

IN THE SUPREME COURT OF OHIO

Francis M. Hyle, :
Green Township Law Director, *ET AL.* : Case No. 2006-2187
 :
 :
 Plaintiff-Appellee, :
 :
 -vs- : On Appeal from the
 : Hamilton County Court of Appeals,
 : First Appellate District
 Gerry R. Porter, Jr.,
 Defendant-Appellant.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANT GERRY PORTER

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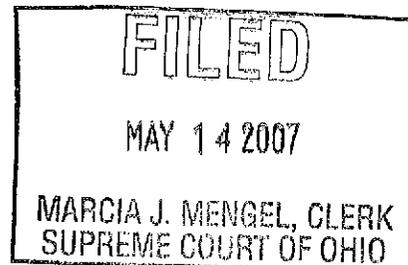


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Pursuant to Ohio Supreme Court Rule VI, Section 6, Jenny Carroll, Rosenthal Institute for Justice at the University of Cincinnati College of Law, Iowa County Attorneys Association (“ICAA”), Iowa Coalition Against Sexual Assault (“IowaCASA”), Iowa State Sheriffs & Deputies Association (“ISSDA”), Jacob Wetterling Foundation and the Association for the Treatment of Sexual Abusers (“ATSA”) (collectively “amici”), hereby submit this brief as *amici curiae* in support of the Appellant, Gerry R. Porter, Jr. This brief conforms to the requirements of Ohio Supreme Court Rule VIII, Section 4.

INTEREST OF AMICI

The RIJ, based at the University of Cincinnati College of Law is an umbrella organization that seeks to harness the idealism, energy and intellect of law students to create positive social and legal change. The work of the RIJ includes work with the Ohio Innocence Project and the creation of RIJ reports which in the past have addressed law and justice issues including race and racial relations, the criminal justice system, the environment, the media and economics.

The ICAA is a non-profit organization whose purpose is to encourage and maintain close coordination among county prosecuting attorneys and to promote the uniform and efficient administration of the criminal justice system in Iowa through cooperation with law enforcement agencies, monitoring of legislation and the provision of continuing legal education for prosecutors.

IowaCASA is a non-profit organization whose mission is to unite people and organizations to promote a society free from sexual violence and to meet the diverse needs of

survivors. IowaCASA consists of 27 sexual assault crisis centers serving survivors of sexual assault throughout Iowa. Its staff work on several initiatives including: technical assistance and training to member centers; civil legal assistance for survivors of sexual assault; improving responses to sexual assault within communities of color; a training initiative for assisting survivors with developmental disabilities; a national project providing peer-based assistance to other sexual assault coalitions; statewide sexual assault prevention; training for allied professionals; and public policy efforts at the state and national level.

The ISSDA is a state association of sheriffs, deputies, and full-time staff organized to provide training and education to its members and to promote effective crime prevention methods and laws that utilize scarce resources effectively.

The Jacob Wetterling Foundation is a victim advocacy agency that was established on January 22, 1990, four months after eleven-year-old Jacob Wetterling was abducted near his home in St. Joseph, Minnesota. The Foundation seeks to educate families and communities to prevent the exploitation of children, including sexual victimization. In addition, the Foundation provides victim support and has worked extensively to promote legislation which seeks to protect children and community from sexual offenders. The Wetterling Foundation was instrumental in passing Jacob's Law in 1996 which facilitated the registration of convicted sex offenders in all states.

Finally, the ATSA is an international, multi-disciplinary professional association dedicated to the research, treatment, and prevention of sexual assault. ATSA's members include the world's leading researchers in the study of sexual violence. Membership is also made up of

professionals who evaluate and treat sexual offenders, sexually violent predators, and victims. Members work closely with public and private organizations such as prisons, probation departments, law enforcement agencies, child protection services, State Attorney's Offices, Public Defender's Offices, victim advocacy groups, and state legislatures in an effort to protect citizens from sexual assault. ATSA advocates for evidence-based practices and policies that are most likely to protect the public from sexual violence, while allowing for the rehabilitation of sexual offenders.

