

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : 2006-2148
Appellee :
-vs- : On Appeal from the
REGINALD WARREN : Cuyahoga County Court
Appellant : of Appeals, Eighth
Appellate District Court
of Appeals
CA: 86854

MERIT BRIEF OF APPELLANT REGINALD WARREN

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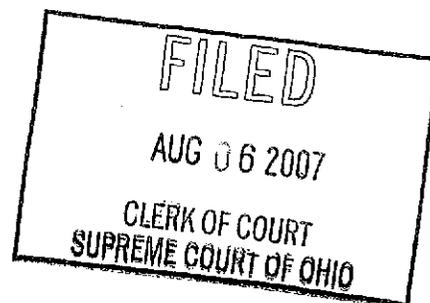


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APPELLANT'S PROPOSITION OF LAW AND MERIT BRIEF

This matter comes before this Court as a discretionary appeal.

STATEMENT OF THE CASE AND FACTS

On November 9, 2004, a Cuyahoga County grand jury issued a 48-count indictment in connection with Reginald Warren's alleged sexual molestation of Tiffany Youngblood in 1988. The indictment charged Mr. Warren with twelve counts of rape, twelve counts of felonious sexual penetration, twelve counts of gross sexual imposition and twelve counts of kidnapping. Mr. Warren waived his right to a jury trial and tried his case to the bench.

At the time that the offenses purportedly occurred, Mr. Warren was fifteen years old and Ms. Youngblood was nine. These acts supposedly transpired in a house belonging to James Thomas and Mr. Murphy, two elderly men who babysat Ms. Youngblood and employed Mr. Warren. The offenses allegedly occurred at times when both men were home. By the time Ms. Youngblood made her allegations public, both men had died and their house had been destroyed.

There was no physical evidence to bolster Ms. Youngblood's accusations. There was no DNA, no medical records, and no physical findings. Because any adult who may have witnessed what happened all those years ago had passed away and the alleged scene of the incident had been destroyed, the case came down to Mr. Warren's denial against the emotional account Ms. Youngblood provided.

Ms. Youngblood testified that during the summer of 1988, when she was nine-years old, her mother left her and her younger sister, Alisa, at the home of James Thomas when she went to work. (Tr. 66) Mr. Thomas's cousin, Mr. Murphy, lived in the home with Mr. Thomas, and Mr. Thomas's eight-year-old granddaughter spent every day at the house that summer. (Tr. 70, 73) A man named "Marvin" visited to help out with housework and Mr. Warren, then fifteen years old,

did yardwork and assisted Marvin around the house. (Tr. 72) At all times when the wrongful conduct allegedly occurred, Mr. Warren and Ms. Youngblood were in the house with Alicia, Mr. Thomas, his granddaughter, and Mr. Murphy. (Tr. 94) Mr. Thomas was disabled and usually sat in a downstairs chair that faced the stairway. (Tr. 95)

Alicia Logan, Ms. Youngblood's younger sister, testified that she was six-years-old in the summer of 1988. (Tr. 187) She remembered that lots of children played at Mr. Thomas's house that summer, and she did occasionally see Mr. Warren there. (Tr. 189, 192) She did not recall any incidents involving inappropriate conduct by Mr. Warren. (Tr. 193)

Ms. Youngblood testified that the first time anything happened, Mr. Warren came into the room and kissed her neck and her breasts. (Tr. 74) She testified that Mr. Warren then laid her on the floor, covered her mouth with one hand, held her hands over her head with another, and somehow found *a third* hand to pull her pants down and insert his finger in her vagina. (Tr. 80-81) She testified that this happened five or six times before he tried "to stick his penis in me, in my vagina, but he wouldn't stick it all the way in there." (Tr. 80-81) She claimed that he would pull her panties down around her knees and lie between her legs with his own legs under her panties. When asked, "Did he insert his penis into you?" she responded "No." (Tr. 85) But after insistent prodding by the prosecutor, Ms. Youngblood eventually conceded that he managed to insert about an inch-and-a-half of his penis inside of her vagina. (Tr. 86)

Regarding the sexual misconduct, Ms. Youngblood recalled that it occurred "several times," or "a good 11 or 12 times." (Tr. 82) When asked where these incidents occurred, she replied "It happened all the time in the dining room or upstairs in the [bed]room." (Tr. 83) She also recalled an episode where Warren tried to put his penis in her mouth but she kept her lips closed, and one time when he tried to insert the handle of a hairbrush into her vagina. (Tr. 89-90,

93) On the latter occasion, the handle penetrated “just a tiny bit,” which she then estimated to be “about two inches.” (Tr. 93)

Ms. Youngblood testified that after she told her mother about the abuse, she never saw Mr. Warren again. She explained that she didn’t know why she waited for sixteen years before reporting these events. (Tr. 119) Ms. Youngblood only called the police after seeing an article in the Cleveland Plain Dealer in April, 2004, indicating that Reggie Warren had been imprisoned on a charge of gross sexual imposition involving a nine-year-old girl. (Tr. 252)

After the close of the prosecution’s case, the court dismissed four of twelve identical rape counts, all of the felonious sexual penetration counts and the violence specifications for the twelve identical gross sexual imposition counts. The defense rested without presenting a case. The court then found Mr. Warren guilty on all remaining counts: eight counts of rape, twelve counts of gross sexual imposition and twelve counts of kidnapping.

After a hearing, the trial court found Mr. Warren to be a sexual predator. At sentencing, Mr. Warren professed his innocence, insisting that he never molested Ms. Youngblood. (Tr. 346-48) Taking Mr. Warren’s protestations as evidence of his lack of remorse and the “depth of [his] depravity,” the trial court focused exclusively on the need to punish Warren and protect society. The trial court sentenced him to multiple consecutive sentences along with multiple life terms for rape. (Tr. 363-64) The judge also ordered Mr. Warren to serve this sentence consecutively to a nine-year sentence he received on the unrelated gross sexual imposition case. At no time did the judge mention or account for the fact that the incident involving Ms. Youngblood, if it did happen, occurred when Warren was only 15 years old.

Mr. Warren appealed to the Eighth District Court of Appeals, The court upheld Mr. Warren’s convictions and resulting sentences for one count of rape, four counts of gross sexual

imposition, and five counts of kidnapping, but reversed the other convictions on sufficiency grounds. That decision was journalized on August 10, 2006. This Court granted Mr. Warren's Motion for Delayed Appeal, and, on May 16, 2007, this Court accepted the appeal on his fifth proposition of law alone, the merits of which he argues below.

ARGUMENT

Proposition of Law:

R.C. 2907.02 AND R.C. 2151.02(C)(3)¹ WERE UNCONSTITUTIONALLY APPLIED TO APPELLANT, WHO WAS A MINOR AT THE TIME OF THE ALLEGED CRIME; THUS APPELLANT'S RIGHT TO DUE PROCESS AND A FAIR TRIAL WAS DENIED WHEN HE WAS SENTENCED AS AN ADULT FOR CRIMES ALLEGED TO HAVE BEEN COMMITTED WHEN HE WAS ONLY FIFTEEN YEARS OLD.

A. Summary of the Argument

The crimes for which Mr. Warren has been tried, convicted, and sentenced to life imprisonment ostensibly occurred in 1988. Mr. Warren was fifteen years old at the time. Because, however, the crimes were not charged until 2004, R.C. 2152.02 (C)(3) divested the Juvenile Court of jurisdiction it would have otherwise had over the case. R.C. 2152.02(C)(3) provides that a child apprehended after age 21 must be prosecuted as an adult, and Mr. Warren was 32 when this indictment was issued. By operation of law therefore, Mr. Warren was treated as if he committed the crime as an adult – which he was not. The distinction is critical because, as we explain further herein, it changes, not only the punishment at stake, but the severity of the crime itself.

Mr. Warren was charged with rape under R.C. 2907.02. Because Ms. Youngblood was under thirteen in 1988 and she claimed he used force, the court that sentenced the adult Mr.

¹ The applicable provision is R.C. 2152.02(C)(3) and it states that “any person who, while under eighteen years of age, commits an act that would be a felony if committed by an adult and

Warren could not sentence him to anything other than a life sentence once it found him guilty. Mr. Warren also received consecutive terms on several remaining counts. Accordingly, because of the interplay between R.C. 2152.02(C)(3) and R.C. 2907.02, the trial court was not permitted to consider, and the record makes clear that it did not, Mr. Warren's minority status at the time of the offense as a mitigating factor at sentencing.

