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STATEMENT OF THE CASE AND FACTS

In May 1996, the Petitioner, Robert Louis Givens, pled no contest to three counts of lewd and lascivious conduct, was sentenced to five years prison, and in January 1999, completed that sentence. (R293) On June 18, 2001 the Pinellas County State Attorney charged him with failing to report as a sexual offender, contrary to Florida Statute 943.0435, after a police encounter on April 23, 2001. (R4-5,293) On January 4, 2002, Mr. Givens filed a motion to dismiss, amended on February 20, 2002. (R7-37)

On March 12, 2002, the Honorable John A. Schaefer, Circuit Judge, conducted a hearing on the motion. (R339-62) On April 10, 2002, Judge Schaefer entered a written order denying the motion(s) to dismiss. (R293-302) On June 13, 2002, Mr. Givens entered a plea of no contest in exchange for a sentence of three years probation. (R303-4) On June 19, 2002, a timely notice of appeal was filed in the Second District Court of Appeal. (R313)

On July 30, 2003, the Second District issued an opinion rejecting the Petitioner's contention that the sexual offender registration and notification requirements violated due process and/or "the Ex Post Facto clause."¹ See Appendix, copy of Givens v. State, 851 So. 2d 813 (Fla. 2d DCA 2003).

Petitioner served a notice to invoke discretionary jurisdiction on August 6, 2003, and his brief on jurisdiction follows.

¹ It appeared to be uncontested in the circuit court that the act requiring registration was passed both after Mr. Givens entered his pleas and after he began serving his sentence.

SUMMARY OF THE ARGUMENT

In rejecting the Petitioner's due process and ex post facto claims, the Second District relied largely on federal case-law, which in turn relied heavily on the federal constitution. However, and despite the Petitioner's request to do so, the Second District failed to address the impact of the Florida Constitution's express right of "privacy²" on the Florida Constitution's protections of due process of law and against ex post facto laws.

² Article I, §23.

ARGUMENT

ISSUE

THIS COURT SHOULD ACCEPT JURISDICTION TO ADDRESS WHETHER THE STATE CONSTITUTION PROVIDES GREATER PROTECTION OF DUE PROCESS AND EX POST FACTO RIGHTS, IN LIGHT OF ARTICLE I, §23, FLORIDA CONSTITUTION, AND AS APPLIED TO THE SEX-OFFENDER REGISTRATION STATUTE(S) AT ISSUE.

This Court should exercise its jurisdiction and accept review of this case because the Second District failed to address the impact of the Florida Constitution's Article I, §23, on the issues raised. That is, unlike the federal constitution, the Florida Constitution (Article I, §23) provides an *express* right of privacy, to wit: that every natural person "has the right to be let alone and *free from governmental intrusion.*" (Emphasis added.)

Having to register as a sex offender under the circumstances present in this case is the quintessence of governmental intrusion. In objecting to that governmental intrusion, the Petitioner cited the due process and ex post facto provisions of both the state and federal constitution. But in its opinion, the Second District relied exclusively on federal case-law. Put another way, the court failed to address the impact of Article I, §23 on the due process and ex post facto provisions of the Florida Constitution.

That is, the Second District relied on two cases from the federal supreme court in finding first that the sex-offender-registration act "did not entitle the defendant to a hearing" - to deter-

mine if he was a danger to the public before being subject to the statutory requirements - and second that because the registration act was "nonpunitive" it did not violate the *federal* "Ex Post Facto clause." See, 851 So. 2d 813, citing Connecticut Department of Public Safety v. Doe, -- U.S. --, 123 S.Ct. 1160 (2003), and Smith v. Doe, - - U.S. --, 123 S.Ct. 1140 (2003), respectively.

However, in Traylor v. State, 596 So. 2d 957 (Fla. 1992), this Honorable Court said that while state courts can't provide *less* protection of individual rights than federal courts, they are free to provide *more* protection, and in doing so held that "state courts and constitutions have traditionally served as the *prime* protectors of their citizens' basic freedoms." (Emphasis added.)