Each of these organizations' missions are furthered by the implementation of evidence-based practices and policies that are most likely to protect the public from sexual violence, while allowing for the rehabilitation of sexual offenders. Each of the amicus believe that these goals are not accomplished under Ohio's current residence restrictions for sexual offenders.

STATEMENT OF FACTS

Amici adopt the statement of facts presented in the brief of Appellant Gerry R. Porter, Jr.

SUMMARY OF THE ARGUMENT

The Court should hold that retroactive application of R.C. 2950.031 to a former sex offender who both committed his offense and purchased his residence prior to July 31, 2003, the effective date of the statute, violates Section 28, Article II of the Ohio Constitution. Retroactive application of the statute under such circumstances retroactively impairs and/or divests such an offender of his vested, substantive property rights.

This brief will address Appellee's anticipated argument that R.C. 2950.031 is simply a remedial law designed to protect children from sexual abuse. Although the protection of children

from sexual abuse is indisputably a compelling government interest – one that each of the Amicus supports and works hard to promote – sex offender residence laws actually harm the innocent children they are intended to protect and have collateral consequences that undermine goals of community safety and treatment of offenders.

Research has shown that sex offenders with stable housing and social support are much less likely to commit new sex offenses compared to those offenders who lack stability. Residence restrictions deprive sex offenders of stable housing and social support, and thus significantly increase the risk of recidivism. In addition, sex offenders who become homeless, or fail to provide accurate addresses as a result of these restrictions, will be more difficult to supervise and monitor in the community, thereby increasing the risk to children. Recent studies have concluded that sex offender residence statutes create a false sense of security that may leave children more vulnerable to sexual abuse.

Equally troubling is the lack of evidence that these laws actually protect children. To the contrary, those states that have studied the issue carefully have found no relationship between sex offense recidivism and the proximity of sex offenders' residences to schools or other places where children congregate.

In reality, sex offender residence laws in Ohio and elsewhere around the country are driven by fear, not facts. Despite widespread belief that sex offender recidivism rates are high, recent studies have shown that such recidivism is the exception, rather than the rule, particularly if the offender has received treatment. In cases where recidivism did occur, residence restrictions

had no impact. Instead, efforts to enforce sex offender residence laws drain valuable law enforcement resources.

Forcing someone like Mr. Porter from his established home will neither increase safety for children nor reduce recidivism. In addition, enforcement of the statute against individuals like Mr. Porter, who resided in his home with family members, has the unintended result of forcing these innocent relatives to either move from their home to remain with their loved one or to live apart. This in no way promotes the articulated and intended goals of the statute. Ultimately, our state's children will suffer from laws that destabilize sex offenders and increase the risk of recidivism.

While the failings of the policy to achieve its articulated goals may not, in themselves, cause furnish a legal basis to invalidate the law, the amici believe, as was recently noted in a similar case, that the concerns expressed by such a diverse group of amicus regarding the reality of such laws – and their failure to achieve their purported objectives – sheds important light on the constitutional issues presented in this case and is relevant to the Court's inquiry. *See Commonwealth of Kentucky v. Baker, et al.*, No. 07-M-00604, 06-M-5879, 06-M-5885, 06-M-5932, 06-M-5915, 06-M-5920, 06-M-6814, 06-M-6031, 06-M-5834, 06-M-5930, and 06-M-5866, (Commonwealth of Kentucky, Kenton District Court, Fourth Division)(April 20, 2007) (holding that Kentucky's residence restrictions were unconstitutional as retroactively applied, particularly given that such policies failed to achieve their articulated goals of promoting public safety and reducing recidivism).

ARGUMENT

Sex Offender Residence Restrictions Increase the Risk of Harm to Children.

