IN THE IOWA DISTRICT COURT FOR WASHINGTON COUNTY

STATE OF IOWA, Plaintiff, vs. KEITH FREDERICK SEERING, Defendant.	)	Criminal No. AGIN006718 RULING

BE IT HEREBY REMEMBERED, on March 20, 2003, and April 17, 2003, this case came before the Court for contested hearing on the Motion to Dismiss for Failure to State a Constitutional Claim, filed by the defendant on February 10, 2003, and the Resistance thereto, filed by the State on February 14, 2003. The State was represented by Washington County Attorney Barbara Edmondson. The defendant was personally present with his attorney, Eric Tindal.

The defendant called as witnesses in support of his motion Nancy Seering, the defendant's wife, and Dawneta Seering, the defendant's daughter, and offered into evidence Defendant's Exhibits A-1 through A-7, B, and B2. The State called as witnesses in support of its resistance Joanne K. Tinker, Program Planner with the Iowa Department of Public Safety; Dr. David McEchron, a general practice psychologist; Ron Mullen, Probation/Parole Officer for the Eighth Judicial District; Pete Buckingham, Geographic Information System (GIS) Coordinator for Washington County; and Sergeant Lyle Hansen, Detective for the City of Washington Police Department. The State also offered into evidence State's Exhibits 1 through 9 and 11 (CV for Dr. David McEchron), which were received by the Court. In addition, the State made an offer of proof with respect to State's Exhibits 9 and 11 (map), 12, 13, and 14.

After considering the testimony of the witnesses, the evidence submitted, and the applicable law, the Court makes the following:

FINDINGS OF FACT

The defendant, Keith Frederick Seering, is fifty years old (DOB 12/04/52). The defendant has been married for approximately thirty years to his wife, Nancy Seering. He has at least three children referred to in the record, including Dawneta Seering, aged twenty-one, who testified on his

behalf. During the course of his marriage to Mrs. Seering, the defendant has generally lived together with his family.

Keith Seering has a prior criminal conviction for Lascivious Contact With a Minor in violation of Iowa Code Section 709.14. This conviction occurred in Johnson County District Court in October of 2000. The victim in this crime was the defendant's daughter, Dawneta, who was fifteen years old at the time of the offense. The defendant received a suspended sentence for this crime and was placed on probation. His probation was later revoked, and he was sentenced to serve the remainder of his time at Hope House in Iowa City.

On or about July 1, 2002, Mrs. Seering and her daughter Dawneta moved to a trailer located at 209 North Washburn Street, Riverside, Iowa. Mrs. Seering and her family had not previously lived in Washington County. Mrs. Seering testified that she and her daughter moved into this trailer because she could not keep up with the payments at a prior residence. Mrs. Seering, her daughter Dawneta, and her son moved in with persons identified as Dale and Diana Cavin and their two children. The Cavins are close friends of the Seering family. The defendant was released from incarceration in August of 2002 and joined his family at the 209 North Washburn Street address.

On August 9, 2002, the defendant met with Sergeant Lyle Hansen, a detective for the City of Washington Police Department. Sergeant Hansen is the law enforcement official designated to register sex offenders in Washington County. Sergeant Hansen testified that he completed the paperwork for registry on August 9, 2002. See: State's Exhibit 7. Sergeant Hansen took note of the defendant's address and told the defendant that his current residence would be in violation of the "2000-foot rule" enacted by the Iowa legislature, which became effective July 1, 2002. The defendant informed Sergeant Hansen that the address would be temporary and that he was seeking a more permanent address in Johnson County.

Sergeant Hansen then procured a map of Riverside showing "sex offender buffer zones." This map was prepared by Pete Buckingham, Geographic Information System Coordinator for Washington County. See: Defendant's Exhibit A-5. According to the map, the 209 North Washburn address was not a legally acceptable address for the defendant to live. Sergeant Hansen met the defendant at his home at 209 North Washburn Street in Riverside on September 4, 2002. According to his testimony, Sergeant Hansen informed the defendant that he would need to find another place to live within one week.

On September 25, 2003, Sergeant Hansen paid a follow-up visit to the 209 North Washburn address to ascertain whether the defendant was still living at that address. Sergeant Hansen met the defendant at the 209 North Washburn address. The defendant informed Sergeant Hansen that he was sleeping in his car. Sergeant Hansen observed no signs that the defendant actually was living out of his car. The defendant was thereafter arrested for Violation of the Registration Requirements for Sex Offenders, an aggravated misdemeanor, and this case was filed.

