto* clause.[5] [*See* R. 220-22]

DPS denied Maves's administrative appeal. [Exc. 1-3] Subsequently, Maves appealed the agency's final decision to the superior court. [R. 129-53][6] Judge Aarseth (reviewing the *ex post facto* issue) agreed with Maves that the *ex post facto* clause was violated and reversed DPS. [Exc. 4-12] The judge cited to this Court's previously holdings that ASORA and its amendments are punitive (as opposed to regulatory) in nature.[7] [Exc. 11] Thus, since Maves committed his offense (1997) before the effective date of the "conviction" definition that DPS applied to him (1999), a penal statute had been retroactively applied to Maves. [*See* Exc. 11] Resultantly, Judge Aarseth

---

[5] The phrase "*ex post facto*" was not mentioned in Maves's initial appeal. However, it is contextually apparent that Maves was raising this type of claim.

[6] The state has not prepared its own except of record in this case. All citations to the excerpt reference the excerpt that Maves filed.

[7] *Doe v. State*, 189 P.3d 999, 1003 (Alaska 2008); *State v. Doe A and Doe B*, 297 P.3d 885, 888 (Alaska 2013).

concluded that only one of Maves's Colorado crimes, his third-degree sexual assault conviction in which he was sentenced at the time of his plea, qualified as a sex offense. [Exc. 11-12]

The state appealed the adverse order to this Court. [R. 348-53] In December 2017, this Court reversed Judge Aarseth and remanded *Maves* for further proceedings. [Exc. 13-15] The *Maves* order explained that the judge's analysis had erroneously assumed that "conviction" could be defined in one of two ways: (1) the 1994 legislature's original phrasing (in which "conviction" was not defined), or (2) the 1999 amendment's definition. AS 12.63.100(6) (1994); AS 12.63.100(3) (1999). [*See* Exc. 13-14] However, as this Court pointed out, Judge Aarseth and the parties failed to recognize that a third definition existed and applied: the definition that DPS promulgated by regulation in 1995, 13 AAC 09.900(a)(2). [*See* Exc. 14] Applying this definition to Maves, no *ex post facto* clause violated occurred because the regulation became effective in 1995 and Maves committed his criminal offense in 1997. [Exc. 14] At the conclusion of the order, this Court provided the following remand instruction to the superior court:

> [T]his matter is REMANDED to the superior court to determine whether Maves's deferred sentence is "similar" to the set aside of a conviction pursuant to AS 12.55.085, and if so, whether [Maves] is required by ASORA to register for life."

[Exc. 14-15] (bold-type omitted)

On remand, the state and Maves, Responding to this Court's directive, filed supplemental briefing on the similarity between Alaska and Colorado's deferred conviction statutes. [R. 432-445 (Maves's opening); R. 411-19 (state's response); R. 403-06 (Maves's reply)] Additionally, Maves was granted leave from the Superior Court to raise a new second issue on remand: "whether the 1995 version of 13 AA 09.900, adopted by DPS, was valid and enforceable." [R. 384]

**Similarity of Procedures:** Under 13 AAC 09.900, a criminal conviction attaches when a person "has entered a plea of guilty or no contest to ... a criminal offense, whether or not the judgment was thereafter set aside under AS 12.55.085 or a *similar* procedure of another jurisdiction" (emphasis added). Maves argued on remand that the two procedures diverged enough that they were not "similar," and consequently, that he was never "convicted" of second-degree sexual assault for purposes of ASORA. [R. 435-40] In its opposition, the state agreed with Maves's framing of the issue (were the procedures similar?) but disagreed with Maves's analysis (the state argued that the procedures *were* similar). [*See* R. 413-17]

**Validity of 13 AAC 09.900(a)(2):** On remand, Maves additionally argued that 13 AAC 09.900(a)(2) is invalid because DPS exceeded its regulatory authority when it promulgated the regulation. [R. 440-45] Maves conceded in his briefing that Alaska Court of Appeals has published an opinion,

*State v. Otness,* holding that 13 AAC 09.900(a)(2) was validly enacted. [R. 440-41] However, Maves contended that *Otness* was wrongly decided, and alternatively, that this Court's 2008 *Doe* decision eroded the force and effect of *Otness*.[8] [R. 441] The state opposed on the ground that *Otness* was binding authority. [R. 418]