The United States Supreme Court has made it plain that when an offender is a child at the time he commits an offense the court must consider the offender's youthful status as a factor that mitigates his sentence. *Roper v. Simmons* (2005), 543 U.S. 551, 570. Yet R.C. 2907.02 and R.C. 2151.02 operate in concert to prevent this result. As a consequence, Mr. Warren has been denied the explicit protections propounded in *Simmons*.

The proceedings below are also troubling because they reflect that the only factor that realistically produced Mr. Warren's lengthier sentence was the passage of time – not the severity of the crime, Warren's personal history, or any other appropriate aggravating factor. Accordingly, the life sentence imposed was arbitrary, capricious and utterly disproportionate to those received by other offenders who are similarly situated: i.e. those convicted of committing aggravated rape at the age of fifteen. Moreover, as applied in this case, R.C. 2152.02(C)(3) and R.C. 2907.02, demonstrate one who claims to be victimized by crime can, with unrestricted impunity delay the pursuing the claim and, thereby circumvent the jurisdiction of the Juvenile Court simply by waiting until after the offender's 21st birthday.

As applied to Mr. Warren, therefore, the provisions at issue here combine to create a substantial violation of his rights to due process of law and a fair sentencing hearing under

who is not taken into custody or apprehended for that act until after the person attains twenty-one years of age is not a child in relation to that act.”

Sections 10 and 16, Article I of the Ohio Constitution, and the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

B. Mr. Warren's life sentence for rape is invalid because the statute under which it was imposed precluded the sentencing judge from considering in mitigation the fact that Warren was a minor at the time the crime occurred.

The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property. In this case, Mr. Warren had been deprived of his liberty, which arises from the Constitution itself, by reason of guarantees implicit in the word "liberty," see, e.g., *Vitek v. Jones* (1980), 445 U.S. 480, 493-494. Both the Ohio and United State Constitutions provide that no person shall be deprived of life, liberty or property without due process of law or be denied the equal protection of the law. Section 2, Article I, Ohio Constitution; Fourteenth Amendment, United States Constitution. Mr. Warren received a life sentence after his conviction for aggravated rape based on misconduct that allegedly occurred when he was 15 years old. Because the trial court was not allowed to consider Mr. Warren's age at the time of the offense as a mitigating factor, his life sentence violates due process.

Juveniles, even those who have committed heinous crimes, are treated differently within the criminal justice system. The juvenile courts in America were established 100 years ago to address the unique needs of children who find themselves entangled in the criminal justice system. Recognizing that children have entirely different needs and motivations from adults, the original intention of the juvenile system was to remove the taint of criminality from juvenile misdeeds and to keep children out of the adult criminal and penal system. The sole goal of the original system was to reform or rehabilitate juvenile offenders.

Over the years, however, concerns driven by the increase in juvenile crime prompted lawmakers to increase penalties for juveniles and spawned a movement to treat them more like

adults.² For many serious crimes, juveniles were increasingly bound over and prosecuted as adults in the criminal courts. Research conducted on bindovers over time, however, demonstrated that transfers to adult court did not deter violent juvenile offenders. In fact, studies have indicated that transfer actually increases recidivism among these offenders. This increased recidivism manifests a failure to deter, a failure to rehabilitate, and most significantly, a failure to protect society. One study involved an examination of the recidivism rates of fifteen and sixteen-year-olds charged with robbery. The author compared the recidivism rate of such youths charged in criminal court under New York's automatic transfer statute to those charged in New Jersey's juvenile court and found a significantly higher rate of recidivism among the juveniles who had been transferred to the adult system.³

More recently, at the recommendation of the Ohio Criminal Sentencing Commission Juvenile Subcommittee, Ohio's General Assembly enacted S.B. 179, which largely overhauled

² 121 HB 1 enacted mandatory transfers to adult court for numerous felony-level violent offenses. See also, 42 U.S.C. § 5601 (2006). Congress's findings for the Juvenile Act include the following:

[a]lthough the juvenile violent crime arrest rate in 1999 was the lowest in the decade, there remains a consensus that the number of crimes and the rate of offending nationwide is still too high ... One in every 6 individuals (16.2 percent) arrested for committing violent crime in 1999 was less than 18 years of age. In 1999, juveniles accounted for 9 percent of murder arrests, 17 percent of forcible rape arrests, 25 percent of robbery arrest [sic], 14 percent of aggravated assault arrests, and 24 percent of weapons arrests.

42 U.S.C. §§ 5601(a)(1), (3). One of the purposes of the Juvenile Act is to "assist State and local governments in promoting public safety by encouraging accountability for acts of juvenile delinquency." 42 U.S.C. § 5602(2).

³ See Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 17 CRIME & JUST. 81, 130-31 (2000) (evaluating Jeffrey Fagan's study); and Mary R. Podkopacz & Barry C. Feld, *The End of the Line: An Empirical Study of Judicial Waiver*, 86 J. CRIM. L. & CRIMINOLOGY 449, 490-91 (1996) (finding a larger percentage of transfers committing additional crimes as compared to juveniles kept in juvenile court).

Ohio's juvenile sentencing structure, replacing it with a more "restorative justice" model.

Accordingly, juvenile courts are now equally concerned with punishment and rehabilitation, and the system's stated goals are restoration and accountability. R.C. 2152.01⁴; 1999 Ohio S.B. 179 (eff. 1-1-02)

In recognition of the fact that children are different from adults, even where serious offenses are involved, S.B. 179 also created a "serious youthful offender" (SYO) category that allows youthful offenders to be tried as adults while remaining in juvenile court. Once categorized as an SYO, the youth is subject to a blended sentence at disposition, where the court could impose both a juvenile and adult sentence. The adult sentence is stayed or suspended to encourage the youth's rehabilitation. If the child avoids further criminal activity while serving the juvenile sentence, the adult term will remain stayed. If, however, the juvenile commits subsequent offenses or engages in certain threatening conduct within the juvenile system, the adult sentence could take effect. The offender would then be transferred to an adult facility or program where he would remain beyond age 21.

As with bindovers, there are both discretionary and mandatory "serious youthful offender" situations. Determining the child's status as an SYO also involves a calculus factoring in age, severity of offense, and prior record. R. C. 2152.11. Data compiled by the Department of Justice and several other studies indicates that graduated sentencing structures like the one

⁴ R.C. 2151(A) states that the overriding purposes for dispositions under this chapter are to provide for the care, protection, and mental and physical development of children subject to this chapter, protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender. These purposes shall be achieved by a system of graduated sanctions and services.

adopted here, used in conjunction with family counseling and other services, have sustained a measure of success in reducing juvenile recidivism.⁵

Such efforts demonstrate longstanding recognition of the fact that youngsters lack the experience, education, and intelligence necessary to evaluate the consequences of their conduct. Moreover, minors are more apt to be motivated by emotion or peer pressure than adults. Accordingly, the law does not entrust juveniles with the privileges and responsibilities that adults enjoy. Driving, for instance is restricted among juveniles. On a state by state basis, the age at which youngsters may begin to operate motor vehicles and the conditions within which they can operate those vehicles are similarly restricted. Other rights and responsibilities of citizenship are similarly restricted based on age. The following is only a few of the many age based restrictions:

Jury Duty: In all 50 states and the District of Columbia no one under the age of 18 can serve on a jury.

Military service: Federal law does not allow youth under the age of 18 to enlist in the Regular Army, Regular Marine Corps, or Regular Coast Guard without written parental consent. Youth under eighteen may not be drafted.