Sergeant Hansen acknowledged that he had had additional concerns about the defendant residing at the 209 North Washburn address, apart from the "2000-foot rule." Sergeant Hansen's concerns related to the fact that minor children lived at that address and the defendant's prior victim, his daughter Dawneta, also lived at that address. Sergeant Hansen further acknowledged, however, that the defendant was not on probation or parole at the time he was arrested. The defendant was arrested because his residence was located within 2000 feet of a school or childcare facility in Riverside. The defendant's choice to live with his prior victim and with minor children would not otherwise violate Iowa law.

The defendant's wife, Nancy Seering, testified that after the defendant was arrested, she attempted to make arrangements to move to a residence which could accommodate the defendant without being in violation of the 2000-foot rule. In October of 2002, Mrs. Seering found an address in Lone Tree, Iowa, and was able to park a fold-down camper in the yard. The Seering family lived at the Lone Tree address from October of 2002 through early January of 2003. At that point the owner of the Lone Tree real estate wanted the Seering's camper removed from the property.

Mrs. Seering thereafter returned to the 209 North Washburn address in Riverside, understanding that the defendant could not live at the Riverside address because of the residency restrictions. Mrs. Seering further testified that she had made diligent efforts to find an appropriate residence for the family. She stated that she had driven around looking for places to live. Many of the residences she located were unaffordable for the Seerings because of the deposit requirements. Mrs. Seering was able to find some available and affordable residences. None of them were acceptable because of the 2000-foot rule.

Mrs. Seering further testified to the reasons that the Seering family is on a limited income. Mrs. Seering receives social security disability payments. The defendant is capable of working, but at that time worked only part-time hours at ACT in Iowa City. Mrs. Seering does not drive. The

family car is in need of repairs, is unreliable, and cannot be counted on for long distance commutes. Mrs. Seering further testified that if the defendant was released, she would want him to live with her again, although she now resides at a homeless shelter.

Dawneta Seering, the defendant's daughter and former victim, testified on the defendant's behalf. She testified that the Seering family has generally tried to live together. She testified that her immediate family unit consists of her mother, father, and brother. Another sister does not live with the family. When her family lived in the Lone Tree camper, she testified that the family was short of space, but that she was willing to tolerate the cramped living conditions because she wanted to be with her dad.

After the defendant's arrest in this case, he was initially released on his own recognizance. On November 7, 2002, the defendant's conditions of release were modified, requiring him to be supervised by the Department of Corrections and follow the Department's rules. It was a further condition of his release that he not visit or be within 100 feet from the property line at the residence of 209 North Washburn Street. On January 22, 2003, an Application to Revoke the Defendant's Pretrial Release was filed by the Department of Corrections. According to the Department's allegations, the defendant did not maintain a suitable residence and had moved several times without the permission of his supervising officer. The defendant's pretrial release was therefore revoked on January 22, 2003. The defendant has remained in jail on a $10,000 bond since that date.

CONCLUSIONS OF LAW

The defendant has been charged with Violation of Registration Requirements for Sex Offenders, an aggravated misdemeanor, in violation of Sections 692A.1(4)(c), 692A.2(1), 692A.3(1), and 692A.2A(2) and (3) of the Iowa Criminal Code of 2001 as amended by the 97th General Assembly, 2002. Defendant's counsel challenges the constitutionality of residency restrictions enacted by the legislature in 2002 and codified in Iowa Code Section 692A.2A. This statute states, in relevant part, as follows:

> 692A.2A(1) For purposes of this section, 'person' means a person who has committed a criminal offense against a minor, or an aggravated offense, sexually violent offense, or other relevant offense that involved a minor.
>
> 692A.2A(2) A person shall not reside within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility.

> 692A.2A(3) A person who resides within two thousand feet of the real property comprising a public or nonpublic elementary or secondary school or a child care facility, commits an aggravated misdemeanor.

This statute carries a strong presumption of constitutionality. See: Saadig v. State, 387 N.W.2d 315, 320 (Iowa 1986). A defendant who challenges the constitutionality of a statute bears the burden to overcome the presumption that it is constitutional. If the constitutionality of a statute is fairly debatable, the reviewing court must allow it to stand. "Thus a statute will not be declared unconstitutional unless it clearly, palpably, and without doubt infringes the Constitution." See: State v. Duncan, 414 N.W.2d 91, 95 (Iowa 1987).

The defendant's attorney asserts numerous legal theories in support of his contention that the above statute is unconstitutional, and the Court will consider each theory in turn.

