

IN THE SUPREME COURT OF OHIO

STATE OF OHIO : 2015-1847
Appellant :
-vs- : On Appeal from the
DARLELL ORR : Cuyahoga County Court
Appellee : of Appeals, Eighth
Appellate District Court
of Appeals
CA: 102460

MERIT BRIEF OF APPELLEE DARLELL ORR

ROBERT L. TOBIK, ESQ.
Cuyahoga County Public Defender
BY: Erika B. Cunliffe (0074480)
(Counsel of Record)
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113
(216) 443-7583
ecunliffe@cuyahogacounty.us

COUNSEL FOR APPELLEE,
DARLELL ORR

Charlyn Bohland #0088080
Assistant State Public Defender
The Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
charlyn.bohland@opd.ohio.gov

TIMOTHY J. MCGINTY, ESQ.
Cuyahoga County Prosecutor
BY: Daniel T. Van (0084614)
Assistant County Prosecutor
The Justice Center – 9th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7800

COUNSEL FOR APPELLANT,
THE STATE OF OHIO

AMICUS CURIAE – Ohio
Prosecuting Attorneys Association
Carol Hamilton O'Brien (0026965)
Douglas N. Dumolt (0080866)
Assistant Prosecuting Attorney
140 N. Sandusky Street, 3rd Floor
(740) 833-2690

Marsha L. Levick PHV #1729-2016
Juvenile Law Center
1315 Walnut Street, Suite 400
Philadelphia, Pennsylvania 19107
(215) 625-0551
(215) 625-2808 – Fax
mlevick@jlc.org

Nadia Natasha Seeratan #1749-2013
National Juvenile Defender Center
1350 Connecticut Avenue, N.W., Suite 304
Washington, D.C. 22209
(202) 452-0010 x 113
(202) 452-1205 – Fax
nseeratan@njdc.info

Counsel for Amici Curiae

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STATEMENT OF THE CASE AND FACTS

The State of Ohio is appealing the Eighth District's opinion affirming the trial court's dismissal of this nearly 20-year-old prosecution after concluding that it violated the due process and *ex post facto* clauses. Most of this case's facts, to the very limited extent they've been developed, are largely not in dispute.

On May 23, 2013, a Cuyahoga County grand jury issued a 3-count indictment charging Darlell Orr with rape, sexual battery, and kidnapping stemming from an incident that allegedly occurred on or about June 25, 1993. Orr, who was born on August 30, 1979, was 13 years old at the time. After the then 14-year-old complainant reported the incident, police transported her to St. Luke's Medical Center. There, a rape kit was taken, although its contents were not subjected to DNA testing until April of 2013.

Mr. Orr pleaded not guilty to the charges and, on December 3, 2014, filed a motion to dismiss them.¹ He argued that because of the lengthy delay between the alleged incident and the charges themselves, the prosecution was barred under the *ex post facto* and due process clauses. Orr argued that if he had been charged contemporaneously with the alleged incidents, he would have been subject to the exclusive jurisdiction of the juvenile court. In fact, the law in effect at the time of the incident precluded Mr. Orr's prosecution as an adult. (See, R.C. 2151.26 (1993) appended to this brief as Appendix pp. 1-3).

¹This matter remained pending – first in the trial court, then in the Eighth District because of an interlocutory appeal – where Mr. Orr disputed the trial court's jurisdiction and the indictment's sufficiency, all the while fighting for the right to self-representation. Ultimately, those efforts proved unsuccessful.

Specifically, under Sections R.C. 2151.26(A)(1) & (2) – which were the operant provisions in 1993 – before a child could be subject to adult jurisdiction, he needed to be at least 15-years-old and meet other criteria, or the allegations needed to involve a *second* adjudication for murder or aggravated murder. Otherwise the treatment of any juvenile in adult court jurisdiction was prohibited under R.C. 2151.26(E), which stated that “No child, either before or after reaching eighteen years of age, shall be prosecuted as an adult for an offense committed prior to becoming eighteen, unless the child has been transferred as provided in this section.”

Given the plain language of the law in effect in 1993, therefore, a 13-year-old child accused of any offense could not be subject to adult jurisdiction – and with good reason.² The distinctions between adults and children are well documented. Based on those differences, we have established a legal system that treats these classes of individuals differently. Juveniles, even those who have committed heinous crimes, receive unique treatment in within the criminal justice system. Since their establishment more than a century ago, juvenile courts in America were intended to meet the special needs of children who find themselves entangled in the criminal justice system. That system’s ultimate goal is to reform or rehabilitate them without the stigma of a criminal conviction.

In the trial court, Orr argued that if the State initiated these charges in a timely fashion he would have remained in the juvenile system – he could not have been treated as an adult. In fact, in 1993 under the clear dictates of R.C. 2151.25(E), even adults arrested for crimes they allegedly committed as juveniles were subject to juvenile court

² Even now, under R.C. 2152.10, a 13-year-old is not subject to adult jurisdiction for any offense.

jurisdiction if they were not otherwise eligible for transfer. In 1997, however, the General Assembly amended R.C. 2151.26 and enacted the following:

(G) If a person under eighteen years of age allegedly commits an act that would be a felony if committed by an adult and if the person is not taken into custody or apprehended for that act until after the person attains twenty-one years of age, the juvenile court does not have jurisdiction to hear or determine any portion of the case charging the person with committing that act, divisions (B) and (C) of this section do not apply regarding that act, the case charging the person with committing that act shall be a criminal prosecution commenced and heard in the appropriate court having jurisdiction of the offense as if the person had been eighteen years of age or older when the person committed that act, all proceedings pertaining to that act shall be within the jurisdiction of the court having jurisdiction of the offense, and the court having jurisdiction of the offense has all the authority and duties in the case as it has in other criminal cases commenced in that court.