⁵ For several examples, analysis of and discussion surrounding efforts similar to Ohio's, see: Steve and Barnoski, Robert. Outcome Evaluation of Washington State's Research-based Programs for Juvenile Offenders. (2004). Olympia, Washington: Washington State Institute for Public Policy; State of Louisiana Office of Youth Development, Youth Services Strategic Plan, 2006-2001. (2005); Press Release, "Redeploy Illinois hailed as a model for the nation. Report Shows Nation a Better Way of Handling Crimes by Young People." Chicago, Illinois: Metropolis 2020, March 23, 2006; Greenwood, Peter. Changing Lives: Delinquency Prevention as Crime-Control Policy. (2006). Chicago: University of Chicago Press; Pennsylvania Workplan (2006). Chicago: Models for Change: Systems Reform in Juvenile Justice; and "The Formula Grants Program supports state and local delinquency prevention and intervention efforts and juvenile justice system improvements. Through this program, OJJDP provides funds directly to states, territories and the District of Columbia to help them implement comprehensive state juvenile justice plans based on detailed studies of needs in their jurisdictions." OJJDP: Program Summary. <http://ojjdp.ncjrs.org/programs/>

Voting:	The twenty-sixth amendment to the Constitution sets eighteen as the age at which citizens may vote; all state legislatures have followed suit for state and local elections.
Foreign travel:	Juveniles under the age of eighteen cannot obtain a passport for foreign travel if the custodial parent objects.
Wills:	In all 50 states and the District of Columbia, youth under the age of 18 cannot make a valid will.
Contracts:	In all 50 states and the District of Columbia, the contract rights of youth under age 18 are restricted and/or infancy is a defense to the enforcement of a simple contract.
Gambling:	47 states and the District of Columbia prohibit youth under the age of 18 from participating in lotteries, bingo games and/or pari-mutuel betting. ⁶
Driving:	In 42 states and the District of Columbia, a youth must be 18 years of age or older to be issued a driver's license free of restrictions or prerequisites.
Alcohol:	All 50 states and the District of Columbia set 21 as the legal age for purchasing alcohol.
Tobacco:	All 50 states and the District of Columbia prohibit either the possession or purchase of cigarettes by youth under the age of 18. Alabama, Alaska, and Utah prohibit either the possession or purchase of cigarettes by youth under the age of 19.
Tattoos:	42 states either absolutely prohibit youth under the age of 18 from obtaining a tattoo, or only allow a youth to obtain a tattoo if a parent consents.
Body piercing:	In 33 states, minors under the age of 18 are either absolutely prohibited from getting body piercings or are only allowed to obtain such if a parent consents.
Pawn shops:	In 37 states, youth under the age of 18 are prohibited from engaging in transactions with pawnbrokers.
Firearms:	Under Federal law, youth under the age of 18 cannot possess a handgun or handgun ammunition. Neither can any federally

⁶ Seven states (Arizona, Iowa, and Louisiana, Mississippi, Nevada, Texas and Washington) prohibit youth under the age of 21 from some forms of gambling. Three states (Alabama, Alaska, and Nebraska) prohibit youth under the age of 19 from some forms of gambling.

licensed importer, manufacturer, dealer, or collector sell or deliver any firearm to a juvenile under the age of 18 or any firearm, other than a shotgun or rifle, to any person under the age of 21.

Tanning salons: 16 states prohibit youth under the age of 18 from using artificial sun tanning facilities without written parental consent.

These restrictions are based on the well-intentioned need to protect children from themselves and society from the unpredictable behaviors of children. See, e.g. *Hodgson v. Minnesota* (1990), 497 U.S. 417, 444-445 (“The state has a strong and legitimate interest in the welfare of its young citizens, whose immaturity, inexperience and lack of judgment may sometimes impair their ability to exercise their rights wisely.... That interest, which justifies state-imposed requirements that a minor obtain his or her parent’s consent before undergoing an operation, marrying, or entering military service..., extends also to the minor’s decision to terminate her pregnancy.”) (citations omitted).

Under the circumstances, “[i]t would be ironic if these assumptions that we so readily make about children as a class – about their inherent difference from adults in their capacity as agents, as choosers, as shapers of their own lives – were suddenly unavailable in determining whether it is cruel and unusual to treat children the same as adults for the purposes of inflicting [] punishment” *Thompson v. Oklahoma* (1988), 487 U.S. 815 at 825 n. 23. In *Thompson* a plurality of the High Court relied on these considerations when it concluded that the Eighth Amendment prohibited the execution of offenders who committed capital murder when they were under 16 years of age. The *Thompson* plurality went on to reason that if the law found children incapable of making adult decisions, they could not be held responsible for their actions in the ways that adults are. Therefore, “less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.” *Thompson*, 487 U.S. 815 at 834-

835, quoting *Eddings v. Oklahoma* (1982), 455 U.S. 104, 115, n.11, quoting the 1978 Report of the Twentieth Century Fund Task Force of Sentencing Policy Toward Young Offenders.

Common sense tells us that compared to adults, teenagers have a significantly diminished capacity for reasoned judgment, for appreciating the consequences of their choices, for managing their emotions, and for controlling their behavior. “Our history is replete with laws and judicial recognition that minors . . . generally are less mature and responsible than adults. Particularly “during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment” expected of adults. Even the normal 15-year-old customarily lacks the maturity of an adult. *Eddings v. Oklahoma*, 455 U.S. 104, 115-116 (1982) (quoting *Bellotti v. Baird* (1979), 443 U.S. 622, 635). *See also, e.g., Johnson v. Texas* (1993), 509 U.S. 350, 367 (“A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.”); *Hodgson*, 497 U.S. 417 at 480, 482-483 (Kennedy, J., concurring in the judgment and dissenting in part) (noting “the qualitative differences in maturity between children and adults”); *Parham v. J.R.* (1979), 442 U.S. 584, 603 (“Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions.”).

Because juveniles are still struggling “to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.” *Simmons*, 543 U.S. 551 at 570. “Indeed, [t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuosity and recklessness that may dominate in younger years can subside.” *Id.*, quoting *Johnson*, 509 U.S. 350 at 368. These principles apply with equal force to

the perpetration of crimes by all juveniles offenders, including Mr. Warren. Because of their documented differences from adults, youngsters simply cannot be held to the same culpability standards as we are.

“It is generally agreed ‘that punishment should be directly related to the personal culpability of the criminal defendant.’” *Thompson*, 487 U.S. 815 at 834, quoting *California v. Brown* (1987), 479 U.S. 538, 545 (O’Connor, J., concurring). “There is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults.” *Thompson, supra*, at 834. The United States Supreme Court has noted that:

[A]dolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender’s fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America’s youth.

Recognizing the unique needs of children, the United State Supreme Court has looked favorably on juvenile court’s core principles of individualized rehabilitation and treatment, noting that youth, because they are still malleable and in development, are more amenable to such rehabilitative interventions than adults. See *McKeiver v Pennsylvania* (1971), 403 U.S. 528, 540. When it upheld the use of preventive detention for certain children, the court again relied on the well-documented behavioral distinctions between children and adults in *Schall v. Martin* (1984), 467 U.S. 253. There, the Court observed that, “children, by definition, are not assumed to have the capacity to care for themselves. They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*...” (citations omitted) *Id.* at 265.

More recently in *Simmons*, the High Court reiterated the notion that children are different from and less culpable for their crimes than adults, when it expanded the Eighth Amendment's prohibition against capital punishment for children to all those under 18 year of age. Indeed, even the Warden in *Simmons*, who opposed the Eighth Amendment expansion, readily conceded that youthfulness was a *mitigating factor that should* be considered on a case by case basis. *Simmons*, 543 U.S. 551 at 572. The High Court, however, rejected that option, noting that, "the differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability." *Id.* at 572-73.

Interestingly, if Mr. Warren had been accused and convicted of aggravated murder and treated as an adult, the sentencing body would have had to consider the fact that he was a minor at the time of the crime under R.C. 2929.04(B)(4). Because, however, this case involved an aggravated rape charge under R.C. 2907.02, the trial court could not consider Mr. Warren's age as a sentencing mitigator. As applied, R.C. 2907.02 absolute sentencing structure violated Mr. Warren's rights under the State and Federal Constitutions.

Mr. Warren understands that in enacting R.C. 2907.02 as it did, the General Assembly intended to punish the rape of a child more severely than similar attacks on other classes of individuals. As noted above, children require and are entitled to special protection from themselves and from predatory adults under the law. The fundamental point of this proposition of law is that the same principles that provide extraordinary protection for child victims also recognize unique considerations that attend children charged with committing crimes. Further, there is a qualitative difference between the rape of a nine year old child by an adult and a similar attack involving two children six years apart.