I. The Defendant's Allegation that the Residency Restrictions Contained in Iowa Code Section 692A.2A Violate Substantive Due Process

The defendant's attorney first alleges that Iowa Code Section 692A.2A infringes upon the defendant's right to substantive due process pursuant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The Due Process Clause prohibits states from "depriving any person or life, liberty, or property without due process of law." See: United States Constitution, Fourteenth Amendment. The Iowa Constitution similarly states, "No person shall be deprived of life, liberty, or property without due process of law." See: Iowa Constitution, Article I, Section 9.

A long line of United States Supreme Court cases indicates that freedom of personal choice in matters of marriage and family life are some of the liberties protected by substantive due process. See: Albright v. Oliver, 510 U.S. 266, 272, 114 S.Ct. 807, 127 L.Ed.2d. 114 (1994); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 847-849, 120 L.Ed.2d. 674, 112 S.Ct. 2791 (1992); Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) 97 S.Ct. 1932, 52 L.Ed.2d. 531 (1977); Zablocki v. Redhail, 434 U.S. 374, 383-85, 98 S.Ct. 673, 679-81, 54 L.Ed.2d. 618 (1978); Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d. 15 (1972).

The United States Supreme Court has recognized the right to choice and privacy in one's family relationships as a fundamental right. See: Roberts v. United States Jaycees, 104 S.Ct. 3244 (1984). In the Roberts case, the United States Supreme Court stated:

> The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships, a substantial measure of sanctuary from unjustified interference by the State...The personal affiliations that exemplify these considerations, and that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection, are those that attend the creation and sustenance of family -- marriage, child birth, the raising and education of children, and cohabitation with one's relatives...Family relationships by their nature involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs, but also distinctively personal aspects of one's life. Id. at 3250 (citations omitted.)

There is no question but that the statute at issue in this case infringes upon one of the defendant's fundamental rights; specifically, the right of the defendant to live with his wife and children and to carry on his daily routine within the shelter and support of his family. When a fundamental right is infringed upon, the reviewing Court must exercise "strict scrutiny" of the statute to determine if the statute is constitutional. See: Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d. 600 (1968). It becomes the burden of the State, not the defendant, to demonstrate the compelling need for the statute. See: Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d. 597 (1976).

The government must satisfy certain criteria in order for a statute to survive the strict scrutiny analysis. See: Palmore v. Sidoti, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984). First, the State must show that the government has intended the statute to further a very strong interest. Second, the statute must be narrowly tailored to meet the State's objective, using the least restrictive means possible. See: Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed. 597 (1976); Wygart v. Jackson Board of Education, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d. 260 (1986). Constitutionally significant infringement must be more than a "de minimus" intrusion before strict scrutiny analysis will be applied. See: Clements v. Flashing, 457 U.S. 957, 102 S.Ct. 2836, 73 L.Ed.2d. 508 (1972); Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d. 92 (1972).

The intrusion upon one of the defendant's fundamental rights in this case was not "de minimus." It was in fact a significant intrusion. Because of the 2000-foot rule, the defendant was

unable to live with his wife and children in what was then the family home. It is true that this home was only of recent origin and that the defendant's wife and children were living with family friends at the time the defendant was released from incarceration and joined them. However, the defendant's wife testified that the family at that time was impoverished, and had looked for another home in Washington County without success. The Seering family was unable to find another home which was both available and affordable. The Seering's ability to search for an alternative residence was further limited by an unreliable car and the constraints of maintaining a reasonable commuting distance.

Because of the significant intrusion upon a fundamental right, this Court is required to exercise "strict scrutiny" analysis. The Court first examines whether there is a compelling state interest to justify this statute. There is no legislative history in this case to provide the Court with information as to the compelling State need for the 2000-foot rule. As there is no statement of legislative intent to guide the Court, the Court relies on the testimony of the State's witnesses as to the State's interest in the statute. The State's witnesses testified to their opinions that the governmental interest behind the statute was "public safety" and the "protection of children from potential harm by convicted sex offenders."

Clearly, these are laudable goals and furthering these goals constitutes an appropriate exercise of the State's police powers. Statistics provided by Joanne Tinker, Program Planner with the Department of Public Safety, show that there are 4,692 minor victims of registered sex offenders in the State of Iowa. See: State's Exhibit 5. Of all registered sex offenders, 87 percent had victims under the age of thirteen. Clearly, the State has a compelling governmental interest to reduce the number of minor victims in this state and to protect current victims from further abuse.

Exercising strict scrutiny analysis, the question next becomes whether the statute is narrowly tailored to meet the State's objectives using the least restrictive means possible. See: Washington v. Glucksberg, 521 U.S. 702, 721, 117 S.Ct. 2258, 117 S.Ct. 2302, 138 L.Ed. 772. (1997). The Court finds that the State has failed to satisfy this prong of the strict scrutiny test.

