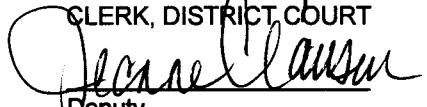


STATE OF IDAHO)
County of KOOTENAI)
FILED 10/14/2020
AT 4:10 O'Clock P. M.
CLERK, DISTRICT COURT

Deputy

**IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE
STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI**

SHANE BRIAN NARDINI,
Petitioner,
v.
IDAHO STATE POLICE, BUREAU OF
CRIMINAL IDENTIFICATION, IDAHO
CENTRAL SEX OFFENDER REGISTRY
Respondent.

Case No. CV28-20-0518

**MEMORANDUM DECISION AND
ORDER ON JUDICIAL REVIEW OF
ADMINISTRATIVE DECISION OF
IDAHO STATE POLICE**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

The matter before the Court is a Petition for Judicial review filed by Petitioner Shane Brian Nardini (Nardini), arising from the Respondent Idaho State Police, Bureau of Criminal Identification, Idaho Central Sex Offender Registry's (SOR) determination on September 17, 2019, that Nardini is required to register in Idaho as a sex offender. A.R. pp. 74-77. SOR's final order is affirmed in part and remanded in part for further proceedings consistent with this opinion.

The events that led up to SOR's September 17, 2019, decision stem from the May 4, 2001, conviction of Nardini in Virginia for Sexual Battery, in violation of Va. Code § 18.2-67.4. A.R. item 11. Nardini was originally indicted by Grand Jury on January 16, 2001, which charged Nardini with violation of rape under Va. Code § 18.2-61, and charged that "[o]n or about the 25th day of June, 2000, in the County of Fairfax, Shan B. Nardini did rape

[name of victim], a child fifteen (15) years of age.” A.R. item 6. Subsequent to Nardini’s conviction, Nardini moved to California and registered as a sex offender as of 2011. A.R. item 1. On February 27, 2012, Nardini obtained notification from the state of California that he was no longer required to register as a sex offender in the state of California for the 2001 conviction in the state of Virginia. Decl. of Shane Nardini in Supp. of Pet’r. Reply Brief Ex. E. Additionally, Nardini is no longer required to register as a sex offender in Virginia due to the statutory ten years having passed since the time of his conviction. *Id.* Ex. D. While there is no finding by the SOR on this point, there is an email in the agency record, between Amy Campbell of the SOR and Kootenai County Sheriff Detective Todd Jackson, that Nardini apparently moved to Idaho prior to September 2019, but did not register as a sex offender at that time. A.R. item 1, pp. 4-5.

On September 17, 2019, the SOR issued an Agency’s Finding and Conclusions of Law and Declaratory Ruling finding that Nardini was required to register as a sex offender in Idaho. A.R. item 21, pp. 74-77. On January 17, 2020, Nardini timely filed a Petition for Judicial Review of Agency Action. Under the terms of the September 17, 2019, determination by the SOR, Nardini had to file his appeal to the district court, “within twenty-eight (28) days (a) of the service date of this final order, (b) of an order denying petition for reconsideration, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. Idaho Code § 67-5273.” A.R. p. 76. The record shows Nardini was served on December 20, 2019, so Nardini’s Petition filed on January 17, 2020, is timely.

On March 30, 2020, Nardini filed Petitioner’s Brief. On May 1, 2020, SOR filed a Respondent’s Brief. On May 21, 2020, Nardini Filed a Petitioner’s Reply Brief.

On September 14, 2020, this Court heard oral arguments regarding the Petition for Judicial Review. During oral arguments, counsel for SOR requested that this Court strike

supplemental materials to the agency record filed by Nardini. This Court denied the motion to strike. At the conclusion of oral argument, this Court took the Petition for Judicial Review under advisement.

II. STANDARD OF REVIEW.

Review of decisions requiring a resident to register with Idaho's Sex Offense Registry is governed by the Idaho Administrative Procedures Act (IDAPA). See I.C. §§ 18-8304, 67-5201(2), 67-5270. Reviewing courts independently review the agency record on appeal. *Marshall v. Idaho Dep't of Transp.*, 137 Idaho 337, 340, 48 P.3d 666, 669 (Ct.App. 2002). But reviewing courts do not substitute their judgment for that of the agency as to weight of the evidence presented. I.C. § 67-5279(1); *Marshall*, 137 Idaho at 340, 48 P.3d at 669. An agency's findings of fact are deferred to unless they are clearly erroneous. *Castaneda v. Brighton Corp.*, 130 Idaho 923, 926, 950 P.2d 1262, 1265 (1998). The agency's factual determinations are binding on the reviewing court, even where there is conflicting evidence before the agency, so long as the determinations are supported by substantial, competent evidence in the record. *Fischer v. City of Ketchum*, 141 Idaho 349, 109 P.3d 1091, 1094 (2005).

