

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: JUSTIN A. MESSMER,
Adjudicated Delinquent Child

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Case No. 10-0780
On Appeal from the Wyandot
County Court of Appeals
Third Appellate District
C.A. Case No. 16-09-17

MEMORANDUM IN SUPPORT OF JURISDICTION OF ADJUDICATED
DELINQUENT CHILD, JUSTIN A. MESSMER

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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Minor child-Appellant Justin A. Messmer’s constitutional rights were violated when the Wyandot County Juvenile Court classified him to be a Tier II juvenile offender registrant under Senate Bill 10 (“S.B. 10”). His right to due process was violated when he was classified based solely on his offense. And his right to equal protection was violated when his eligibility for classification was determined by a non-rational age-based distinction. His right to be protected from ex post facto and retroactive laws was violated, as S.B. 10 is significantly different from the law that was in effect at the time of his offense.

This Court should accept jurisdiction in this case and hold it for the decisions in *In re Smith*, Case No. 2008-1624, discretionary appeal granted, 120 Ohio St. 3d 1416, 2008-Ohio-6166; *In re Adrian R.*, Case No. 2009-0189, discretionary appeal granted on Proposition of Law I; Propositions of Law II and III held for the decision in *In Re Smith*, 121 Ohio St. 3d 1472; 2009-Ohio-2045 (May 6, 2009); and *State v. Bodyke*, Case No. 2008-2502, discretionary appeal granted, 121 Ohio St. 3d 1438, 2009-Ohio-1638 (April 8, 2009).¹

STATEMENT OF THE CASE AND FACTS

On September 4, 2007, Justin M., aged 16, was charged with one count of gross sexual imposition, a violation of R.C. 2907.05(A)(4) and a felony of the third degree if committed by an adult. On October 16, 2008, after his original adjudication was reversed and remanded by the Third District Court of Appeals, the Wyandot County Juvenile Court accepted Justin’s admission to the offense and found him to be delinquent. On September 9, 2009, upon his release from the

¹ If in *Smith* this Court determines that juvenile courts have discretion in determining the tier level of juvenile offender registrants, then this case must be remanded to the juvenile court.

Ohio Department of Youth Services, the Wyandot County Juvenile Court found Justin M. to be a Tier II Juvenile Sex Offender Registrant.

Justin filed a timely appeal of his juvenile sex offender classification. *In re Justin A. Messmer*, Wyandot App. No. 16-09-17, 2010-Ohio-1088. The Third District affirmed Justin's classification.

Proposition of Law I: The retroactive application of Senate Bill 10 to juveniles whose offense was committed prior to the enactment of Senate Bill 10 violates the Ex Post Facto Clauses of the United States Constitution and the Retroactivity Clause of the Ohio Constitution. Article I, Section 10 of the United States Constitution; Article II, Section 28 of the Ohio Constitution.

The retroactive application of S.B. 10 to offenses that occurred before January 1, 2008 violates the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution. Article II, Section 28 of the Ohio Constitution provides that "the general assembly shall have no power to pass retroactive laws." Additionally, Article I, Section 10 of the United States Constitution prohibits any legislation that "changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed." *Miller v. Florida* (1987), 482 U.S. 423, 429. Ex post facto laws are prohibited in order to ensure that legislative acts "give fair warning to their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham* (1981), 450 U.S. 24, 28-29. Article II, Section 28 of the Ohio Constitution; Article I, Section 10 of the United States Constitution.

The Ex Post Facto Clause of the United States Constitution prevents the legislature from abusing its authority by enacting arbitrary or vindictive legislation aimed at disfavored groups. See *Miller*, at 429. However, the Ex Post Facto Clause applies only to criminal statutes. *California Dept. of Corrections v. Morales* (1995), 514 U.S. 499, 504; *Collins v. Youngblood* (1990), 497 U.S. 37, 43. Determining whether a statute is civil or criminal is a matter of

statutory interpretation. *Helvering v. Mitchell* (1938), 303 U.S. 391, 399; *Allen v. Illinois* (1986), 478 U.S. 364, 368. Various courts have used the “intent-effects test” to delineate between civil and criminal statutes for the purposes of an ex post facto analysis of sex-offender registration and notification statutes. *State v. Cook* (1998), 83 Ohio St.3d 404, 415-417 (the intent of the General Assembly in enacting former Revised Code Chapter 2950 was remedial, not punitive). See, also, *Kansas v. Hendricks* (1997), 521 U.S. 346.