This provision was later replaced by R.C. 2152.02(C)(3) and R.C. 2152.12(J), which likewise required those apprehended after the age of 21 for offenses allegedly undertaken before the age of 18 to be dealt with in the adult criminal courts. Because of this precipitous change in the law, when 36-year-old Darrell Orr was finally charged in 2013, he had to be prosecuted as an adult – even though he had been only 13-years old when the alleged misconduct happened.

Before the trial court, Mr. Orr argued that his automatic transfer to adult court – where he would have been otherwise ineligible for transfer at the time of the offense – under laws enacted years after he allegedly committed it, was unconstitutional. Orr maintained that his prosecution as an adult – which had nothing to do with the crime, his culpability, or his criminal history – was arbitrary and unfair. In fact, the only factor that distinguished Orr's case from the ones that remain in juvenile jurisdiction was the passage of time. The disparate treatment stemming from the delayed prosecution was unfair and violated Orr's rights under the State and Federal Constitutions.

Accordingly, Orr argued, as applied in his case, R.C. 2152.02(C)(3) and R.C. 2152.12(J) violated his rights to due process and a fair sentencing, as well as those under the Constitution's Eighth Amendment and the *Ex Post Facto* Clause. The trial court agreed, and, following a hearing on December 23, 2014, the court dismissed the indictment without prejudice. More specifically, the court noted it was clear from his review of the applicable law that:

[A]t the time of the alleged incident, the State did not want to punish 13-year-olds in adult court... they were not subject to bindover and, for the reason, jurisdiction in this general division is inappropriate.

(Tr. 143) The trial court went on to note that, since Mr. Orr was now well over 21-years-old, his case could not be litigated in the juvenile court. Accordingly, the court concluded that the State of Ohio could not properly pursue this prosecution in either adult or juvenile jurisdictions and, consequently, dismissed the case without prejudice.

The State appealed that dismissal to the Eighth District Court of Appeals, which similarly concluded that, "Orr could not have been tried as an adult under the law in effect at the time of the offense and thus, any application of current laws would violate the Due Process and Ex Post Facto Clauses of the Ohio and United States Constitutions." *State v. Orr*, 8th Dist. Cuyahoga No. 102460, 2015 Ohio 4081, ¶ 10.

This Court granted the State's request for leave to appeal from that decision on March 9, 2016. Mr. Orr responds to the State's argument herein.

ARGUMENT

The State of Ohio has asked this Court to pronounce as a Proposition of Law that –

R.C. 2152.02 (C)(3), R.C. 2151.23(I), and R.C. 2152.12(J) consider a person who committed a crime as a juvenile but apprehended after their 21st birthday an adult subject to prosecution in the general division. These provisions do not violate the Ex Post Facto Clause of the United States Constitution or Retroactivity Clause of the Ohio Constitution when applied to a person who committed the crime of rape prior to attaining the age of 15.

A. Summary of the Argument

Adopting such a proposition would be a mistake, and one which could encourage county prosecutors to delay charging some juvenile offenders until after their 21st birthdays, thereby avoiding juvenile jurisdiction altogether. Instead, this Court should issue a ruling proclaiming that where a juvenile is alleged to have committed an offense for which, under the law in effect at the time, he would not have been subject to adult jurisdiction under any circumstance, a delay in pursuing that charge until after the child's 21st birthday will preclude the charge's prosecution in either adult or juvenile jurisdiction. The circumstances under which such a rule would apply will be rare, as this case, indeed, is. But crafting such a rule will encourage timely juvenile adjudications and the needed intervention those adjudications entail. At the same time, it will prevent circumstances, like this one, where child offenders are arbitrarily treated, and potentially punished, like adults.

The misconduct for which the State of Ohio sought to prosecute Mr. Orr ostensibly occurred in 1993. Mr. Orr was then 13-years-old. Because, however, the Cuyahoga County Prosecutor's Office failed to seek Orr's indictment on the underlying misconduct until 2013, nearly 20 years, R.C. 2152.02 (C)(3) – enacted in 1997 – divested the juvenile court of jurisdiction it would have otherwise had over the case.

R.C. 2152.02(C)(3)³ provides that a child apprehended after age 21 must be prosecuted as an adult, and Mr. Orr was 36 when this indictment was issued. By operation of law therefore, Mr. Orr would be treated as if he committed the crime as an adult – even though he clearly had not been.

The near 20-year delay that elapsed before this prosecution was initiated violated Mr. Orr's rights to due process and a fair trial and sentencing, while also violating the Federal Constitution's *ex post facto* clause and the Ohio Constitution's Retroactivity Clause. As discussed further below, this matter's dismissal on those grounds, and the Eighth District's decision to affirm it, were justified given the unusual circumstances of this case.

- B. R.C. 2152(C)(3), R.C. 2151.23(I), and R.C. 2152.12(J), which require this case to be filed in adult, rather than juvenile, court violates the prohibition against *ex post facto* laws as prohibited by Article I, Section 10 of the United States Constitution and the Ohio Constitution's Retroactivity Clause because the offenses allegedly committed here occurred before these provisions were enacted.**

The prohibition against the enactment of an *ex post facto* law is an express limitation on the power of the Ohio General Assembly to enact laws. Article I, Section 10 of the United States Constitution. While the states retain the powers of legislation "... which are not expressly taken away by the Constitution of the United States," the prohibition against the enactment of *ex post facto* laws is a deeply rooted constitutional principle. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 387-388, 1 L.Ed. 648 (1796). See also *Stonger v. California*, 539 U.S. 607, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003).