Courts may overturn an agency's decision where its findings, inferences, conclusions, or decisions: (a) violate statutory or constitutional provisions; (b) exceed the agency's statutory authority; (c) are made upon unlawful procedure; (d) are not supported by substantial evidence in the record or (e) are arbitrary, capricious, or an abuse of discretion. I.C. § 67-5279(3). The party challenging the agency decision must demonstrate that the agency erred in a manner specified in I.C. § 67-5279(3) and that a substantial right of that party has been prejudiced. *Price v. Payette County Bd. Of County Comm'r's*, 131 Idaho 426, 429, 958 P.2d 583, 586 (1998).

III. ANALYSIS

Nardini Makes three arguments for judicial review of SOR's determination that Nardini had to register as a sex offender in Idaho: (1) Mr. Nardini's original charge in Virginia was not substantially equivalent to lewd conduct with a minor; (2) Nardini requests that the administration board obtain additional evidence on whether Mr. Nardini was a resident of Idaho; (3) requiring Mr. Nardini to register as a sex offender would violate his constitutional rights.

A. Substantial Equivalence of Virginia Code § 18.2-67.4 and Idaho Code § 18-1508.

The question of deference to an agency decision regarding a matter of statutory construction was delineated by the Idaho Supreme Court in *J.R. Simplot Co. v. Idaho State Tax Comm'n (Simplot)*:

In determining the appropriate level of deference to be given to an agency construction of a statute, we are of the opinion that a court must follow a four-prong test. The court must first determine if the agency has been entrusted with the responsibility to administer the statute at issue. Only if the agency has received this authority will it be "impliedly clothed with power to construe" the law. *Kopp v. State*, 100 Idaho 160, 163, 595 P.2d 309, 312 (1979).

The second prong of the test is that the agency's statutory construction must be reasonable. This requirement was recognized at the beginning of our case law when in *State v. Omaecheviaria*, 27 Idaho 797, 152 P. 280 (1915), we indicated that deference would not be appropriate when an agency interpretation "is so obscure and doubtful that it is entitled to no weight or consideration." 27 Idaho at 803, 152 P. at 281; see also *Breckenridge v. Johnston*, 62 Idaho 121, 108 P.2d 833 (1940).

The third prong for allowing agency deference is that a court must determine that the statutory language at issue does not expressly treat the precise question at issue. An agency construction will not be followed if it contradicts the clear expressions of the legislature because "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842–43, 104 S.Ct. at 2781 (footnotes omitted).

If an agency, with authority to administer a statutory area of the law, has made a reasonable construction of a statute on a question without a precise statutory answer then, under the fourth prong of the test, a court must ask whether any of the rationales underlying the rule of deference are

present. If the underlying rationales are absent then their absence may present “cogent reasons” justifying the court in adopting a statutory construction which differs from that of the agency.

When some of the rationales underlying the rule exist but other rationales are absent, a balancing is necessary because all of the supporting rationales may not be weighted equally. Therefore, the absence of one rationale in the presence of others could, in an appropriate case, still present a “cogent reason” for departing from the agency’s statutory construction. Because these rationales are important in determining whether cogent reasons exist for departing from an agency interpretation, we disapprove of the practice of merely concluding that cogent reasons for departing from the agency interpretation exist without any further explanation. If one or more of the rationales underlying the rule are present, and no “cogent reason” exists for denying the agency some deference, the court should afford “considerable weight” to the agency’s statutory interpretation. If, on the other hand, a court concludes that the agency is not entitled to receive considerable weight to its interpretation based on the lack of justifying rationales for deference, then the agency’s interpretation will be left to its persuasive force.

120 Idaho 849, 862–63, 820 P.2d 1206, 1219–20 (1991).

In the present case, the first prong of *Simplot*’s administrative deference test is met.

In *Knox v. State* the Idaho Court of Appeals delineated the legal framework that entrusts the Idaho State Police with the responsibility to administer the statute at issue (I.C. § 18-8304).

The Idaho Sexual Offender Registration Notification and Community Right-to-Know Act (SORA) requires a person sentenced for an offense identified in the Act to register with the Registry. I.C. § 18-8306(1). The registry is maintained on a publicly accessible website. SORA applies, in relevant part, to anyone “who has a foreign conviction that is substantially equivalent to the offenses listed in paragraph (a) of this subsection.” I.C. § 18-8304(1)(b). The legislature delegated to the Idaho State Police the authority to implement SORA and establish the Registry. I.C. § 18-8304(4); *Doe v. State*, 158 Idaho 778, 782, 352 P.3d 500, 504 (2015). The Idaho State Police then promulgated “Rules Governing the Sex Offender Registry” (“Registry Rules”) for administration of the Registry. IDAPA 11.10.03.000-012. The Registry Rules apply to “[a] person convicted of a sex offense in another jurisdiction and who moves to ... Idaho.” IDAPA 11.10.03.012(08). The Registry Rules state the process for appeals of agency decisions, IDAPA 11.10.03.003, and the process for obtaining and appealing “substantially equivalent” determinations, IDAPA 11.10.03.012(08).

Knox v. State, 162 Idaho 729, 732, 404 P.3d 1280, 1283 (Ct. App. 2017).

With the first prong of *Simplot* satisfied, this Court turns next to the second prong of *Simplot*, to determine whether SOR's statutory construction of I.C. § 18-8304 is *reasonable*, as well as the third prong, whether Idaho statutes directly contradict SOR's interpretation. Following these determinations, this Court must perform a balancing test to determine whether SOR's determination should be granted significant weight.