When applying the intent-effects test here, it is evident that the provisions of S.B. 10 are criminal for the purposes of ex post facto and retroactivity principles. First, the offense-based reclassification of youth under S.B. 10 has transformed Ohio’s previous classification scheme from a “narrowly tailored” solution (*Cook*, at 417) to a punitive statutory scheme that does not consider the offender’s risk to the community or likelihood of reoffending. Additionally, the formal attributions of S.B. 10’s enactment—its placement in the Revised Code, enforcement mechanisms, and consequences for failure to comply with its requirements—are probative of the General Assembly’s punitive intent. R.C. 2950.99; *Smith v. Doe* (2003), 538 U.S. 84, 94; *State v. Williams*, 114 Ohio St.3d 103, 2007-Ohio 3268, at ¶ 10; and *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, ¶43-49. Further, S.B. 10 imposes burdens on juvenile offenders that have historically been regarded as punishment and operate as affirmative disabilities and restraints. Moreover, S.B. 10 furthers the traditional aims of punishment: retribution and deterrence. *Doe*, at 102.

The General Assembly has mandated that S.B. 10 be applied retroactively. R.C. 2950.031(A)(1). See, also, R.C. 2950.07(C)(2). Accordingly, because S.B. 10 is criminal in nature and has a punitive effect, a reviewing Court may determine whether S.B. 10’s retroactive application is constitutional under federal law. A law falls within the ex post facto prohibition if

it meets two critical elements: first, the law must be retrospective, applying to events occurring before its enactment; and second, the law must disadvantage the offender affected by it. *Miller*, at 430. A law is retrospective if it “changes the legal consequences of acts completed before its effective date.” *Id.* at 431, citing *Weaver*, at 31. As to the second element, the United States Supreme Court explained that it is “axiomatic that for a law to be ex post facto it must be more onerous than the prior law.” *Id.* (internal citation omitted). See, also, *State v. Brewer* (1991), 86 Ohio St.3d 160, 163, 1999-Ohio-146 (requiring an offender to register every 90 days for life is “more onerous” than requiring registration every year for ten years.).

Prior to the enactment of S.B. 10, and at the time of the offense for which Justin was classified as a Tier II juvenile offender registrant, juvenile courts had discretion to determine whether a child was a lifetime registrant, or would be subject to registration for either twenty or ten years. Former R.C. 2152.83. However, under S.B. 10’s classification system, Justin was automatically classified as a “Tier II” registrant with a duty to register with the local sheriff every 180 days for ten years. R.C. 2152.83, 2950.04, 2950.041, 2950.05, and 2950.06.

Article II, Section 28 of the Ohio Constitution forbids the enactment of retroactive laws. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 106. Ohio’s Constitution affords its citizens greater protection against retroactive laws than does the Ex Post Facto Clause of the United States Constitution. *Id.* at 105, footnote 5 (“[Ohio’s Constitution of 1851 provides a] much stronger prohibition than the more narrowly constructed provision in Ohio’s Constitution of 1802.”).

In considering whether a particular law may be applied retrospectively, a reviewing court must first determine whether it should apply the rule of statutory construction or immediately engage in the constitutional review of the statute. *Van Fossen*, at 105. The issue of whether a

statute may constitutionally be applied retrospectively does not arise unless there has been a prior determination that the General Assembly has specified that the statute so apply. *Id.* When “there is no clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment.” *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262. Since the General Assembly mandated that S.B. 10 be applied retroactively, further review is necessary.

When the General Assembly has ordered that a new law be applied retroactively, a reviewing court must determine whether the new law affects a person’s substantive rights. *Kunkler v. Goodyear Tire* (1988), 36 Ohio St.3d 135, 137. A statute is substantive, therefore, unconstitutional if it is applied retroactively, if the statute “impairs or takes away vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligation or liabilities as to a past transaction, or creates a new right.” *Cook*, at 411.

Under old law, the court could have ordered Justin to register annually for ten years. Now, he must comply with registration duties—which are more onerous and require more information than what was previously required—every 180 days for twenty years. As such, his reclassification violates the Ohio Constitution’s prohibition against retroactive laws.

Proposition of Law II: The retroactive application of Senate Bill 10 to juveniles whose offense was committed prior to the enactment of Senate Bill 10 violates the juvenile’s right to Due Process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution.