The juvenile court act and the Constitution recognize that distinction. Due process requires that in ascertaining an offender's culpability for a crime, the trial court take account of the offender's minority status at the time of the offense. The High Court stated this principle expressly in *Simmons*, when, after acknowledging a juvenile's substantially diminished culpability, it observed,

[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

Simmons at 571. This Court has similarly acknowledged that minors are different, their characters less formed, and personalities more transitory. *In re D.S.* (2006), 111 Ohio St.3d 361, 364.

R.C. 2152.02 and R.C. 2907.02 operated in Mr. Warren's case to foreclose consideration of his minor status and circumvent a constitutional mandate that his minor status renders him less culpable. Consequently, as applied in this case, those provisions violated his right to due process and a fair sentencing hearing under the State and Federal Constitutions.

C. The Life Sentence that Mr. Warren received is Disproportionate to Sentences imposed on similarly situated offenders.

The Eighth Amendment "guarantees individuals the right not to be subjected to excessive sanctions." *Simmons*, 543 U.S. 551 at 560. "The right flows from the basic precept of justice that the punishment for crime . . . be graduated and proportioned to the offense." U.S. Const. amend. VIII, *Atkins v. Virginia* (2002), 536 U.S. 304, 311. (quoting *Weems v. United States* (1910), 217 U.S. 349, 367). Acknowledging the need for proportionality between similar offenders, Ohio has statutorily incorporated a form of comparative proportionality review in death penalty cases that

compares a defendant's death sentence to others who have also received a sentence of death. See *State v. Steffen* (1987), 31 Ohio St. 3d 111.

Where a sentence imposed is grossly disproportionate to those imposed for the same crime on offenders who are similarly culpable, that sentence is unconstitutionally disparate and ought to be vacated. The principle requiring rational, *proportionate punishment* is the essence of the rule of law. It has deep roots in our cultural and biological heritage. Aristotle observed in the *Nicomachean Ethics* that basic notions of justice require courts to treat like cases and like offenders alike: "If, then, the unjust is unequal, the just is equal, as all men suppose it to be, even apart from argument. . . . This, then, is what the just is -- the proportional; the unjust is what violates the proportion. . . . [I]t is by proportionate requital that the city holds together."⁷

In a fairly recent article, Judge Morris Hoffman and Timothy Goldsmith, a distinguished Yale biologist, made this point:

[I]t is not surprising that collectively we struggle to balance the form and amount of punishment that is appropriate, a struggle that lies at the heart of what we mean by "justice." . . . The two faces of justice -- to deal firmly with transgressors, but not too harshly -- reflect an intrinsic human sense of fairness and are important to the political ideal of equality. When Aristotle commands that like cases be treated alike, he is touching both on the personal notion that none of us wants to be punished more than anyone else (and therefore on our self-interest) and on the social notion that none of us wants to punish others more than they deserve (and therefore on the equilibrium between our inclination to punish and our intuitions about fairness and sympathy).⁸

The tension discussed here -- between punishment and fairness -- presents itself keenly in Mr. Warren's case.

⁷ Aristotle, *Ethica Nichomachea*, in *The Works of Aristotle* V.3.1131a-1131b, V.5.1132b (W.D. Ross ed. & trans. 1954).

⁸ Morris B. Hoffman & Timothy H. Goldsmith, *The Biological Roots of Punishment*, 1 Ohio St. J. Crim. L. 627, 638-39 (2004).

Because of R.C. 2152.02, Mr. Warren received a life sentence for aggravated rape under a statute that forbid proportionality analysis. The offenses surrounding the alleged misconduct occurred during one summer when he was 15 years old. The victim was six years younger than her alleged attacker. Mr. Warren was treated as an adult because the victim did not report the misconduct until sixteen years after she claimed it happened. Had he been arrested for the offense in 1988, he not only would have been in a better position to defend himself at trial, but he would not have been treated as an adult. Under R.C. 2151.26, which, at the time, governed transfers to adult court for juveniles, a boy 15 years old like Mr. Warren was only eligible for bindover to adult court if:

After an investigation, including mental and physical examinations of the child
***, that there are reasonable grounds to believe that:

(a) He is not amenable to care or rehabilitation or further care or rehabilitation ***; and

(b) The safety of the community may require that he be placed under legal restraint *** for the period extending beyond his majority.

Under the circumstances, if Mr. Warren had been charged in a timely fashion, he would not have been automatically eligible for the life sentence he received.

Moreover, in determining whether the child is amenable to the juvenile court's services as part of the transfer calculus, the judge also had to consider under Juv. R. 30(E) additional factors, like "1) The child's age and his mental and physical health; 2) The child's prior juvenile record; 3) Efforts previously made to treat or rehabilitate the child; 4) The child's family environment; and 5) his school record." Accordingly, while perhaps eligible for adult treatment under the system in effect at the time of the incident, he would have been entitled to dispute and fight such treatment, while forcing the state to demonstrate that he was not treatable within the juvenile system.

Research into the current state of juvenile bindovers indicates that many teenagers charged with similar misconduct are now deemed to be SYO's under R.C. 2151.13. Under that provision, a 15-year-old who commits an F1 offense with a violence enhancement, like the Aggravated Rape charged in Mr. Warren's case, would be treated as a discretionary SYO. In other words he would remain in the juvenile system, he would not be boundover immediately into adult court. More importantly, although he might receive a provisional adult sentence, that term would be stayed if the youth avoided further criminal activity while serving the juvenile term.⁹ (See, *In re Smith*, Union App. No. 14-05-33, 2006 Ohio 2788; *In re Wells*, Allen App. No.1-05-30, 2005 Ohio 6861; and *In re Anderson* (2001), 92 Ohio St.3d 63 (All three SYO defendants received blended sentences that amounted to a small fraction of the sentence that Mr. Warren received).

The bindover from juvenile court to the adult criminal system is not simply a change in venue or jurisdiction. See P. Han, *The Juvenile Offender and the Law* 180 (3rd ed. 1984, p. 5) (The waiver to adult court is the single most serious act that the juvenile court can perform). The bindover in this case dramatically enhanced Mr. Warren's sentence. See *Beazell v. Ohio* (1925), 296 U.S. 167. In fact, there is nothing about Mr. Warren's case, other than the passage of time, that renders it any different from the SYO cases where juveniles received blended sentences, which were substantially shorter. This disparity is unfair and violated Mr. Warren's rights under the Constitution.

⁹ Ohio Criminal Sentencing Commission. 1999. A plan for juvenile sentencing in Ohio. Columbus, Ohio: Ohio Criminal Sentencing Commission. (Fall, 1999); Wilkinson, et al, *Youthful Offenders Recognizing Their Strengths Through Resiliency: Changing Minds, Changing Lives*; Journal of Correctional Best Practices (2001) discussing the SYO statute and its impact on juvenile corrections in detail.

D. R.C. 2152(C)(3) allows the victim to unfettered power to delay what should have been a juvenile prosecution until after defendant's 21st birthday, which violates due process and promotes arbitrary and capricious application of law.

Mr. Warren's life sentence was arbitrary because it was dictated entirely by the victim's unjustified decision to delay reporting this case to authorities until 16 years after it happened. Because R.C. 2152.02(C)(3) allowed such a delay, it is unconstitutional. During the sixteen years that elapsed between the summer of 1988 and April 2004 when the indictment was issued, witnesses died, memories faded, and evidence – all of it in the case – was destroyed. More importantly for purposes of this argument, Mr. Warren aged, as people naturally do. Because he became an adult while Ms. Youngblood was trying to decide whether to tell anyone other than her mother about what she claims happened, his sentencing exposure necessarily increased. This is not speculation. As noted previously, the mandatory penalty for an adult convicted of aggravated rape involving a child under 13 is a life sentence.

Had Mr. Warren been charged as a minor under either the juvenile court system used in 1988 or the one currently in effect, he would have been entitled to the protections that those systems offer. The delayed indictment along with R.C.2152.02(C)(3), deprived him of those protections. The severity of a sentence normally depends on the severity of the crime, the impact to the victim, and the offender's background. It should not depend on the length of time the victim lets pass before she brings the crime to the attention of law enforcement. Another 15 year old boy with a background identical to Mr. Warren's could commit the identical offense. If the alleged victim reports the incident sometime within the next six years, that 15 year old boy will probably be treated as an SYO, serve some time in a juvenile detention facility and, assuming he behaves, be released with conditions. Mr. Warren's offense, on the other hand, was not reported for 16 years, and he was treated as an adult and is now serving a life sentence. The delay in

prosecuting this case was not Mr. Warren's fault and he should not be subjected to harsher punishment exclusively based on the delay.