In May 2019, Judge Aarseth ruled that Maves is required under ASORA to register as a sex offender for life. [Exc. 18-36] In reaching this conclusion, the court made two sub-rulings: that Alaska's SIS and Colorado's deferred sentencing procedures were "similar,"[9] [Exc. 21-32] and that 13 AAC 09.900(a)(2) was a valid exercise of DPS's rule-making authority.[10] [Exc. 32-35]

---

[8] *Doe v. State of Alaska, Dep't of Pub. Safety*, 189 P.3d 999 (Alaska 2008).

[9] Judge Aarseth concluded: "The Alaska and Colorado Procedures are categorically alike with no significant difference in how the Alaska and Colorado [sic] employ their procedure or how they treat the initial determination of guilt following successful completion of each state's procedure. Similar to Alaska, Colorado allows a defendant to avoid collateral consequences of a conviction resulting from the court's determination of guilt through a judicial restoration mechanism. In neither case does the state' procedure challenge a court's initial determination of guilt for the commission of a sexual offense— the defendant committed a sexual offense and a court found the defendant guilty." [Exc. 32]

[10] ""[T]his court is bound by the Court of Appeals decision *Otness* that DPS validly enacted 13 AAC 09.900(a)(2). In addition, this court finds that 13 AAC 09.900(a)(2) clarifies rather than expands application of ASORA." [Exc. 33]

## ARGUMENT

### I. DPS ACTED REASONABLY AND WITHIN THE SCOPE OF ITS DELEGATED AUTHORITY WHEN IT ENACTED 13 AAC 09.900(2)

### A. Standard of Review

"When the superior court acts as an intermediate court of appeal, no deference is given to the lower court's decision." *E.g.*, *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987). This Court reviews all questions of law *de novo*, "adopt[ing] the rule that is most persuasive in light of precedent, reason, and policy." *E.g.*, *Hutton v. State*, 350 P.3d 793, 795 (Alaska 2015).

### B. 13 AAC 09.900(a)(2)

In May 1994, the legislature enacted ASORA for the express purpose of promoting public safety by protecting the public from sex offenders. Ch. 41, § 1, SLA 1994.[11] To further this purpose, the legislature imposed a duty on sex offenders to register under ASORA and imposed a duty on DPS (the overseeing agency) to maintain and publically disseminate a registry of sex offenders. *Id.* (*see also* AS 12.63.010, AS 18.65.087).

---

[11] The ASORA legislature made the following four findings: (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 safety; and (4) release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety. Ch. 1, § 1, SLA 1994.

Under the statutory scheme, individuals must register if "convicted" of one or more qualifying sex offenses. AS 12.63.010(a); AS 12.63.100(6). Initially, when ASORA was enacted in 1994, the legislature did not specifically define the term "conviction." *See* Ch. 41, § 4, SLA 1994; AS 12.63.100 (1994). However, it expressly instructed the Department of Public Safety to "adopt regulations necessary to carry out the purposes of [the online registry] and [the duty to register]." Ch. 41, § 5, SLA 1994; AS 18.65.087(a) (1994).

Pursuant to this grant of authority, DPS adopted several regulations, including 13 AAC 09.900(a)(2), which became effective in December 1995. The regulation provides:

> '[C]onviction' means that an adult, or juvenile tried as an adult under AS 47.10 or a similar procedure in another jurisdiction, has entered a plea of guilty or no contest to, or has been found guilty by a court or jury of, a criminal offense, whether or not the judgment was thereafter set aside under AS 12.55.085 [Alaska's SIS statute] or a similar procedure in another jurisdiction, or was the subject of a pardon or other executive clemency, but does not include a judgment that has been reversed or vacated by a court due to motion, appellate action, petition for writ of habeas corpus, or application for post-conviction relief under the Alaska Rules of Criminal Procedure or similar procedures of another jurisdiction.

13 AAC 09.900(a)(2) (1995).

In spring 1999, the legislature formally adopted DPS's definition of conviction.[12] Ch. 54, § 12-15, SLA 1999.