The guarantees of the Due Process Clause apply to juveniles and adults alike. *Kent v. United States* (1966), 383 U.S. 541; *In re Gault* (1967), 387 U.S. 1; *In re Winship* (1970), 397 U.S. 358. In *Gault*, the Supreme Court of the United States explicitly extended federal constitutional protections to children in juvenile delinquency proceedings. *Gault*, at 13-14. The Court also determined that a child’s interest in delinquency proceedings is not adequately protected without the adherence to due process principles. *Id.* at 30-31.

Despite the recognition that children enjoy the protections of the Due Process Clause, the standard regarding due process requirements in juvenile proceedings is inexact. *In re D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, ¶51, citing *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, ¶80. “Due process ‘is not a technical conception with a fixed content unrelated to time, place and circumstances’.” *D.H.*, at ¶52, citing *McElroy*, at 895. “Rather, the phrase expresses the requirement of fundamental fairness, a requirement whose meaning can be as opaque as its importance is lofty.” *Id.*, citing *Lassiter v. Dept. of Social Servs. Of Durham Cty., North Carolina* (1981), 452 U.S. 18, 25; see, also, *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 543 (the applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship*, is fundamental fairness).

This Court has long recognized that juvenile courts “occupy a unique place in our legal system.” *C.S.*, at ¶65. The philosophy driving juvenile justice has been rooted in social welfare, rather than in the body of the law. *Id.* at ¶66, citing *Kent*, at 554. The objective of the juvenile court, from its inception, has been that courts would protect a wayward child from evil influences, save him from criminal prosecution, and provide him social and rehabilitative services. *In re T.R.* (1990), 52 Ohio St.3d 6, 15; *Children’s Home of Marion City v. Fetter* (1914), 90 Ohio St. 110, 127. It is firmly established that a child is not a criminal by reason of any juvenile court adjudication; and civil disabilities, ordinarily following convictions, do not attach to children. *Agler*, at 73; R.C. 2151.357(H).

In *D.H.*, this Court highlighted the vital role of the juvenile court in determining the disposition for a delinquent child. *D.H.*, at ¶55. Specifically, this Court stated:

[t]he [juvenile] court’s dispositional role is at the heart of the remaining differences between juvenile and adult courts. It is there that the expertise of a juvenile judge is necessary. The judge, given the factors set forth in R.C. 2152.13(D)(2)(a)(i), must assess the strengths and weaknesses of the juvenile

system vis-à-vis a particular child to determine how this particular juvenile fits within the system and whether the system is equipped to deal with the child successfully. That assessment requires as much familiarity with the juvenile justice system as it does a familiarity with the facts of the case.

Id. at ¶59. This Court found that juvenile court discretion was vital in determining dispositions for youth who were eligible for serious youthful offender dispositions. Yet, an offense-based application of S.B. 10 removes that discretion, and subverts one of the “remaining differences between juvenile and adult courts.” Id.

The purpose of R.C. 2950 was purported to be to “promote public safety and bolster the public’s confidence in Ohio’s criminal and mental health systems.” *Cook*, at 417. Under former R.C. 2152.83(B)(2)(b), if a juvenile court found that a child who had been adjudicated delinquent of a sex offense was to be classified as a juvenile offender registrant, the court then determined whether that juvenile was also a sexual predator or a habitual sex offender, by considering a number of enumerated factors in R.C. 2152.83(E)(1)-(5). The determination that a juvenile offender registrant was also a sexual predator or habitual offender could only be made with the support of clear and convincing evidence. Former R.C. 2152.83(C).

The procedures set forth in former R.C. 2152.83 provided juvenile sex offenders with protections that ensured their classification would be determined on a case-by-case basis, in which the court would take into consideration their youth and what effect treatment had on their future likelihood to reoffend. However, by reclassifying children under S.B. 10, based solely on their offense, a juvenile court no longer makes specific case-by-case determinations of a juvenile offender’s dangerousness or likelihood to reoffend; rather, the child is assigned to a registration tier based solely on the offense committed. R.C. 2152.83(B)(2)(b), 2152.02(Y), and 2950.01(E),(F), and (G). There now exists little distinction between juvenile offenders and adult offenders who have been convicted or adjudicated of the same offense. And unlike the

procedures outlined in R.C. 2152.13, there is no procedure that makes an offense-based classification fundamentally fair for children.