There are no standards to guide when and whether to charge aggravated rape in circumstances like this one. R.C. 2152.02 puts all of the discretion in the hands of the victim. As demonstrated in this case, the result of such challengeable authority is an arbitrarily enhanced sentence like this one. See, *United States v. Littrell*, 2007 U.S. Dist. LEXIS 21316, 39 (C.D. Cal. March 22, 2007) (The court barred the death penalty against a less culpable defendant who plead guilty to murder where the jury had already found his more culpable coconspirators ineligible for such a punishment. The court concluded that seeking death against the less culpable coconspirator was "wholly divorced from reason and arbitrarily disregards the totality of the relevant evidence, a capital prosecution based on that decision would be repugnant to the Constitution.")¹⁰

Mr. Warren's case represents similar standardless discretion, which, if left unchecked, unreviewed and unfettered, will not only lead to further arbitrary sentences, but will allow the victim and the passage of time to exclusively circumvent the Juvenile Court's jurisdiction over any case. As noted above, the juvenile court serves an important role in our justice system. The restorative justice policies that the General Assembly has adopted should be allowed to work in all cases to which they apply. R.C. 2152(C)(3) and R.C. 2907.02 demonstrate that arbitrary circumstances wholly unrelated to the crime and offender can operate to defeat the goals of

¹⁰ The court went on to observe that it would be fundamentally inconsistent with the constitutional prohibition on the arbitrary imposition of the death penalty to say that an arbitrary decision to seek the death penalty is constitutionally permissible. The Fifth Amendment requires that every aspect of the process by which the Government seeks to put a defendant to death is consistent with due process of law. At a bare minimum, the court noted, the protections of the Fifth Amendment must guarantee that the application of the death penalty is rational.

juvenile jurisdiction. Under the circumstances they have been unconstitutionally applied in Mr. Warren's case.

CONCLUSION

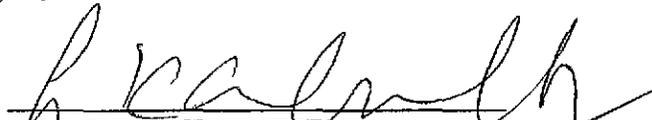
For the foregoing reasons, Defendant-Appellant Reginald Warren asks this Court to find that R.C. 2152.02 and R.C. 2907.02 are unconstitutional as they applied to his case. He further asks that this Court vacate his sentence, hold that the life sentence he received under R.C. 2907.02 was invalid and inapplicable, and remand this case for resentencing, directing the trial court to consider that Mr. Warren was a minor at the time of the offense. Mr. Warren also asks that this Court grant any other relief it deems necessary

Respectfully Submitted,


ERIKA B. CUNLIFFE
Counsel for Appellant

CERTIFICATE OF SERVICE

A copy of the foregoing Brief was served upon William Mason, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 6th day of August, 2007.


ERIKA B. CUNLIFFE

APPENDIX

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee,

v.

REGINALD WARREN

Appellant.

06-2148

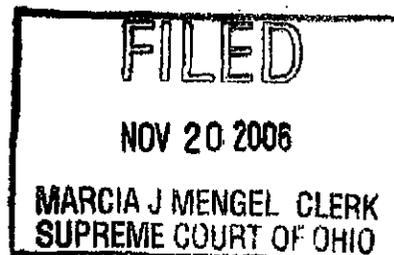
On Appeal From the
Cuyahoga County Court
of Appeals, Eighth
Appellate District

Court of Appeals
Case No. 86854

NOTICE OF APPEAL OF APPELLANT, REGINALD WARREN

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Notice of Appeal of Appellant

Appellant hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, filed in the Court of Appeals case No. 86854, released on August 10, 2006 and journalized on August 21, 2006.

This case involves a felony, raises a substantial constitutional question, and/or is one of public or great general interest.

Respectfully submitted,



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PROOF OF SERVICE

I certify that a copy of this Notice of Appeal was personally served by hand on counsel for appellee, William D. Mason, Esq., Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on the 17th of November, 2006.



ERIKA B. CUNLIFFE, ESQ.
Assistant Public Defender

8-30-06
AUG 21 2006

Judge P. Corrigan
FILED

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

m(MANCI)

COUNTY OF CUYAHOGA

2006 AUG 30 A 11: 53

NO. 86854

GERALD E. ...
STATE OF OHIO

Plaintiff-appellee

vs.

REGINALD WARREN

A-463-766

Defendant-appellant

JOURNAL ENTRY
and
OPINION

**FEE
3
TAXED**

DATE OF ANNOUNCEMENT
OF DECISION

AUGUST 10, 2006

CHARACTER OF PROCEEDING

Criminal appeal from Cuyahoga
County Common Pleas Court
Case No. CR-458468

JUDGMENT

AFFIRMED IN PART; REVERSED
IN PART.

DATE OF JOURNALIZATION

AUG 21 2006

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KENNETH A. ROCCO, J.:

Defendant-appellant, Reginald Warren, appeals from his convictions for eight counts of rape with violence specifications, eight counts of gross sexual imposition, four counts of gross sexual imposition with violence specifications, and twelve counts of kidnaping with violence specifications. He contends that the sixteen-year delay from the time the crimes were committed until he was indicted and the twenty-year statute of limitations for these offenses violated his due process rights. He also asserts that the indictment containing twelve identical counts for each of four different offenses did not provide him with adequate notice of the individual charges. He argues that the court erroneously considered inadmissible evidence, and used "uncharged and untested" allegations against him in sentencing. He claims the kidnaping convictions should have been merged with the other offenses because the restraint of the victim was incidental to the other crimes. He urges that he has a right to have the court consider his age at the time he committed the offenses in deciding what punishment to impose, and that the court erred by imposing maximum consecutive sentences.

Procedural History

On November 12, 2004, appellant was charged in a forty-eight count indictment concerning events that occurred from June to August 1988, when he was fifteen years old. Counts 1-12 charged

him with rape of a child under the age of 13. Counts 13-24 alleged that he committed felonious sexual penetration. Counts 25-36 charged appellant with gross sexual imposition. Counts 37-48 charged appellant with kidnaping. Each of the forty-eight charges carried a violence specification.

Appellant moved the court to dismiss the charges against him because of excessive pre-indictment delay. The court orally overruled this motion prior to trial, as well as appellant's oral motion to dismiss for lack of jurisdiction because of his age at the time the offenses occurred.

Appellant waived his right to a jury trial and the matter then proceeded to trial before the court. At trial, the court heard the testimony of Cleveland Police Detective Daniel Ross; the victim, Tiffany Logan Youngblood; the victim's mother, Edith Logan Gaffney; the victim's sister, Alisa Marie Logan; the victim's former husband, Louis Williams; and Cleveland Police Officer James McPike.

The victim testified that during the summer when she was nine years old, she and her younger sister stayed at the home of James Thomas while their mother was at work. Thomas lived two or three houses away from their home with his cousin, Mr. Murphy. Another girl, Thomas's granddaughter, was also at Thomas's house every day, and the girls played together. Thomas was "crippled," and would sit in a chair at the base of the stairs in the front room of the house.

Appellant came to Thomas's house to help with yard work and housework. The first time anything happened, appellant entered an upstairs bedroom where the victim was playing with dolls. He started kissing her and "playing with my breasts." The next time, appellant had her lay down on the dining room floor. He held her hands over her head, then pulled down her shorts and inserted his finger approximately 1½ inches into her vagina. He did this on 11 or 12 occasions. He would tell her to be quiet or he would hurt her and her mother and sister and Mr. Thomas.

On another eight or nine occasions, the victim testified that appellant rubbed his penis against her vagina and attempted to insert it. On another occasion, he tried to force her to perform fellatio sex on him. He tried to insert a brush handle into her vagina on another occasion, but Mr. Murphy called him away before he could do so.