³ As noted by the State of Ohio, R.C. 2151.23(I), and R.C. 2152.12(J) contain similar language.

Under Article I, Section 10 of the U.S. Constitution, the *Ex Post Facto* Clause commands that: “No state shall . . . pass any . . . ex post facto law . . .” The framers intended the *Ex Post Facto* Clause to ensure that legislation gives “fair warning of [the law’s] effect and permit[s] individuals to rely on the meaning until explicitly changed.” *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), citing *Dobbert v. Florida*, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). The U.S. Supreme Court has limited the constitutional prohibition on *ex post facto* laws to penal statutes which disadvantage the offender affected by them. *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990).

A law runs afoul of the *ex post facto* prohibition in four situations: 1) where it makes conduct undertaken before passing the law criminal, that theretofore had not been, and punishes it; 2) where it aggravates a crime, or makes it greater than it was, when committed; 3) where it changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed; and 4) where it alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. *Id.* at 42, 110 S.Ct. 2715, 111 L.Ed.2d 30, citing *Calder*, 3 U.S. (Dall.) 386, 390, 1 L.Ed. 648 (opinion of Chase, J.).

To determine if a law is *ex post facto*, the high court has applied a two-part analysis. First, is the law retrospective, i.e. does it apply to events occurring before its enactment? *Lindsey v. Washington*, 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937). Second, does the law disadvantage the offender affected by it by altering the definition of criminal conduct or increasing the punishment of the crime? *Weaver*, 450 U.S. at 29, 101 S.Ct. 960, 67 L.Ed.2d 17.

Article II, Section 28 of the Ohio Constitution, commonly referred to as the Retroactivity Clause, bars the General Assembly from passing retroactive laws. Analysis under Ohio's Retroactivity Clause is distinct from that required under the US Constitution's *Ex Post Facto* Clause. *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 23. Ohio's Retroactivity Clause broadly prohibits retroactive legislation impairing substantial rights, while the federal *Ex Post Facto* Clause applies only to criminal statutes. See *State v. Cook*, 83 Ohio St.3d 404, 410, 1998 Ohio 291, 700 N.E.2d 570 (1998), citing *California Dept. of Corrections v. Morales*, 514 U.S. 499, 504, 115 S. Ct. 1597, 131 L. Ed. 2d 588 (1995).

Like the *Ex Post Facto* Clause analysis, however, a Retroactivity Clause challenge is evaluated using a similar two-tiered framework. *Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829 at ¶ 10. First, the court determines whether the legislature expressed a clear intent that a statute apply retroactively, but does so in light of the presumption that legislation operates prospectively unless it is expressly made retrospective. R.C. 1.48. Second, the court considers whether the retroactive application of the statute can survive the constitutional limitation set forth in Ohio's Retroactivity Clause. *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 106, 522 N.E.2d 489 (1988).

A statute is retroactive if it penalizes conduct that occurred before its enactment. *State v. Williams*, 103 Ohio St.3d 112, 2004-Ohio-4747, 814 N.E.2d 818, ¶ 7. More specifically, retroactive laws are those that "reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time." *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, ¶ 40. In *Walls*, this Court held that the 1997 amendments to R.C. 2151 – those which divested the juvenile court of

jurisdiction over "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 that person attains twenty-one years of age" – were retroactive. *Id.* at 96 Ohio St.3d 437 at 443, 2002-Ohio-5059, 775 N.E.2d 829.

Nevertheless, this Court concluded that these juvenile statutes were merely remedial – meaning laws affecting the methods and procedures by which rights are recognized and enforced, rather than the substantive rights themselves. *Id.* Walls had been implicated in a 1985 murder, an offense for which he was always subject to prosecution in adult criminal courts, with or without the 1997 changes. Under the circumstances, this Court resolved that the 1997 law simply removed the possibility of a juvenile bindover proceeding, a process it concluded was typically remedial.

In Mr. Orr's case, on the other hand, that same statutory framework required his prosecution as an adult for a rape he was alleged to have committed at 13, when he would otherwise have remained under the auspices of the juvenile court. That difference is critical. The passage of time has not merely deprived Mr. Orr of a bindover hearing. It has transformed a civil proceeding devoted to the juvenile Orr's best interests into a criminal prosecution focused on his conviction and punishment.

It has also taken from Orr the right to be treated as a child – a distinction, the constitutional significance of which, this Court and the US Supreme Court have repeatedly acknowledged. See, *State v. Long*, 138 Ohio St. 3d 478, 2014-Ohio-849, where this Court expressly held that "youth is a mitigating factor for a court to consider when sentencing a juvenile." *Long*, 138 Ohio St. 3d 478, 2014-Ohio-849, ¶ 19; and *In re C.P.*, 131 Ohio St.3d 513, 528, 2012 Ohio 1446 (acknowledging that since juveniles generally have "twice diminished moral culpability," the penological goal of rehabilitation enjoys

heightened importance.) In *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011(2010), the US Supreme Court 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. Accord, *Miller v. Alabama*, 567 U.S. ___, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012) (Mandatory sentencing schemes which necessarily "prevent the sentencer from considering youth and from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender" were unconstitutional.)

