ORIGINAL

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

REPLY BRIEF OF APPELLANT JUSTIN A. M[.]

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INTRODUCTION

In its brief, counsel for Amicus Curiae the Ohio Attorney General asserts that it believes "the juvenile court erred in finding that it was required to designate [Justin M.] as a tier II juvenile sex offender" and concedes that Justin's case should be reversed and remanded for a new classification hearing. *Merit Brief of Amicus Curiae* at p. 7. Justin believes that S.B. 10 cannot be applied to him, as his offense occurred between March 27, 2007 and June 30, 2007, just before the enactment of S.B. 10. (S-1). Both issues will be resolved by this Court in In re Smith, No. 2008-1624 and In re Adrian R., No. 2009-0189, and both cases will determine the resolution of this case.

In its first proposition of law, the Ohio Attorney General asserts that "there is no retroactivity issue" in this portion of Justin's case, and urges this Court to dismiss Justin's proposition of law as improvidently allowed. *Merit Brief of Amicus Curiae* at pp. 7-9. Indeed, the age-based distinctions found in R.C. 2152.83 are the same under old or new law; but that fact does not render Justin's retroactivity claim meaningless. This is because under the Third District's jurisprudence regarding the automatic, offense-based operation of S.B. 10, the juvenile court believed it was required to impose a twenty-year registration requirement upon Justin. (Aug 21, 2009, T.pp. 2-14 (S-32); (S-48–S-57). Had the court proceeded under old law, Justin would have been eligible for a ten-year classification, unless the State proved that a longer classification period was warranted.

If this Court reverses Justin's case and remands the matter for a new classification hearing under either old or new law, the equal protection question presented by this portion of Justin's case will need to be resolved by this Court. Accordingly, Justin asks this Court to 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 parties agree that in order for this Court to find that there is an equal protection violation, this Court has to first identify a valid state interest. *Merit Brief of Amicus Curiae* at p. 10, citing Pickaway County Skilled Gaming, L.L.C. v. Cordray, 127 Ohio St.3d 104, 2010-Ohio-4908 at ¶19; *Answer* at pp. 6-8. Further, the Court must determine "whether the method or means the state has chosen to advance that interest is rational." Pickaway County at ¶19.

In its brief, counsel for Amicus Curiae asserts that "[s]ex offender registration laws advance legitimate state interests." *Merit Brief of Amicus Curiae* at p. 10. In support of its claim, the Attorney General cites R.C. 2950.02(A)(2); (A)(6), and State v. Ferguson, 120 Ohio St.3d 7, 2008-Ohio-4824. *Merit Brief of Amicus Curiae* at p. 11.

Indeed, R.C. 2950.02 provides the legislative purpose for Ohio's sex offender classification and registration scheme. And, the last sentence of R.C. 2950.02(B) provides that it is the policy of the state of Ohio to release and require the exchange of information about sex offenders, "as a means of assuring public protection and that the exchange or release of that information is not punitive." It follows then, that if this Court determines that the sex offender registration and classification scheme contained in S.B. 10 is punitive, the state's interest as stated in R.C. 2950.02(B) is no longer valid and S.B. 10 cannot be retroactively applied to juveniles whose offense predated its enactment.

This Court's decision in Ferguson offers no support for the Attorney General's assertion that classification and registration under S.B. 10 is remedial, as Ferguson addressed Ohio's

previous sex offender classification and registration scheme—S.B. 5—not S.B. 10. Despite its claim that sex offender laws further "a legitimate nonpunitive purpose of 'public safety'" (*Merit Brief of Amicus Curiae* at p. 11, citing Smith v. Doe (2003), 538 U.S. 84, 102-03; Ferguson at ¶38) the Attorney General emphasizes "accountability" and "culpability" repeatedly throughout its brief. Specifically, the Attorney General addresses children's "accountability" five times (*Merit Brief of Amicus Curiae* at pp. 5, 11, 12, 13) and children's "culpability" six times (at pp. 1, 12, 13, 14) throughout its brief. See also *Answer* at p. 10. The Attorney General's focus on accountability and culpability as justification for the age-based distinctions in R.C. 2152.83 belies its purported belief that the classification of sex offenders is not punitive or retributive.