As argued by defendant's counsel, there are simply no facts which prove or even suggest children will be rendered more safe from the predations of sex offenders because of the 2000-foot residency restriction. The defendant's attorney reviewed numerous studies concerning offender recidivism. See: Defendant's Brief, page 5. The defendant's attorney concludes, "The undersigned

has not found a single study showing a relationship between a residence, distances from a school or day care, and the risk to reoffend." See: Defendant's Brief, page 5. The defendant offered into evidence a document entitled "The Iowa Sex Offender Registry and Recidivism," prepared by the Iowa Department of Human Rights, Division of Criminal and Juvenile Justice Planning and Statistical Analysis Center. See: Defendant's Exhibit B. One conclusion of this study was as follows:

> The Iowa Sex Offender Registry appeared to have mixed effects on recidivism rates, at least over a period of 4.3 years. Sex offense recidivism was low at 3 percent for the registry sample and 3.5 percent for the pre-registry sample...These differences in recidivism were not found to be statistically significant. See: Defendant's Exhibit B, page 19.

This Iowa study does not purport to study the effect of residency restrictions on the recidivism rate for sex offenders. According to defense counsel, no such studies appear to be available, nor has the State cited any such research studies. The State did, however, call a number of witnesses who attempted to link the 2000-foot rule to compelling State objectives.

Dr. Dave McEchron, a Ph.D. psychologist in private practice, testified on behalf of the State. Dr. McEchron has been a private psychologist for thirty-five years. Dr. McEchron's general practice has included the treatment of sex offenders for over twenty-five years. He has done sex offender evaluations for court and has conducted research in the field of sex offender treatment. Dr. McEchron testified that it is reasonable to restrict access to children if the sex offender had child victims. He further testified that "reducing opportunity" is the biggest factor in reducing the incidence of child sexual abuse. Dr. McEchron stated, "If you keep someone away from a playground, you reduce opportunity and temptation." However, Dr. McEchron went on to state, "There are no good hard data on what is the 'safe distance' for sex offenders to stay away from children." This testimony contradicts the State's assertion that the statute is narrowly tailored to reduce the opportunity and temptation for sex offenders to reoffend.

Several of the State's witnesses directly testified that the 2000-foot rule could actually hinder, rather than enhance, the State's objective of protecting children from sex offenders. Dr. McEchron testified that a restriction that lasts forever, regardless of a sex offender's progress in treatment, "does not sound fair. It does not motivate the individual." He went on to explain that the 2000-foot

rule does not allow any consideration of a positive response to sex offender treatment. Sex offenders who had successfully completed treatment and were still not allowed to live in the home of their choice could become depressed and therefore become more likely to reoffend. Dr. McEchron also emphasized that sex offenders are more likely to do well if they have strong family ties. Laws which prevent sex offenders from living with their families, could lead sex offenders to reoffend because of the lack of family support to encourage self control.

Ron Mullen, a parole/probation officer for the Eighth Judicial District, testified that he has lengthy experience in working with sex offenders as a counselor in the sex offender treatment unit in Mt. Pleasant. He stated that the goal of sex offender treatment is to establish internal controls for sex offenders and to develop an individualized relapse prevention plan for such offenders. Mr. Mullen further testified that external controls, such as restrictions on living arrangements, are very important for sex offenders early on in their treatment. As treatment progresses, however, the external controls need to be relaxed so that the sex offender can gain more internal controls. External controls include restricting the sex offender's access to pornography and the internet, preventing sex offenders from driving aimlessly around and picking up hitchhikers, and prohibiting sex offenders from associating with minors or going to places where minors might be, such as fast food restaurants, arcades, and schools.

Mr. Mullen stated that the 2000-foot restriction creates a problem for treatment of sex offenders. The residency restriction means that it is very difficult to find appropriate residences for sex offenders while they are still on parole or probation. Thus, according to Mr. Mullen, the Department "loses the opportunity to see people function in the community before they leave probation." The sex offender may leave probation or parole before the Department has had an opportunity to assess if the probationer has actually acquired internalized controls.

Mr. Mullen further testified that in treating sex offenders, each person's circumstances are considered individually. If a sex offender wants to move into a proposed residence, the Department considers that residence and its appropriateness on an individual basis. Mr. Mullen stated that within the Department there are no guidelines concerning the number of feet from a school or day care because such a restriction creates "a false indication of safety." Mr. Mullen further testified that he is not aware of any studies or literature that would indicate that 2000 feet is somehow a guarantee of safety against the predation of sex offenders. Mr. Mullen's testimony echoed Dr. McEchron's

testimony that there are simply no studies showing a correlation between a sex offender's residence and the safety of children.