The victim said these events occurred every other day for a period of approximately two months, and appellant threatened her every time. At her mother's prompting, the victim told her mother that appellant was "messing with me." Her mother then spoke with Mr. Thomas and the victim did not see appellant again.

At the conclusion of the state's case, appellant moved the court for a judgment of acquittal pursuant to Crim.R. 29. The court granted this motion as to four of the rape charges and all twelve of the charges of felonious sexual penetration. The court

further dismissed the violence specifications with respect to eight of the charges of gross sexual imposition. Appellant presented no evidence at trial. The court found appellant guilty of each of the remaining charges and specifications. It subsequently sentenced appellant to life imprisonment on each of the eight rape charges, to be served concurrently with one another but consecutively to the other sentences; four to ten years' imprisonment on each of the four gross sexual imposition charges with violence specifications, to be served concurrently with one another but consecutively to the other sentences; two years' imprisonment as to three of the gross sexual imposition charges to be served concurrently with one another but consecutively to the other sentences; two years' imprisonment as to the remaining five gross sexual imposition charges, to be served concurrently with one another but consecutively to the other sentences; and fifteen to twenty-five years' imprisonment on the kidnaping charges with violence specifications, to be served concurrently with the other sentences.

Law and Analysis

Appellant first contends that his due process rights were violated by the sixteen year delay between the criminal acts and the indictment against him. The United States Supreme Court has acknowledged that "the Due Process Clause has a limited role to play in protecting against oppressive [preindictment] delay." *United States v. Lovasco* (1977), 431 U.S. 783, 789. "[P]roof of

prejudice is generally a necessary but not sufficient element of a due process claim *** [T]he due process inquiry must consider the reasons for the delay as well as the prejudice to the accused." Id. at 790.

In *Lovasco*, the court held that due process is not violated by an "investigative delay" in prosecution, even if the defendant is "somewhat prejudiced" by this delay. The court distinguished investigative delay from delay undertaken for the purpose of gaining a tactical advantage, noting that an investigative delay is "not so one sided. Rather than deviating from elementary standards of 'fair play and decency,' a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt. Penalizing prosecutors who defer action for these reasons would subordinate the goal of 'orderly expedition' to that of 'mere speed.'" Id., quoting *Smith v. United States* (1959), 360 U.S. 1, 10.

In this case, the delay was not caused by government action or inaction. See, e.g., *United States v. Cruikshank* (1876), 92 U.S. 542, 554 ("The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights

which belong to every citizen as a member of society"). The victim did not report the crime to the police until April 2004. Her delay in reporting the crime cannot be ascribed to the state for purposes of finding a violation of appellant's due process rights. Therefore, we overrule the first assignment of error.

Second, appellant argues that the amendment of the statute of limitations effective March 9, 1999 violated his rights to due process. R.C. 2901.13 formerly provided for a six-year limitations period for all felonies except murder and aggravated murder. In 1999, the statute was amended to increase the limitations period to twenty years for certain crimes, including rape, gross sexual imposition and kidnaping. 1997 Ohio H.B. 49. House Bill 49 provided that the amended statute of limitations "applies to an offense committed prior to the effective date of this act if prosecution for that offense was not barred under section 2901.13 of the Revised Code as it existed on the day prior to the effective date of this act."

Appellant's prosecution for these 1988 offenses was not barred before the effective date of House Bill 49, because the statute of limitations was tolled because of the victim's age. Pursuant to R.C. 2901.13(F), "[t]he period of limitation shall not run during any time when the corpus delicti remains undiscovered." When the victim of a sex offense is a child, the corpus delicti generally is deemed to be discovered when the child reaches the age of majority.

See *State v. Elsass* (1995), 105 Ohio App.3d 277, 280, and cases cited therein. However, when the child tells a "responsible person" who is required by law to report the events to a peace officer or children's services agency pursuant to R.C. 2151.421(A)(1), the statute of limitations begins to run as of that time, even if the child has not attained the age of majority. *State v. Hensley* (1991), 59 Ohio St.3d 136. In this case, there is no evidence that the victim reported these crimes to a "responsible person" before she attained the age of eighteen in 1997. Thus, the statute of limitations did not begin to run until then, and had not expired as of March 9, 1999, when the statute was amended.

We have recently held that the extension of an unexpired statute of limitations is not an invalid ex post facto law. *State v. Diaz*, Cuyahoga App. No. 81857, 2004-Ohio-3954, at ¶12; also see *State v. Bentley*, Ashtabula App. No. 2005-A-0026; 2006-Ohio-2503. Apparently, however, appellant is arguing that a twenty-year statute of limitations is unreasonable and therefore unconstitutional. He has cited no support for this proposition, and we find none. Therefore, we overrule the second assignment of error.

Third, appellant argues that the indictment was insufficient to inform him of the charges because it did not distinguish the multiple allegations of the same type of wrongful conduct.

Furthermore, appellant claims the actual testimony at trial also did not distinguish the incidents of which appellant was accused and convicted.

Appellant requested and received a bill of particulars. "Ambiguity, if any, in the indictment which was not cured by the bill of particulars should have been brought to the attention of the court. Since defendant made no such request or motion it is presumed he possessed sufficient notice of the charges; any error in this regard is waived." *State v. Haberek* (1988), 47 Ohio App.3d 35, 43, quoted with approval in *State v. Endsley*, Columbiana App. No. 04-CO-46, 2005-Ohio-5631, ¶24.

To the extent that appellant challenges the sufficiency of the evidence to support his convictions, we must determine "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime[s] proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

A rational trier of fact could have found the essential elements of gross sexual imposition from the first incident involved here, where appellant touched the victim's chest and threatened her with physical harm. Likewise, a rational trier of fact could also have found the essential elements of gross sexual

imposition¹ from the following events: (1) the incident in which appellant held the victim on the dining room floor and digitally penetrated her, (2) the incident in which appellant inserted a brush handle into her vagina, and (3) the incident in which appellant attempted to force her to perform fellatio on him. A rational trier of fact could find appellant raped the victim by his attempt to insert his penis into her vagina, causing her to suffer a burning sensation in her vagina for an hour or two afterward. A rational trier of fact could find that appellant kidnapped the victim by restraining her for the purpose of engaging in sexual activity with her against her will on each of these occasions.

However, we are constrained to agree that the victim's testimony that appellant inserted his penis into her vagina "eight, nine times" and that he inserted his finger into her vagina "a good 11 or 12 times" is not sufficient to support appellant's convictions of additional charges of rape and gross sexual imposition. "[W]e cannot accept the numerical estimate which is unconnected to individual, distinguishable incidents." *State v. Hemphill*, Cuyahoga App. No. 85431, 2005-Ohio-3726, ¶88. *Valentine v. Konteh* (6th Cir. 2005), 395 F.3d 626. Accordingly, we will affirm the judgment with respect to the charges as to which we have

¹This conduct would constitute rape under the current statute. However, sexual conduct was more narrowly defined at the time this offense was committed, and did not include digital penetration. Cf. *State v. Polk* (May 17, 1979), Cuyahoga App. Nos. 38832 & 38833 (digital penetration may constitute gross sexual imposition).

found sufficient evidence, specifically, four of the counts of gross sexual imposition, one count of rape, and five counts of kidnapping. The other convictions are reversed.

Appellant's fourth assignment of error urges that the court erred by allowing hearsay and other inadmissible evidence to be introduced at trial, and further erred by relying on it. "[I]n a bench trial, the court must be presumed to have considered only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary." *State v. Richey* (1992), 64 Ohio St.3d 353, 357-358, 1992 Ohio 44, 595 N.E.2d 915, quoting *State v. Post* (1987), 32 Ohio St.3d 380, 384, 513 N.E.2d 754, 759. First, appellant complains that the victim's testimony suggested that appellant vandalized Mr. Thomas's house. Neither the victim nor the court suggested that the vandalism was committed by appellant; the court mentioned the vandalism in rendering its verdicts only to show why the victim perceived that her safety was still in danger if she told anyone about what had happened. This testimony has no relevance to the charges. There is no evidence that the court relied upon it to convict appellant.

Appellant also argues that the victim's former husband and the police detective who interviewed her improperly buttressed the victim's testimony. The victim's former husband testified that, long before she went to the police, the victim "went berserk" when he pinned her hands down either at her side or over her head when

they were having sexual intercourse. The court viewed this behavior as corroborating the victim's testimony about the details of appellant's modus operandi. Appellant did not object to the testimony of Detective McPike, and there is no indication that the court relied on his testimony in finding appellant guilty.² Therefore, we overrule the fourth assignment of error.