*a. The Court of Appeals' analysis of 13 AAC 09.900(a)(2)*

In August 1999, the Court of Appeals decided *Otness*.[13] In a published opinion, the majority framed the question of 13 AAC 09.900(a)(2)'s validity as a matter of administrative law. *Id.* at 891. First, the court recognized that in 1994, the legislature expressly authorized DPS to promulgate regulations to implement ASORA.[14] *Id.* The court then analyzed whether the regulation was "reasonably necessary to implement [ASORA]." *Id.* Ultimately, *Otness* found that the regulation was valid, explaining:

> Under the standard of review we must apply when reviewing an administrative regulation, we conclude that the definition of "conviction" adopted by the Department is consistent with the legislative purpose to protect the public. The definition requires those individuals convicted of a sex offense to register with the Department even if the conviction was set aside. The Department's conclusion that persons whose conviction has been set aside should have the duty to register is a reasonable

---

[12] "The purpose of the amendment to AS 12.63.100(7) ... is to clarify the law in order to validate and affirm the long-standing policy in state regulation definition "conviction" ... to include a variety of judgments, including those set aside by [SIS]." Ch. 54, § 1, SLA 1999.

[13] While the legislature debated and enacted the amendment to ASORA, *State v. Otness* was pending before the Alaska Court of Appeals. In *Otness*, the issue on appeal was whether 13 AAC 09.900(a)(2) was valid (*i.e.*, enacted within the scope of DPS's rule-making authority.) *Id.*

[14] "Although ASORA [as promulgated in 1994] contained no explicit definition of "conviction," the legislature authorized the Department of Public Safety to promulgate regulations implementing the act." *Id.* at 891.

> construction consistent with the purposes and policies of ASORA.

*Id.* at 892.

In Otness's briefing before the Court of Appeals, he had argued that DPS had been required to apply a "strict construction" of ASORA when exercising its rule-making authority. *Id.* at 891. However, the *Otness* majority explicitly rejected this analysis:

> When it adopted regulations, the Department was not required to employ strict construction, but to adopt regulations that are consistent with the purposes of the legislation."

*Id.* at 892.

In concurrence, Judge Mannheimer elaborated on why strict construction did not apply, explaining that agencies are not required to strictly construe criminal statutes when rule-making. *Id.* at 893 (Mannheimer, J., Concurring). However, he explained, if an agency promulgates a regulation and that regulation is ambiguous, then the reviewing court must apply strict construction in its interpretation of the regulation. Applying this process to 13 AAC 90.900(2), because the regulation "has no ambiguity, there is no need to invoke the doctrine of strict construction." *Id.* (internal quotations omitted).

*b. The Supreme Court's recognition of Otness*

This Court has cited *Otness* on at least two occasions: first, in its decision in *Doe v. State*, 92 P.3d 398 (Alaska 2004), and second, in its December 2017 order in this case.

1. *Doe v. State*, 92 P.3d 398 (Alaska 2004)

In *Doe*, the defendant committed a sex offense in 1987. *Id.* at 400. In 1989, he pled guilty and received a suspended imposition of sentence and a term of probation. *Id.* In April 1994, the superior court found that Doe had successfully complied with probation and ordered that his conviction be set aside. *Id.* Later that same year – *after* Doe's SIS was granted – ASORA became effective and DPS notified Doe that (despite the granted SIS) he must register under ASORA. *Id.* at 400-01. In 1997, Doe registered "under protest" and then appealed to the superior court. *Id.* at 401-02.

The superior court (acting as an appellate body) initially agreed with Doe and reversed DPS, finding that 13 AAC 09.900(a)(2) "exceeded [DPS's] authority to promulgate regulations effectuating ASORA's purpose." *Id.* at 402.[15] DPS appealed to the supreme court. *Id.*

When *Doe* first came before this Court, the primary issue on appeal was whether 13 AAC 09.900(a)(2) was valid. *See id.* at 402. However, this Court opted not to interpret the regulation at that time. Instead, the court stayed

---

[15] "[T]he legislature did not clearly indicate its intent to include [conviction] "set-asides" in ASORA's registration requirement." *Id.* at 402.