Sergeant Lyle Hansen, a detective for the Washington Police Department, also testified as to his understanding of the basis for the 2000-foot rule. Sergeant Hansen is the designated Washington County law enforcement officer to register sex offenders. According to Sergeant Hansen, the statute theoretically could be an important tool for enhancing public safety by reducing sex offender recidivism. In practice, however, Sergeant Hansen's concern is that sex offenders will simply choose not to register at all, knowing that they may be prosecuted for revealing their residence. The statute's possible "chilling effect" on registry may lead to less available and accurate information as to the actual location of sex offenders.

The Court concludes that the statute restricting the residence location of sex offenders is not narrowly tailored to meet the State's objective and does not use the least restrictive means possible to attain State objectives. As both Dr. McEchron and Ron Mullen testified, the population of sex offenders is not a uniform population. Some sex offenders respond well to treatment, and the likelihood of reoffense is low. Other sex offenders do not respond well or at all to treatment. The State's goal for such sex offenders should simply be to protect the community for as long as possible. Both witnesses also referred to the sex offender civil commitment process, which has as its objective long-term protection from the most serious sex offenders who are at high risk to reoffend and are unamenable to treatment. The civil commitment process is narrowly tailored to protect the community from the most dangerous sex offenders for as long as possible.

The 2000-foot rule, by contrast, is not narrowly tailored to protect the community from sex offenders who <u>are</u> amenable to treatment and who are less likely to reoffend. The statute restricts only where a sex offender can live, not where he can travel or work. Basically, such a residency restriction is unlikely to enhance public safety when a sex offender can walk past a school or day care as often as he/she chooses, be in the neighborhood of a school or day care, and be employed in a school or day care center.

In conclusion, the Court determines that Iowa Code Section 692A.2A, as applied to this defendant, violates one of his fundamental rights: the right to live with his family members. The statute therefore must pass the constitutional strict scrutiny test in order to survive. There is undoubtedly a compelling State interest to protect children from convicted sex offenders. The Court

finds, however, that this statute is not a substantially effective method for furthering that interest, and the statute is not narrowly tailored to meet the State's objective. The Court therefore determines that Iowa Code Section 692A.2A is unconstitutional as applied to this defendant because it violates his Fourteenth Amendment Right to substantive due process.

II. The Defendant's Allegations that the Residency Restrictions Contained in Iowa Code Section 692A.2A Violate Procedural Due Process

As indicated above, the states are prohibited from depriving any person of life, liberty, or property without due process of law under both the Federal Constitution and the State of Iowa Constitution. Iowa Courts have held that "fundamental fairness" is the basic standard of procedural due process. See: Cox v. Burke, 361 F.2d. 183, 186 (7th Circuit 1966), cert denied, 385 U.S. 939 (1966). The test of a denial of due process claim is whether it would be unfair to permit the procedure complained of to stand; i.e. whether the procedure tends to shock the sense of fair play. See: Howard v. United States, 372 F.2d. 294 (9th Circuit 1967), cert denied 388 U.S. 915 (1967). What process is due, and what procedures are fair, relate directly to the situation involved. See: Cohen v. Hurly, 366 U.S. 117, 81 S.Ct. 954, 6 L.Ed.2d 156 (1961).

In this case, the defendant's attorney asserts that the defendant was not afforded his constitutional right to procedural due process. Specifically, no Court or other arbiter is empowered to grant the defendant an exemption so that he might live with his wife and family, the only home available and affordable to them at the time of the alleged offense. Thus, his attorney argues that Iowa Code Section 692A.2A violates the defendant's right to procedural due process.

The defendant's attorney cites J.L.N. v. State of Alabama, 2002 W.L. 31399425 (Alabama Criminal Appeals), in support of his procedural due process claim. In the J.L.N. case, the Court of Criminal Appeals of Alabama found that that State's sex offender residency restriction violated procedural due process because it allowed "no procedure by which a convicted sex offender can petition the Court for an exemption – from the restrictions imposed by the statute and the corresponding severe punitive consequences for noncompliance."