Nardini argues that:

The codes are not substantially equivalent because Virginia's Code of Sexual Abuse is not about minors. An individual could be charged with Virginia's Code of Sexual Abuse if the victim was for example forty years old. This would not be substantially equivalent to Idaho Code's Lewd Conduct with Minor Child under Sixteen.

Substantially equivalent does not mean exactly the same, nor exactly identical to." *Id.* at 782. Substantially equivalent means "any sex offense related crime, regardless of whether a felony or misdemeanor, that consists of similar elements." *Id.* The elements of Virginia's Code of Sexual Abuse are not similar to the elements of Idaho's Lewd Conduct with Minor Child Under Sixteen because Virginia's Code does not state how young the victim has to be. Since Virginia's Code of Sexual Abuse does not state how old the victim needs to be, this code is not substantially equivalent to Idaho's Code Lewd Conduct with Minor Child Under Sixteen, which states that the victim has to be under sixteen.

Pet'r Br. 5. Additionally, Nardini argues that:

The Idaho Statute that should be substantially equivalent to Virginia Code 18.2- 67.4 is Idaho Statute 18-924 Sexual Battery. Idaho Statute 18-924 states that "sexual battery is any willful physical contact, over or under the clothing, with the intimate parts of any person, when the physical contact is done without consent and with the intent to degrade, humiliate or demean the person touched or with the intent of arousing, appealing to or gratifying the lust, passion or sexual desires of the actor or any other person."

Id. at 3.

SOR argues that "In comparing the sex offense statutes between the two states, one can reasonably discern that they are substantially equivalent on their face... It is clear that the two sex offenses match up closely enough to require registration in Idaho." Resp't. Br. 9. Additionally, SOR argues that:

It is clear that the two sex offenses match up closely enough to require registration in Idaho. With regards to the age of the victim element, because a person under 16 cannot consent to sexual acts in Idaho, unless the perpetrator is also minor, then this is closely akin to the “against the will” language contained in VA. CODE 18.2 67.4.

Id. at 10. Next, SOR argues that:

The fact that there may be other statutes in Idaho that also contain some similar elements, does not mean the SOR’s determination is not in accordance with its governing law.

In fact the Idaho Supreme Court and Court of Appeals have both stated, that when comparing a foreign sex offense conviction to an Idaho sex offense, the SOR and the courts are permitted to compare the elements of the foreign sex offense to one or more of Idaho’s sex offenses listed in IDAHO CODE 18-8304(1)(a).

Id. at 11. Finally, SOR argues that:

Additionally, the SOR may make use of some underlying documents to assist it in its substantially equivalent determinations.

c. The bureau may make all substantially equivalent determinations using the police report (of the incident related to the sex offense), indictment or information or other lawful charging document, judgment or order (of sex offense conviction), psychosexual evaluation report, and order of probation.

IDAPA 11.10.03.012.07.c.

Looking at Virginia’s Warrant of Arrest dated 11-15-2000, which is part of the documents covered under above IDAPA rule, it describes Nardini’s crime as sexual intercourse with 15 year—old female against the complaining witness’s will by force, threat or intimidation. A.R. #4 and #6. As noted in the SOR’s Declaratory Ruling that is the subject of this petition, “[T]hese reviews are commonly made to assist the SOR in making the proper determination of which Idaho sex offense is substantially equivalent to the crime you were convicted of in Virginia.” A.R. #22. With something as serious as Nardini’s genital contact with his victim, it was useful to look at these underlying documents to make this determination.

Because the agency record supports the SOR’s determination and the essential elements of Virginia’s sexual battery statute are consistent with Idaho’s statutes, Nardini’s assertions should be disregarded and found to be without merit.

Id. at 12.

SOR cites both *Doe* and *Youngman* (Resp’t. Br. 7-8) and Nardini cites *Doe* (Pet’r Br. 4). Neither case is directly on point to the issue before this Court. In *Yoeman* the Idaho

Supreme Court found that the:

Defendant does not contend that the definition of the crime of rape for which he was convicted in Washington in 1984 was not substantially equivalent to rape as defined in Idaho Code § 18–6101. Rather, he argues that the words “[o]n or after July 1, 1993,” should be read as part of the definition of “the offenses listed in subsection (1)(a) of this section” so that subsection (1)(c) would only apply if the conviction of a substantially equivalent offense occurred on or after July 1, 1993. Because his conviction occurred before that date, he contends that the statute does not apply to him.

State v. Yeoman, 149 Idaho 505, 507, 236 P.3d 1265, 1267 (2010). Unlike the defendant in *Yeoman*, Nardini is not challenging the statute due to a statute of limitations as to the date in which his crime was committed. Instead, Nardini is directly challenging SOR’s decision that his convicted crime (Virginia Code § 18.2-67.4) is substantially similar to Idaho Code § 18-1508. For this reason, *Yeoman* is not all that relevant to the present case.