DPS's appeal due to the fact that *Otness* – which concerned the same issue – was pending before the Court of Appeals at that time. *Id.*

In August 1999, *Otness* held that 13 AAC 9.900(a)(2) was valid. 986 P.2d 890. After *Otness* the published, this Court lifted its stay in Doe's appeal. *Doe*, 92 P.3d at 402. However, instead of deciding *Doe* then, the supreme court remanded the case to the superior court and instructed the court to reconsider its ruling (in which it had found that 13 AAC 09.900(a)(2) was *invalid*) in light of *Otness* (which held the opposite). *Id.* On remand, the trial court applied *Otness*, reversed its previous ruling, and granted summary judgment to DPS. *Id.* Doe then appealed.

On appeal for the second time, the *Doe* court reversed DPS's finding that Doe was required to register under ASORA. *Id.* at 412. The *Doe* court referenced *Otness* and 13 AAC 09.900(a)(2) in its section describing the case's procedural history. *Id.* at 400-02. However, neither *Otness* nor 13 AAC 09.900(a)(2) factored into the court's holding because the court ruled in favor of Doe on separate grounds (that requiring him to register violated due process). *See id.* at 403-412.

2. SCO, *State v. Maves*, S-16460/S-16470, Alaska Supreme Ct. (Dec. 19, 2017)

In 2017, DPS appealed Judge Aarseth's ruling that crediting Maves's set-aside Colorado conviction as a prior sex offense violated the *ex post facto*

clause. [R. 348-53] In December 2017, this Court reversed Judge Aarseth and remanded the case for further proceedings. SCO, *State v. Maves*, S-16460/S-16470, Alaska Supreme Ct. (Dec. 19, 2017).

When the *ex post facto* issue was litigated in the superior court, neither the state, Maves, nor Judge Aarseth cited to 13 AAC 09.900(a)(2) or recognized its applicability. [*See* Exc. 1-12; *see* R. 129-53, 348-53] This Court, recognizing the material omission, raised the existence and applicability of 13 AAC 09.900(a)(2) in its order *sua sponte*. [Exc. 13-15] While the order did not directly state that 13 AAC 09.900(a)(2) was valid, the Maves court, by citing to *Otness* and by hinging its ruling on 13 AAC 09.900(a)(2), held indirectly that 13 AAC 09.900(a)(2) was valid. [*See* Exc. 13-14] The court explained:

> At the time of Maves's offenses, ASORA did not define "conviction." In 1995, however, the Department of Public Safety promulgated a regulation that defined conviction. [13 [AAC] 09.900(2) (1995); *see State v. Otness*, 986 P.2d 890, 891 (Alaska App. 1999)]
>
> ...
>
> The parties did not cite this 1995 regulation when they briefed the matter in the superior court. The superior court therefore concluded that the lifetime registration requirement ... violated ... ex post facto .... . But we conclude that this prohibition does not bar application of ASORA to judgments entered after adoption of the 1995 regulation, even if they are set aside under AS 12.55.085, because the defendants in this category had notice that they would not be exempt from registration.

*Id.* at p. 1-2.

### C. *Otness* remains good law

On appeal, Maves contends that that the DPS regulation is invalid for two reasons: First, because "the *Otness* court got it wrong and 13 AAC 09.900(2) was not reasonably necessary to carry out the purposes of [t]he ASORA[;]" and second, because "the foundation for the court's decision in *Otness* collapsed with the decision in *Doe v. State*[.]" [At.Br. at 19] Neither argument has merit.

When the legislature enacted ASORA, it explicitly delegated DPS the authority to "adopt regulations necessary to carry out the purposes of [ASORA]." AS 18.65.087(a). In response, DPS promulgated 13 AAC 90.900(a)(2) to clarify what qualifies as a "conviction."

Agency regulations such as 13 AAC 09.900(a)(2) are presumed to be valid, and must be reviewed with "considerable" deference. *State, Dep't of Revenue v. Cosio,* 858 P.2d 621, 624 (Alaska 1993); *Whaley v. State*, 438 P.2d 718, 722 (Alaska 1968) (courts must not overrule agency regulations construing statutes absent "weighty reasons"). When this Court reviews the validity of an agency regulation, it must ascertain two things:

> First, ... whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency. [And] [s]econd, ... whether the regulation is reasonable and not arbitrary.