This Court similarly finds that Iowa Code Section 692A.2A violates procedural due process as applied to the facts of this case. The statute prescribes no method by which the defendant could petition the Court for an exemption. As stated by defendant's counsel, "The statute does not afford a procedure for a Court (or neutral arbitrator) to contemplate any individualized facts in applying the

statute or its punitive result." See: Defendant's Brief, page 6. The statute effectively precludes the defendant from living with his wife and family in the only home which was both available to them and affordable for them at the time the defendant was criminally charged. The practical affect of the statute was to render the defendant homeless, a result which shocks the sense of "fair play." This Court concludes that Iowa Code Section 692A.2A is unconstitutional as applied to the facts of this case, in that it violates the Fourteenth Amendment right to procedural due process.

III. Allegation that the Residency Restrictions Contained in Iowa Code Section 692A.2A Violates the United States Constitution's Ex Post Facto Clause

Article I, Section 10 of the United States Constitution prohibits the States from passing any ex post facto law. Similarly, Article I, Section 21 of Iowa's Constitution states, "No...ex post facto law...shall ever be passed." The ex post facto clause forbids enactment of laws that increase the punishment for a crime after its commission. See: State v. Pickens, 558 N.W.2d 396 (Iowa 1997). In the Pickens case, the Iowa Supreme Court held that Iowa's sex offender registration statute was not punitive and thus was not an ex post facto law. In analyzing whether the sex offender registry statute was an ex post facto law, the Court considered the factors identified by the United States Supreme Court in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d. 644 (1963).

In the more recent United States Supreme Court case of Smith v. Doe, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003), the United States Supreme Court analyzed whether the Alaska Sex Offender Registration Act was unconstitutional as an ex post facto law. The Court enumerated the factors to consider in its analysis as follows:

1. whether the law imposes an affirmative disability or restraint;
2. whether the law has been regarded in our history and traditions as a punishment;
3. whether the law has a rational connection to a nonpunitive purpose; and
4. whether the law is excessive with respect to this purpose.

The first factor to consider is whether the law involves an affirmative disability or restraint. The Court finds that in this case, the statute does impose such an affirmative disability or restraint. Specifically, it precludes the defendant from living in his family's home. This case thus can be distinguished from the case of Smith v. Doe, supra. In the Smith v. Doe case, the United States

Supreme Court upheld the Alaska Sex Offender Registration Act, finding that it did not constitute an unconstitutional ex post facto law. In considering the issue of affirmative disability or restraint, the United States Supreme Court stated, "Contrary to the Ninth Circuit's assertion, the record contains no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords." Id. at 182.

The Iowa statute, however, does create a housing disadvantage for former sex offenders, and for this defendant, in particular. Specifically, the defendant is precluded from living in his family home. Generally, he is precluded from living in almost every urban area in Washington County, with the exception of two small towns (Brighton and West Chester, See: State's Exhibit 9). The housing that would be available to him is primarily in rural areas. The record is that the defendant's wife searched for alternative housing for herself and the defendant and could find nothing in Washington County that was both available and affordable.

The Court agrees with defendant's counsel that factors two and three are also met in this case. Defense counsel analogizes the sex offender residency restrictions to banishment, and this Court agrees. It has historically been regarded as a punishment to banish a person from their family home and from living within their community. In Kennedy v. Mendoza-Martinez, supra., the United States Supreme Court stated:

> Reference to history here is peculiarly appropriate...banishment and exile have throughout history been used as punishment...Banishment was a weapon in the English legal arsenal for centuries (citation omitted) but it was always adjudicated a harsh punishment even by men who were accustomed to brutality in the administration of criminal justice...(citation omitted). Id. at 662, 568, 170.

In the Smith v. Doe, supra., case, the United States Supreme Court similarly recognized the colonial history of banishment as a punishment, stating, "The most serious offenders were banished, after which they could neither return to their original community nor, reputation tarnished, be admitted easily into a new one." Id. at 179, 1150.

In Burnstein v. Jennings, 4 N.W.2d 428 (Iowa 1942), the Iowa Supreme Court summarily indicated that a trial court does not have the right to order a defendant to be removed from his county of residence as a condition of probation. Yet, the statute at issue effectively removes the defendant

from most of the small towns in Washington County, although he is not on either probation or parole. The Court finds that Iowa Code Section 692A.2A has the effect of banishment, which has historically been considered a punishment.

This Court next considers whether the Iowa sex offender residency restriction has a rational connection to a nonpunitive purpose. The Iowa Supreme Court has previously held that the sex offender registry statute was motivated by a concern for public safety and not to increase the punishment for sex offenders. Specifically, the Court stated:

> The primary purpose of a sex offender registry is not to punish but to aid the efforts of law enforcement officers in protecting society. We believe that our statute may be fairly characterized as remedial and not as a statute for deterrence or retribution purposes, even though disseminations are 'unpleasant consequences of the offense.' See: State v. Pickens, 558 N.W.2d 396, 400.

