IN THE SUPREME COURT OF OHIO

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

REPLY BRIEF OF APPELLANT REGINALD WARREN

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FILED
OCT 15 2007
CLERK OF COURT
SUPREME COURT OF OHIO

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ARGUMENT

Reply to Proposition of Law:

> ***R.C. 2907.02 AND R.C. 2152.02(C)(3) 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.***

In responding to Mr. Warren's brief, the State mischaracterizes the issues this case presents in almost every particular. To be clear: Mr. Warren has not alleged that his life sentence for rape violates the Ex Post Facto Clause; nor does he maintain that the juvenile court should have retained jurisdiction over his case. Finally, he does not argue that his life sentence violates the Eighth Amendment in light of *Roper v. Simmons* (2005), 543 U.S. 551. By devoting its attention to these "straw men" and readily knocking them down, the State overlooks the actual issues in the case at bar.

Mr. Warren's life sentence is unconstitutional because R.C. 2152.02 and R.C. 2907.02 prevented the trial court from considering the fact that Warren was a minor when he committed the sexual misconduct alleged. It is unconstitutional because, but for the delay in pursuing this prosecution, a factor over which Mr. Warren had no control, there is a strong likelihood that he would not have been treated as an adult and, in all likelihood would not have received a life sentence. In sum, the sentence is objectionable because arbitrary circumstances having nothing to do with the seriousness of the crime and the history of the offender precluded judicial discretion and dictated the severity of the sentence. The State does not address these claims.

This Court's decision in *State v. Walls* (2002), 96 Ohio St.3d 437, has no Bearing on the Issues Raised in this Appeal

The State expounds at length on this Court's decision in *Walls,* 96 Ohio St.3d 437. There, this Court concluded that changes made to R.C. 2151.26 and 2151.011(B)(6) applied

retroactively to divest the juvenile court of jurisdiction over offenders apprehended after they turned 21. *Id.* at 442. It also found that the retroactive application of those provisions to offenders arrested after the 1997 amendments, did not violate the Ex Post Facto Clause. *Id.* at 452. Mr. Walls was alleged to have committed aggravated murder in 1985 when he was 15 years old. In 1998, latent fingerprints recovered from the scene were entered into a database ultimately linked to Mr. Walls. Walls, who had at that point turned 29 years old, argued that he could not be prosecuted as an adult because at the time he allegedly committed the murder, the law stated that the juvenile court retained jurisdiction regardless of his age at the time of arrest. *Id.* at 438. This Court said the amended law applied and its retroactive application to Mr. Walls did not violate the Ex Post Facto Clause.

The instant case does have several factors in common with the Walls case. Like Mr. Walls, Mr. Warren was 15 years old at the time the crimes were alleged to have transpired. Similarly, Mr. Warren's case was impacted by the same series of amendments that put Mr. Walls in adult rather than juvenile court. But the similarities between the two cases end there. Mr. Warren does not take issue with the *Walls* decision here, nor does he claim that the juvenile court should have retained jurisdiction over his case.

The State, however, treats the two matters as if they were analogous, suggesting that the holding in *Walls* disposes of Mr. Warren's case. Specifically, the State proposes that "given this Court's recent, favorable constitutional review of [the] application [of] these statutory amendments in *Walls*, it cannot be said that these same statutory amendments were unconstitutionally applied to Appellant." (Appellee Brief, p. 11) The State is wrong. There are many provisions in the Constitution. Just because an enactment is consistent with one does not

mean that it comports with all of them. Under the circumstances, *Walls* and the reasoning that underpins it has no application to Mr. Warren's case.

This Court need not expand the scope of *Roper v. Simmons* to resolve this Matter in Mr. Warren's favor.

The State contends that Mr. Warren has asked this Court to impermissibly extend the United States Supreme Court's ruling in *Roper v. Simmons* (2005), 543 U.S 551. In *Simmons*, the High Court held that the Eighth Amendment barred states from executing juveniles convicted of capital crimes. Mr. Warren's is not an Eighth Amendment case and he does not here claim that juvenile offenders cannot properly receive a life sentence. Nevertheless, the State provides a laundry list of cases where, not surprisingly, courts have refused to extend Simmons beyond the capital sentencing context. Next, to seemingly justify the sentence imposed on Mr. Warren, the State ventures that "there appears to be a national trend in favor of allowing life penalties for juvenile offenders." (Appellee Brief, p. 14)

What the State omits from that important observation is the fact that this purported "trend" only involves capital cases. It is easily attributed to the fact that in the wake of *Simmons*, a life sentence was the obvious alternative where the death penalty was no longer an option. The case it offers in support of this self-evident and irrelevant observation is *People v. Galvez* (2007), Cal.App.2 Dist. No. B194868, 2007 WL 237739. In *Galvez*, the defendant was a sixteen-year-old gangster who "committed two particularly callous murders." *Id.* at *13. Following a trial, the court imposed a life sentence without the possibility of parole. Unlike Mr. Warren, *Galvez* argued that his life sentence violated the Eighth Amendment in light of Simmons, and the Court concluded that such a sentence did not transgress the Eighth Amendment.

