ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE:	:	CASE NO. 2010-0731
	:	
C. P.	:	On Appeal from the Athens
	:	County Court of Appeals
Adjudicated Delinquent Child	:	Fourth Appellate District
and Serious Youthful Offender	:	
	:	

APPELLEE'S MEMORANDUM IN OPPOSITION TO JURISDICTION

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WHY THIS COURT SHOULD REFUSE JURISDICTION

This case does not raise any substantial constitutional issues nor is it one of great public or general interest. Appellant claims that his due process and equal protection rights were violated by the juvenile court classifying him as a public registry-qualified juvenile offender registrant (PRQJOR). He also claims that being required to register as a tier III sex offender is cruel and unusual punishment. None of these arguments has any merit.

Appellant also urges this honorable Court to accept jurisdiction because it is considering the constitutionality of Senate Bill 10 in other cases. However, the issues in those other cases cited by Appellant primarily deal with the retroactive application of Senate Bill 10. That issue is not present in this case. Therefore, this Court should refuse jurisdiction.

APPELLEE'S RESPONSE TO PROPOSITION OF LAW I

THE CLASSIFICATION OF A REGISTRATION-ELIGIBLE YOUTH AS A PUBLIC REGISTRY-QUALIFIED JUVENILE OFFENDER REGISTRANT DOES NOT VIOLATE 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.

"[T]he classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts. *** Without the legislature's creation of sex offender classifications, no such classification would be warranted. Therefore, *** we cannot find that sex offender classification is anything other than a creation of the legislature, and therefore, the power to classify is properly expanded or limited by the

legislature." In re Smith, 2008-Ohio-3234 at paragraph 39.

Statutes enacted in Ohio "are presumed to be constitutional." State v. Ferguson, 120 Ohio St.3d 7, 2008-Ohio-4824 at paragraph 12. This presumption remains until one challenging a statute's constitutionality shows, "beyond reasonable doubt, that the statute is unconstitutional." Roosevelt Properties Co. v. Kinney (1984), 12 Ohio St.3d 7, 13.

The right to procedural due process is found in the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution. To trigger protections under these clauses, a sexual offender must show that he was deprived of a protected liberty or property interest as a result of the registration requirement. See Steele v. Hamilton Cty. Community Mental Health Bd. (2000), 90 Ohio St.3d 176, 181. The basic requirements under this clause are notice and an opportunity to be heard. State v. Hochhausler (1996), 76 Ohio St.3d 455, 459.

Appellant asserts in his first proposition of law that the trial court violated due process of law because it followed the requirements R.C. 2152.86 and, after finding C.P. to be a serious youthful offender, automatically classified him as a Tier III juvenile offender registrant. The argument seems to be that adult and juvenile offenders must be treated differently in all respects and all juveniles, regardless of their circumstances, must be treated the same. Despite the abundance of case law to the contrary, Appellant also argues that the sex classifications are punitive and not remedial. On page 3 of his memorandum, he writes:

> "The criminal aspects of juvenile delinquency have been highlighted with the advent of Senate Bill 10, which imposes on defendants and juvenile offenders, burdens that have historically been regarded as punishment and

operate as affirmative disabilities and restraints. These aspects are perhaps most evident in the classification of PRQJORs."

The United States Supreme Court thought otherwise in Smith v. Doe (2003), 538 U.S. 84 . The Supreme Court considered whether the regulatory scheme has traditionally been regarded as a punishment. The Court noted that sex offender registration statutes are of recent origin, which suggests they did "not involve a traditional means of punishment." Id. at 97.

There is no ambiguity in the wording of R.C. 2152.86, it makes the classification mandatory. If the juvenile court imposed upon the child a serious youthful offender dispositional order for committing certain sex offences, he must be classified as a Tier III sex offender.

> "(B)(1) If an order is issued under division (A)(1), (2), or (3) of this section, the classification of tier III sex offender/child-victim offender automatically applies to the delinquent child based on the sexually oriented offense the child committed,". R.C. 2152.86(B)

Appellant has not shown that he was deprived of a protected liberty or property interest. A constitutionally protected liberty interest has been defined as freedom from bodily restraint and punishment. Ingraham v. Wright (1977), 430 U.S. 651, 673-674. Appellant has not suffered any bodily restraint as a result of the registration requirement imposed on him as a sex offender. Nor has he been punished. In State v. Eppinger (2001), 91 Ohio St2d 158, 165, this honorable Court stated that "R.C. Chapter 2950 is not meant to punish a defendant, but instead, to protect the safety and general welfare of the people of this state." Id., quoting R.C. 2950.02(B).

The Fourth District Court of Appeals has ruled on numerous occasions that Senate

Bill 10 is civil and not criminal. The Fourth District Court of Appeals said in In re T.M., 2009-Ohio-4224:

> "However, this court has repeatedly held that S.B. 10 is civil in nature; a conclusion that necessarily rejects T.M.'s argument. *State v Coburn*, 4th Dist. No. 08CA3062, 2009-Ohio-632, at paragraph 12; *State v. Randlett* 4th Dist. No. 08CA3050, 2009-Ohio-112 at paragraph 14; *State v. Linville,*, 4th Dist. No. 08CA3081, 2009-Ohio-313, at paragraph 11; *State v. Messer,* 4th Dist. N. 08CA3050, 2009-Ohio-312, at paragraph 12. We see no reason to revisit this conclusion now, and we find that S.B. 10 is not so punitive as to frustrate the purpose of Ohio's juvenile law." Id at paragraph 28.

