

IN THE SUPREME COURT OF OHIO
Case No. 07-1427

STATE OF OHIO :
Appellee :
-vs- :
ANDREW J. FERGUSON :
Appellant :

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 88450

REPLY BRIEF OF APPELLANT ANDREW J. FERGUSON

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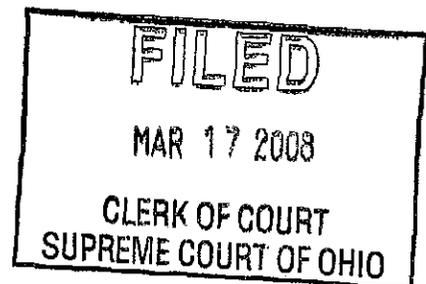


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ARGUMENT

Proposition of Law I:

R.C. §2950.01 et seq., as applied to persons who committed their sexually oriented offenses prior to July 31, 2003, violates Art. I, Sec. 10, of the United States Constitution as ex post facto legislation, and violates Art. II, Sec. 28 of the Ohio Constitution as retroactive legislation.

In his merit brief of Appellant, Mr. Ferguson argued that changes in Ohio's Megan's Law enacted after he committed his criminal offenses caused Megan's Law to cross the line from regulatory to punitive. Accordingly, application of Ohio's Megan's Law as amended via S.B. 5 constitutes ex post facto punishment in violation of the United States Constitution and the Ohio Constitution. Mr. Ferguson argued that the remedy in such a circumstance was to excise the provisions in the law that caused Megan's Law to cross from regulatory to punitive, i.e. to hold that the S.B. 5 amendments to the Megan's Law cannot be applied to Mr. Ferguson.

The State of Ohio has responded by stating that, in light of *Hyle v. Porter*, 2008-Ohio-542, the changes in the Megan's Law that were enacted via S.B. 5 do not, as a matter of statutory construction, apply to Mr. Ferguson. While conceding the inapplicability of S.B. 5 to Mr. Ferguson as a statutory matter, the State nonetheless asks this Court to reject Mr. Ferguson's constitutional challenges and to hold that the S.B. 5 amendments did not cause Megan's Law to cross from regulatory to punitive.

In a separate brief, Amicus Curiae Franklin County Prosecutor Ron O'Brien ("State's Amicus") argues that this Court should dismiss this case as improvidently allowed. State's Amicus also argues briefly that Mr. Ferguson's constitutional challenges should be rejected.

Mr. Ferguson has no quarrel with this Court's giving him his requested relief on the basis of statutory interpretation, as conceded by the State, as opposed to granting him the same relief on the basis of a constitutional determination. He merely wants relief from the provisions of S.B. 5.

Accordingly, this reply brief concentrates on the issue of whether this case should be dismissed as improvidently allowed. The reply brief addresses only briefly the merits of the constitutional arguments, which were argued more extensively in Mr. Ferguson's previously filed merits brief.

A. This Case Should Not Be Dismissed As Improvidently Allowed

State's Amicus argues that the residency and internet database provisions imposed upon Mr. Ferguson by virtue of S.B. 5 cannot be challenged in a direct appeal of the determination that he is a sexual predator. At the same time, State's Amicus does concede, at page 6 of its brief, that there are aspects of S.B. 5 whose retroactive application can be challenged in this appeal. Thus, State's Amicus envisions a bifurcated process where certain challenges, specific to sexual predators, can be raised on appeal and others, inherent to all sexually oriented offenders, must be raised via a declaratory judgment action.

This Court should decline to engage in such a bifurcated approach that compartmentalizes those consequences unique to predators from those other, universal, consequences nonetheless imposed on Mr. Ferguson. The issue is whether the totality of consequences causes Megan's Law to cross the regulatory-punitive line. That others will also be punished does not deprive Mr. Ferguson of his right to challenge the punishment imposed on him on direct appeal.