Research demonstrates that stability and support increase the likelihood of successful reintegration for former offenders, and that public policies making it more difficult for former offenders to succeed undermine public safety. *See, e.g.,* JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY* (2003). With respect to sex offenders in particular, research has shown that isolation, unemployment, depression, and instability – conditions known as dynamic risk factors – correlate with increased recidivism. *See* CALCASA, *Opposition to California's Jessica Lunsford Act*, from <http://www.calcasapublicpolicy.org> (2006); Jill Levenson & Leo Cotter, *The Impact of Sex Offender Residency Restrictions: 1,000 Feet From Danger or One Step From Absurd?*, 49 *Int'l J. of Offender Therapy and Comp. Criminology*, 168 (2005); R. KARL HANSON & ANDREW J.R. HARRIS, *DYNAMIC PREDICTORS OF SEXUAL RECIDIVISM* (1998); R. KARL HANSON & KELLY MORTON-BOURGON, *PREDICTORS OF SEXUAL RECIDIVISM: AN UPDATED META-ANALYSIS* (2004); COLO. DEP'T OF PUBLIC SAFETY, *REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY* (2004); Candace Kruttschnitt, Christopher Uggen & Kelly Shelton, *Predictors of Desistance Among Sex Offenders: The Interaction of Formal and Informal Social Controls*, 17 *JUST. Q.*, 61-88 (2000). Studies have also concluded that residence restrictions often force sexual offenders to move to socially disorganized, economically depressed communities that lack the resources and the social networks to protect residents and to

organize a unified response to crime. See E.E. Mustaine, R. Tewksbury & K.M. Stengel *Residential Location and Mobility of Registered Sex Offenders*, 30 AMERICAN JOURNAL OF CRIMINAL JUSTICE ,177-192 (2006); R. Tweskbury and E.E. Mustaine, *Where to Find Sex Offenders: An Examination of Residential Locations and Neighborhood Conditions*, 19 CRIMINAL JUSTICE STUDIES 63-68 (2006). As a result such restrictions not only have a detrimental impact on the reintegration of the sexual offender, but may also create negative impact on certain communities by forcing offenders to cluster in the very areas that are least equipped to provide a unified response in the event of re-offense.

The Ohio statute may significantly increases the danger that sex offenders will recidivate by depriving them of housing and decreasing their access to social services and support networks. If this Court concludes that this residence restriction can be imposed retroactively upon offenders who committed their offenses and purchased their homes prior to the effective date of the law, then no sexual offender in Ohio can ever safely buy property with the hopes of establishing a permanent residence there. Municipalities across Ohio have recently enacted residence restrictions that either increase the distance sex offenders must live from schools and/or require sex offenders to refrain from living near other places where children may congregate, such as parks and daycares.¹ Thus, even if an offender like Mr. Porter buys a home that complies with state law, new, more expansive residence restrictions may render the new

¹ See e.g. City of Hilliard, Municipal Ordinance 06-43 (Amended)(2006) (prohibiting sex offenders from “establishing a residence or occupying a residential premise within one thousand (1,000) feet of any school premises, licensed daycare facilities, preschools, or cit owned and operated public parks. . .”); Upper Arlington Municipal Code (2004) (creating additional restrictions on sex offenders, requiring registration with City Hall, in addition to state mandated County authorities, and restricting offenders from working for the city, or living within 1000 feet of libraries, parks and pools).

residence illegal. Moreover, even if new laws are not passed, new schools could be built rendering the offender in violation. In either scenario, the offender would be in violation of the residence restriction, and forced to move.