This Court finds that the 2000-foot rule has a rational connection to a nonpunitive purpose; specifically, public safety. The Court also finds, however, that the statute is excessive with respect to this purpose. Certainly, the State has the right to create a regulatory scheme for the purpose of enhancing the safety of children and protecting them from sex offenders. However, in this case, the regulatory means chosen are not reasonable in light of the State's objective. As testified by the State's own witnesses, there is nothing magic about a 2000-foot restriction. There are no studies to prove or even suggest a 2000-foot restriction enhances the safety of children. There are no studies which correlate the residence of sex offenders with their recidivism rates. The 2000-foot law punishes sex offenders by severely restricting where they can live. In this case, the law effectively rendered the defendant homeless. Such a result is excessive when compared to the State's nonpunitive purpose of enhancing public safety. The Court concludes that Iowa Code Section 692A.2A violates the ex post facto clause of the constitutions of the United States and the State of Iowa.

IV. Allegation that Iowa Code Section 692A.2A Violates the Defendant's Fifth Amendment Rights Against Self-Incrimination

The Fifth Amendment to the United States Constitution provides that a person cannot "be compelled in any criminal case to be a witness against himself." See: United States Constitution,

Fifth Amendment. Case law makes clear that this prohibition privileges a defendant not to answer official questions put to him in any proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings. See: Lefkowitz v. Turley, 414 U.S. 70, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973). Generally, a witness must assert the privilege against self-incrimination rather than answer if he desires not to incriminate himself. See: Minnesota v. Murphy, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d. 409 (1984). However, there is an exception where claiming the privilege in lieu of answering the inquiry would tend to incriminate the person. See: Minnesota v. Murphy, supra.

The Court agrees with defense counsel that in this case that the defendant was clearly required to register his residence pursuant to the sex offender registry requirement set forth in Iowa Code Section 692A. Failure to register as a sex offender would lead to additional criminal charges. The defendant therefore went to the Washington County Sheriff's Office to register. When asked to provide the address of his residence, the defendant could have chosen to remain silent, thus exercising his Fifth Amendment Rights. However, if he had done so, it would have tended to incriminate him. Whether he answered honestly or refused to answer, a criminal investigation was bound to ensue.

The Court agrees with defense counsel that under these set of circumstances, the defendant was compelled to make a testimonial concerning his residence; thus, incriminating himself. The Court concludes that Iowa Code Section 692A.2A violates the defendant's Fifth Amendment Rights against self-incrimination.

V. Allegation that the Residency Restrictions Contained in Iowa Code Section 692A.2A Renders it an Unconstitutional Bill of Attainder

The same clauses in the United States and State of Iowa Constitutions which prohibit ex post facto laws also prohibit bills of attainder. In State v. Swartz, 601 N.W.2d 348 (Iowa 1999), the Iowa Supreme Court defined a bill of attainder as:

> ...a legislative determination that metes out punishment to a particular individual or a designated group of persons without a judicial trial. The danger of such a law is that it deprives the accused of the protection afforded by a judicial process. Id. at 351.

The courts are to consider three factors in determining whether legislation is an unconstitutional bill of attainder:

1. specificity as to the target of the legislation;
2. imposition of punishment; and
3. the lack of a judicial trial.

See: State v. Phillips, 610 N.W.2d 840 (Iowa 2000).

In this case, the target of the legislation is very specific: those sex offenders who have been convicted of crimes involving minors as victims. This Court has previously determined that the effect of this legislation is to impose a punishment. The Court finds that the third element for a bill of attainder is not met in this case, however. The defendant does have a right to trial in this case, a right which he is currently in the process of exercising. The Court agrees with the State that because the defendant has the right to a judicial trial, there is no valid argument for a "bill of attainder" violation. The Court concludes that Iowa Code Section 692A.2A is not an unconstitutional bill of attainder.

VI. Allegation that Iowa Code Section 692A.2A Enacts Cruel and Unusual Punishment

The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishment." The prohibition against cruel and unusual punishment means that the punishment must not be grossly out of proportion to the severity of the crime. See: Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d. 859 (1976); State v. Heinz, 478 N.W.2d 888 (Iowa Ct.App. 1991). The Courts are to consider a three-factor test in determining whether punishment is disproportional:

1. Gravity of the offense and harshness of the penalty;
2. Sentences imposed on other crimes in this jurisdiction;
3. The sentence imposed for the same crime in other jurisdictions

See: Solem v. Helm, 436 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983).