The offense-based application of S.B. 10 has effectively placed children into the same categories as adults who are convicted of sex offenses, without having received the same due process rights that similarly situated adults have been afforded. At the time of his offense, the only way Justin could have been subject to a twenty-year registration requirement was if the juvenile court had determined that he had been previously adjudicated delinquent for committing a previous offense. Former R.C. 2950.01(B). However, because S.B. 10 demanded the offense-based classification of all offenders, Justin is now required to register as a Tier II juvenile offender registrant, every 180 days in the counties where he lives, works, and goes to school, for twenty years.

Ohio has created a system of juvenile justice in which adult treatment and sentencing is reserved for exceptional circumstances, and in which procedural rights are afforded to similarly situated juveniles. R.C. 2152.12 and 2152.13. However, an offense-based application of S.B. 10 to juveniles does not provide a youth with those same procedural rights. By requiring that juvenile offenders be placed on the same tier structure as adult offenders in the same manner as adult offenders, S.B. 10 erases the line between juvenile and criminal offenders.

Proposition of Law III: The retroactive application of Senate Bill 10 to juveniles whose offense was committed prior to the enactment of Senate Bill 10 violates the juvenile's right to Equal Protection as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Ohio Constitution.

The guarantee of equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances. Fourteenth Amendment to the United States Constitution; Ohio Const., Art 1, Sec. 2. The Ohio Constitution provides, "all political power is

inherent in the people. Government is instituted for their equal protection and benefit...” Ohio Const., Art. I, Sec. 2. In order to be constitutional, a law must be applicable to all persons under like circumstances and not subject individuals to an arbitrary exercise of power. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 288-289. In other words, the equal protection clause prevents the state from treating differently or arbitrarily, persons who are in all relevant respects alike. *Park Corp. v. Brook Park* (2004), 102 Ohio St.3d 166, 2004-Ohio-2237.

The Equal Protection Clause of the Ohio Constitution has been interpreted to be essentially identical in scope to the analogous provision of the U.S. Constitution. *State v. Brown* (1996), 117 Ohio App.3d 6, 10. Furthermore, the U.S. Supreme Court has found that while children’s constitutional rights are not “indistinguishable from those of adults *** children generally are protected by the same constitutional guarantees against governmental deprivations as are adults.” *Bellotti v. Baird* (1979), 443 U.S. 622, 635.

Senate Bill 10 violates the Equal Protection Clauses of both the Ohio and United States Constitutions by treating similarly situated persons in vastly different ways. It subjects some juvenile sex offenders to mandatory classification and registration while others are subject to discretionary sex offender classification and registration. And some juvenile offenders are not subject to any classification or registration orders at all. These classes are based largely on the age of the offender at the time of their offense and the existence of a prior offense, if any.

Justin was sixteen at the time of his offense. Although he had no prior adjudication for a sex offense, because of his age at the time of the offense, he was subject to mandatory classification. Had he been fourteen or fifteen at the time of his offense, he would have been subject to discretionary classification—that is, the court could have evaluated the effectiveness of Justin’s treatment and determined that Justin should not be classified. Had he been thirteen at

the time he committed his offense, he could not have been subject to any registration at all. While the legislature may set more severe penalties for *acts* that it believes have greater consequence, under this penalty scheme the differences are not based on acts of greater consequence, since the conduct of the juvenile is identical or of the same felony classification.

The S.B. 10 age-based distinctions are not rationally related to the government's stated objective in providing for public safety. First, it should be noted that the primary motivation in passing S.B. 10 was to comply with a federal mandate to all states to pass the Adam Walsh Act or risk a loss of federal funds. Nevertheless, S.B. 10 provides no rationale for treating thirteen-year-old offenders (no registration) differently from fourteen-year-old offenders (discretionary registration); or for treating fifteen-year-old offenders (discretionary registration) differently from sixteen-year-old offenders (mandatory registration). Rather than demonstrating distinctions among juvenile offenders, what research actually shows is that adolescent offenders as a whole are significantly different from adult sex offenders in several ways:

- Adolescent sex offenders are considered to be more responsive to treatment than adult sex offenders and do not appear to continue re-offending into adulthood, especially when provided with appropriate treatment.
- Adolescent sex offenders have fewer numbers of victims than adult offenders and, on average, engage in less serious and aggressive behaviors.
- Most adolescents are not sexual predators nor do they meet the accepted criteria for pedophilia.
- Across a number of treatment research studies, the overall sexual recidivism rate for adolescent sex offenders who receive treatment is low in most U.S. settings as compared to adults. Adolescents who offend against young children tend to have slightly lower sexual recidivism rates than adolescents who sexually offend against other teens.

