IN THE SUPREME COURT OF OHIO

IN RE: JUSTIN A. M[.], Adjudicated Delinquent Child	:	Case No. 2010-0780
	:	On Appeal from the Wyandot County Court of Appeals Third Appellate District
	:	C.A. Case No. 16-09-17

MERIT BRIEF OF APPELLANT JUSTIN A. M[.]

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STATEMENT OF THE CASE AND FACTS

On September 4, 2007, Justin M. was charged with one count of gross sexual imposition, a violation of R.C. 2907.05(A)(4) and a felony of the third degree if committed by an adult. (S-1). Justin was 16 years of age at the time of his offense. (S-1). On January 9, 2008, the Wyandot County Juvenile Court found Justin to be delinquent, committed him to the custody of the Department of Youth Services, and classified him as a tier II juvenile sex offender registrant. (S-2–S-14). On October 16, 2008, after his original adjudication was reversed and remanded by the Third District Court of Appeals on September 29, 2008 (In re Justin M[.], Wyandot App. No. 16-08-03, 2008-Ohio-4955); (S-15–S-26), the Wyandot County Juvenile Court accepted Justin's admission to the offense and found him to be delinquent. (S-27). On August 21, 2009, upon his release from the Ohio Department of Youth Services, the Wyandot County Juvenile Court conducted a classification hearing in Justin's case. (Aug. 21, 2009, T.pp. 2-14 (S-32); (S-48–S-57). Following In re Smith, 3rd Dist. No. 1-07-58, 2007-Ohio-3234, ¶31, the Wyandot County Juvenile Court found that because Justin was sixteen at the time he committed his offense, the court was required to classify him as a tier II juvenile offender registrant. Justin's classification will expire in 2029, when he is thirty-eight years of age. (S-58).

The Third District Court of Appeals affirmed Justin's classification. In re Justin A. M[.], Wyandot App. No. 16-09-17, 2010-Ohio-1088. (A-4); (S-61). On August 25, 2010, this Court accepted review of Justin's first and second propositions of law, and held them for the pending decisions in case numbers 2008-1624, In re Smith, and 2009-0189, In re Adrian R., and stayed briefing. (A-18). This Court also accepted Justin's third proposition of law for review and set the matter for briefing and oral argument. Id. Justin's merit brief timely follows.

INTRODUCTION

I. Ohio's Juvenile Sex Offender Registration and Notification Law.

In 1963, Ohio enacted its first sex-offender registration statute. State v. Cook, 83 Ohio St.3d 404, 406, 1998-Ohio-291. Remarkably, the original version of this statute adequately protected the citizens of this state, without substantial modification, for thirty-three years. In fact, between 1963 and 1996, R.C. Chapter 2950 was amended only three times, and the General Assembly never modified the provisions governing the duty to register, the duration of registration, or the registration requirements. By contrast, in the past twelve years, the General Assembly has enacted three different versions of the sex-offender classification law.

Statutory regulations for classifying juvenile sex offenders in Ohio did not exist until January 1, 2002, when the Ohio General Assembly implemented Ohio's juvenile sex offender registration and notification ("JSORN") system. 2002 Am.Sub.S.B. No. 3 ("S.B. 3"). Similar to the adult sex offender registration and notification provisions ("SORN") at the time, S.B. 3 classified juvenile offender registrants into three categories: sexually oriented offenders, habitual sexual offenders, and sexual predators. Former 2152.02; 2950.01(B), (E), and (J) (Eff. Jan. 1, 2002-July 1, 2007, 2007 Am.Sub.S.B. No. 10).

Under S.B. 3, juvenile sexually oriented offenders were children who had been adjudicated delinquent of a sexually oriented offense, but who did not fit the description of either a habitual sex offender or a sexual predator. Former 2950.01(D) (Eff. Jan. 1, 2002- July 1, 2007). Habitual juvenile sex offenders were youth who had been adjudicated delinquent of a sexually oriented offense and had previously been adjudicated delinquent of one or more sexually oriented offenses. Former 2950.01(B) (Eff. Jan. 1, 2002- July 1, 2007). The designation of a juvenile offender registrant as a sexual predator was reserved for youth who had been adjudicated delinquent of a sexually oriented offense and who a juvenile court found to be

likely to engage in the future in one or more sexually oriented offenses. Former 2950.01(E) (Eff. Jan. 1, 2002- July 1, 2007). The determination that a juvenile offender registrant was a sexual predator was made only after a full hearing at which the youth had a chance to present evidence regarding the determination of the child as a sexual predator. Former R.C. 2950.09(B)(2) (Eff. Jan. 1, 2002- July 1, 2007).