Fifth, appellant contends that the court erred by failing to merge the sentences for kidnaping with the other charges. The defense did not raise this issue at trial, and therefore waived all but plain error. *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006, ¶139. For this purpose, we consider only those charges we have found to be supported by sufficient evidence.

The question whether two offenses are of similar import is determined by objectively analyzing the statutory provisions at issue to determine whether the elements of the charged offenses "correspond to such a degree that the commission of one crime will result in the commission of the other." *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117. This statutory analysis is performed in the abstract, focusing solely on the elements of the offenses charged without reference to the facts of the particular

²In finding appellant guilty, the court did rely upon the testimony of Detective Ross, whom the court incorrectly identified as Detective McPike. Detective Ross testified that, although the victim's sister did not allege that appellant committed any crime against her, in questioning appellant, he was careful to refer to both the victim and her sister. Appellant's responses referred only to "Tiffany," suggesting guilty knowledge.

case. *State v. Rance* (1999), 85 Ohio St.3d 632, paragraph one of the syllabus.

As charged in this case, gross sexual imposition and kidnaping are not allied offenses of similar import. The indictment charged appellant with sexual conduct with a child under the age of thirteen years. The commission of this form of gross sexual imposition will not necessarily result in kidnaping because no restraint or removal is involved. Therefore, these offenses are not allied offenses of similar import, and R.C. 2941.25 does not apply. *State v. Hay*, Union App. No. 14-2000-24, 2000-Ohio-1938; *State v. Moralevitz* (1980), 70 Ohio App.2d 20, 27-28. Nor are the charges of rape and kidnaping allied offenses as charged in this case. Appellant was charged with engaging in sexual conduct with a child under the age of thirteen. R.C. 2907.02(A)(1)(b). Again, no restraint or removal was required to commit this crime. Therefore, the form of rape charged in this case does not necessarily result in kidnaping. Cf. *State v. Logan* (1979), 60 Ohio St.2d 126, 130 ("implicit within every forcible rape (R.C. 2907.02[A][1]) is a kidnaping"). We overrule the fifth assignment of error.

Sixth, appellant asserts that the court erred by basing its sentence "on the speculative allegation that [appellant] vandalized the Thomas house." The court did not cite the vandalism incident

as a factor in sentencing, much less accuse appellant of that crime. Therefore, we overrule the sixth assignment of error.

Seventh, appellant claims that the mandatory life sentence required by R.C. 2907.02 is unconstitutional as applied to him because it does not allow for consideration of his juvenile status at the time he committed the offense. Although appellant does not explain the constitutional basis for his argument, we presume from his citations to *Roper v. Simmons* (2005), 543 U.S. 551, and *Thompson v. Oklahoma* (1988), 487 U.S. 815, that he intends to argue that life imprisonment is "cruel and unusual punishment" for a fifteen-year-old offender.

The life sentence imposed here was mandated by statute. "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history." *Harmelin v. Michigan* (1991), 501 U.S. 957, 994-95. Consideration of mitigating factors in sentencing (including the defendant's chronological age) is not constitutionally required except when the death penalty is imposed. *Id.*; *Rice v. Cooper* (7th Cir. 1998), 148 F.3d 747, 752.

Outside the death penalty context, the "Eighth Amendment does not require strict proportionality between crime and sentence [but] forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 1001. We cannot say that a sentence of life imprisonment (with possibility of parole) is grossly

disproportionate to the crime of rape of a child under the age of 13. Therefore, we overrule the seventh assignment of error.

Finally, appellant claims the court abused its discretion by sentencing him to consecutive terms of imprisonment. He argues that the consecutive sentences imposed violated the limitation set forth in R.C. 2929.41(E)(2) at the time these offenses were committed. R.C. 2929.41(E)(2) formerly provided that "[c]onsecutive terms of imprisonment imposed shall not exceed: *** (2) An aggregate minimum term of fifteen years, *** when the consecutive terms imposed are for felonies other than aggravated murder or murder[.]" The absence of a minimum term of imprisonment for the charge of rape takes this case out of the ambit of R.C. 2929.41(E)(2). *McMeans v. State Adult Parole Auth.* (Oct. 27, 1998), Franklin App. No. 98AP-42; *State v. Gregory* (1982), 8 Ohio App.3d 184. In any event, this statute is self-executing, automatically operating to limit the minimum term of imprisonment. *State v. White* (1985), 18 Ohio St.3d 340. It is not a basis for reversal. Accordingly, we overrule the eighth assignment of error.

For the foregoing reasons, we affirm appellant's convictions and the resultant sentences for one count of rape, four counts of gross sexual imposition with violence specifications, and five counts of kidnaping with violence specifications. We reverse his convictions for the remaining charges.

Affirmed in part, reversed in part.

This cause is affirmed with respect to appellant's convictions and sentences for one count of rape, four counts of gross sexual imposition with violence specifications, and five counts of kidnaping with violence specifications. The convictions and sentences imposed for all remaining charges are reversed.

It is, therefore, considered that said appellant recover of said appellee his costs herein.

It is ordered that a special mandate be sent to the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



JUDGE
KENNETH A. ROCCO

SEAN C. GALLAGHER, P.J. and

MARY EILEEN KILBANE, J. CONCUR

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

FILED AND JOURNALIZED
PER APP. R. 22(E)

AUG 10 2006

AUG 21 2006

GERALD E. PUERST
CLERK OF THE COURT OF APPEALS
BY:  DEP.

GERALD E. PUERST
CLERK OF THE COURT OF APPEALS

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED



34648120

IN THE COURT OF COMMON PLEAS CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

REGINALD WARREN
Defendant

Case No: CR-04-458468-A

Judge: PETER J CORRIGAN

INDICT: 2907.02 RAPE /VS
2907.02 RAPE /VS
2907.02 RAPE /VS
ADDITIONAL COUNTS...

JOURNAL ENTRY

DEFENDANT IN COURT WITH ATTORNEY JAMES A JENKINS.
COURT REPORTER PRESENT.

ON A FORMER DAY OF COURT THE COURT RETURNED A VERDICT OF GUILTY OF RAPE WITH VIOLENT SPEC / 2907.02 - F1 AS CHARGED IN COUNT(S) 1, 2, 3, 4, 5, 6, 7, 8 OF THE INDICTMENT.

ON A FORMER DAY OF COURT THE COURT RETURNED A VERDICT OF GUILTY OF GROSS SEXUAL IMPOSITION WITH VIOLENT SPEC / 2907.05 - F3 AS CHARGED IN COUNT(S) 25, 26, 27, 28 OF THE INDICTMENT.

ON A FORMER DAY OF COURT, THE COURT RETURNED A VERDICT OF GUILTY OF GROSS SEXUAL IMPOSITION / 2907.05 - F3 UNDER COUNT(S) 29, 30, 31, 32, 33, 34, 35, 36 OF THE INDICTMENT.

ON A FORMER DAY OF COURT THE COURT RETURNED A VERDICT OF GUILTY OF KIDNAPPING WITH VIOLENT SPEC / 2905.01 - F1 AS CHARGED IN COUNT(S) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48 OF THE INDICTMENT.

THE COURT CONSIDERED ALL REQUIRED FACTORS OF THE LAW.

THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R. C. 2929.11.

THE COURT IMPOSES A PRISON SENTENCE AT THE LORAIN CORRECTIONAL INSTITUTION OF LIFE.

(COUNTS 1-8, LIFE SENTENCE ON EACH COUNT, COUNTS TO RUN CONCURRENT TO EACH OTHER BUT CONSECUTIVE TO COUNTS 25-36; COUNTS 25-28, 4-10 YEARS EACH COUNT TO RUN CONCURRENT TO EACH OTHER BUT CONSECUTIVE TO COUNTS 29-36; COUNTS 32-36, 2 YEARS EACH COUNT TO RUN CONCURRENT TO EACH OTHER BUT CONSECUTIVE TO COUNTS 29-31; COUNTS 29-31, 2 YEARS EACH COUNT TO RUN CONCURRENT TO EACH OTHER; COUNTS 37-48, 15-25 YEARS EACH COUNT TO RUN CONCURRENT TO EACH OTHER AND CONCURRENT TO COUNTS 1-8 AND 25-36. SENTENCE TO RUN CONSECUTIVE TO CASE CR 446924)

POST RELEASE CONTROL IS PART OF THIS PRISON SENTENCE FOR THE MAXIMUM TIME ALLOWED FOR THE ABOVE FELONY(S) UNDER R.C.2967.28.