For these reasons, the retroactive application of R.C. 2152(C)(3), R.C. 2151.23(I), and R.C. 2152.12(J) to Mr. Orr for misconduct he allegedly committed in 1993 when he was 13 years old, violates both the Retroactivity and Ex Post Facto Clauses. In 1993, when the complainant maintained the misconduct occurred, she promptly reported the incident to the police. According to the record of proceedings, the complainant knew who Orr was at the time and she provided the police with his description. (Tr. 138) A rape kit was taken, but then it was shelved somewhere and forgotten. The State of Ohio has never explained why it waited nearly 20 years before submitting the evidence collected for forensic and DNA testing. But it is clear that it could have investigated the case and did not.

Had Orr, who was only 13-years-old in 1993, been arrested for the offense contemporaneously with the complainant's allegations, his case would have been disposed of in Juvenile Court. Nevertheless, Mr. Orr was not indicted for the offenses until May of 2013. In 1997, the General Assembly enacted R.C. 2151.25(G). According to that provision juvenile offenders not apprehended until after their 21st birthdays must be treated as adults. The law has since been re-codified under R.C. 2152(C)(3) and R.C. 2152.12(J) but the gist is the same.

The 1997 amendment⁴ and the re-codifications thereafter, upon with the State of Ohio rely here, now require anyone apprehended after their 21st birthday for misconduct allegedly committed before the age of 18, to be treated as an adult. Under the amended statutory framework, Orr necessarily faced adult prosecution, a potential criminal conviction, and a lengthy prison sentence. Under the law in effect at the time of the alleged incident, however, his only concern would have been a juvenile adjudication (which is not criminal in nature) and involvement of some kind in the juvenile system. *In re Anderson*, 92 Ohio St.3d 63, 2001 Ohio 131. Solely due to the Cuyahoga County Prosecutors Office's failure to diligently do its job, Orr faced starkly contrasting legal landscapes and consequences.

This Court's reasoning in *Walls* and *Warren* required this prosecution's dismissal.

In arguing that the trial court's decision to dismiss Orr's indictment was erroneous, the State maintains that this Court considered and rejected this very argument in two decisions: *Walls*, 96 Ohio St.3d 437, 2002 Ohio 5059; and then later in *State v. Warren*, 119 Ohio St.3d 200, 2008 Ohio 2011. According to the State, these decisions not only call for Orr's prosecution as an adult, but also make it clear that there is no constitutional impediment to such a prosecution. While these cases no doubt have bearing on this discussion, they actually call for a different result than the one the State here seeks. In fact, a careful reading of those cases make is plain that the trial court's decision to dismiss Orr's prosecution was not only proper, but constitutionally mandated.

⁴ Orr was still a juvenile in 1997, and, in fact, could have been treated as one up until 2001, even under the new law.

As noted above, in *Walls*, 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. 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 and, 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, however, concluded that the amended law applied and its retroactive application to Mr. Walls did not violate the Retroactivity or *Ex Post Facto* Clauses. In reaching these conclusions, however, the Court made it clear that, given the nature of the crime – aggravated murder – and his age (15), Walls would have been subject to adult prosecution whether R.C. 2151.26 existed or not. In that case, the bindover proceeding would have been a mere formality. *Id.* at 447 (¶27). Accordingly, the Court concluded that the mandatory transfer statute was only remedial, not substantive.

The circumstances in *Warren* are similar. In 2004, Reginald Warren was charged with rape under R.C. 2907.02 stemming from conduct that allegedly occurred in 1988, when he was 15 years old. Because the complainant was under thirteen in 1988, and she claimed he used force, Warren was automatically subject to a life sentence upon conviction. Warren argued that, as applied in his case, R.C. 2152.02(C)(3) and R.C. 2907.02 operated to violate his right to due process clause and a fair trial and sentencing.

In rejecting Warren's claim, this Court likened the case to *Walls*, observing the following:

Most important, as in *Walls*, the application of the statutes requiring that Warren be tried as an adult in common pleas court (in this case, R.C. 2152.02(C)(3), 2151.23(I), and 2152.12(J)) cannot be viewed as affecting a substantive right because under either the 1985 bindover law or the 1997 law that was applied to him, Warren was on notice that the offense[s] he allegedly committed could subject him to criminal prosecution as an adult in the general division of the court of common pleas. *Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶ 17.

Warren, 2008-Ohio-2011, ¶ 49, 118 Ohio St. 3d 200, 210 (emphasis added). In both cases, this Court stressed that the defendants were on notice that they would be subject to a bindover proceeding, which was likely to result in their prosecution as adults.

Moreover, this court went on to point out that:

[A]lthough Warren "perhaps remained eligible for retention within the jurisdiction of the juvenile court under a technical reading of the old statutes, the practical reality is that [he] had virtually no chance of being kept in the juvenile system." *Walls*, at ¶ 31. As in *Walls*, any bindover hearing under the statute that was in place in 1988 would have been simply a procedural step in the process of transferring Warren for prosecution as an adult. *Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, at ¶ 41.

Warren, 2008-Ohio-2011, ¶ 50, 118 Ohio St. 3d 200, 210. Accordingly, in both cases, this Court concluded that the bindover into adult court was virtually automatic, given the defendants' ages and the crimes alleged. Because the respective defendants' adult prosecution was largely a foregone conclusion, the bindover proceeding itself was merely remedial rather than substantive.