*Cosio,* 858 P.2d at 624 (quoting *Kelly v. Zamarello*, 486 P.2d 906, 911 (Alaska 1971)); *see also Otness*, 986 P.2d at 891-92.

As *Otness* recognized, the regulation enacted by DPS defining "conviction" to include persons whose convictions are ultimately set aside is "reasonable" and "consistent with the purposes and policies of ASORA." *Id.* at 892. The purpose of AS 12.63 can be readily ascertained by reviewing the legislative findings that accompanied the enactment of ASORA. The legislature found that, among other things, "sex offenders pose a high risk of re-offending after release from custody" and "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety." Ch. 41, §1, SLA 1994. Thus, the primary purpose of ASORA is to identify individuals who have committed sex offenses, monitor them, and make certain information about them available to the public.

13 AAC 09.900(a)(2) establishes that a sex offender is "convicted" at the time he or she either pleads guilty or *nolo contendere* to, or is found guilty by judge or jury of, a qualifying sex crime. 13 AAC 09.900(a)(2) (1995). In other words, a conviction attaches when a defendant's guilt is established or when a defendant accepts responsibility for committing a sex offense. Under the regulation DPS promulgated, once a defendant is convicted (*i.e.*, once guilt/responsibility is established), they must register under ASORA, regardless of whether their conviction is later set aside. 13 AAC 09.900(a)(2).

The structure of 13 AAC 09.900(a)(2) is consistent with ASORA's public safety mandate. The ASORA legislature, when deliberating the watershed law, understood that sex offenders have elevated recidivism rates and may never be cured of their sexual predilections; thus, the legislature sought to monitor and raise public awareness of sex offenders in the interest of public safety. House Judiciary Committee, Hearing on HB 69, 18th Alaska Legislature (February 10, 1993) (Testimony of DPS Commissioner Lloyd Rupp). Requiring offenders who have been convicted of sex offenses to register (regardless of whether their conviction was later set aside) furthers this purpose and intention.

In his briefing, Maves contends that strict construction and the non-delegation doctrine apply to the analysis of 13 AAC 09.900(a)(2). [*See* At.Br. at 19-23] However, neither principle of construction is applicable.

The Rule of Lenity, or "strict construction," is the principle that "ambiguous penal statutes should be construed against the government." *Municipality of Anchorage v. Brooks*, 397 P.3d 346, 349 (Alaska Ct. App. 2017); *De Nardo v. State*, 819 P.2d 903, 907 (Alaska App. 1991). A statute is "ambiguous" for purposes of the Rule of Lenity if the statute is "susceptible of more than one meaning." *Ward v. State, Dep't of Pub. Safety*, 288 P.3d 94, 97-98 (Alaska 2012). Only if and when a statute is ambiguous does strict

construction apply.[16] *Otness*, 986 P.2d at 982, 983 (Mannheimer, J. Concurring). Similarly, when interpreting an agency regulation strict construction *only* applies if the *regulation* bring interpreted is ambiguous. *Id.* Thus, unless a regulation is ambiguous, strict construction need not be applied.

13 AAC 09.900(a)(2) is not subject to strict construction. As the *Otness* majority explained, "[w]hen it adopted regulations, [DPS] was not required to employ strict construction, but to adopt regulations that are consistent with the purposes of [ASORA]. *Otness*, 986 P.2d at 892. Thus, because DPS had been delegated rule-making authority and because the agency defined "conviction" unambiguously, "there [was] no need to invoke the doctrine of strict construction." *Id.* at 893 (Mannheimer, J. Concurring).