A declaratory judgment action is simply one procedure available for challenging the constitutionality of a statute. This Court as well as lower courts across the state routinely address the constitutionality of statutes, ordinances and other state actions. See, *Toledo v. Tellings*, 114 Ohio St. 3d 278; 2007 Ohio 3724 (the Court reviewed the constitutionality of a municipal ordinance in a criminal matter), *State v. Cowan*, 103 Ohio St. 3d 144, 2004 Ohio 4777 (defendant was deprived of her due process rights where her dogs were deemed "vicious" by a dog warden

and she had no ability to dispute that prior to the determination having been made; nor was there an appeal mechanism.) Indeed, this Court resolved the constitutional challenges to the original version of Ohio's Megan's Law in a criminal case, not an action for declaratory judgment. See, *State v. Cook* (1998), 83 Ohio St.3d 404, 1998 Ohio 291.

Moreover, the State's position that declaratory judgment is the only available means of raising the more universal constitutional challenges is illogical because it would further tax judicial resources by creating at least double the litigation. Under the theory of the State's Amicus, which was not adopted by the State of Ohio in its merits brief, Mr. Ferguson and others similarly situated would need to file declaratory judgment actions as a companion to a direct appeal.

The State's Amicus argues that Mr. Ferguson's suggested relief – excising the S.B. 5 amendments to Megan's Law – belies a belief on Mr. Ferguson's part that he is actually seeking an advisory opinion. This is incorrect. Severing those provisions in a statute that cause the statute to be unconstitutional as applied to a defendant is a statutorily recognized remedy. R.C. 1.50.

State's Amicus also argues that, because Mr. Ferguson will be subject to the provisions of the Adam Walsh Act upon his release from prison, this appeal is "largely academic." State's Amicus Brief, at 6. This issue was addressed by Mr. Ferguson when he first sought this Court's review of this case. As he argued at that time, Mr. Ferguson believes that the Adam Walsh Act will not be allowed to apply to offenders such as himself, whose criminal conduct preceded the AWA. Indeed, should this Court accept the proposition of law posited by Mr. Ferguson in this appeal, it is likely that the same constitutional problems present in Megan's Law, as amended by S.B. 5, will also prevent retroactive application of the AWA.

B. Responding to the Constitutional Arguments

The State's Amicus argues, at pages 11 and 12 of its brief, that R.C. 2950.11(H)'s provision that provides possible relief from community notification after twenty years is further evidence that the amendments of S.B. 5 are not punitive. Respectfully, a minimum of twenty years of community notification without the opportunity to revisit this requirement, even where intervening circumstances would demonstrate that the offender is not a significant risk to re-offend, is too long to satisfy the constitutional considerations discussed in Mr. Ferguson's earlier merits brief. Moreover, as the State's Amicus acknowledges, other obligations attendant to being a sexual predator cannot be changed, even after twenty years and even when a judge has found by clear and convincing evidence that the offender is not likely to re-offend. *Id.*

The State and State's Amicus both argue that the risk of recidivism among sexual offenders is so high that the General Assembly is justified in enacting the provisions of S.B. 5 which are the subject of this appeal. However, even if recidivism were a foregone conclusion, the General Assembly cannot promulgate retroactive punishment. Moreover, as a practical matter, empirical research indicates that the premise of this argument is flawed -- sexual offenders do not pose a high risk of re-offending sexually. See, Ohio Department of Rehabilitation and Correction, *Ten-Year Recidivism Follow-Up of 1989 Sex Offender Releases*, at 11 (April, 2001) (likelihood of commission of new sex offense by convicted sex offender is less than or equal to eleven percent).

CONCLUSION

Wherefore, this Court should hold that Mr. Ferguson is subject to the provision of R.C. 2950.01 et seq. as effective prior to July 31, 2003.

Respectfully submitted,


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SERVICE

A copy of the foregoing Appellant's Reply Brief was served via U.S. mail upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113, and on Steven L. Taylor, Counsel for Amicus Curiae, 373 South High Street, 13th Floor, Columbus, Ohio 43215, on this 17th day of March, 2008.


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