IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

Superior Court Docket No.
852 WDA 2013

In re: O.M.

REPLY BRIEF

Appeal from the Orders of the Honorable John J. Driscoll
Entered on April 12, 2013 and May 2, 2013 in the Court of Common Pleas of Westmoreland County, Pennsylvania, Family Division, Juvenile Section at Docket No. JP-028637

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I. UNITED STATES SUPREME COURT JURISPRUDENCE CONFIRMS THAT THE INDIVIDUAL'S AGE AT THE TIME OF THE OFFENSE MUST BE CONSIDERED IN ASSESSING THE PUNITIVE NATURE OF A STATUTE.

In its Brief, the Commonwealth states that "[t]he standard as to whether a statute is punitive should not change simply due to an individual's age." Brief of Appellee at 9. The Commonwealth's argument fundamentally misses the point. The parties agree that whether a law is punitive[1] is analyzed under the Supreme Court's seven-factor test. *Kennedy v. Mendoza–Martinez*, 372 U.S. 144, 168-69 (1963); *Lehman v. Pennsylvania State Police*, 839 A.2d 265, 271. (Pa. 2003). Appellant's opening brief makes clear, however, that the fact that kids are different must be considered in the analysis. *See* Brief of Appellant at 44-59

[1] Whether SORNA as applied to juveniles violates the *Ex Post Facto* clauses of the Pennsylvania and United States Constitutions was not expressly raised as a question presented in appellant's Statement of Errors Complained of on Appeal. However, the issue is a necessary corollary and subsidiary issue of the ultimate question of whether SORNA is excessive punishment.

(noting numerous times that as applied to children, SORNA imposes more disabilities, is not rationally related to the Legislature's aims, and is extraordinarily excessive in relation to its purported purpose). Indeed, the United States and Pennsylvania Supreme Courts have repeatedly held that a child's age and immaturity is almost uniformly considered in determining whether a law may constitutionally apply to kids. And in nearly every case, a child's unique developmental status and attributes alter the result.

For example, in 2005, the Court held that the death penalty, a punishment still imposed on adult criminal defendants, could not be imposed on individuals who were juveniles at the time of their offense because it violated the Eighth Amendment's ban on cruel and unusual punishment. *Roper v. Simmons*, 543 U.S. 551 (2005). Five years later, the Court extended this ruling to the imposition of life without parole on juveniles convicted of non-homicide offenses, *Graham v. Florida*, 130 S. Ct. 2011 (2010), and most recently in *Miller v. Alabama*, the Court held that the mandatory imposition of life without parole sentences on juveniles convicted of homicide violated the Eighth Amendment. 132 S.Ct. 2455 (2012). Acknowledging the unique status of juveniles and reaffirming its recent holdings in

Roper, *Graham*, and *J.D.B.*, the Court in *Miller* held that "children are constitutionally different from adults for purposes of sentencing," *id*. at 2464, and therefore the "imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children." *Id*. at 2466. Justice Kagan, writing for the majority in *Miller*, was explicit in articulating the Court's rationale for its holding: the mandatory imposition of sentences of life without parole "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and greater 'capacity for change,' and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties." *Id*. (quoting *Graham*, 130 S. Ct. at 2026-27, 2029-30). Indeed, it should be emphasized that Pennsylvania has a longstanding commitment to providing special protections for minors. For example, the Pennsylvania Supreme Court has recognized the special status of adolescents, and has mandated that a court determining the voluntariness of a youth's confession must consider the youth's age, experience, comprehension, and the presence or absence of an interested adult.

Commonwealth v. Williams, 504 Pa. 511, 521 (1984). In light of the text of the Pennsylvania Constitution, the Commonwealth's historic recognition of the special status of juveniles, recent knowledge about adolescent development, and Pennsylvania's policies, it is clear that Pennsylvania courts must consider a child's age when determining the punitive nature of a law.

A. Social Science Confirms That Juveniles Are Different From Adults And The Law Must Reflect These Findings

Grounding its holding "not only on common sense . . . but on science and social science as well," *id*. at 2464, which demonstrate fundamental differences between juveniles and adults, the *Miller* Court noted "that those [scientific] findings – of transient rashness, proclivity for risk, and inability to assess consequences – both lessened a child's 'moral culpability' and enhanced the prospect that, as the years go by and neurological development occurs, his 'deficiencies will be reformed.'" *Id*. at 2464-65 (quoting *Graham*, 130 S. Ct. at 2027; *Roper v. Simmons*, 543 U.S. at 570. Therefore, the fact that a sentence may be acceptable for an adult does not dictate that the same punishment is acceptable for a child.