Children classified as juvenile sexually oriented offenders under S.B. 3 were required to register annually for ten years. Former R.C. 2950.07(B) (Eff. Jan. 1, 2002- July 1, 2007). Children classified as habitual offenders were required to register annually for twenty years. Former R.C. 2950.07(B) (Eff. Jan. 1, 2002- July 1, 2007). And, children classified as sexual predators were required to register every 90 days until death, or until a court determined that the person was no longer a sexual predator. Former R.C. 2950.07(B) (Eff. Jan. 1, 2002- July 1, 2007).

II. The Enactment of Senate Bill 10.

On July 27, 2006, the United States Congress enacted the Adam Walsh Act, including the Sex Offender Registration and Notification Act (hereinafter referred to as "SORNA"), which tightened federal guidelines and requirements for sexually oriented offenders. While a few states, including Ohio, quickly amended their sex offender laws to comply with SORNA, many states have not, citing concerns that the federalized system of registration and notification is extremely costly and arguably inefficient.[1]

In fact, despite the now four-year-old federal mandate, only four states, Delaware, Florida, South Dakota, and Ohio, have been deemed to be in compliance with SORNA. U.S.

[1] For example, the estimated cost for Illinois to comply with the Act in the first year is $21,000,000; but, if it does not comply, it will lose $1,000,000. See Liz Winiarski, *Facing the Compliance Deadline for the Adam Walsh Child Protection and Safety Act, States are Weighing all the Costs* (2009), 14 PUB. INT. L. REP. 192, 193-196.

Department of Justice, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking (SMART), available at http://www.ojp.gov/smart/newsroom.htm. On May 14, 2010, the Department of Justice issued proposed Supplemental Guidelines for SORNA. Supplemental Guidelines for Sex Offender Registration and Notification, 75 Fed. Reg. 27,362, 27,363. These proposed supplemental guidelines provide modifications to many of the compliance requirements for SORNA; one of the proposed changes would give jurisdictions the discretion to exempt juvenile offenders from public website posting. Id. This is seen by many as a positive change, given the increasing concerns that the juvenile provisions of SORNA cause more harm than good. See Joanna S. Markman, *Community Notification and the Perils of Mandatory Juvenile Sex Offender Registration: The Dangers Faced by Children and Their Families*, 32 SETON HALL LEGIS. J. 261, 281-83 (2008).

Ohio's SORNA-enactment legislation, Senate Bill 10, drastically changed the landscape of Ohio's SORN and JSORN provisions. Most notably, the bill created a three-tiered, offense-based classification scheme, which eliminated the requirement that classification levels be determined after a full hearing. R.C. 2950.01(E), (F), and (G); Former R.C. 2950.09 (Eff. Jan. 1, 2002- July 1, 2007). S.B. 10 increased the frequency and duration of registration duties, as well as the amount of information that registrants are required to give to local law enforcement officers. R.C. 2950.07; R.C. 2950.041(B) and (C).

S.B. 10 has caused confusion throughout Ohio's juvenile courts. Specifically, the definitions in R.C. 2950.01 and other related statutes have contributed to the inconsistent classification of juveniles into the tier levels outlined in S.B. 10's provisions. Because Ohio courts are not applying the law in the same manner to all juveniles who are eligible to be classified as sexually oriented offenders, two different classification schemes have emerged throughout Ohio's juvenile courts. See In re Smith, 3rd Dist. No. 1-07-58, 2007-Ohio-3234, ¶31,

discretionary appeal granted, Case No. 2008-1624 (S.B. 10 requires juvenile courts to classify eligible juveniles into tier levels based solely on offense), and In re G.E.S., 9th Dist. No. 24079, 2008-Ohio-4076, ¶37, discretionary appeal granted, Case No. 2008-1926 (juvenile courts retain discretion in determining a juvenile's tier level under S.B. 10).

Although the juvenile registration and classification system has changed dramatically, one aspect of Ohio's juvenile registration system has not changed since the passage of S.B. 10: Ohio treats similarly situated children who have committed a sex offense in vastly different ways. Specifically, R.C. 2152.83 differentiates between first-time juvenile offenders based solely upon the child's age at the time of the offense:

> Children who were thirteen years old or younger at the time of committing their offense are not subject to sex offender classification or registration. R.C. 2152.191; 2152.83(A)(1)-(B)(1).
>
> Juvenile offenders who are fourteen years old or older are subject to classification and registration. R.C. 2152.191; 2152.83(A)(1)-(B)(1).
>
> Children who were fourteen or fifteen years old at the time of committing their offense, who do not have a prior adjudication for a sexually oriented offense, are subject to discretionary classification and registration. R.C. 2152.83(B)(1).
>
> Children who were sixteen or seventeen years old at the time of committing their offense are subject to mandatory sex offender classification and registration. R.C. 2152.83(A)(1).