DEFENDANT IS TO PAY COURT COSTS.

07/08/2005

CPJEB 07/11/2005 09:07:52

Peter J Corrigan

Judge Signature Date 7/12/05

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CUYAHOGA COUNTY, OHIO

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07/08/2005

8 # RIFF'S SIGNATURE

JMS 7.15.05

Ohio Revised Code §2152.02

As used in this chapter:

(C)(1) "Child" means a person who is under eighteen years of age, except as otherwise provided in divisions (C)(2) to (6) of this section.

(2) Subject to division (C)(3) of this section, any person who violates a federal or state law or a municipal ordinance prior to attaining eighteen years of age shall be deemed a "child" irrespective of that person's age at the time the complaint with respect to that violation is filed or the hearing on the complaint is held.

(3) Any person who, while under eighteen years of age, commits an act that would be a felony if committed by an adult and who is not taken into custody or apprehended for that act until after the person attains twenty-one years of age is not a child in relation to that act.

(4) Any person whose case is transferred for criminal prosecution pursuant to section 2152.12 of the Revised Code shall be deemed after the transfer not to be a child in the transferred case.

(5) Any person whose case is transferred for criminal prosecution pursuant to section 2152.12 of the Revised Code and who subsequently is convicted of or pleads guilty to a felony in that case, and any person who is adjudicated a delinquent child for the commission of an act, who has a serious youthful offender dispositional sentence imposed for the act pursuant to section 2152.13 of the Revised Code, and whose adult portion of the dispositional sentence is invoked pursuant to section 2152.14 of the Revised Code, shall be deemed after the transfer or invocation not to be a child in any case in which a complaint is filed against the person.

(6) The juvenile court has jurisdiction over a person who is adjudicated a delinquent child or juvenile traffic offender prior to attaining eighteen years of age until the person attains twenty-one years of age, and, for purposes of that jurisdiction related to that adjudication, except as otherwise provided in this division, a person who is so adjudicated a delinquent child or juvenile traffic offender shall be deemed a "child" until the person attains twenty-one years of age. If a person is so adjudicated a delinquent child or juvenile traffic offender and the court makes a disposition of the person under this chapter, at any time after the person attains eighteen years of age, the places at which the person may be held under that disposition are not limited to places authorized under this chapter solely for confinement of children, and the person may be confined under that disposition, in accordance with division (F)(2) of section 2152.26 of the Revised Code, in places other than those authorized under this chapter solely for confinement of children.

Ohio Revised Code §2152.13

(A) A juvenile court may impose a serious youthful offender dispositional sentence on a child only if the prosecuting attorney of the county in which the delinquent act allegedly occurred initiates the process against the child in accordance with this division, and the child is an alleged delinquent child who is eligible for the dispositional sentence. The prosecuting attorney may initiate the process in any of the following ways:

- (1) Obtaining an indictment of the child as a serious youthful offender;
- (2) The child waives the right to indictment, charging the child in a bill of information as a serious youthful offender;
- (3) Until an indictment or information is obtained, requesting a serious youthful offender dispositional sentence in the original complaint alleging that the child is a delinquent child;
- (4) Until an indictment or information is obtained, if the original complaint does not request a serious youthful offender dispositional sentence, filing with the juvenile court a written notice of intent to seek a serious youthful offender dispositional sentence within twenty days after the later of the following, unless the time is extended by the juvenile court for good cause shown:
 - (a) The date of the child's first juvenile court hearing regarding the complaint;
 - (b) The date the juvenile court determines not to transfer the case under section 2152.12 of the Revised Code.

After a written notice is filed under division (A)(4) of this section, the juvenile court shall serve a copy of the notice on the child and advise the child of the prosecuting attorney's intent to seek a serious youthful offender dispositional sentence in the case.

(B) If an alleged delinquent child is not indicted or charged by information as described in division (A)(1) or (2) of this section and if a notice or complaint as described in division (A)(3) or (4) of this section indicates that the prosecuting attorney intends to pursue a serious youthful offender dispositional sentence in the case, the juvenile court shall hold a preliminary hearing to determine if there is probable cause that the child committed the act charged and is by age eligible for, or required to receive, a serious youthful offender dispositional sentence.

(C) (1) A child for whom a serious youthful offender dispositional sentence is sought has the right to a grand jury determination of probable cause that the child committed the act charged and that the child is eligible by age for a serious youthful offender dispositional sentence. The grand jury may be impaneled by the court of common pleas or the juvenile court.

Once a child is indicted, or charged by information or the juvenile court determines that the child is eligible for a serious youthful offender dispositional sentence, the child is entitled to an open and speedy trial by jury in juvenile court and to be provided with a transcript of the proceedings. The time within which the trial is to be held under Title XXIX of the Revised Code commences

on whichever of the following dates is applicable:

(a) If the child is indicted or charged by information, on the date of the filing of the indictment or information.

(b) If the child is charged by an original complaint that requests a serious youthful offender dispositional sentence, on the date of the filing of the complaint.

(c) If the child is not charged by an original complaint that requests a serious youthful offender dispositional sentence, on the date that the prosecuting attorney files the written notice of intent to seek a serious youthful offender dispositional sentence.

(2) If the child is detained awaiting adjudication, upon indictment or being charged by information, the child has the same right to bail as an adult charged with the offense the alleged delinquent act would be if committed by an adult. Except as provided in division (D) of section 2152.14 of the Revised Code, all provisions of Title XXIX of the Revised Code and the Criminal Rules shall apply in the case and to the child. The juvenile court shall afford the child all rights afforded a person who is prosecuted for committing a crime including the right to counsel and the right to raise the issue of competency. The child may not waive the right to counsel.

(D) (1) If a child is adjudicated a delinquent child for committing an act under circumstances that require the juvenile court to impose upon the child a serious youthful offender dispositional sentence under section 2152.11 of the Revised Code, all of the following apply:

(a) The juvenile court shall impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.

(b) The juvenile court also shall impose upon the child one or more traditional juvenile dispositions under sections 2152.16, 2152.19, and 2152.20, and, if applicable, section 2152.17 of the Revised Code.

(c) The juvenile court shall stay the adult portion of the serious youthful offender dispositional sentence pending the successful completion of the traditional juvenile dispositions imposed.

(2)(a) If a child is adjudicated a delinquent child for committing an act under circumstances that allow, but do not require, the juvenile court to impose on the child a serious youthful offender dispositional sentence under section 2152.11 of the Revised Code, all of the following apply:

(i) If the juvenile court on the record makes a finding that, given the nature and circumstances of the violation and the history of the child, the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of the Revised Code will be met, the juvenile court may impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment

without parole.

(ii) If a sentence is imposed under division (D) (2)(a)(i) of this section, the juvenile court also shall impose upon the child one or more traditional juvenile dispositions under sections 2152.16, 2152.19, and 2152.20 and, if applicable, section 2152.17 of the Revised Code.

(iii) The juvenile court shall stay the adult portion of the serious youthful offender dispositional sentence pending the successful completion of the traditional juvenile dispositions imposed.

(b) If the juvenile court does not find that a sentence should be imposed under division (D) (2)(a)(i) of this section, the juvenile court may impose one or more traditional juvenile dispositions under sections 2152.16, 2152.19, 2152.20, and, if applicable, section 2152.17 of the Revised Code.

(3) A child upon whom a serious youthful offender dispositional sentence is imposed under division (D) (1) or (2) of this section has a right to appeal under division (A)(1), (3), (4), (5), or (6) of section 2953.08 of the Revised Code the adult portion of the serious youthful offender dispositional sentence when any of those divisions apply. The child may appeal the adult portion, and the court shall consider the appeal as if the adult portion were not stayed.

(2002 H 393, eff. 7-5-02; 2000 S 179, § 3, eff. 1-1-02)