The Court considers first the gravity of the offense. In this case, the defendant has previously been convicted of lascivious conduct with a minor. This is a serious misdemeanor. Ordinarily, a serious misdemeanor would carry a sentence of up to one year in jail. There are no other serious misdemeanors of which this Court is aware which effectively preclude the defendant from living in the family home. The exception would be a domestic abuse offense in which a No Contact Order has been issued and extended at the request of the State. Such an extension requires, however, that a court find the defendant continues to be a threat to the safety of the victim, persons residing with the

victim, or members of the victim's immediate family. See: Iowa Code Section 236.14. Of course, in this case, the Court has made no such findings.

The Court next considers the sentence imposed for the same crime in other jurisdictions. The Court agrees with defense counsel's statement that "The undersigned has not found any legislation from this State or any other that is as extensive and punitive as Iowa Code Section 692A.2A that has survived a Constitutional challenge." See: Defendant's Brief, page 13. This Court's internet search similarly yielded no other cases involving such stringent residency restrictions on sex offenders. The Court concludes that Iowa Code Section 692A.2A is unconstitutional as cruel and unusual punishment.

VII. Allegation that Iowa Code Section 692A.2A is Unconstitutionally Overbroad

The defendant's counsel has argued that Iowa Code Section 692A.2A is overbroad because it applies to individuals without regard to individual circumstances or exceptions. The Iowa Supreme Court has stated that a statute is unconstitutionally overbroad "if it attempts to achieve a governmental purpose to control or prevent activities constitutionally subject to state regulation by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." See: State v. Pilcher, 242 N.W.2d 348, 353 (Iowa 1976).

It is not every area of protected freedoms, however, which can be subject to overbreadth analysis. Overbreadth analysis is confined to an alleged denial of First Amendment Rights. See: Moose Lodge #107 v. Irvis, 407 U.S. 163, 168, 92 S.Ct. 1965, 1969, 32 L.Ed.2d 627, 634 (1972). The defendant's counsel asserts that the ability to live with one's family is undoubtedly behavior protected by the First Amendment and therefore subject to overbreadth analysis.

In this Court's opinion, however, the right to live with one's family is not a First Amendment right but rather a Fourteenth Amendment Right. As the United States Supreme Court stated in Moore v. City of East Cleveland, Ohio, supra., "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the due process clause of the Fourteenth Amendment." (citation omitted) Id. at 1935.

The First Amendment, on the other hand, covers the freedoms of religion, speech, assembly, and association. The association referred to is not family association but association for the advancement of economic, religious, political, or cultural purposes. See: City of Maquoketa v. Russell, 484 N.W.2d 179, 184 (Iowa 1992). See also: Los Angeles Police Department v. United

Reporting Publishing Group, 528 U.S. 32, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999).

As stated in United States v. Lemons, 697 F.2d. 832, 835 (Eighth Circuit, 1983):

> ...the 'chilling effect' exception which has been traditionally called overbreadth, has consistently been applied only to claims that a statute tends to 'chill' the constitutional free speech or expression rights of others in violation of the first amendment; the United States Supreme Court has limited this exception to traditional free speech cases.

Defendant's counsel in this case has not shown that the 2000-foot rule implicates the defendant's rights to freedom of speech or expression. The Court therefore determines that this statute is not unconstitutionally overbroad.

CONCLUSION

For all of the reasons previously stated, this Court finds Iowa Code Section 692A.2A to be unconstitutional, as violative of the defendant's right to substantive and procedural due process under the Fifth and Fourteenth Amendments, the ex post facto clauses of the federal and state constitutions, the defendant's Fifth Amendment right against self-incrimination, and the Eighth Amendment prohibition against cruel and unusual punishment. The Court therefore finds that the defendant's Motion to Dismiss should be granted.

IT IS THEREFORE ORDERED that the defendant's Motion to Dismiss is GRANTED. This case is hereby DISMISSED with costs to the State.

DATED April 29, 2003.

Lucy J. Gamon
LUCY J. GAMON
JUDGE, EIGHTH JUDICIAL DISTRICT

JUDGE

CERTIFICATE OF SERVICE: The undersigned certifies that a true copy of this document was served on each person named (and checked) below, including attorneys of record, or the parties where no attorney is of record, by enclosing this document in an envelope addressed to each named person at the respective addresses disclosed by the pleadings of record herein, with postage fully paid, by depositing the envelope in a United States depository or hand delivered on: 4/30/2003.

✓ County Attorney
✓ Defendant's Attorney: Eric Tindal

Signed: Clerk/Designee