Additionally, the Ohio statute may increase the risk of recidivism by forcing many sex offenders to move from supportive environments that reduce the offenders' risk of re-offending. *See, e.g.*, JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY (2003) (concluding that positive social support is critical to the success of released offenders.). In Mr. Porter's case, he and his wife lived in their home for fourteen years.² Mr. Porter lived with his family and was well established in his community. In forcing Mr. Porter to vacate his residence, the State requires him to leave much more than the physical location where he lives, it asks him to leave the support network and potentially his source of services. Such phenomenon is seen throughout the country as sex offenders are required to leave their homes in the face of residence restrictions. In the Iowa case of *Doe v. Miller*, John Doe XVIII sought to live with his adult son upon release from prison but was prohibited from doing so because of Iowa's residency restriction. *Doe v. Miller*, 298 F.Supp.2d 858 (2007). Instead, he moved to the countryside, where his access to services and support were limited. *Id.*; *see also* Levenson & Cotter, *The Impact of Sex Offender Residency Restrictions: 1,000 Feet From Danger or One Step From Absurd?*, 49 Int'l J. of Offender Therapy and Comp. Criminology, 168 (2005) (reporting that almost half of the sex offenders surveyed in Florida were prevented from living with supportive family members because of the state's residency restriction).

² Hyle v. Porter, No. C-050768, 2006-OH-5454.

Uprooting offenders like Mr. Porter from housing, social support and services, and employment opportunities will only increase, rather than reduce, the risk that they will recidivate and sexually abuse children. This is precisely one of the reasons why the State of Minnesota rejected a proposal to prohibit sex offenders from living within 1500 feet of schools and parks. A 2003 study commissioned by the Minnesota Legislature recommended against passing the proposed restrictions in part because they would “pose . . . problems, such as a high concentration of offenders [in rural areas] with no ties to community; isolation; lack of work, education and treatment options; and an increase in the distance traveled by agents who supervise offenders.” MINN. DEP’T OF CORRECTIONS, LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES, 2003 REPORT TO THE LEGISLATURE, 9 (2003). The study also concluded, as will be addressed in more detail below, that the proposed residence restrictions would not reduce sex offender recidivism. *Id.*³ This conclusion was borne out by a subsequent study by the Minnesota Department of Corrections released in April, 2007, which after examining 224 cases of recidivism among sex offenders concluded that “[n]ot one of the 224 sex offenders would likely have been deterred by a residency restrictions law.” MINN. DEP’T OF CORRECTIONS, RESIDENTIAL PROXIMITY & SEX OFFENSE RECIDIVISM IN MINNESOTA, April, 2007 available at <http://www.corr.state.mn.us/documents/04-07SexOffenderReport-Proximity.pdf> at 2.

³ Furthermore, sex offender residence statutes create a false sense of security that may leave children more vulnerable to sexual abuse. See Robert F. Worth, *Exiling Sex Offenders From Town: Questions About Legality and Effectiveness*, THE NEW YORK TIMES, Oct. 3, 2005 (“The restrictions could create a false sense of security, since many convicted sex offenders did not live or work near their victims”) (quoting Ernie Allen, president of the National Center for Missing and Exploited Children).

In addition, forcing Mr. Porter to leave his home also required his family to engage in the difficult choice between remaining in their established home or keeping their family together. In Mr. Porter's case, this decision affected not only the adults in the home (Mr. Porter and his wife), but also their two minor children.

A. There Is No Evidence That Sex Offender Residence Restrictions Protect Children from Sexual Abuse.

Proponents of sex offender residence restrictions argue that such measures are necessary to diminish the likelihood that sex offenders will come in contact with children whom they might potentially victimize. Such restrictions, however, do not protect children.

Recent studies specifically analyzed whether proximity to schools or parks increased the recidivism rates for sexually violent predators. One such study reached the following conclusions:

Based on the examination of level three re-offenders, there were no examples that residential proximity to a park or school was a contributing factor in any of the sexual re-offenses [observed in the study]. *Enhanced safety due to proximity restrictions may be a comfort factor for the general public, but it does not have any basis in fact.* The two level three offenders [in the study] whose re-offenses took place near parks both drove from their residences to park areas that were several miles away. ... Based on these cases, it appears that a sex offender attracted to such locations for purposes of committing a crime is more likely to travel to another neighborhood in order to act in secret rather than in a neighborhood where his or her picture is well known.