(National Center on Sexual Behavior of Youth, July 2003, Number 1). The NCSBY defines "adolescent sex offenders" as "adolescents from age thirteen to seventeen who commit illegal sexual behavior as defined by the sex crime statutes of the jurisdiction in which the offense occurred." There is no distinction in these findings between a thirteen year old and a seventeen

year old. This research explains why we traditionally have treated juvenile offenders differently from adult offenders, and why the distinction between a juvenile offender and an adult offender is rationally related in the law. There is no such rational basis for the difference in the treatment of first-time juvenile offenders under S.B. 10. As such, the law violates the Equal Protection Clauses of the United States and Ohio Constitutions.

CONCLUSION

For the reasons argued above, Justin Messmer respectfully requests that this Court accept jurisdiction of this appeal and hold it for the decisions in *Smith, Adrian R.*, and *Bodyke*,

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing **Memorandum In Support of Jurisdiction of Adjudicated Delinquent Child Justin Messmer**, was served by ordinary U.S. Mail to Douglas D. Rowland, Wyandot County Assistant Prosecuting Attorney, 137 S. Sandusky Avenue, Upper Sandusky, Ohio 43351, on this 3rd day of May, 2010.



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IN THE SUPREME COURT OF OHIO

IN RE: JUSTIN A. MESSMER, :
Adjudicated Delinquent Child : Case No.
: :
: On Appeal from the Wyandot
: County Court of Appeals
: Third Appellate District
: :
: C.A. Case No. 16-09-17

**APPENDIX TO THE MEMORANDUM IN SUPPORT OF JURISDICTION OF
ADJUDICATED DELINQUENT CHILD, JUSTIN A. MESSMER**

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
WYANDOT COUNTY

IN THE MATTER OF:

CASE NO. 16-09-17

JUSTIN A. MESSMER,

ADJUDICATED DELINQUENT CHILD.

OPINION

Appeal from Wyandot County Common Pleas Court
Juvenile Division
Trial Court No. A 2071139

Judgment Affirmed

Date of Decision: March 22, 2010

APPEARANCES:

Amanda J. Powell for Appellant

Douglas D. Rowland for Appellee

COURT OF APPEALS
WYANDOT CO., OHIO
FILED

MAR 22 2010

Ann K. Dunbar
CLERK OF COURTS
WYANDOT CO., OHIO

ROGERS, J.

{¶1} Defendant-Appellant, Justin Messmer, appeals from the judgment of the Court of Common Pleas of Wyandot County, Juvenile Division, designating him a Tier II sex offender. On appeal, Messmer argues that the trial court abused its discretion in classifying him as a Tier II sex offender based on a finding that the classification was mandated by his offense; that the application of Senate Bill 10 (“S.B. 10”) to his case resulted in a violation of his due process rights and right to equal protection under the United States and Ohio Constitutions; and, that S.B. 10’s application violated the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution. Based on the following, we affirm the judgment of the trial court.

{¶2} In September 2007, the Upper Sandusky Police Department filed a complaint alleging Messmer was a delinquent child on one count of gross sexual imposition in violation of R.C. 2907.05(A)(4) and 2152.02(F), a felony of the third degree if committed by an adult. The complaint arose from allegations that Messmer had sexual contact with his eight year-old sister. Subsequently, the juvenile court entered a denial of the allegation on Messmer’s behalf.

{¶3} In October 2007, Messmer withdrew his denial to the complaint and entered an admission to the charge of gross sexual imposition, with the juvenile court accepting the admission and adjudicating him a delinquent child.

{¶4} In January 2008, the juvenile court proceeded to disposition, classifying Messmer as a Tier II sex offender, committing him to the Department of Youth Services (“DYS”) for a minimum period of six months, and up to a maximum period not to exceed his twenty-first birthday, and ordering him to complete fifty hours of community service and to have no contact with a juvenile without adult supervision.

{¶5} In September 2008, this Court reversed the judgment of the juvenile court in *In re Messmer*, 3d Dist. No. 16-08-03, 2008-Ohio-4955, finding that Messmer’s admission to the charge of gross sexual imposition was not knowing, voluntary, and intelligent because the juvenile court failed to comply with Juv.R. 29(D) in accepting Messmer’s admission.