Orr, on the other hand, was never on notice that he could be subject to criminal prosecution – because he could not have been. According to this Court's reasoning in *Warren* and *Wall* Mr. Orr was entitled to relief under the retroactivity, *ex post facto*, or, as argued below, due process clauses. Because Orr was so young at the time the offenses

allegedly occurred, he was simply not eligible for bindover at the time of the incident. Only the changes in the law in 1997, and the passage of time – he became an adult in 2001 – rendered this adult prosecution possible. Under the circumstances, and *Walls* and *Warren* make it clear dismissal was the correct result, Orr’s prosecution as an adult for a crime allegedly committed at the age of 13, and the statutory provisions that require this prosecution, are unconstitutional as applied to his unique circumstances.

C. R.C. 2152(C)(3), R.C. 2151.23(I), and R.C. 2152.12(J), are also unconstitutional as applied to the extent that they require Mr. Orr to be treated and punished as an adult for crimes that allegedly occurred when he was 13 years old and otherwise ineligible for adult prosecution violating his rights to due process and a fair trial and sentencing.

This prosecution was otherwise barred under the due process clause. Both the Ohio and United States 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. In Mr. Orr’s case, his treatment as an adult for offenses allegedly committed when he was a child deprives him of his liberty without due process. *Vitek v. Jones*, 445 U.S. 480, 493-494, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980). This is not a case where Mr. Orr would have been subject to a bindover procedure – of any kind. Had this case been timely prosecuted, Orr could not have been treated as an adult. Nevertheless, because so much time had passed since the alleged incident, the State sought to prosecute and punish him as an adult for juvenile misconduct.

Adolescents are Different from Adults

Adolescence is a distinct period of development between childhood and adulthood characterized by increased experimentation and risk taking, a tendency to

discount long-term consequences, and heightened sensitivity to peers and other social influences. A key function of adolescence is developing an integrated sense of self, including individuation, separation from parents, and personal identity.

Experimentation and novelty-seeking behavior, such as alcohol and drug use, unsafe sex, and reckless driving, are thought to serve a number of adaptive functions despite their risks.⁵

Adolescents differ from adults and children in three important ways that lead to differences in behavior. First, adolescents have less capacity for self-regulation in emotionally charged contexts, relative to adults. Second, adolescents have a heightened sensitivity to proximal external influences, such as peer pressure and immediate incentives, relative to children and adults. Third, adolescents show less ability than adults to make judgments and decisions that require future orientation. See, accord, *Graham*, 560 U.S. 48, 68-72, 130 S.Ct. 2011, 176 L.Ed.2d 825; and *Miller*, 567 U.S. ___, 132 S.Ct. 2455, 2463-64, 183 L.Ed.2d 407. The combination of these three cognitive patterns accounts for the tendency of adolescents to prefer and engage in risky behaviors that have a high probability of immediate reward but can have harmful consequences.

Accordingly, the law has come to recognize that, as 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 . .

⁵ Steinberg & Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003).

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*, 455 U.S. 104 at 115-116, 102 S.Ct.869, 71 L.Ed.2d 1 (quoting *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S.Ct. 3035, 61 L.Ed. 2d 797 (1979)). See also, e.g., *Johnson v. Texas*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (“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 v. Minnesota*, 497 U.S. 417, 480, 482-483, 110 S.Ct.2926, 111 L.Ed.2d 344 (1990) (Kennedy, J., concurring in the judgment and dissenting in part) (noting “the qualitative differences in maturity between children and adults”); *Parham v. J.R.*, 442 U.S. 584, 603, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) (“Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions.”).

This longstanding recognition that adolescents are unique has been used to justify the many laws that treat them differently from adults. See, *Thompson v. Oklahoma*, 487 U.S. 815, 825, 108 S.Ct. 2687, 101 L.Ed.2d 702 (1988); and *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 71 S.Ct. 2d. 1 (1982); noting the 1978 Report of the Twentieth Century Fund Task Force of Sentencing Policy Toward Young Offenders. In fact, the need to treat adolescents differently from adults generated the creation of a distinct juvenile court. America’s system of juvenile justice was founded on the premise that, because of their immaturity, young people accused of crimes should be treated differently from adults.

The Juvenile Justice System is Different from Adult Criminal Courts

Given the distinctions between adults and children, the juvenile justice system was created to treat youngsters differently. Established in 1899, juvenile courts in America were intended to meet the special needs of children in the criminal justice system. Historically the system aspired to remove the taint of criminality from juvenile misdeeds and to keep children from perpetuating criminal behavior as adults.

In the 1990's, however, concerns driven by an increase in juvenile crime prompted lawmakers to increase penalties for juveniles and spawned a movement to treat them more like adults.⁶ Those concerns prompted changes which made it easier to treat increasingly younger children as adults. Even with those changes, however, Orr would not have met the bindover criteria for the instant offense. Recent research on adolescent development, however, has called into question the core assumptions that drove the criminalization of juvenile justice policy in the last decade of the 20th and early in the 21st centuries.

⁶ 121 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).

Notwithstanding that criminalization process, juvenile proceedings have always been, and remain civil, not criminal in nature. *Cope v. Campbell*, 175 Ohio St. 475 (1964). By definition, then, a delinquency adjudication in juvenile court is not a criminal conviction. *Schall v. Martin*, 467 U.S. 253, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984); *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (plurality opinion). Rather, juvenile courts, acting in the best interests of the child, fashion dispositions for delinquents which are geared toward making that child a responsible adult. Depending on the case, adjudicative and dispositional decision-making requires the juvenile judge to assess culpability by reviewing the evidence, entertaining arguments from counsel, and (often) consulting with a guardian *ad litem*, whose sole responsibility is to press for the best interests of the child. Throughout the process one concept remains inviolate – the juvenile court acts as society’s representative to advance a child’s best interests. Consistent with that goal, in 1993, when the incident underpinning the charges in this case allegedly occurred, R.C. 2151.01⁷ established that the Juvenile Court’s purpose was –

- (A) To provide for the care, protection, and mental and physical development of children subject juvenile court jurisdiction;
- (B) To protect the public interest in removing the consequences of criminal behavior and the taint of criminality from children committing delinquent acts and to substitute therefor a program of supervision, care, and rehabilitation; and
- (C) To achieve the foregoing purposes, whenever possible, in a family environment, separating the child from its parents only when necessary for his welfare or in the interests of public safety.