It is well-established that children and adolescents have a "lack of maturity and an underdeveloped sense of responsibility," are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," and their characters are "not as well formed." *Graham*, 130 S. Ct. at 2026 (quoting *Roper*, 543 U.S. at 569-70). These characteristics clearly differentiate a child's actions from those of an adult; "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds." 130 S. Ct. at 2026 The Court in *Graham* held that based on this reasoning, a juvenile could not be reliably classified among the worst offenders for purposes of sentencing. *Id*. But the *Graham* majority was also unequivocal in its insistence that irrevocable judgments about the character of juvenile offenders are impermissible under the Constitution – at least where they deny juveniles any opportunity to prove their rehabilitation and their eligibility to re-enter society. Both *Graham* and *Roper* are explicit in their belief that a juvenile offender's capacity to change and grow, combined with their reduced blameworthiness and inherent immaturity of

judgment, set them apart from adult offenders in fundamental – and constitutionally relevant – ways. The registration decision is based solely on the adjudication without determination of its need or the individual's amenability to treatment and rehabilitation. It is precisely this feature of SORNA that is directly at odds with the Court's reasoning in *Graham* and *Roper*.

Graham and *Roper* confirmed that neurological science is integral to the analysis of children's constitutional rights. Research in developmental psychology and neuroscience since *Roper* "strengthens the conclusion that…juveniles—including older adolescents—are less able [than adults] to restrain their impulses and exercise self-control; less capable of considering alternative courses of action and maturely weighing risks and rewards; and less oriented to the future and thus less capable of apprehending the consequences of their often-impulsive actions," even when these impulsive actions lead to heinous criminal offenses. Brief of American Psychological Association, et al. as *Amici Curiae* Supporting Petitioners, *Graham v. Florida* and *Sullivan v. Florida*, 130 S. Ct. 2011 (2010) (Nos. 08-7412, 08-7621), 2009 WL 2236778 at 3-4. Various psychosocial factors can undermine

adolescent decision-making and thus result in immature judgment; immature judgment, in turn, factors into the choices that adolescents make when engaging in conduct prohibited by the criminal law. Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 37-44 (Harvard University Press 2008). They include:

Risk-taking and minimizing risk. Risk-taking behavior peaks in adolescence. An adolescent may pursue a different course of action than an adult when faced with the same situation because the adolescent does not consider all the possible outcomes of his or her actions. Jennifer Woolard, *Adolescent Development, in Toward Developmentally Appropriate Practice: A Juvenile Court Training Curriculum* at 6 (2009). Youth do not perceive or weigh risks accurately, and indeed, "it is statistically aberrant to refrain from such [risk-taking] behavior during adolescence." L.P. Spear, *The Adolescent Brain and Age-Related Behavioral Manifestations, in Neuroscience and Biobehavioral Reviews, 24*, 417, 421 (2000). Moreover, in comparison to adults, adolescents attach a higher value to the possible benefits of risk taking. Scott & Steinberg, *supra*, at 42. Adolescents are more likely to act on impulse and less able to exercise self-control, and such impulsivity is characteristic of adolescence. APA Brief, *supra*, at 7. Just as a teenager might take off without hesitation on his skateboard down a hill which

adults would consider dangerous, he might also engage in sexual activities without regard to the consequences to himself or others.

Sensation-seeking. Sensation-seeking is the need for varied, novel, and complex experiences and the willingness to take physical and social risks to obtain such experiences. Because adolescents value new experiences more than adults do, they may engage in risky behaviors because they are enticed by the excitement and novelty of these activities. Woolard, *supra,* at 6.

Present-oriented thinking. Adolescents view time differently than adults. Generally, adolescents may seem unable to think about the future (i.e., they cannot consider anything beyond the present) or they discount the future and place more consideration on the short-term risks and benefits of decisions. *Id*. Children such as O.M. should not be held to the same standard as adults who are fully capable of understanding future consequences but still choose to engage in conduct that the law proscribes.