The non-delegation doctrine prohibits congress from delegating its Article I legislative powers. *E.g.*, *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472-73 (2001). However, the doctrine does not prevent the legislature from conferring rule-making authority upon agencies as long as it "lay[s] down by legislative act an intelligible principle" to guide the agency in its rule-

---

[16] If strict construction applies, the statute need "not ... be given the narrowest meaning allowed by the language; rather, the language should be given a reasonable of common sense construction, consonant with the objectives of the legislature." *Belarde v. Municipality of Anchorage*, 634 P.2d 567, 568-69 (Alaska App. 1981) (internal quotations omitted) (quoting C. Sands, Sutherland Statutory Construction s 59.03, at 6-7 (4th ed. 1974)).

making authority. *Id.*; *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). The administrative state's flourishment is attributed to this critical distinction between the delegation of legislative *power* and the delegation of legislative *authority* guided by an intelligible principle. Kathryn A. Watts, Rulemaking as Legislating, 103 GEO. L.J. 1003, 1014 (2015). In the case of ASORA, the non-delegation doctrine was not violated because the legislature gave DPS an intelligible principle to guide its rule-making authority: to protect the public from sex offenders by "adopt[ing] regulations necessary to carry out the purposes of [ASORA]." AS 18.65.087(a); Ch. 1, § 1, SLA 1994.

## II. MAVES HAS BEEN CONVICTED OF TWO SEX OFFENSES IN COLORADO AND MUST REGISTER FOR LIFE UNDER ASORA

### A. Standard of Review

"When the superior court acts as an intermediate court of appeal, no deference is given to the lower court's decision." *E.g.*, *Tesoro Alaska Petroleum Co. v. Kenai Pipe Line Co.*, 746 P.2d 896, 903 (Alaska 1987). This Court reviews all questions of law *de novo*, "adopt[ing] the rule that is most persuasive in light of precedent, reason, and policy." *E.g.*, *Hutton v. State*, 350 P.3d 793, 795 (Alaska 2015).

### B. The superior court, guided by language in this Court's remand order, engaged in an unnecessary comparison of Alaska and Colorado statutes

In December 2017, this Court reversed the trial court's ruling that the *ex post facto* clause had been violated and remanded Maves with this instruction:

> **IT IS THEREFORE ORDERED** that this matter is **REMANDED** to the superior court to determine whether Maves's deferred sentence is similar" to the set aside of a conviction pursuant to AS 12.55.085, and if so, whether he is required by ASORA to register for life.

[Exc. 14-15]

On remand, Judge Aarseth conducted the analysis that he thought this Court had requested: a comparison of whether Alaska's SIS statute (AS 12.55.085) is procedurally similar to Colorado's deferred sentence statute (Colo. Rev. Stat. § 16-7-403). [17] Upon concluding that the procedures in both states were similar, the judge affirmed DPS's determination that Maves had been convicted of two sex offenses and must register under ASORA for life.

On appeal, Maves agrees that Judge Aarseth conducted the proper analysis when he compared the procedures to determine whether the statutes were "similar." [*See* At.Br. at 16] However, Maves disagrees with the judge's

---

[17] "The Alaska Supreme Court remanded the case for this court to determine, in connection with the ex post facto issue, whether "the Colorado deferred sentencing procedure is similar to the set-aside procedure in AS 12.55.085." " [Exc. 20]

conclusion that procedures are similar. [At.Br. at 16] Consequently, Maves argues that because "the procedures employed by Alaska versus Colorado are not categorically alike," he "only stands convicted of one misdemeanor and is only required to register for 15-years." [At.Br. at 16]

The state agrees with Judge Aarseth that Maves has been convicted of two prior sex offenses and must register for life. However, the judge's analysis in reaching this conclusion, and how Maves has framed this issue on appeal, is incorrect. Maves was "convicted" of second-degree sexual assault (for which he received a deferred sentence) at the time he plead no contest to the offense. It is immaterial to the definition of conviction provided by 13 AAC 09.900(a)(2) whether Maves's conviction was later set aside.

Under 13 AAC 09.900(a)(2),

> "conviction" means that an adult, or a juvenile tried as an adult under AS 47.10 or a similar procedure in another jurisdiction, has entered a plea of guilty or no contest to, or has been found guilty by a court or jury of, a criminal offense, whether or not the judgment was thereafter 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, but does not include a judgment that has been reversed or vacated by a court due to motion, appellate action, petition for writ of habeas corpus, or application for post-conviction relief under the Alaska Rules of Criminal Procedure or similar procedures in another jurisdiction[.]