MINN. DEP'T OF CORRECTIONS, LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT Issues, 2003 Report to the Legislature (2003) (emphasis added).

In 2004, the Colorado Department of Public Safety conducted a similar study. The Colorado researchers concluded: “Placing restrictions on the location of ... supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism.” COLO. DEP’T OF PUBLIC SAFETY, *supra* at 5. The 2007 Minnesota study confirmed such results, noting that residential proximity did not effect sexual recidivism. MINN. DEP’T OF CORRECTIONS, RESIDENTIAL PROXIMITY & SEX OFFENSE RECIDIVISM IN MINNESOTA, (2007) at <http://www.corr.state.mn.us/documents/04-07SexOffenderReport-Proximity.pdf> at 2.

The Minnesota and Colorado studies suggest that while sex offender residence restrictions might provide a sense of security to the public, it is a false one, and they do not protect children from sexual abuse. In fact, such restrictions may exasperate the problem of attempting to track sex offenders. One recent analysis concluded that within six months of the implementation of Iowa’s residence restriction law, the number of registered sex offenders who could not be located more than doubled, leading law enforcement agents to caution that the transience created by residence restrictions damages the reliability and validity of sex offender registries, and does not serve the public’s best interests. L. Rood, *New Data Shows Twice as Many Sex Offenders Missing*, DES MOINES REGISTER, January 23, 2006.

B. Sex Offender Residence Statutes Are Driven by Fear, Not Facts.

Sex offender residence restrictions are growing in number across the country. The proliferation of these measures, however, is driven by fear, not facts. Tragic cases of child abduction and sexually motivated murder receive extraordinary media attention, and the

publicity of such events creates a sense of alarm and urgency among citizens. These high profile cases are partly responsible for the increase in sex offender residence restrictions in recent years. In reality, however, such cases are extremely rare. Approximately 100 stranger abductions occur in the United States each year. See Center for Missing and Exploited Children, at <http://www.missingkids.com> (last visited May 13, 2007). Less than 1% of all murders involve sexual assault, and in fact, the prevalence of sexual murders declined by about half between the late 1970's and the mid 1990's. BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT, 27 (1997).

Moreover, a 2000 Department of Justice study found that 93% of child sexual abuse victims knew their abuser, 34.2% were family members, and 58.7% were acquaintances. BUREAU OF JUSTICE STATISTICS, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS, 10 (2000). Only 7% of child victims reported that they were abused by strangers. *Id.*⁴ Such conclusions are confirmed by the 2007 Minnesota study, which found that the vast majority (79%) of recidivists selected victims with whom they had a previous relationship – whether social or biological. MINN. DEP'T OF CORRECTIONS, RESIDENTIAL PROXIMITY & SEX OFFENSE RECIDIVISM IN MINNESOTA, (2007)

⁴ As discussed above as the Ohio statute requires that all sex offenders live at least 1000 feet from schools, the impact of these laws is to either permanently separate offenders from their families and children who depend on them, or to force entire families to relocate, creating psychological and financial hardship to innocent family members. This includes the forced relocation of children away from their schools and their friends. Ironically, this may create a strong incentive for these children not to report sexual abuse committed upon them by members of their own household. Of course, that is counterproductive to the goal of keeping children safe from sexual abuse.

at <http://www.corr.state.mn.us/documents/04-07SexOffenderReport-Proximity.pdf> at 13-14.