Galvez and the litany of other cases the State identifies in support of its position that Simmons applies exclusively to capital cases will not drive whatever result this Court reaches in

Mr. Warren's case. For one thing, not one of the cases cited address the proposition of law before this Court. Next, all but two of them involve challenges under the Eighth Amendment to life sentences imposed in murder cases, a scenario having little, if anything, to with the arguments that Mr. Warren has made.[1]

Mr. Warren does not challenge a trial court's authority under certain circumstances to impose life sentences on the juvenile offenders before them. Under the sentencing scheme Mr. Warren faced, however, the trial court had no choice but to impose a life sentence because the accuser claimed he used force and she was under 13 years old at the time. Even the sentencing judge in *Galvez* had discretion to impose a more lenient sentence. *Galvez, supra* at *6. The judge who sentenced Mr. Warren had no such option.

The two cases that State identifies that involve offenders convicted of something other than capital murder are *State v. Schaar*, Stark App. No. 2003 CA 129, 2004 Ohio 1631 and *Vermont v. Rideout*, 2007 Vt. 164. *Schaar* involved an equal protection challenge to R.C. 2152.02(C)(3) and did not even mention the *Simmons* case. In *Rideout,* the offender challenged the use of prior juvenile convictions to support an habitual offender sentencing enhancement. Neither case poses any implication for the resolution of Mr. Warren's case.

United States v. Feemster (C.A. 8, 2007), 483 F.3d 583, also contained in the State's list ostensibly demonstrating the overwhelming authority against Mr. Warren's claims, actually supports his argument. In *Feemster,* a Federal Circuit Court of Appeals actually acknowledged

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[1] See, *In re J.B.*, Butler App. No. CA 2004-09-226, 2005 Ohio 7026 (addresses sentencing under SYO amendments and does not even cite to *Simmons*); *State v. Eggers* (Az. App. 2007), 160 P.3d 1230; *Thomas v. State* (2007), Texas App. No. 14-06-66-CR, 2007 WL 2238890; *Gussler v. Commonwealth* (Ky.App. 2007), 2007 WL 2069509; *Miller v. Martin* (N.D.Georgia, 2007), 2007 WL 639737; *Culpepper v. McDonough* (M.D. Fla. 2007), 2007 WL 2050970; *Douma v. Workman* (N.D. Okla., 2007) 2007 WL 2331883; *Owens v. Russell* (S.Dakota 2007), 726 N.W.2s 610 (17 year old helped beat burglary victim to death with a hammer); *State v. Craig* (La.App.

that a defendant whose career criminal enhancement was predicated in part on prior criminal offenses committed when he was a juvenile was entitled to a downward variance. *Id.* at 589. The Court reasoned that a conviction resulting from conduct while not yet eighteen is not the same as a conviction resulting from adult conduct. *Id.* It was the extent of that downward departure to which the court took exception.

The other case the State lists is *In re Strum*, Washington App. No. 05CA35, 2006 Ohio 7101. In that case the district court of appeals examined the constitutionality of the SYO enactment and concluded that it did not violate the constitution. Nevertheless, this Court has accepted that case for review on Proposition of Law I, which states:

> The imposition of a discretionary adult sentence under Ohio's serious youthful offender law violates a juvenile's rights under the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Jury Trial Clause of the Sixth Amendment to the United States Constitution.

While both cases involve sentencing considerations, the two challenge different sentencing structures based on different considerations.[2]

Under the circumstances, the State finds little actual support in the authority it has identified.

R.C. 2907.02 and R.C. 2152.02(C)(3) create a situation where the trial court has no choice but to sentence an offender to life imprisonment even if they were juveniles at the time of the crime.

It does not take an overly broad reading of *Simmons* to notice that, in reaching its decision, the High Court focused extensively on the fragility and evolving nature of the juvenile mind and how those characteristics impacts their actions. Many of those studies are discussed at

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2006), 944 So. 2d 660 (defendant's death sentence for murder commuted to life sentence following *Simmons* decision).

[2] Further, the equities weigh more heavily in favor of Warren's case because his sentencing judge lacked discretion to impose any sentence but life, while at least *Sturm*'s judge could have imposed a shorter blended sentence had he wished.

length in the *Simmons* opinion and they apply to all juvenile misbehavior. In addressing this research, Simmons not only acknowledged but stressed that those studies demonstrate that teenagers, and juvenile offenders specifically, are less culpable than their adult counterparts. *Simmon*, 543 U.S. at 570. Mr. Warren understands that the High Court's reasoning in support of its ultimate decision does not stand as its holding. Yet the reasoning upon which the decision was grounded cannot be overlooked either. The Court has clearly recognized that youth is a mitigating factor that must be in the sentencing context.

Because R.C. 2907.02 and R.C. 2152.02(C)(3) precluded consideration of Mr. Warren's youth at the time of the offense, as well as his age in relation to the alleged victim, they were unconstitutional as applied to his case.

CONCLUSION

Wherefore, pursuant to the sole proposition of law posited herein, this Court should vacate his sentence and remand the matter to the trial court for resenting.

Respectfully Submitted,

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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 15th day of October, 2007.

Jon A Bay 0023816 for Erika B. Cunliffe

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