(Emphasis added). The definition has three parts, each separated by a transition signal. First, 13 AAC 09.900(a)(2) states that a conviction occurs

when a person "has entered a plea of guilty or no contest to, or has been found guilty by a court or jury of, a criminal offense." Second, the regulation clarifies that person remains "convicted" under ASORA "whether or not the judgement was thereafter set aside under AS 12.55.085 or a similar procedure in another jurisdiction." Third, the regulation excludes judgments that have been "reserved or vacated by a court due to motion, appellate action, petition for writ of habeas corpus, or application for post-conviction relief... ." 13 AAC 09.900(a)(2).

Maves was convicted of second and third degree sexual assault when he pled no contest to both offenses in 1997. *See* 13 AAC 09.900(a)(2). [R. 251-63, 267-28, 278-81] Consequently, Maves was "convicted" of two sex offenses at that time. *Id.* In 2004, Maves's judgment was set-aside; however, it was not reversed or vacated. Accordingly, under 13 AAC 09.900(a)(2)'s definition of "conviction," Maves remains convicted of two Colorado sex offenses.

Judge Aarseth's analysis, in which he compared Alaska and Colorado deferred sentencing procedures, was immaterial to whether Maves was "convicted." The key phrase in 13 AAC 09.900(a)(2) signaling that this analysis is not needed is "whether or not" – that "whether or not" a judgment is set aside

under Alaska SIS statute or a similar procedure in another jurisdiction, ASORA still considers the offender "convicted" for registration purposes. [18]

According, because Maves was convicted of two prior sex offenses, DPS properly concluded that he must register in Alaska as a sex offender for life.

## III. THE ISSUE OF ATTORNEY'S FEES IS NOT RIPE AT THIS TIME

On June 12, 2019 (after Judge Aarseth ruled in favor of DPS on remand), the state filed a motion requesting attorney's fees. [*See* R. 502] Initially, the court granted the state's motion after Maves did not file an opposition. [R. 502] However, after the adverse order, Maves motioned for reconsideration and asked the opportunity to file an untimely opposition to the state's request for attorney's fees. [R. 500-01] On August 6, 2019, Judge

---

[18] In the trial court proceedings, Judge Aarseth, Maves, and the state all errantly engaged in the "similar" analysis suggested by the remand order. For guidance on the "similar" issue, the parties drew from *State v. Doe*, 425 P.3d 115 (Alaska 2018). In that *Doe* case, this Court analyzed a different provision of ASORA, AS 12.63.100(6)(c), which defined a "sex offense" as "a crime under [a listed Alaska statute] or a similar law of another jurisdiction." *Id.* at 119. The *Doe* court interpreted the phrase "similar law of another jurisdiction" and held that the legislature intended a comparison of whether the statutes had similar elements. The parties then extrapolated the analysis of "similar law" as used in the definition of "sex offense" to "similar procedure" as used in the definition of conviction.

As previously explained, whether Maves or not Maves was "convicted" is not affected by whether Alaska and Colorado's deferred sentence procedures are similar. This is because ASORA considered Maves "convicted" at the time he pled guilty to second and third degree sexual assault in 1997.

Aarseth granted reconsideration and granted Maves leave to file an untimely opposition. [R. 499] As of this writing, the superior court has not ruled on Maves's motion, presumably because the issue would be mooted if Maves prevails in this appeal. [*See* At.Br. at 23]

The Alaska Supreme Court has jurisdiction over "decision[s] of the superior court on an appeal from an administrative agency decision .... ." AS 22.05.010(c). Maves, despite acknowledging that no decision on attorney's fees has been issued, nevertheless urges this Court to address the substance of the state's motion for attorney's fees at this time. [At.Br. at 23-26] However, because the trial court has not decided the motion, the issue is not ripe to be decided on appeal.

## CONCLUSION

For the foregoing reasons, this Court should uphold Judge Aarseth's order affirming DPS's determination that Maves must register under ASORA for life.

DATED December 23, 2019.

KEVIN G. CLARKSON
ATTORNEY GENERAL

By: _____
Hazel C Blum (1605027)
Assistant Attorney General