Additionally, recent advances in imaging technology have revealed new information about the adolescent brain that confirms the findings of the developmental research described herein*:*

> The parts of the brain controlling higher-order functions (e.g., reasoning, judgment, inhibitory control) develop after other parts of the brain controlling more basic functions (e.g., vision, movement). As a result, the prefrontal cortex—the brain's "CEO" that controls important decision-making processes—is the last to develop. In fact,

> researchers believe that the prefrontal cortex does not fully develop until one's early 20s. Because the prefrontal cortex governs so many aspects of complex reasoning and decision-making, it is possible that adolescents' undesirable behavior may be significantly influenced by their incomplete brain development.

Id. at 19-20. *See also* APA Brief, *supra*, at 27 (noting that the part of the brain that is critical for control of impulses and emotions and mature, considered decision-making is still developing during adolescence). The frontal lobes of the brain are critical for response inhibition—i.e, the ability to control one's impulses.

Adolescents are more likely to experiment and engage in reckless, impulsive behaviors because the frontal lobes do not fully develop until young adulthood. Incomplete development of the frontal lobes is also related to poorer decision-making in adolescence. Woolard, *supra*, at 20.

"Adolescents acquire biologically driven preferences for novel stimuli and may also believe that they are `untouchable' . . . Chemical changes in the brain that are a normal part of adolescent development may lead teenagers to engage in specific types of risk-taking behavior, such as drug and alcohol use." *Id*. Thus, neuroscience has confirmed that the sensation-seeking, risk minimizing, and perceived invulnerability discussed in this section that is characteristic of adolescence is, in fact, also a biological phenomenon.

For all these reasons, Courts have consistently held that a child's age at the time of the offense must be considered when determining a statute's punitive nature.

B. SORNA Applied To Children Is Not Equivalent To Earlier Versions Of Megan's Law Applied To Adults.

The Commonwealth's Brief further reasons that "Pennsylvania courts have determined that the stricter registration requirements of adult offenders are not punitive and are not protected under the Eighth Amendment." Brief of Appellee at 10 (internal citations removed). The Commonwealth's reasoning is deeply flawed. Essential elements that set SORNA apart from prior versions of Megan's Law and other registration schemes applied to adults dramatically change its requirements and effects. Furthermore, these prior interpretations of a law that in no way mirrors current registration requirements was, not until now, applicable to children. As Appellant set forth in its opening brief, SORNA is *not* Megan's Law. *See* Brief of Appellant at 39-44.

The Commonwealth also notes that given the public availability of the adjudication information and the non-public nature of Appellant's registration, the

previous adult Megan's Law provisions were more severe. *See* Brief of Appellee at 4-6. The Commonwealth again fails to consider the numerous ways in which information about the child's registration can be shared with and released to the public as well as the stark difference between an adjudication of delinquency and a lifetime brand as a "sex offender." *See* Brief of Appellant at 16-32.

The Pennsylvania Supreme Court has applied an *ex post facto* analysis to prior versions and particular portions of Megan's Law previously applicable *only to adults*. *See Lee*, 935 A.2d 865 (whether lifetime registration provisions for "sexually violent predators" in Megan's Law II was punishment); *Williams*, 832 A.2d 962 (whether "sexually violent predator" provisions of Megan's Law II was punishment); *Gaffney*, 733 A.2d 616 (whether Megan's Law I was punitive); *see also*, *Commonwealth v. Fleming*, 801 A.2d 1234 (Pa. Super. 2002) (whether Megan's Law II was punitive). Contrary to the Commonwealth's assertions, because Pennsylvania has never before required children adjudicated delinquent in this Commonwealth to register as sex offenders, no court has yet considered whether lifetime sex offender registration of children is excessive or punitive.

Moreover, prior case law applicable to adult registration under Megan's Law is unavailing on this question.

SORNA's requirements and provisions are severe, intimately connected to the criminal process, and apply automatically. And its imposition on children dramatically increases its punitive effect.

CONCLUSION

WHEREFORE, O.M., by and through counsel, respectfully requests that this Honorable Court reverse the decision of the trial court and declare 42 Pa.C.S. § 9799.10 *et seq.* unconstitutional as it applies to O.M. and other juvenile offenders and violative of the Juvenile Act, and remand the case so the trial court may declassify O.M. as a "juvenile offender" and order the Pennsylvania State Police to remove his name, photographs, and all other information from the sex offender registry.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellant has been served on this 10th day of February, 2014, upon the following persons by first class mail, which satisfies the requirements of Pa.R.A.P. 121:

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