⁷ R.C. 2151.01 was, thereafter, superseded by R.C. 2152.01, which also makes “protect[ing] the public interest and safety, hold[ing] the offender accountable for the offender’s actions, restor[ing] the victim, and rehabilitat[ing] the offender,” as Juvenile Court goals.

Because the child's best interest is the juvenile court's overriding concern, juveniles are not convicted and sentenced as adults. Instead, we adjudicate them delinquent and dispose of their cases with an assortment of available sanctions intended to treat or help them. Juvenile proceedings are distinguishable from adult proceedings in that they are noncriminal and decidedly informal. Their consequences are not intended to be permanent. Had Orr's case been timely prosecuted, he would have been adjudicated and disposed of in a system designed to "protect" "supervise" "care for" and "rehabilitate" him.

By contrast, the criminal courts are created to punish and incapacitate the offender. At the most fundamental level, therefore, the criminal justice system is demonstrably and intentionally more punitive. The near 20-year delay in initiating the charges against Mr. Orr forced him from an informal system dedicated to treating and serving his best interests; to one largely focused on prosecuting and punishing him. The increased punishment created by the provisions enacted since 1997, which require his automatic prosecution as an adult – violates Orr's right to due process.

Due process requires that in ascertaining an offender's culpability for a crime, the trial court must take account of the offender's minority status at the time of the offense. The High Court stated this principle expressly in *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1(2004), 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.

Id. at 571, 125 S.Ct. 1183, 161 L.Ed.2d 1. This Court has similarly acknowledged that minors are different, their characters less formed, and personalities more transitory. *In re D.S.*, 111 Ohio St.3d 361, 364, 2006 Ohio 5851. Accordingly, the Ohio Supreme Court recently acknowledged that even in the worst cases, a juvenile offender's youth must be separately considered in mitigation of the penalty imposed. See, *State v. Long*, 138 Ohio St.2d 478, 2014 Ohio 849.

The 20-year delay reflected here not only foreclosed Orr's treatment in the juvenile system, it would have hamstrung the trial court's ability to treat his youth as a mitigating factor in the event a sentence must be imposed. Under the circumstances, R.C. 2152.02(C)(3) and 2152.12(J), as applied to Darrell Orr, created a substantial violation of his rights to due process of law and a fair sentencing hearing under Sections 10 and 16, Article I of the Ohio Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

D. The near 20 year delay in prosecuting this case also violated Mr. Orr's Constitutional Right to a Prompt Indictment.

In addition, or alternatively, the Due Process Clause also protects the right to a prompt indictment. *United States v. Marion*, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971). In *Marion*, the Supreme Court observed that statute of limitations is "the primary guarantee against bringing overly stale criminal charges." *Marion, supra*, at 322, 92 S.Ct. 455, 30 L.Ed.2d 468. But it went on to "acknowledge that the 'statute of limitations does not fully define (defendants') rights with respect to the events occurring prior to indictment,' 404 U.S. 307 at 324, 92 S.Ct. 455, 30 L.Ed.2d 468, and that the Due Process Clause has a limited role to play in protecting against oppressive delay."

In *United States v. Lovasco*, 431 U.S. 783, 789, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977), the US Supreme Court fashioned a two-part test to determine if pre-indictment delay violates due process. Under that test, the defendant must show that the delay caused actual prejudice. *Lovasco* at 789, 97 S.Ct. 2044, 52 L.Ed.2d 752. Where the defendant shows such prejudice, it then falls on the State to produce evidence that purports to justify the delay.

In *State v. Luck*, 15 Ohio St.3d 150, 472 N.E.2d 1097 (1984), this Court found that principle in the Ohio Constitution as well as the Due Process Clause.

An unjustifiable delay between the commission of an offense and a defendant's indictment therefor, which results in actual prejudice to the defendant, is a violation of the right to due process of law under Section 16, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution.

Id. at paragraph two of the syllabus. In acknowledging that a due process violation could spring from certain delays, this Court adopted the approach articulated in *Lovasco*, that “the prejudice suffered by the defendant must be viewed in light of the state's reason for the delay.” *Id.* at 153. This Court's prejudice analysis focused on the loss of a witness named Cassano, who had died during the 15 year delay between the crime and the indictment. Luck told the police that Cassano was in the apartment at the time of the killing – in fact, the police originally considered him a suspect – and was “the one person who could have helped her.” This Court found that Cassano's loss, as well as the loss of all the witness interviews and statements, demonstrated actual prejudice.

In looking at the delay and the reasons underlying it, this Court noted that “when the state, through negligence or error in judgment, effectively ceases the active investigation of a case, but later decides to commence prosecution upon the same

evidence that was available to it at the time that its active investigation was ceased.” *Id.* at 158. Finding that the delay in Luck’s prosecution met that standard, this Court affirmed the dismissal. Similarly, in *State v. Whiting*, 84 Ohio St. 3d 215, 217, 1998 Ohio 575, this Court applied this analysis to an actual prejudice claim over a 14-year delay. *Whiting* noted that the delay rendered his alibi witnesses unavailable and that some of the physical evidence obtained in the original investigation was also gone. As for any justification for the delay, this Court held that the burden was on the State to provide it.