Further, the Attorney General confuses matters by relying on R.C. 2152.01, which outlines the purposes for dispositions under Chapter 2152. *Merit Brief of Amicus Curiae* at p. 11. Juvenile dispositions are intended, among other things, "to hold the offender accountable for the offender's actions," but only until the child's disposition is satisfied or until the child attains twenty-one years of age. R.C. 2152.02(C)(6); R.C. 2151.38. See also In re T.R. (1990), 52 Ohio St. 3d 6, 16 ("[I]t is the law's policy 'to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.'") (citing In re Gault (1967), 387 U.S. 1, 24). The Attorney General repeatedly emphasizes that the classification and registration of juvenile sex offenders is more about accountability and culpability than it is about protecting the public from harm. Why, then, in a system that requires a limited time frame for accountability are children required to register as sex offenders well past the usual limit of juvenile court dispositions and jurisdiction? The Attorney General's focus on accountability and culpability reflects that the juvenile sex offender classification and registration scheme is punitive.

Should this Court conclude that the sex offender classification and registration scheme advanced by S.B. 10 is not punitive, and then conclude that the scheme implicates a valid state

interest, it must evaluate whether the scheme bears any relation to the state's interests. State v. Thompkins, 75 Ohio St.3d 558, 561, 1996-Ohio-264. This Court has instructed that "the party challenging the constitutionality of a statute 'bears the burden to negate every conceivable basis that might support the legislation.'" Pickaway County at ¶20.

In its brief, the State concludes, "Obviously, the higher the likelihood of recidivism, the greater the risk to the community where the offender will live, work, and travel." *Answer* at p. 8. But glaringly absent from the State's conclusion is evidence that older adolescent offenders reoffend at a higher rate than younger offenders or any evidence that offenders under age fourteen pose no risk to reoffend. The State offers no support, because none exists.

Further, addressing the recidivism rates of juveniles generally, the State misstates the research. Citing The Ohio Association of County Behavioral Health Authorities, *Behavioral Health: Developing a Better Understanding, Juvenile Sex Offenders*, Volume 3, Issue I, p.2,[1] the State claims "that up to ten percent of those juveniles released after having committed a sex offense *are likely* to commit another sex offense within one year." *Answer* at p. 9 (emphasis added). In fact, the publication states that "Up to 10% of youth released after having been committed for a sex offense *may* commit a subsequent sex offense within one year." *Developing a Better Understanding, Juvenile Sex Offenders* at p.2 (emphasis added). Not only does the State plainly misstate the research, but it fails to explain how the recidivism rates for *all* children supports Ohio's treating children under fourteen differently than children who are fourteen and fifteen and differently than children who are sixteen and seventeen.

In Justin's case below, the Third District held that "it is likely the General Assembly concluded that the lower the age of the offender, the reduced likelihood of recidivism, thereby

[1] Available at https://secure.digital-community.com/english/oacbha.org/publications/archive.html?PHPSESSID=c39e47809be364ec98220565964a6bc4#1

granting the juvenile court discretion in determining whether a sex offender classification is needed when the offender is younger." In re Justin A. M[.], Wyandot App. No. 16-09-17, 2010-Ohio-1088 at ¶26. And, while the belief that risk increases with age may seem logical, research shows that the risk of reoffending actually decreases with age. Specifically, a number of studies of juvenile sex offenders over the last few decades have provided researchers an opportunity to obtain comprehensive data on patterns of juvenile sexual offenders and their transitions into adulthood. Zimring, F.E., Jennings, W.G., Piquero, A.R., and Hays, S., *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort.* JUSTICE QUARTERLY, Forthcoming (2008) at p. 2.[2] "The general pattern we find is that juveniles with sexually-based police contacts have a high volume of non-sex contacts, a low volume of sexual recidivism during their juvenile careers, and an even lower probability for sexual offending during young adulthood." Id. at p. 4. The Zimring study also found that "at least in the large birth cohort data used in the current study, nine out of ten juvenile sex offenders do not sexually re-offend during the first eight years of legal adulthood and the temporal pattern of sex recidivism suggests that more than 85% of juvenile sex offenders will never again recidivate for a sexually-based offense." Id. at 18.