R.C. 2152.83. The legislative history gives no indication why or how these distinctions were made. If this Court finds that these distinctions are not rationally related to a legitimate governmental interest, it must find that R.C. 2152.83 violates the Equal Protection Clauses of the United States and Ohio Constitutions.

ARGUMENT

PROPOSITION OF LAW

The retroactive application of Senate Bill 10 to juveniles whose offense was committed prior to the enactment of Senate Bill 10 violates the juvenile's right to Equal Protection as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Ohio Constitution.

The United States Supreme Court has found that while children's constitutional rights are not "indistinguishable from those of adults [* * *] children generally are protected by the same constitutional guarantees against governmental deprivations as are adults." Bellotti v. Baird (1979), 443 U.S. 622, 635.

The guarantee of equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances. Fourteenth Amendment to the United States Constitution; Ohio Const., Art 1, Sec.2. The Ohio Constitution provides, "all political power is inherent in the people. Government is instituted for their equal protection and benefit...." Ohio Constitution, Art. I, Sec. 2. In order to be constitutional, a law must be applicable to all persons under like circumstances and not subject individuals to an arbitrary exercise of power. Conley v. Shearer (1992), 64 Ohio St.3d 284, 288-289, 1992-Ohio-133. In other words, the Equal Protection Clause prevents the state from treating differently or arbitrarily, persons who are in all relevant respects alike. Park Corp. v. Brook Park (2004), 102 Ohio St.3d 166, 2004-Ohio-2237. The Equal Protection clause of the Ohio Constitution has been interpreted to be essentially identical in scope to the analogous provision of the U.S. Constitution. Sorrell v. Thevenir (1994), 69 Ohio St.3d 415, 424.

This Court has set forth the following standard for equal protection analysis:

> [C]lass distinctions in legislation are permissible if they bear some rational relationship to a legitimate governmental objective. [* * *] Under rational-basis scrutiny, legislative distinctions are invalid only if they bear no relation to the state's goals and no ground can be conceived to justify them.

State v. Thompkins, 75 Ohio St.3d 558, 561, 1996-Ohio-264. (Internal citations omitted.)

A. Ohio Revised Code section 2152.83 creates classes of similarly situated children who are treated differently.

Ohio Revised Code section 2152.83 differentiates between first-time juvenile offenders based solely upon the child's age at the time of the offense as follows: Children who were thirteen years old or younger at the time of committing their offense are not subject to sex offender classification or registration. R.C. 2152.83(A)(1)-(B)(1). Children who were fourteen or fifteen at the time of their offense are subject only to discretionary classification. R.C. 2152.83(B)(1). Those children, if they are committed to a secure facility, are assessed for the effectiveness of their disposition and of any treatment provided to them, and the juvenile court determines whether the child should be classified as a juvenile offender registrant. R.C. 2152.83(B)(2). But, children who were sixteen or seventeen at the time of their offense are subject to mandatory classification, and are not entitled to a court's determining whether they should be classified; rather the court must classify them as a juvenile sex offender registrant. R.C. 2152.83(A)(1). Although the legislature may set more severe penalties for *acts* that it believes should have greater consequences, the differences in R.C. 2152.83 are not based on acts of greater consequence, but simply on the child's age at the time of the offense. The proper standard of review for classifications based upon age is the rational basis test. Massachusetts Board of Retirement v. Murgia (1976), 427 U.S. 307. If the age-based classification is not rationally related to the State's objective in making the classification, it will be found to be in violation of the Equal Protection Clause of the United States Constitution. Id. at 315 (holding that the classification was rationally related to the State's objective).

B. The age-based distinctions in R.C. 2152.83 are not rationally related to the purpose of sex offender registration.

Although S.B. 10 has dramatically changed sex offender registration and notification, the stated purpose of the classification and registration laws after S.B. 10 has changed only minimally. Compare Former R.C. 2950.02 (Eff. Jan. 1, 2002- July 1, 2007) and R.C. 2950.02 (Eff. Jan. 1. 2008). R.C. 2950.02(A)(6) provides that "The release of information about sex offenders and child-victim offenders to public agencies and the general public will further the governmental interests of public safety and public scrutiny of the criminal, juvenile, and mental health systems as long as the information released is rationally related to the furtherance of those goals."