Next, SOR correctly states the holding in *Doe*, where the Idaho Supreme Court found that:

“ ‘Substantially Equivalent or Similar’ means any sex offense related crime, regardless of whether a felony or misdemeanor, that consists of similar elements defined in Title 18 of the Idaho Criminal Code. It does not mean exactly the same, nor exactly identical to.” IDAPA 11.10.03.010.05. Thus, our only focus in determining whether two offenses are substantially equivalent is the elements of each offense.

Doe v. State, 158 Idaho 778, 782–83, 352 P.3d 500, 504–05 (2015).

This Court follows *Doe*’s holding in finding that no weight will be given to misdemeanor or felony designations when evaluating whether Nardini’s conviction under Virginia Code § 18.2-67.4, is substantially equivalent to an Idaho Statute. Beyond that, *Doe* is not particularly useful to the present case. *Doe* does not address the question of whether SOR can consider Grand Jury indictments and police reports when analyzing whether the elements of the statutes are substantially similar. The Court in *Doe* only

states, "our only focus in determining whether two offenses are substantially equivalent is the elements of each offense." Since no Idaho case law has directly addressed this point, this Court will largely rely on statutory construction in determining whether it is reasonable that SOR found Virginia Code § 18.2-67.4 to be substantially equivalent to Idaho Code § 18-1508. This Court also finds that the documents allowed for SOR's review (outlined in Admin. Code 11.10.03.012) are legitimate sources for SOR to use to reach a determination.

Idaho Code § 18-1508 states:

Any person who shall commit any lewd or lascivious act or acts upon or with the body or any part or member thereof of a minor child under the age of sixteen (16) years, including but not limited to, genital-genital contact, oral-genital contact, anal-genital contact, oral-anal contact, manual-anal contact, or manual-genital contact, whether between persons of the same or opposite sex, or who shall involve such minor child in any act of bestiality or sado-masochism as defined in section 18-1507, Idaho Code, when any of such acts are done with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person, such minor child, or third party, shall be guilty of a felony and shall be imprisoned in the state prison for a term of not more than life.

Virginia Code § 18.2-67.4 States:

An accused is guilty of sexual battery if he sexually abuses, as defined in § 18.2-67.10, (i) the complaining witness against the will of the complaining witness, by force, threat, intimidation, or ruse, (ii) within a two-year period, more than one complaining witness or one complaining witness on more than one occasion intentionally and without the consent of the complaining witness...

Under Virginia law "sexual abuse" means:

an act committed with the intent to sexually molest, arouse, or gratify any person, where:

- a. The accused intentionally touches the complaining witness's intimate parts or material directly covering such intimate parts;
- b. The accused forces the complaining witness to touch the accused's, the witness's own, or another person's intimate parts or material directly covering such intimate parts...

Va. Code Ann. § 18.2-67.10

Under Virginia law “Intimate parts” means the genitalia, anus, groin, breast, or buttocks of any person.’ *Id.*

The question before this Court, the second prong of *Simplot*, centers on whether SOR was reasonable in their determination that Idaho Code § 18-1508 is substantially similar to Virginia Code § 18.2-67.4, even though Idaho Code § 18-1508 requires the victim to be under the age of 16, and Virginia Code § 18.2-67.4 lacks such a requirement but instead requires that the sexual abuse was committed against the “witness against the will of the complaining witness, by force, threat, intimidation, or ruse..” Virginia Code § 18.2-67.4.

In the present case, this Court finds SOR’s statutory construction of I.C. § 18-8304 to be reasonable in their determination that “[t]he criminal elements contained in Virginia Code § 18.2-67.4, Sexual Battery are substantially equivalent to those found in IDAHO CODE § 18-1508, Lewd Conduct with a Minor Child under Sixteen.” A.R. item 21, at p. 75. Additionally, this Court finds that SOR’s construction does not contradict the clear expressions of the legislature.

Nardini was found guilty of Virginia Code § 18.2-67.4. As shown above, Nardini claims that SOR’s determination should not consider his initial charge, the Grand Jury Indictment, or the fact that his victim was under the age of 16. Instead, Nardini argues that SOR’s determination must solely rely on the statutory language of what he was found guilty of. This Court finds that there is nothing in I.C. §§ 18-8304, 67-5201(2), 67-5270, that precludes the Idaho State Police from promulgating rules that allow for the consideration of certain relevant materials when making their agency determinations regarding statutes that are “substantially equivalent”. This determination satisfies the fourth prong of the *Simplot* test (no Idaho statutes directly contradict SOR’s interpretation.)

Relevant to the instant case, Idaho Admin. Code 11.10.03.012 states that:

- a. A person convicted of a sex offense in another jurisdiction and who moves to, works in, or becomes a student in Idaho may be required to register as a sex offender in Idaho pursuant to Title 18, Chapters 83 or 84, Idaho Code. (3-25-16)
- b. The bureau shall determine if a person's out-of-jurisdiction conviction is substantially equivalent or similar to an Idaho sex related offense, as defined by Idaho's Criminal Code, for the purposes of requiring a person to register in Idaho. (3-29-12)
- c. The bureau may make all substantially equivalent determinations using the following documents: (3-25-16)
 - i. Police Report (of the incident related to the sex offense); (3-25-16)
 - ii. Indictment or Information or other lawful charging document; (3-25-16)
 - iii. Judgment or Order (of sex-offense conviction); (3-25-16)
 - iv. Psychosexual Evaluation Report; and (3-25-16)
 - v. Order of Probation. (3-25-16)

Idaho Admin. Code r. 11.10.03.012. Additionally, Idaho Admin. Code 11.10.03.010 states that, "Substantially Equivalent" means any sex offense related crime, regardless of whether a felony or misdemeanor, that consists of similar elements defined in Title 18 of the Idaho Criminal Code. It does not mean exactly the same, nor exactly identical to. (3-25-16)."