{¶6} In October 2008, Messmer re-entered his admission to the charge of gross sexual imposition, and the juvenile court accepted the admission and adjudicated him a delinquent child. Thereafter, Messmer was again committed to DYS for a minimum period of six months, and up to a maximum period not to exceed his twenty-first birthday, and ordered to complete fifty hours of community service and to have no contact with a juvenile without adult supervision.

{¶7} In August 2009, the juvenile court conducted a juvenile sexual offender designation hearing, in which it categorized Messmer as a Tier II sexual offender.

{¶8} It is from the juvenile court's sexual offender designation that Messmer appeals, presenting the following assignments of error for our review.

Assignment of Error No. I

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT JUSTIN M'S CLASSIFICATION AS A TIER II JUVENILE SEX OFFENDER REGISTRANT WAS OFFENSE-BASED, IN VIOLATION OF R.C. 2950.01(E)-(G). (A-7); (T.PP. 2-6).

Assignment of Error No. II

THE TRIAL COURT ERRED WHEN IT FOUND SENATE BILL 10 CONSTITUTIONAL AS APPLIED TO JUSTIN M., AS THE APPLICATION OF SENATE BILL 10 TO JUSTIN VIOLATES HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION. (A-7); (T.PP. 5-6).

Assignment of Error No. III

THE RETROACTIVE APPLICATION OF SENATE BILL 10 TO JUSTIN M. VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION AND THE RETROACTIVITY CLAUSE OF SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION. (A-7); (T.PP. 2-6).

Assignment of Error No. IV

THE JUVENILE COURT ERRED WHEN IT APPLIED SENATE BILL 10 TO JUSTIN M., AS THE LAW VIOLATES HIS RIGHT TO EQUAL PROTECTION UNDER THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION 2 OF THE OHIO CONSTITUTION. (A-7); (T.PP. 2-6).

{¶9} Due to the nature of Messmer's arguments, we elect to address assignments of error two and three together.

Assignment of Error No. I

{¶10} In his first assignment of error, Messmer argues that the juvenile court abused its discretion when it classified him as a Tier II sex offender. Specifically, he contends that the juvenile court mistakenly believed that the classification was offense-based and mandatory, when, in fact, it had the discretion to determine his classification. We disagree.

{¶11} S.B. 10 was enacted in June 2007, with an effective date of January 1, 2008, and amended the sexual offender classification system found in former R.C. 2950. *In re Gant*, 3d Dist. No. 1-08-11, 2008-Ohio-5198, ¶11, appeal accepted for review, 3/25/2009 Case Announcements, 2009-Ohio-1296. Under the prior classification system, the trial court determined whether the offender fell into one of three categories: (1) sexually oriented offender, (2) habitual sex offender, or (3) sexual predator. Former R.C. 2950.09; *State v. Cook*, 83 Ohio St.3d 404, 407, 1998-Ohio-291. In determining whether to classify an offender as a sexual predator, former R.C. 2950.09(B)(3) provided the trial court with numerous factors to consider in its determination. *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234, ¶28, appeal accepted for review, 12/8/2008 Case

Announcements, 2008-Ohio-6166. Additionally, R.C. 2950.04 imposed registration requirements for sexual offenders.

{¶12} In contrast, S.B. 10 requires the trial court to designate the offender as either a Tier I, II, or III sex offender. R.C. 2950.01; *Gant*, 2008-Ohio-5198, at ¶15. The new classification system places a much greater limit on the discretion of the trial court to categorize the offender, as S.B. 10 requires the trial court to simply place the offender into one of the three tiers based on the offense. *Id.* A portion of the requirements for a Tier II classification are as follows:

F) “Tier II sex offender/child-victim offender” means any of the following:

(1) A sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any of the following sexually oriented offenses:

* * *

(c) A violation of division (A)(4) of section 2907.05 or of division (A)(1) or (2) of section 2907.323 of the Revised Code;

R.C. 2950.01(F)(1)(c). Accordingly, the trial court has no discretion in designating the offender as a Tier I, II, or III sex offender; it must merely classify the offender according to the offense committed. See *Smith*, 2008-Ohio-3234, at ¶31; *Gant*, 2008-Ohio-5198, at ¶15; *Downing v. State*, 3d Dist. No. 8-08-29, 2009-Ohio-1834, ¶10.