Treating children differently from adults makes sense. The United States Supreme Court has recognized that even children who are prosecuted as adults for very serious crimes are "categorically less culpable than the average criminal." Roper v. Simmons (2005), 543 U.S. 551, 567; Graham v. Florida, 130 S. Ct. 2011, 2026-27. The Court held that "juvenile offenders cannot with reliability be classified among the worst offenders." Roper at syl. These findings apply generally to all adolescents under the age of 18.

The differential treatment of children under R.C. 2152.83 is not supported by empirical evidence, which recognizes the differences between adults and children, not between older children and younger children. Notwithstanding the lack of scientific support, R.C. 2152.83 draws bright-line distinctions between children who were sixteen or seventeen, children who were fourteen or fifteen, and children who were under fourteen at the time of their offense.

The legislature may impose special burdens on defined classes in order to achieve permissible ends, but equal protection requires that the distinctions drawn are relevant to the purpose for which the classification is made. Rinaldi v. Yeager (1966), 384 U.S. 305, 309 (there

must be some rationality in the nature of the classes singled out). The provisions of R.C. 2152.83 do not demonstrate such relevance.

For example, studies have shown that the SORNA criteria for tier assignment does not "predict re-offense of any kind" for juvenile offenders. Michael Caldwell, Michael Ziemke, & Michael Vitacco, *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles,* PSYCHOLOGY, PUBLIC POLICY, AND LAW, Vol. 14, No. 2 (2008) at 104. In fact, researchers have found that "sexual recidivism-specific measures and the proposed tier classifications will not correctly identify adolescents most at risk for sexual offense." Id. Instead, SORNA's provisions indicate that juvenile sex offenders are on a "singular trajectory to becoming adult sexual offenders," yet that finding "is not supported by [empirical data], is inconsistent with the fundamental purpose of the juvenile court, and may actually impede the rehabilitation of youth who [are] adjudicated for [a] sexual offense." Id.

In general, juvenile sex offenders are recognized as being significantly different from adult sex offenders in several ways:

- Adolescent sex offenders are considered to be more responsive to treatment than adult sex offenders and do not appear to continue re-offending into adulthood, especially when provided with appropriate treatment.
- Adolescent sex offenders have fewer numbers of victims than adult offenders and, on average, engage in less serious and aggressive behaviors.
- Most adolescents do not have deviant sexual arousal and/or the deviant sexual fantasies that many adult sex offenders have.
- Most adolescents are not sexual predators nor do they meet the accepted criteria for pedophilia.
- Few adolescents appear to have the same long-term tendencies to commit sexual offenses as some adult offenders.
- Across a number of treatment research studies, the overall sexual recidivism rate for adolescent sex offenders who receive treatment is low in most US settings as compared to adults. Adolescents who offend against young children tend to have slightly lower sexual recidivism rates than adolescents who sexually offend against other teens.

Mark Chaffin, Barbara Bonner & Kerri Pierce, *What Research Shows About Adolescent Sex Offenders*, National Center on Sexual Behavior of Youth, July 2003, Number 1, available at http://www.ncsby.org/pages/publications/What%20Research%20Shows%20About%20Adolescent%20Sex%20Offenders%20060404.pdf.[2] The NCSBY defines "adolescent sex offenders" as "adolescents from age thirteen to seventeen who commit illegal sexual behavior as defined by the sex crime statutes of the jurisdiction in which the offense occurred."

Further, according to the Ohio Association of County Behavioral Health Authorities, the Ohio recidivism rates for juveniles who commit a sexual offense and who receive treatment, supervision, and support, are lower than any other group of offenders, at 4%-10%. The Ohio Association of County Behavioral Health Authorities, *Behavioral Health: Developing a Better Understanding, Juvenile Sex Offenders*, Volume 3, Issue I, p.1. That means 90% to 96% of juvenile offenders receiving appropriate treatment are not a danger to the public.

In Ohio, children who are adjudicated delinquent are shielded from the public eye. Specifically, R.C. 2151.18(A) keeps juvenile court records private, and R.C. 2151.313 provides stringent requirements regarding information collected—including fingerprints, photographs, and other arrest or custody records—for children involved with law enforcement or the juvenile