The Agency Record contains a Grand Jury indictment of Nardini for rape of a 15-year-old child. A.R. item 6. Nardini then faced trial on the rape indictment. A.R. item 8. This Court finds that SOR legitimately used this documentation to determine that the victim in Nardini's crime was under the age of sixteen. In doing so SOR could reasonably determine that the crime Nardini was convicted of, Virginia Code § 18.2-67.4, was substantially similar to Idaho Code § 18-1508.

In this case, the requirement under Virginia Code § 18.2-67.4 that the sexual abuse was committed against the "witness against the will of the complaining witness, by force, threat, intimidation, or ruse...", is inconsequential to whether the statutes are substantially similar. What is consequential is whether the victim was under the age of sixteen. If Nardini's victim was under the age of sixteen, then what he was convicted of under Virginia Code § 18.2-67.4 is obviously substantially similar to Idaho Code § 18-1508 because

persons under the age of sixteen cannot consent under Idaho Code § 18-1508. Thus the “against the will” requirement would become irrelevant. Based on the evidence found in the Agency Record, it appears that Nardini’s victim was under the age of 16. If Nardini wishes to appeal this decision, his best course of action would be to provide evidence that his victim was actually over the age sixteen, because otherwise, SOR’s decision is reasonable in finding that Nardini’s conviction under Virginia Code § 18.2-67.4 is substantially similar to Idaho Code § 18-1508, and therefore he is required to register as a sex offender in the State of Idaho.

For the reasons described above, this Court affirms SOR’s Decision that Virginia Code § 18.2-67.4 is substantially similar to Idaho Code § 18-1508.

B. Nardini’s request that the administration board obtain additional evidence on whether Mr. Nardini was a resident of Idaho.

This Court notes there is absolutely no discussion of Nardini’s residency in the September 17, 2019, letter from the Idaho Central Sex Offender Registry’s (SOR), in which it notified Nardini that he is required to register in Idaho as a sex offender. A.R. pp. 74-77. At best, from the standpoint of the respondent SOR, there is an assumption by the SOR that Nardini has been found by the SOR to be a resident of Idaho. In that letter, there is no evidence cited by the SOR to support such an assumption of residency in Idaho.

Nardini argues that:

The Idaho State Police Bureau of Criminal Identification did not adequately verify Mr. Nardini’s residence. To register in Idaho, “the Registry Rules apply to ‘a[a] person convicted of a sex offense in another jurisdiction and who moves to Idaho. *Doe v. State*, 158 Idaho 778, 782, citing IDAPA 11.10.03.012(08).

Pet’r. Br. 6. Nardini continues:

Defendant being present “at the dwelling on several occasions and testimony” that defendant lived there is not sufficient evidence that defendant resided at that residence. *State v. Harris*, 157 N.C. App. 647, 653 (2003) citing *State v. Bowens*, 140 N.C. App. 217, 221-22 (2000). Also finding of

defendant's personal property on the premises, "at most, this evidence supports finding that defendant occupied the property from time to time." *Id.* at 652-653.

The Petitioner requests this administration board to look at additional evidence to determine if Mr. Nardini was residence [sic] under the Idaho Statute 34-107. It would be unfair to Mr. Nardini if this Court deemed Mr. Nardini a resident of Idaho if he was not in fact a resident of Idaho State.

Pet'r. Br. 6.

SOR argues that:

It is not clear whether Nardini is arguing that he was not a resident of Idaho at some previous time or whether he is claiming he is currently not a resident of Idaho, but in any event, it is not relevant to this case...the SOR does not and cannot charge any criminal violations for failure to register, so it is unclear how this matters as there is evidence that Nardini does in fact live in Idaho, received from law enforcement in Kootenai County, ID.

Resp't. Br. 13. First, SOR's argument that residence of Nardini in Idaho is not relevant seems disingenuous at best. This will be discussed further below. Second, Nardini makes it quite clear that he was not a resident of Kootenai County at any time. In his declaration, Nardini testifies that, "I was not a resident of Kootenai County, Idaho at any time before or after the Notice of Failure to Register was initiated." Decl. of Shane Nardini in Support of Petitioner's Reply Brief, 1, ¶2 (attached to Petitioner's Reply Brief).

Nardini in his reply brief argues that:

Mr. Nardini is not a resident of Idaho and has not travelled to the State for work purposes. In *Doe v. State*, the Court ruled that Petitioner did not have [sic] register because he was not a resident of the State. *Id.* at 781. Mr. Nardini has maintained residence in Washington state and has a Washington Issued Drivers License. See *Exhibit A and B attached*. Mr. Nardini and his wife were separated and she resided in Idaho. See *Exhibit C attached*.