Appellant cites Smith v. Doe (2003), 538 U.S. 84 at 98, as authority for this statement:

> "This dissemination of information resembles shaming punishment, which are intended to inflict public disgrace." Appellant's memorandum at page 4.

What the United States Supreme Court actually said was:

> "Respondents contend that Alaska's compulsory registration and notification resemble these historical punishments, for they publicize the crime, associate it with his name, and, with the most serious offenders, do so for life.
>
> Any initial resemblance to early punishments is, however, misleading. Punishments such as whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public. Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community. See Earle, supra at 20, 35-36, 51-52; Massaro, supra, at 1912-1924; Semmes, supra, 39-40; Blomberg & Lucken, supra, at 30-31. By contrast, the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of accurate information in furtherance of a legitimate governmental objective as punishment." Id. at 98.

Appellant again cites Doe at 102 for the following assertion:

"Senate Bill 10 also furthers the traditional aims of punishment: retribution and deterrence. *Smith v. Doe*, at 102." Appellant's memorandum at page 4.

What the United States Supreme Court actually said was:

> "To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation. Hudson, 522 U.S. at 105; see also Ursery, 518 U.S. at 292; 89 Firearms, 465 U.S. at 364.
> The Court of Appeals was incorrect to conclude that the Act's registration obligations were retributive because 'the length of the reporting requirement appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed.' 259 F.3d 990. The Act, it is true, differentiates between individuals convicted of aggravated or multiple offenses and those convicted of a single nonaggravated offense. Alaska Stat. Section 12.63.020(a)(1) (2000). The broad categories, however, and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective.
> The Act's rational connection to a nonpunitive purpose is a '[m]ost significant' factor in our determination that the statute's effects are not punitive." State v. Doe at 102.

The Supreme Court of the United States has already stated , "The state's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment." Smith v. Doe (2003), 538 U.S. 84, 104. This is true whether the offender is a juvenile or an adult. This honorable Court, in State v. Wilson,, 113 Ohio St.3d 382, decided that sex offender classification proceedings were civil n nature. It said:

> "Consistent with our jurisprudence in those cases, we find that sex-offender-classification proceedings under R. C. Chapter 2950 are civil in nature and that a court of appeals must apply the civil manifest-weight-of-the-evidence standard in its review of the trial court's findings. Under this standard, a court of appeals must affirm the trial court's determination if it is supported by some competent, credible evidence." Id. at 389.

"The purpose and principal effect of notification are to inform the public for its

own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." Doe at 99.

Since the Ohio legislature in enacting legislation is not required to grant a juvenile court discretion in classifying juvenile sex offenders and may have the classifications offense-based, Appellant's due process rights were not violated. Additionally, since Senate Bill 10 is civil and not criminal, no substantive due process issues are involved. The Fourth District Court of Appeals noted:

> "The mere fact that community notification provisions might conflict with the principles of juvenile law does not establish a violation of due process. to establish such a violation, C.P. would need to demonstrate that he had a fundamental right to not be treated like an adult in this proceeding. At best, C.P. has demonstrated that the juvenile code has some provisions that are in tension with the juvenile code's stated purpose. But this is to be expected. Legislatures need to reconcile competing concerns and interests. In so doing, the resulting legislation often includes provisions motivated by those competing interests, and this is not a sufficient basis for finding a statute unconstitutional." In the Matter of C.P., 2010-Ohio-1484 at paragraph 15.

Since Appellant's first proposition of law has no merit, it should be rejected.

APPELLEE'S RESPONSE TO PROPOSITION OF LAW II

THE CLASSIFICATION OF A REGISTRATION-ELIGIBLE YOUTH AS A PUBLIC REGISTRY-QUALIFIED JUVENILE OFFENDER REGISTRANT DOES NOT VIOLATE 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.

In order to determine the constitutionality of a statute under the equal protection clause, the court must first decide whether a fundamental right or suspect class is

involved. Conley v. Shearer, 64 Ohio St.3d 284, 289. "A statutory classification which involves neither a suspect class nor a fundamental right does not violate the Equal Protection Clause of the Ohio or the United States Constitution if it bears a rational relationship to a legitimate government interest." McCrone v. Bank One Corp., 107 Ohio St.3d272. Under rational basis review, the judgment of the General Assembly is granted substantial deference. State v. Williams, 88 Ohio St.3d 513, 531. Futhermore, 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,

In this proposition of law, Appellant incredibly asserts that :

> "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 classifications and registration while others are subjected to discretionary sex offender classifications and registration. R.C. 2152.82, R.C. 2152.83. Some juvenile offenders are subject to public registration while others are not. R.C. 2950.081. And some juvenile offenders are not subject to any classification or registration orders. 2152.82; R.C. 2152.83. These classes are based largely on the age of the offender at the time they committed their offense, the existence or not of prior offenses, and whether the prosecutor pursued a serious youthful offender disposition." Appellant's memorandum at page 8.