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[2] See, also, Association for the Treatment of Sexual Abusers (ATSA), *The Effective Legal Management of Juvenile Sex Offenders*, Mar. 11, 2000, available at http://www.atsa.com/ppjuvenile.html; Alexis O. Miranda & Colette Corcoran, *Comparison of Perpetration Characteristics Between Male Juvenile and Adult Sexual Offenders: Preliminary Results* (2000), 12 SEXUAL ABUSE, A JOURNAL OF RESEARCH AND TREATMENT 179 (2000), available at http://www.springerlink.com/content/n8234311q65916m3/; Margaret A. Alexander, *Sexual Offender Treatment Efficacy Revisited*, 11 SEXUAL ABUSE, A JOURNAL OF RESEARCH AND TREATMENT, 101 (1999) available at http://www.springerlink.com/content/n33644k217r38211/; Franklin E. Zimring *et al.*, *The Predictive Power of Juvenile Sex Offending: Evidence from the Second Philadelphia Birth Cohort Study* (2007), *available at*, http://ssrn.com/abstract=995918; Zimring, F. E., Piquero, A. R. and Jennings, W. G. (2007), *Sexual Delinquency In Racine: Does Early Sex Offending Predict Later Sex Offending In Youth And Young Adulthood?*. CRIMINOLOGY & PUBLIC POLICY, 6: 507–534.

court. But, without any justification, R.C. 2152.83(A)(1) requires that the shield be removed from children adjudicated delinquent for a sex offense committed when they were sixteen or seventeen; but requires that the shield be kept in place for those who committed an offense—even multiple or very serious offenses—when they were under the age of fourteen. R.C. 2152.191; 2152.82(A)(2); 2152.86(A)(1). And, those who were fourteen or fifteen have the opportunity to keep the shield in place if a court determines that the child should not be classified. R.C. 2152.83(B).

Children classified pursuant to R.C. 2152.83(C)(2) may have their registration information disseminated to the public in certain circumstances, even though their registration information cannot be made public via the internet. R.C. 2950.081(B). But, any juvenile sex offender registrant's registration information—including the child's photograph and address—is a public record that is open to public inspection pursuant to R.C. 149.43. R.C. 2950.081(A). This is despite evidence that public registration may actually *increase* recidivism, as juveniles will find it difficult if not impossible to transition into society, attend school, find employment, and find housing. For example, research shows that calling a child a "sex offender" or "rapist" can have severely damaging psychological and practical consequences. See Judith V. Becker, *What We Know About the Characteristics and Treatment of Adolescents Who Have Committed Sexual Offenses*, 3 CHILD MALTREATMENT 317, 317 (1998); Mark Chaffin & Barbara Bonner, *Don't Shoot: We're Your Children: Have We Gone Too Far in Our Response to Adolescent Sexual Abusers and Children with Sexual Behavior Problems?*, 3 CHILD MALTREATMENT 314 (1998).

Rehabilitation is facilitated by "interpersonal development through positive interaction with family members, school personnel, peers, and the community." Stacey Hiller, *The Problem with Juvenile Sex Offender Registration: The Detrimental Effects of Public Disclosure*, 7 B.U.

PUB. INT. L.J. 271, 292 (1998). However, notification inhibits positive interactions: "Disclosure of a juvenile sex offender's past to his community may only serve to increase his or her alienation, possibly encouraging re-offending, because of the negative attitudes the public will emit toward the youth." Id.

Further, including juveniles who are not a risk to public safety dilutes the purpose and effect of the registration scheme and the purpose of the juvenile court. "Over-inclusive public notification can actually be harmful to public safety by diluting the ability to identify the most dangerous offenders and by disrupting the stability of low-risk offenders in ways that may increase their risk of re-offense." The National Alliance to End Sexual Violence, *Legislative Analysis: The Adam Walsh Child Protection & Safety Act of 2006* (available at http://naesv.org/2009/?page_id=87).

Justin was sixteen when he committed his offense. Unlike children who were thirteen or younger at the time of their offense, Justin, and all children who were sixteen or seventeen at the time of their offense, was required to be classified as a juvenile sexual offender. R.C. 2152.83(A)(1). And, unlike children who were fourteen or fifteen at the time of their offense, Justin did not have the opportunity to prove to the court that he was not a danger to the public prior to the imposition of his classification. R.C. 2152.83(B)(1).

There is no evidence to support the need for disparate treatment under R.C. 2152.83. And, the General Assembly gives no rationale for treating older children who have committed a sex offense differently from younger children who have committed the same sex offense. Therefore, R.C. 2152.83, which allows for similarly-situated children to receive disparate treatment without any rational basis whatsoever cannot withstand constitutional scrutiny.

CONCLUSION

For all the foregoing reasons, this Court must find that R.C. 2152.83 violates the Equal Protection Clauses of the United States and Ohio Constitutions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Merit Brief of Appellant Justin A. M[.]** and the **Appendix to the Merit Brief of Appellant Justin A. M[.]**, was forwarded by regular U.S. Mail, postage prepaid, this 15th day of November, 2010, to the office of Douglas D. Rowland, Wyandot County Assistant Prosecuting Attorney, 137 S. Sandusky Avenue, Upper Sandusky, Ohio 43351.

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