In *Doe v. State*, the petitioner sought declaratory judgment. *Id.*, at 780. The Court determined that declaratory judgement was necessary because there was an "Injury" of future work in Idaho. *Id.*, at 781. Here, Mr. Nardini is injured in the fact that he is currently facing criminal prosecution for failure to register. See Kootenai County Case # CR28-19-18339. Entering Idaho to "establish residence" is a requirement for the registration to apply.

Pet'r. Reply Br. 2.

In *Doe v. State*, the defendant sought a declaratory judgment as to his sex offender registration requirements due to his plans to move to the state of Idaho for work. 158 Idaho 778, 781, 352 P.3d 500, 503 (2015). The Court in *Doe* decided he had standing to resolve whether he was required to register in the state of Idaho. *Id.* Additionally, the Court in *Doe* found that:

[n]owhere do the Registry Rules provide a process for a person to obtain a “substantially equivalent” determination before moving to Idaho or when only working in Idaho. Therefore, the agency did not provide a remedy for Doe. Because declaratory judgment was appropriate, we remand to the district court for proceedings consistent with this opinion.

Doe v. State, 158 Idaho 778, 782, 352 P.3d 500, 504 (2015).

While *Doe* is not substantially on point to the present case, its holding does suggest that an agency decision must include a finding that the defendant meets the residency or other minimal contacts requirements triggering the requirement for a defendant to register in the State of Idaho. The Court also finds that such a finding is required due to the language of Idaho Code § 18-8304, regarding what contacts a defendant must have with the state of Idaho in order to trigger a requirement to register.

The Court now goes back to the SOR’s argument that Nardini’s residence is “not relevant” as the “SOR does not and cannot charge any criminal violations for failure to register, so it is unclear how this matters as there is evidence that Nardini does in fact live in Idaho, received from law enforcement in Kootenai County, ID.” Resp’t. Br. 13. There is no “evidence” in the Agency Record. The only “evidence” this Court can find in the Agency Record is an email between Amy Campbell of the SOR and Kootenai County Sheriff Detective Todd Jackson, that Nardini apparently moved to Idaho prior to September 2019, but did not register as a sex offender at that time. A.R. item 1, pp. 4-5. But an inquiry in an email is not an assertion of a fact and it is not “evidence”. There is no testimony from

Detective Todd Jackson under oath, there is no affidavit from him, as to Nardini's residence in Idaho. Thus, counsel for SOR is completely wrong in arguing, "there is evidence that Nardini does in fact live in Idaho, received from law enforcement in Kootenai County, ID." Resp't. Br. 13.

On the other hand, there is the unequivocal statement from Nardini, under oath in his declaration that, "I was not a resident of Kootenai County, Idaho at any time before or after the Notice of Failure to Register was initiated." Decl. of Shane Nardini in Support of Petitioner's Reply Brief, 1, ¶2 (attached to Petitioner's Reply Brief). Based on the state of the evidence, the September 17, 2019, determination of the Respondent Idaho State Police, Bureau of Criminal Identification, Idaho Central Sex Offender Registry's (SOR), that Nardini is required to register in Idaho as a sex offender (A.R. pp. 74-77), should quite arguably be dismissed. In an abundance of caution, this Court remands the matter back to the Respondent Idaho State Police, Bureau of Criminal Identification, Idaho Central Sex Offender Registry's (SOR), to make a finding as to residency in Idaho by Nardini (or not), and to consider the evidence presented by Nardini attached to his Reply Brief, and perhaps additional evidence such as live testimony, and make findings on this issue.

This Court finds that not only is Idaho residence not "not relevant" as counsel for the SOR claims, it is an essential question which must be answered before a decision like the one the SOR issued in this case on September 17, 2019, can be made. At the present time, this Court finds the SOR has not made a finding on Nardini's residence in Idaho, and that there is absolutely no evidence in the Agency Record which would support such a finding.

Additionally, counsel for SOR's argument that, "the SOR does not and cannot charge any criminal violations for failure to register" (Resp't. Br. 13), is especially inappropriate given the fact that Nardini is currently facing criminal charges for failing to

register in Kootenai County case number CR28-19-18339. .

Brushing by the residency question, counsel for the SOR argues:

The SOR completed its determination based on information it received from law enforcement in Kootenai County, where Nardini is currently residing. A.R. #1; Petitioner's Brief, p. 2. See IDAHO CODE § 18-8306(4) and (5). See also *Doe*, 158 Idaho at 781-82, 352 P.3d at 503-04 (2015) (outlining the agency's requirement to issue declaratory rulings for residents and non-residents alike).

Resp. Br. 13. There is nothing in *Doe* that allows the SOR to determine residency without any evidence. There is nothing in Idaho Code § 18-8306(4) and (5) that allow the SOR to determine residency without any evidence. There is no presumption of residency.