Accordingly, Mr. Orr recognizes that delay alone is not enough to justify the charges’ dismissal under a prejudicial preindictment delay analysis. As noted above, this delay was uniquely prejudicial in that it transformed the case from a purely juvenile matter to an adult criminal prosecution with a potentially lengthy sentence. That outcome alone ought to have been enough, but because, the delay was so long, the prejudice runs deeper. Twenty years have elapsed since the complainant reported the incident to the police. The parties involved have aged considerably since 1993. Mr. Orr was a child at the time, and appears vastly different now as an adult. Any identification the complainant might make of Mr. Orr now as opposed to 20 years ago, is itself problematic based on the passage of time. The passage of time also hampers the identification and location of witnesses. To the extent that Mr. Orr might be able to provide evidence in defense of the charges, his ability to secure such evidence or witnesses is necessarily handicapped.

With respect to any justification for this delay, it should be underscored, that none of it can be attributed to Mr. Orr. The 14-year-old complainant knew who Mr. Orr was at the time the incident allegedly occurred. State has been in possession of the rape

kit evidence since then. This evidence could have been tested years ago. In fact, BCI was able to test that material for a DNA match in the late 1990's *when Orr was still a juvenile*.⁸ Nevertheless, the State of Ohio waited until 2013 to submit that rape kit to BCI for testing. There is no explanation for this delay other than negligence – even gross negligence.

During the 19 plus years that the State of Ohio sat on the rape kit evidence, the General Assembly passed the various amendments addressed herein to the Juvenile Court act, thereby removing all juveniles apprehended after the age of 21 from that Court's jurisdiction. Accordingly, by operation of law and the passage of time – factors over which Orr had no control – he was automatically treated as if he committed this misconduct as an adult, rather than as a juvenile. See also, R.C. 2152.12(J) (a child apprehended after age 21 must be prosecuted as an adult). As an adult, his sentencing exposure in the event of guilty verdict was considerable compared to what he faced as a juvenile. Orr was charged with two first degree felony offenses and one third degree felony. While some of the charges may have merged, he still faced substantial, i.e. double digit, prison time. As a juvenile, on the other hand, his potential for DYS confinement would have been extraordinarily limited.

The delay was wholly the result of the State's negligence in failing to timely submit the rape kit evidence gathered in this case. That near 20-year delay is simply unjustifiable and warranted the indictment's dismissal.

⁸ According to the testimony of BCI employee Heather Bizub during the recent prosecution of Roosevelt Martin (CR572966(B); 8th Dist. Cuyahoga No. CA 100753), it was "common for BCI to perform DNA testing in the late 1990's." (Tr. 700-701) the Court of Appeals vacated Martin's conviction after concluding that the prosecution had violated the Statute of Limitations. See, *State v. Martin*, 8th Dist. Cuyahoga No. 100753, 2015 Ohio 761.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Darlell Orr asks this Court to find that R.C. 2152(C)(3), R.C. 2151.23(I), and R.C. 2152.12(J) are unconstitutional as applied to his case; and to affirm the trial court's decision to dismiss this prosecution based on any or all of the grounds provided herein.

Respectfully Submitted,

Erika B. Cunliffe

ERIKA B. CUNLIFFE
Counsel for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Appellee's Brief was served on all parties to this action via email or by regular U.S. Mail, postage pre-paid to their respective addresses on this 20th day of July, 2016.

Erika B. Cunliffe

ERIKA B. CUNLIFFE

APPENDIX

R.C. 2151.26
BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XXI COURTS--PROBATE--JUVENILE
CHAPTER 2151 JUVENILE COURT
PRACTICE AND PROCEDURE

2151.26 RELINQUISHMENT OF JURISDICTION FOR PURPOSE OF CRIMINAL PROSECUTION

(A)(1) Except as provided in division (A)(2) of this section, after a complaint has been filed alleging that a child is a delinquent child for committing an act that would constitute a felony if committed by an adult, the court at a hearing may transfer the case for criminal prosecution to the appropriate court having jurisdiction of the offense, after making the following determinations:

(a) The child was fifteen years of age or older at the time of the conduct charged;
(b) There is probable cause to believe that the child committed the act alleged;
(c) After an investigation, including a mental and physical examination of the child made by a public or private agency or a person qualified to make the examination, and after consideration of all relevant information and factors, including any fact required to be considered by division (B)(2) of this section, that there are reasonable grounds to believe that:

(i) He is not amenable to care or rehabilitation or further care or rehabilitation in any facility designed for the care, supervision, and rehabilitation of delinquent children;
(ii) The safety of the community may require that he be placed under legal restraint, including, if necessary, for the period extending beyond his majority.

(2) After a complaint has been filed alleging that a child is a delinquent child for committing an act that would constitute aggravated murder or murder if committed by an adult, the court at a hearing shall transfer the case for criminal prosecution to the appropriate court having jurisdiction of the offense, if the court determines at the hearing that both of the following apply:

(a) There is probable cause to believe that the child committed the alleged act.
(b) The child previously has been adjudicated a delinquent child for the commission of an act that would constitute aggravated murder or murder if committed by an adult.