Proponents of sex offender residency statutes also point to allegedly high sex offender recidivism rates as a justification for such laws. Recent research, however, contradicts the myth that most sex offenders will re-offend. For example, the Department of Justice found that 5.3% of sex offenders were rearrested for a new sex crime within three years after release from prison. BUREAU OF JUSTICE STATISTICS, *RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994*, 24 (2003). Moreover, studies by Canadian researchers, who examined recidivism statistics for more than 29,000 sex offenders in North America and Europe, found a 14% recidivism rate among all sex offenders, though child molesters were re-arrested at a slightly higher rate of about 20%. See R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 *J. OF CONSULTING & CLINICAL PSYCHOL.* 348-362 (1998); R. KARL HANSON & KELLY MORTON-BOURGON, *PREDICTORS OF SEXUAL RECIDIVISM: AN UPDATED META-ANALYSIS* (2004). See also OHIO DEP'T OF REHAB. & CORR., *TEN-YEAR RECIDIVISM FOLLOW-UP OF 1989 SEX OFFENDER RELEASES* 12, 24 (2001) (reporting total sex offense related recidivism rate of 11% over ten-year period, and characterizing sex offense recidivism as a "fairly unusual" occurrence in Ohio).

While it is true that official recidivism data – for any offense type – always underestimates actual re-offense rates, it is clear, based on the research discussed above, that the majority of sexual offenders are unlikely to commit new sex offenses.⁵

⁵ Some studies, based on older data, have suggested higher recidivism rates. See, e.g., Robert A. Prentky, Austin F.S. Lee, Raymond A. Knight, & David Cerce, *Recidivism Rates Among Child*

CONCLUSION

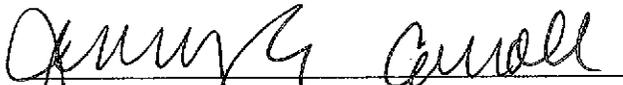
Residence restrictions do not decrease the risk of recidivism among sex offenders, nor do they promote the safety of the children of Ohio. Such restrictions undermine public safety goals by isolating offenders from their support networks and their treatment providers. They have the collateral effect of limiting offenders' access to housing and secure property rights. In addition, such restrictions create a false sense of security by suggesting that recidivism can be reduced by limiting an offender's residential proximity to his/her potential victims, despite the fact that studies of such recidivists indicate no correlation exists between residential proximity and risk of re-offense. In fact, such restrictions in at least one state have been shown to reduce the ability of law enforcement officials to track sexual offenders. Finally, such restrictions place an undue burden on law enforcement agents and prosecutors by requiring enforcement of laws which fail to meet their articulated policy goals.

Molesters and Rapists: A Methodological Analysis, 21 LAW & HUM. BEHAV. 635, 643 (1997) (reporting an estimated recidivism rate of 52%, but only among sex offenders who chose boys as their victims, a very targeted subset of all sexual offenders). Drawing conclusions about current recidivism rates based upon old data is unwarranted, however. For example, the subjects of the Prentky study were sex offenders released from prison during the period 1959-1985, before treatment became widespread and state-of-the-art. Additionally, the subjects were the proverbial "worst of the worst," men who were civilly committed for repeat and/or aggressive sex offenses. Because the subjects of the Prentky study were not necessarily representative of sex offenders generally, the authors issued two caveats: (1) "[t]he obvious heterogeneity of sexual offenders precludes automatic generalization of the rates reported here to other samples," and (2) "these findings should *not* be construed as evidence of the inefficacy of treatment," since "the treatment services [available to the subjects of the study] were not provided uniformly or systematically and did not conform to a state-of-the-art mode." *Id.* at 656-57 (emphasis in original).

Each of the amici that join this brief seeks to reduce and prevent sexual crimes against children. While we applaud the goals of the Ohio legislature in seeking to address this issue, we also recognize that the issue of sexual harm is complex and is unlikely to be remedied by laws which are overly restrictive and attempt to remedy the problem with little consideration to the continuum of offenders who commit this type of crime. We urge this Court to strike down this law which does nothing to protect the children of Ohio and instead merely leeches away valuable resources.

For the foregoing reasons, the undersigned respectfully request that this Court strike the retroactive application of Ohio's residence restrictions.

Respectfully Submitted,



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