Finally, this Court must consider the SOR's objections made at the September 14, 2020, hearing on the Petition for Judicial Review. After counsel for petitioner had made his opening argument, counsel for SOR moved to strike the Declarations of Shane Nardini and Brigid Nardini, which were attached to Petitioner's Reply Brief. Noting such Declarations were not part of the administrative record, Counsel for petitioner cited to Idaho Code § 67-5249(3) in support of that oral motion to strike made after counsel for petitioner had finished his oral argument. That subsection provides, "Except to the extent that this chapter or another statute provides otherwise, the agency record constitutes the exclusive basis for agency action in contested cases under this chapter or for judicial review thereof." Counsel for petitioner noted Idaho Code § 67-5276 provides a process to supplement the administrative record, and that process was not followed by petitioner. Counsel for petitioner objected to the verbal motion to strike made by petitioner's counsel. Counsel for petitioner noted that the respondent had raised the issue of residency in its memorandum, and petitioner had replied his reply memorandum. At oral argument, because all of this had been raised for the first time, the Court did not rule on respondent's oral motion to strike at that hearing. The Court will now addresses such. The Court denies

respondent's motion to strike made at oral argument.

Nardini clearly raised this issue of his residency in his opening brief, "there is no verification that Mr. Nardini was/is a residence [sic] of Idaho." Pet'r. Br. 3. Nardini requested the SOR take additional evidence on this issue. *Id.* at 6. That brief was filed on March 30, 2020, five and one half months before oral argument on September 15, 2020. The SOR responded, "It is not clear whether Nardini is arguing that he was not a resident of Idaho at some previous time or whether he is claiming he is currently not a resident Of Idaho, but in any event, it is not relevant to this case." Resp. Br. 13. That brief was filed May 1, 2020. Nardini responded with a Reply Brief, attached to which were Nardini's declaration that he was not an Idaho resident. That brief was filed May 21, 2020, nearly four months before oral argument. Still, no motion to strike was ever filed by counsel for respondent. Even at the start of the September 14, 2020, hearing, there was no motion to strike. Instead, counsel for SOR **waited** until she began her oral argument, **after** counsel for petitioner had finished his argument, to make an oral motion to strike this additional evidence. There is no doubt that both parties have made the residency of Nardini in Idaho (or lack thereof) a contested issue.

But counsel for Nardini is equally at fault. Counsel for Nardini never made a motion for this Court to take additional evidence on judicial review, as allowed under Idaho Rule of Civil Procedure 84(e)(1)(B), where the authorizing statute allows such. Additional evidence is allowed in this case. As pointed out at oral argument by counsel for respondent, Idaho Code § 67-5276 allows additional evidence before the district court if application for leave to present such evidence is made before the date set for the hearing. Clearly, such application was not timely made by Nardini, even though additional evidence was filed. Then, counsel for the SOR did not timely object to the filing of such. Equally clear is the fact that both sides feel Nardini's residence is relevant. And it is even more clear that there

is no evidence in the record to support the SOR's implicit finding that Nardini was a resident of Idaho for purposes of registration. The issue now is what should this Court do about the problem, since neither counsel handled this issue and additional evidence correctly.

This Court determines that the SOR's motion to strike must be denied. Essentially, this Court finds that the filing of the Declarations of Nardini and his wife four months before the September 14, 2020, hearing, were an imperfect motion by petitioner under Idaho Code § 67-5276, to which counsel for respondent waived any objection by failing to make a timely objection. As such, there is evidence in the record that Nardini was not a resident at the applicable time. As mentioned above, arguably the September 17, 2019, determination of the (SOR) that Nardini is required to register in Idaho as a sex offender (A.R. pp. 74-77), should be dismissed. If this Court is not prohibited from reviewing any additional evidence not in the agency record (I.R.C.P. 84(e)(1)(B)), then SOR has no evidence and Nardini's declaration is uncontradicted. Instead, the Court remands to the SOR for further consideration and a determination as to residency at the applicable time.

Even if the respondent's motion to strike were granted, this case must still be remanded. If this Court is prohibited from reviewing any additional evidence not in the agency record (due to I.R.C.P. 84(e)(1)(A) or a failure of petitioner to comply with I.C. § 67-5276), and the Nardinis declarations should not be considered, then this Court finds there is not sufficient evidence in the Agency Record as to Nardini's residence in Idaho, indeed there is not any evidence, from which the SOR could make a finding that Nardini was a resident of the state of Idaho.

For the reasons described above, this Court remands for further proceedings consistent with this opinion the issue of determining Nardini's residency regarding the requirement that he register as a sex offender in the State of Idaho.

C. Nardini's assertion that the requirement for him to register as sex offender would violate his constitutional rights.

Nardini argues that:

Mr. Nardini's constitutional rights would be violated if he was required to register in Idaho as sex offender... Requiring Mr. Nardini to register would not abide by the Full Faith and Credit clause because California already certified that Mr. Nardini was not required to register as a sex offender. According to the Full Faith and Credit clause, Idaho must abide by California's judgement, and if not, this would be unfair to Mr. Nardini. A final judgement in one state qualifies for recognition throughout the land. *V.L. v. R.L.*, 136 S. Ct. 1017, 1020.

Pet'r. Br, 7.