Further, much like the Attorney General in its brief, discussed above, the State concludes that "it is only logical to recognize that society puts greater responsibilities on children who are on the verge of adulthood" and that children "are held accountable" for their actions as they age. *Answer* at p. 10. Again, accountability has nothing to do with the risk an offender may pose to the community, and holding an older juvenile offender more accountable than a younger offender has nothing to do with protecting the public from the offenders who are actually dangerous.

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[2] Available at http://works.bepress.com/franklin_zimring/4/.

The State also suggests that any harm caused by the age-based distinctions is mitigated by the reclassification and declassification provisions found in R.C. 2152.84 and R.C. 2152.85. *Answer* at pp. 10-11. First, it strains credulity to suggest that an arbitrary age-based classification that is not rationally related to a valid state interest could be cured by giving a court discretion to reduce or eliminate the harm at a later date. Second, R.C. 2152.84(A)(2)(b) and (c) also require the juvenile court to treat children differently based only upon their age at the time of the offense: R.C. 2152.84(A)(2)(b) provides that children who were fourteen or fifteen at the time of their offense can have their classification removed, but R.C. 2152.84(A)(2)(c) provides that children who were sixteen or seventeen at the time of their offense are eligible only to have their classification level reduced, but not removed.

Neither the State nor the Attorney General has advanced any basis to support the need for disparate treatment of children under R.C. 2152.83. A legislative distinction "may be based on rational speculation unsupported by evidence or empirical data." Pickaway County at ¶32, cited in *Merit Brief of Amicus Curiae* at p. 13. But if the party challenging the validity of a statute negates "every conceivable basis that might support the legislation" the arbitrary distinctions must be struck down. Pickaway County at ¶20. Using empirical data, Justin has met his burden; therefore, R.C. 2152.83, which requires juvenile courts to treat similarly-situated children differently without any rational basis for doing so 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 **Reply Brief of Appellant Justin A. M[.],** was forwarded by regular U.S. Mail, postage prepaid, this 24th day of January, 2011, to the office of Douglas D. Rowland, Wyandot County Assistant Prosecuting Attorney, 137 S. Sandusky Avenue, Upper Sandusky, Ohio 43351.

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APPENDIX TO REPLY BRIEF OF APPELLANT JUSTIN A. M[.]

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LEXSTAT O.R.C. 2152.84

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH FILE 58 ***
*** ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2010 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH OCTOBER 1, 2010 ***

TITLE 21. COURTS -- PROBATE -- JUVENILE
CHAPTER 2152. DELINQUENT CHILDREN; JUVENILE TRAFFIC OFFENDERS
JUVENILE SEX OFFENDER REGISTRATION AND NOTIFICATION LAW

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ORC Ann. 2152.84 (2011)

§ 2152.84. Hearing upon completion of disposition on whether to continue classification or determination; reclassification

(A) (1) When a juvenile court judge issues an order under section 2152.82 or division (A) or (B) of *section 2152.83 of the Revised Code* that classifies a delinquent child a juvenile offender registrant and specifies that the child has a duty to comply with *sections 2950.04, 2950.041 [2950.04.1], 2950.05*, and *2950.06 of the Revised Code*, upon completion of the disposition of that child made for the sexually oriented offense or the child-victim oriented offense on which the juvenile offender registrant order was based, the judge or the judge's successor in office shall conduct a hearing to review the effectiveness of the disposition and of any treatment provided for the child, to determine the risks that the child might re-offend, to determine whether the prior classification of the child as a juvenile offender registrant should be continued or terminated as provided under division (A)(2) of this section, and to determine whether its prior determination made at the hearing held pursuant to *section 2152.831 [2152.83.1] of the Revised Code* as to whether the child is a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender should be continued or modified as provided under division (A)(2) of this section.

(2) Upon completion of a hearing under division (A)(1) of this section, the judge, in the judge's discretion and after consideration of all relevant factors, including but not limited to, the factors listed in division (D) of *section 2152.83 of the Revised Code*, shall do one of the following as applicable:

(a) Enter an order that continues the classification of the delinquent child as a juvenile offender registrant made in the prior order issued under section 2152.82 or division (A) or (B) of *section 2152.83 of the Revised Code* and the prior determination included in the order that the child is a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender, whichever is applicable;

(b) If the prior order was issued under division (B) of *section 2152.83 of the Revised Code*, enter an order that contains a determination that the delinquent child no longer is a juvenile offender registrant and no longer has a duty to comply with *sections 2950.04, 2950.041 [2950.04.1], 2950.05*, and *2950.06 of the Revised Code*. An order issued under division (A)(2)(b) of this section also terminates all prior determinations that the child is a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender, whichever is applicable. Division (A)(2)(b) of this section does not apply to a prior order issued under section 2152.82 or division (A) of *section 2152.83 of the Revised Code*.