{¶13} Here, Messmer was adjudicated a delinquent child due to his admission to gross sexual imposition in violation of R.C. 2907.05(A)(4). Accordingly, pursuant to R.C. 2950.01(F)(1)(c), the juvenile court was required to classify Messmer as a Tier II sex offender. Consequently, we find there to be no error in the juvenile court's classification of Messmer as a Tier II sex offender.

{¶14} Accordingly, we overrule Messmer's first assignment of error.

Assignments of Error Nos. II and III

{¶15} In his second and third assignments of error, Messmer argues that the juvenile court's application of S.B. 10 to designate him as a Tier II sex offender violated his due process rights under the United States and Ohio Constitutions, and violated the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution. Specifically, Messmer contends that S.B. 10's elimination of the juvenile court's discretion in designating sex offenders results in criminal sanctions for juvenile offenders and eliminates due process protections afforded by case-by-case designations. Additionally, Messmer also asserts that, due to S.B. 10's application to offenses that occurred prior to its enactment, and due the General Assembly's penal objective in promulgating the statute, S.B. 10 violates the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution.

{¶16} “An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.” *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus. “That presumption of validity of such legislative enactment cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution.” *Xenia v. Schmidt* (1920), 101 Ohio St. 437, paragraph two of the syllabus.

{¶17} A statute’s constitutionality can be challenged on its face or on the particular set of facts to which the statute has been applied. *Harold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶37, citing *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, paragraph four of the syllabus. When a statute is challenged on its face, the challenger must demonstrate that no set of circumstances exist under which the statute would be valid. *Id.*, citing *United States v. Salerno* (1987), 481 U.S. 739, 745. The fact that the statute could operate unconstitutionally under some given set of facts or circumstances is insufficient to render it wholly invalid. *Id.* “Conversely, when a statute is challenged as applied, the challenger must establish by clear and convincing evidence an existing set of facts that renders the statute invalid when applied to those facts.” *Smith v. Jones*,

175 Ohio App.3d 705, 2007-Ohio-6708, ¶14, citing *Harold*, 107 Ohio St.3d 44, at ¶38.

{¶18} Here, Messmer challenges the constitutionality of S.B. 10 as applied to his case. This Court has previously addressed the issues of whether the application of S.B. 10 violates a defendant's due process rights under the Ohio and United States Constitutions, and whether it violates the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution, and has continually found there to be no such constitutional violations. See *Smith*, 2008-Ohio-3234; *Gant*, 2008-Ohio-5198; *Downing*, 2009-Ohio-1834; *Holcomb v. State*, 3d Dist. Nos. 8-08-23, 8-08-24, 8-08-25, 8-08-26; 2009-Ohio-782; *In re Copeland*, 3d Dist. No. 1-08-40, 2009-Ohio-190. Consequently, because this Court has found that S.B. 10 does not run afoul of these constitutional provisions, we are now bound by the principle of stare decisis to our prior decisions. See *Copeland*, 2009-Ohio-190, at ¶11.

{¶19} Accordingly, we overrule Messmer's second and third assignments of error.

Assignment of Error No. IV

{¶20} In his fourth assignment of error, Messmer argues that the application of S.B. 10 to his case results in a violation of his right to equal protection under the United States and Ohio Constitutions. Specifically, he

contends that S.B. 10's penalty scheme based upon the offender's age bears no rational relation to a legitimate government interest and, therefore, runs afoul of the United States and Ohio Constitutions. We disagree.

{¶21} As set forth in our disposition of Messmer's second and third assignments of error, all legislative enactments are presumed constitutional, and a challenge to the constitutionality of a statute can only prevail when the challenger demonstrates unconstitutionality beyond a reasonable doubt. *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶17, citing *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, ¶4. Additionally, we note that Messmer challenges the constitutionality of S.B. 10 on its face and as applied to him.