SOR argues that, "substantially equivalent determination for an out of state conviction is exclusively within ISP's authority." Resp't. Br. 14. SOR cites *State v. Glodowski*, 166 Idaho 265, 457 P.3d 917, 919-20 (Ct. App. 2019), reh'g granted (June 24, 2019); *Rosin v. Monken*, 599 F.3d 574, 577 (7th Cir. 2010); and *Donlan v State*, 127 Nev. 143 (Nev. 2011). Resp't. Br. 16.

Nardini argues in his reply brief that:

Idaho's own code here points to giving full faith and credit to Mr. Nardini's relief from registration. An individual is required to register who "has been convicted of any crime . . . in another jurisdiction . . . , that is substantially equivalent to the offenses listed in paragraph (a) of this subsection and was required to register as a sex offender in any other state or jurisdiction when he established residency in Idaho." Idaho Code 18-8304(1)(c). Here, besides not being a resident, Mr. Nardini is not required to register in any other state or jurisdiction.

Resp't. Reply Br. 3.

This Court finds that the full faith and credit clause does not extinguish Idaho's right to require sex offender registration, even if a person has been released of the requirement to register as a sex offender in previous states in which they have lived. (See *Rosin v. Monken*, 599 F.3d 574, 577 (7th Cir. 2010); *Donlan v. State*, 127 Nev. 143, 145,-46 (2011)). Additionally, Idaho Code §18-8310 governs how a person can be released of their

requirement to register as a sex offender in Idaho:

- (4) The court may exempt the petitioner from the registration requirement only after a hearing on the petition in open court and only upon proof by clear and convincing evidence and upon written findings of fact and conclusions of law by the court that:
 - (a) The petitioner has complied with the requirements set forth in subsection (1) of this section;
 - (b) The court has reviewed the petitioner's criminal history and has determined that the petitioner is not a recidivist, has not been convicted of an aggravated offense or has not been designated as a violent sexual predator; and
 - (c) It is highly probable or reasonably certain the petitioner is not a risk to commit a new violation for any violent crime or crime identified in section 18-8304, Idaho Code

Idaho Code Ann. § 18-8310

Nardini has not followed this process, and therefore this Court cannot exempt Nardini from his requirement to register in Idaho simply because he has provided this Court with evidence that he is no longer required to register in California or Virginia. Decl. of Brigid Nardini in Supp. of Pet'r. Reply Brief Ex. D, and Ex. E.

For the reasons described above, this Court denies Nardini's petition that the full faith and credit clause bars SOR from determining that Nardini is required to register as a sex offender in the State of Idaho.

IV. CONCLUSION AND ORDER.

For the reasons stated above, this Court finds that the SOR's September 17, 2019, decision that Virginia Code § 18.2-67.4 is substantially similar to Idaho Code § 18-1508 must be affirmed. This Court remands for further proceedings consistent with this opinion the issue of determining Nardini's residency regarding the requirement that he register as a sex offender in the State of Idaho. This Court denies respondent's motion to strike made on September 14, 2020. This Court denies the claim in Nardini's petition that the full faith and credit clause bars SOR from determining that Nardini is required to register as a sex offender in the State of Idaho. Finally, attorney fees requested by the SOR are denied.

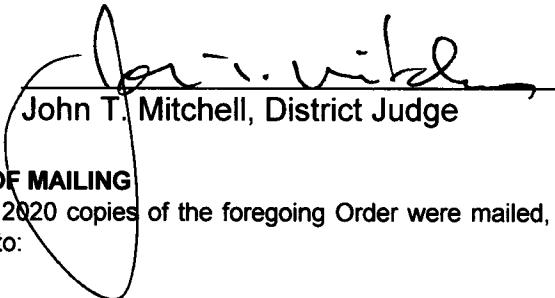
IT IS HEREBY ORDERED the SOR's September 17, 2019 decision that Virginia Code § 18.2-67.4 is substantially similar to Idaho Code § 18-1508 is AFFIRMED. This Court DENIES Nardini's petition that the full faith and credit clause bars SOR from determining that Nardini is required to register as a sex offender in the State of Idaho.

IT IS FURTHER ORDERED THAT the SOR's claim for attorney fees is DENIED.

IT IS FURTHER ORDERED THAT the SOR's motion to strike made at oral argument on September 14, 2020, is DENIED.

IT IS FURTHER ORDERED THAT this case is REMANDED to the SOR for further proceedings consistent with this opinion the issue of determining Nardini's residency in the state of Idaho regarding the requirement that he register as a sex offender in the State of Idaho.

DATED this 14th day of October, 2020.


John T. Mitchell, District Judge

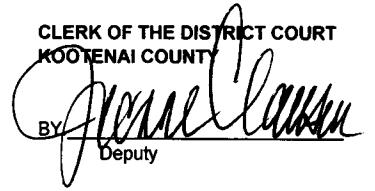
I hereby certify that on the 14th day of October, 2020 copies of the foregoing Order were mailed, postage prepaid, sent by facsimile, email or interoffice mail to:

Petitioner's Attorney, Jason Johnson,
Info@Johnson-Litigation.com ✓

Respondent's Attorney, Stephanie C. Nemore,
Stephanie.nomore@isp.idaho.gov ✓

CERTIFICATE OF MAILING

CLERK OF THE DISTRICT COURT
KOOTENAI COUNTY

BY 
Deputy