(B)(1) The court, when determining whether to transfer a case pursuant to division (A)(1) of this section, shall determine if the victim of the delinquent act was sixty-five years of age or older or permanently and totally disabled at the time of the commission of the act and whether the act alleged, if actually committed, would be an offense of violence, as defined in section 2901.01 of the Revised Code, if committed by an adult. Regardless of whether or not the child knew the age of the victim, if the court determines that the victim was sixty-five years of age or older or permanently and totally disabled, that fact shall be considered by the court in favor of transfer, but shall not control the decision of the court. Additionally, if the court determines that the act alleged, if actually committed, would be an offense of violence, as defined in section 2901.01 of the Revised Code, if committed by an adult, that fact shall be considered by the court in favor of transfer, but shall not control the decision of the court.

(2)(a) As used in division (B)(2)(b) of this section, "foreign jurisdiction" means any state other than this state, any foreign country or nation, or any province, territory, or other political subdivision of any foreign country or nation.

(b) The court, when determining whether to transfer a case pursuant to division (A)(1) of this section, shall determine whether the child is domiciled in this state or in a foreign jurisdiction and, if the child is domiciled in a foreign jurisdiction, whether the law of that foreign

jurisdiction would subject him to criminal prosecution as an adult for the alleged act without the need for any transfer of jurisdiction from a juvenile, family, or similar noncriminal court to a criminal court if that act had been committed in that foreign jurisdiction. If the court determines that the child is domiciled in a foreign jurisdiction and that, if the alleged act had been committed in that foreign jurisdiction, the law of that foreign jurisdiction would subject him to criminal prosecution as an adult for that act without the need for any transfer of jurisdiction from a juvenile, family, or similar noncriminal court to a criminal court, the court shall consider that fact, along with all other relevant information and factors, in determining whether there are reasonable grounds to believe that the child is not amenable to care or rehabilitation or further care or rehabilitation, as described in division (A)(1)(c)(i) of this section, and whether there are reasonable grounds to believe that the safety of the community may require that the child be placed under legal restraint, as described in division

(A)(1)(c)(ii) of this section.

(C) The child may waive the examination required by division (A)(1)(c) of this section, if the court finds the waiver competently and intelligently made. Refusal to submit to a mental and physical examination by the child constitutes waiver of the examination.

(D) Notice in writing of the time, place, and purpose of any hearing held pursuant to division (A) of this section shall be given to the child's parents, guardian, or other custodian and his counsel at least three days prior to the hearing.

(E) No child, either before or after reaching eighteen years of age, shall be prosecuted as an adult for an offense committed prior to becoming eighteen, unless the child has been transferred as provided in this section. Any prosecution that is had in a criminal court on the mistaken belief that the child was eighteen years of age or older at the time of the commission of the offense shall be deemed a nullity, and the child shall not be considered to have been in jeopardy on the offense.

(F) Upon such transfer, the juvenile court shall state the reasons for the transfer and order the child to enter into a recognizance with good and sufficient surety for his appearance before the appropriate court for any disposition that the court is authorized to make for a like act committed by an adult. The transfer abates the jurisdiction of the juvenile court with respect to the delinquent acts alleged in the complaint.

(G) Any child whose case is transferred for criminal prosecution pursuant to this section and who subsequently is convicted in that case thereafter shall be prosecuted as an adult in the appropriate court for any future act that he is alleged to have committed that if committed by an adult would constitute the offense of murder or aggravated murder, or would constitute an aggravated felony of the first or second degree or a felony of the first or second degree.

HISTORY: 1991 H 27, eff. 10-10-91

1986 H 499; 1983 S 210; 1981 H 440; 1978 S 119; 1971 S 325; 1969 H 320

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES Note: Former 2151.26 repealed by 1969 H 320, eff. 11-19-69; 132 v H 343; 1953 H 1; GC 1639-32.

UNCODIFIED LAW

Note: 1991 H 27, § 3, eff. 10-10-91, reads: The provisions of section 2151.26 of the Revised Code, as amended by this act, apply only to offenses that are committed on or after the effective date of this act.

2151.26 RELINQUISHMENT OF JURISDICTION FOR PURPOSE OF..., R.C. 2151.26

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REFERENCES

PRACTICE AND STUDY AIDS

Merrick-Rippner, Ohio Probate Law (4th Ed.), Text 217.04(A), 219.02(B)(C), 221.01(D), 223.07(B), 223.09(A), 223.10(B)(C), 223.12(B), 223.14(A), 225.01(K); Forms 223.75

Kurtz & Giannelli, Ohio Juvenile Law (2d Ed.), Text 1.04, 3.01, 3.02, 3.10(A)(B), 7.08(B), 9.01, 9.02(A) to (D), 9.03(A)(C)(D)(I), 9.04(B), 13.07(C), 13.10, 15.01(B)

CROSS REFERENCES

Relinquishment of jurisdiction, procedure, Juv R 30

Social history, physical and mental examinations, custody investigation, Juv R 32

LIBRARY REFERENCES

OJur 3d: 22, Courts and Judges § 345; 25, Criminal Law § 379; 26, Criminal Law § 668; 46, Family Law § 359, 409 to 412, 558, 584; 72, Notice and Notices § 1 to 5, 8, 27 to 30

Am Jur 2d: 47, Juvenile Courts and Delinquent and Dependent Children § 19

Right of other person on trial for crime to invoke privilege as to communications by a juvenile delinquent to juvenile court. 2 ALR2d 652

Homicide by juvenile as within jurisdiction of a juvenile court. 48 ALR2d 663