{¶22} In order to determine the constitutionality of a statute under the equal protection clause, we must first decide whether a fundamental right or suspect class is involved. *Conley v. Shearer*, 64 Ohio St.3d 284, 289, 1992-Ohio-133. "A statutory classification which involves neither a suspect class nor a fundamental right does not violate the Equal Protection Clause of the Ohio or United States Constitutions [sic] if it bears a rational relationship to a legitimate governmental interest." *McCrone v. Bank One Corp.*, 107 Ohio St.3d 272, 2005-Ohio-6505, ¶8, quoting *Menefee v. Queen City Metro* (1990), 49 Ohio St.3d 27, 29. Under rational basis review, the judgment of the General Assembly is granted substantial deference. *Eppley v. Tri-Valley Local School Dist. Bd. of Edn.*, 122

Ohio St.3d 56, 2009-Ohio-1970, ¶15, citing *State v. Williams*, 88 Ohio St.3d 513, 531, 2000-Ohio-428. Furthermore, rational basis review only requires a reasonable justification for the classification, even if the classifications are imprecise. *Groch v. Gen. Motors Corp*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶82.

{¶23} Here, Messmer asserts a violation of equal protection on the basis that S.B. 10 impermissibly classifies sexual offenders according to age. However, the suspect classes have been traditionally defined as race, sex, religion, and national origin, *Adamsky v. Buckeye Local School Dist.*, 73 Ohio St.3d 360, 362, 1995-Ohio-298, with age being excluded. *Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 1999-Ohio-285, fn2. Accordingly, we will analyze whether S.B. 10's classification scheme bears a rational relationship to a legitimate government interest.

{¶24} Under R.C. 2152.83(A)(1), a juvenile court is required to classify a juvenile as a sex offender where three conditions are met. One of those conditions is that the juvenile was sixteen or seventeen years of age at the time of committing the offense. However, pursuant to R.C. 2152.83(B)(1), the juvenile court has the discretion to conduct a hearing to determine if the juvenile should be classified as a sex offender when three conditions are met, one of which is that the juvenile was fourteen or fifteen years of age at the time of committing the offense. Accordingly, whether the juvenile court has discretion to or is required to classify

a juvenile as a sex offender is partly based upon the age of the juvenile at the time of committing the offense.

{¶25} The General Assembly's reasoning behind the promulgation of sex offender classifications and punishments is set forth in R.C. 2950.02, which provides, in pertinent part:

If the public is provided adequate notice and information about offenders and delinquent children who commit sexually oriented offenses or who commit child-victim oriented offenses, members of the public and communities can develop constructive plans to prepare themselves and their children for the offender's or delinquent child's release from imprisonment, a prison term, or other confinement or detention. * * *

* * *

Sex offenders and child-victim offenders pose a risk of engaging in further sexually abusive behavior even after being released from imprisonment, a prison term, or other confinement or detention, and protection of members of the public from sex offenders and child-victim offenders is a paramount governmental interest.

R.C. 2950.02(A)(1),(2).

{¶26} Accordingly, if the purpose of sex offender classification is to notify and protect the public due to the likelihood of recidivism among sex offenders, it is likely the General Assembly concluded that the lower the age of the offender, the reduced likelihood of recidivism, thereby granting the juvenile court discretion in determining whether a sex offender classification is needed when the offender is

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younger. Consequently, we find that this age classification bears a rational relationship to a legitimate government interest.

{¶27} Accordingly, we overrule Messmer's fourth assignment of error.

{¶28} Having found no error prejudicial to the appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed

WILLAMOWSKI, P.J. and PRESTON, J., concur.

/jlr

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
WYANDOT COUNTY

IN THE MATTER OF:

JUSTIN A. MESSMER,

ADJUDICATED DELINQUENT CHILD.

CASE NO. 16-09-17

JUDGMENT
ENTRY

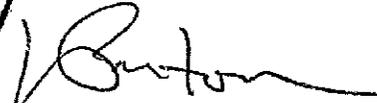
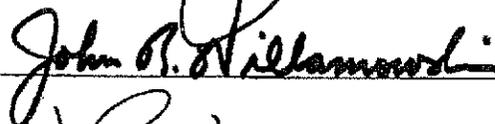
For the reasons stated in the opinion of this Court, the assignments of error are overruled and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs assessed to Appellant for which judgment is hereby rendered. The cause is hereby remanded to the trial court for execution of the judgment for costs.

It is further ordered that the Clerk of this Court certify a copy of this Court's judgment entry and opinion to the trial court as the mandate prescribed by App.R. 27; and serve a copy of this Court's judgment entry and opinion on each party to the proceedings and note the date of service in the docket. See App.R. 30.

COURT OF APPEALS
WYANDOT CO., OHIO
FILED

MAR 22 2010

Ann K. Dunbar
CLERK OF COURTS
WYANDOT CO., OHIO



JUDGES

DATED: March 22, 2010

/jlr