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, with age being excluded. Cleveland v. Trzebuckowski, 85 Ohio St.3d 524. Appellant admit on pages 7-8 of his memorandum that the correct standard of review of classifications based on age is the rational basis test.

Appellant, in this proposition of law, apparently argues that younger juveniles and older j

juveniles should be treated the same or it violates equal protection. More serious offenders should be treated the same as less serious offenders. Those who commit multiple offenses should be treated the same as those who committed a single offense. There is no authority to support these notions. A major purpose of classifications and notification statutes is to protect the public from sex offenders.

The purpose of juvenile dispositions is stated in R. C. 2152.01(A) which says:

> (A) 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 to the offender's actions, restore the victim, and rehabilitate the offender. These purposes shall be achieved by a **system of graduated sanctions and services.** (My emphasis)

The purpose of R. C. Chapter 2950 is stated in R. C. 2950.02(B) which states:

> (B) The general assembly hereby declares that, in providing in this chapter for registration regarding offenders and **certain delinquent children who have sexually oriented offenses** or child-victim oriented offenses and for community notification regarding tier III sex offender/child-victim offenders who are criminal offenders, public registry-qualified juvenile offender registrants, and certain other juvenile offenders registrants who are about to be or have been released from imprisonment, a prison term. Or other confinement or detention and who will live in or near a particular neighborhood or who otherwise will live in or near a particular neighborhood, It is the general assembly's intent to protect the safety and general welfare of the people of this state. The general assemble further declares that it is the policy of this state to require the exchange in accordance with this chapter of relevant information about sex offenders among public agencies and officials and to authorize the release in accordance with this chapter of necessary and relevant information about sex offenders and child-victim offenders to members of the general public as a means of assuring public protection and that the exchange or release of that information **is not punitive.** (My emphasis)

The law requires the court to make certain finding in classifying a child as a "serious youthful offender". And if the offense involves certain serious sex offences, the

court must then classify the offender as a tier III registrant. This classification is reserved for those, such as the Appellant, who present the most danger to the public. Therefore, there is a rational basis for this law. Appellant was fifteen years old at the time of his latest offense. He has committed multiple offenses against small children. There was a rational basis for classifying him as a serious youthful offender and a mandatory Tier III registrant. It is not a violation of equal protection to treat serious offenders differently than less serious offenders. Therefore, Appellant's equal protection rights were not violated nor is R.C. 2152.86 unconstitutional.

APPELLEE'S RESPONSE TO PROPOSITION OF LAW III

THE CLASSIFICATION OF A REGISTRATION-ELIGIBLE YOUTH AS A PUBLIC REGISTRY-QUALIFIED JUVENILE OFFENDER REGISTRANT DOES NOT VIOLATE THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE OHIO CONSTITUTION.

In Appellant's memorandun in his third proposition of law he makes an argument based on his juvenile status. He argue s that subjecting him to the onerous tier III registration and classification requirements similar to adult sex offenders constitutes cruel and unusual punishment., maintaining that the courts in Ohio have long recognized the fundamental differences between juvenile and adult offenders and have traditionally treated them differently. However, the cruel and unusual punishment claim is only cognizable in the criminal or punitive context. Powell v. Texas (1968), 392 U.S. 514, 532.

Every Ohio appellate district has held that R.C. Chapter 2950, as modified by Senate Bill 10, remains remedial in nature and is not punitive. See Sewell v. State, 1st Dist., 2009-Ohio-872; State v. King, 2nd Dist., 2008-Ohio-2594; In re Gant, 3rd Dist., 2008-Ohio-5198; State v. Graves, 4th Dist., 2008-Ohio-5763; In re Kristopher W., 5th Dist., 2008-Ohio-6075; Montgomery v. Leffler, 6th Dist., 2008-Ohio-6397; State v. Byers, 7th Dist., 2008-Ohio-5051; Gildersleeve v. State, 8th Dist., 2009-Ohio-2031; In re G.E.S., 9th Dist., 2008-Ohio-4076; State v.Gilfillan, 10th Dist., 2009-Ohio-1104; State v. Swank, 11th Dist., 2008-Ohio-6059; State v. Williams, 12th Dist., 2008-Ohio-6195. In addition, federal court that have addressed the issue have also reached the same result. See United States v. Markel (W.D. Ark, 2007), 2007 U.S. Dist. LEXIS 27102 and United States v. Templeton (W.D. Okla. 2007), 2007 U.S. Dist. LEXIS 8930.

Since the requirements of Senate Bill 10 are civil and not criminal, they do not violate the Eighth Amendment's restriction on cruel and unusual punishment.

CONCLUSION

Since this case does not present any substantial constitutional question nor any issue of public or great general interest, This Court should refuse jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon:

Brooke M. Burns, Attorney for C.P., Office of the Ohio Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215

:by regular U.S. mail on the 26th day of May, 2010.

George Reitmeier

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