(c) If the prior order was issued under section 2152.82 or division (A) or (B) of *section 2152.83 of the Revised Code*, enter an order that continues the classification of the delinquent child as a juvenile offender registrant made in the prior order issued under section 2152.82 or division (A) or (B) of *section 2152.83 of the Revised Code*, and that modifies the prior determination made at the hearing held pursuant to *section 2152.831 [2152.83.1] of the Revised Code* that the child is a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender, whichever is applicable. An order issued under division (A)(2)(c) of this section shall not include a determination that increases to a higher tier the tier classification of the delinquent child. An order issued under division (A)(2)(c) of this section shall specify the new determination made by the court at a hearing held pursuant to division (A)(1) of this section as to whether the child is a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender, whichever is applicable.

(B) (1) If a judge issues an order under division (A)(2)(a) of this section that continues the prior classification of the delinquent child as a juvenile offender registrant and the prior determination included in the order that the child is a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender, whichever is applicable, the prior classification and the prior determination shall remain in effect.

(2) A judge may issue an order under division (A)(2)(c) of this section that contains a determination that reclassifies a child from a tier III sex offender/child-victim offender classification to a tier II sex offender/child-victim offender classification or to a tier I sex offender/child-victim offender classification.

A judge may issue an order under division (A)(2)(c) of this section that contains a determination that reclassifies a child from a tier II sex offender/child-victim offender classification. A judge may not issue an order under that division that contains a determination that reclassifies a child from a tier II sex offender/child-victim offender classification to a tier III sex offender/child-victim offender classification.

A judge may not issue an order under division (A)(2)(c) of this section that contains a determination that reclassifies a child from a tier I sex offender/child-victim offender classification to a tier II sex offender/child-victim offender classification or to a tier III sex offender/child-victim offender classification.

If a judge issues an order under this division that contains a determination that reclassifies a child, the judge shall provide a copy of the order to the delinquent child and the bureau of criminal identification and investigation, and the bureau, upon receipt of the copy of the order, promptly shall notify the sheriff with whom the child most recently registered under *section 2950.04* or *2950.041 [2950.04.1] of the Revised Code* of the determination and reclassification.

(3) If a judge issues an order under division (A)(2)(b) of this section that declassifies the delinquent child as a juvenile offender registrant, the judge shall provide a copy of the order to the bureau of criminal identification and investigation, and the bureau, upon receipt of the copy of the order, promptly shall notify the sheriff with whom the child most recently registered under *section 2950.04* or *2950.041 [2950.04.1] of the Revised Code* of the declassification.

(C) If a judge issues an order under division (A)(2)(a), (b), or (c) of this section, the judge shall provide to the delinquent child and to the delinquent child's parent, guardian, or custodian a copy of the order and, if applicable, a notice containing the information described in divisions (A) and (B) of *section 2950.03 of the Revised Code*. The judge shall provide the notice at the time of the issuance of the order and shall comply with divisions (B) and (C) of that section regarding that notice and the provision of it.

(D) An order issued under division (A)(2)(a) or (c) of this section and any determinations included in the order shall remain in effect for the period of time specified in *section 2950.07 of the Revised Code*, subject to a modification or termination of the order under *section 2152.85 of the Revised Code*, and *section 2152.851 [2152.85.1] of the Revised Code* applies regarding the order and the determinations. If an order is issued under division (A)(2)(a) or (c) of this section, the child's attainment of eighteen or twenty-one years of age does not affect or terminate the order, and the order remains in effect for the period of time described in this division.

(E) The provisions of this section do not apply to a delinquent child who is classified as both a juvenile offender registrant and a public registry-qualified juvenile offender registrant pursuant to *section 2152.86 of the Revised Code*.

HISTORY:

149 v S 3 (Eff 1-1-2002); 149 v H 393. Eff 7-5-2002; 150 v S 5, § 1, eff. 7-31-03; 152 v S 10, § 1, eff. 1-1-08.