The Petitioner respectfully suggests the same rationale applies here, meaning Florida citizens are entitled to greater protection of their due process rights, and of their right to be free *from* ex post facto laws, based largely on the impact of Article I, §23 on those provisions of the Florida Constitution.

In light of this express protection of freedom from undue governmental intrusion, this Court must determine whether Florida's sex-offender registration act is subject to stricter scrutiny, in order to give effect to *both* Article I, §23, and Article I, §9, providing that no citizen of Florida shall be "deprived of life, liberty or property without due process of law," and Article I, §10, providing that "No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed."

It should be noted that in Espindola v. State, 28 Fla. L. Weekly D222 (Fla. 3d DCA January 15, 2003), the Third District Court of Appeal made precisely the kind of finding requested herein. In that case, the Third District ruled that the substantially-similar sexual-predator act violated procedural due process by failing to provide an individualized hearing before imposing the harsh registration and notification requirements.

In his appeal before the Second District, the Petitioner asked that court to find persuasive the reasoning in Espindola, and find in turn that the statute(s) applied below violated procedural due process of law. The court declined to do so, and further declined to expressly certify conflict because Espindola was not yet final.³ Nevertheless, the Petitioner respectfully suggests the reasoning in Espindola is sound and should be adopted by this Court.

In his second issue on appeal, the Petitioner requested the Second District should adopt the reasoning of the federal Ninth Circuit Court of Appeals in Doe v. Otte, 259 F.3d 979 (9th Cir. 2001), in which case the federal court ruled that since the Alaska act at issue increased the punishment for sex offenses, "the Ex Post Facto Clause limits its application to those sex offenders whose crimes were committed after its enactment." The Petitioner then said the same finding was warranted in this case, "for reasons including

³ See Givens, supra, 851 So. 2d 813, citing Milks v. State, 848 So. 2d 1167 (Fla. 2d DCA 2003). In Milks, the Second District Court wrote that as of the date that opinion was issued (May 2, 2003), Espindola "was not a final opinion and therefore may be subject to withdrawal or revision. Accordingly, we decline to certify conflict with that decision."

the express guarantee of privacy set out in Article I, §23, of the Florida Constitution, that every natural person 'has the right to be let alone and free from governmental intrusion.'" Petitioner's initial brief on appeal, page 16.

Accordingly, and as noted above, in denying the Petitioner's prayers for relief the Second District Court of Appeal appeared to rely exclusively on federal case-law, which in turn relied on the federal constitution, which in turn contains neither an express right of privacy nor an express right to be free from undue governmental intrusion. Put another way, the Second District failed to address the impact of Article I, §23 of the Florida Constitution, on that article's sections 9 - providing that no citizen of Florida shall be "deprived of life, liberty or property without due process of law" - and 10, providing that no "ex post facto law ... shall be passed" by the Legislature.

CONCLUSION

WHEREFORE, AND IN light of the foregoing, the Petitioner respectfully requests that this Honorable Court accept jurisdiction and grant review of the opinion of the Second District Court of Appeal in the foregoing cause.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Donna S. Koch, Concourse Center #4, Suite 200, 3507 E. Frontage Rd., Tampa, FL 33607, (813) 287-7900, on this _____ day of October, 2003.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Wordperfect 5.1 format with Courier 12 Point Font. The Office of the Public Defender, Tenth Judicial Circuit, is currently in the process of converting from Wordperfect 5.1 format to Microsoft Word format in order to comply with Rule 9.210(a)(2), since Courier New 12 Point Font is not available in Wordperfect 5.1. As soon as this upgrade is completed, Courier New 12 Point Font will be the standard font size used in all documents submitted by undersigned. This document substantially complies with the technical requirements of Rule 9.210(a)(2) and complies with the intent of said rule.

Respectfully submitted,

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APPENDIX

Copy of Givens v. State, 851 So. 2d 813 (Fla. 2d DCA 2003)