No.

IN THE

SUPREME COURT OF THE UNITED STATES

JUAN RODRIGUEZ, Petitioner,
-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition For Writ Of Certiorari

To The Appellate Court Of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The circuit court ordered Juan Rodriguez–who suffers from significant mental and physical disabilities and was unfit to stand trial–to register as a "sex offender" under Illinois's Sex Offender Registration Act ("SORA"). Under Illinois's SORA scheme, child sex offenders may not reside within 500 feet of a "school, park, or playground" (730 ILCS 150/8 (2014)); must make frequent in-person trips to law enforcement agencies upon moving, purchasing a new vehicle, obtaining a new job, attending school, and opening a new email account (730 ILCS 150/3(a), (b), (c)(3), (c)(4) (2014)); and face criminal penalties for failing to comply with the statute (730 ILCS 150/8-5 (2014) (first violation of Illinois' SORA is a Class 3 felony; second violation is a Class 2 felony)). Registrants have no mechanism to demonstrate that they should be exempt because they do not present a current danger of recidivism. Several jurisdictions have held that similar statutory schemes constitute punishment under *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *See, e.g.*, *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (Michigan SORA); *Doe v. State*, 189 P.3d 999 (Alaska 2008); *Starkey v. Okla. Dept. of Corrections*, 305 P.3d 1004 (Okla. 2013); *State v. Letalien*, 985 A.2d 4 (Me. 2009). The questions presented are:

I. Does Illinois's SORA scheme constitute punishment that impinges the fundamental right of unfit defendants to be free from trial or sentencing, thus failing strict scrutiny?

II. Does Illinois's SORA scheme's application to unfit defendants unlikely to recidivate violate substantive due process, both facially under rational basis review and as applied to a defendant with significant cognitive defects?

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To The Appellate Court Of Illinois

The petitioner, Juan Rodriguez, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The decision of the Illinois Appellate Court (Appendix A) is reported at 2019 IL App (1st) 151938-B, and is published. The order of the Illinois Supreme Court denying leave to appeal with a dissenting opinion (Appendix B) is reported, and is available at 2019 WL 2240588.

JURISDICTION

On March 26, 2019, the Appellate Court of Illinois issued its decision. No petition for rehearing was filed. The Illinois Supreme Court denied a timely filed petition for leave to appeal on May 22, 2019. Rodriguez invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

730 ILCS 150/2 (2015) - Definitions

(A) As used in this Article, "sex offender" means any person who is:

> (1) charged pursuant to Illinois law . . . with a sex offense set forth in subsection (B) of this Section or the attempt to commit an included sex offense, and . . .
>
> > (d) is the subject of a finding not resulting in an acquittal at a hearing conducted pursuant to Section 104-25(a) of the Code of Criminal Procedure of 1963 for the alleged commission or attempted commission of such offense.

U.S. CONST. amend. XIV

No State shall . . . deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This case presents a pressing question that has divided state courts of last resort: Do state sex offender registration schemes with onerous reporting requirements and severe penalties constitute punishment that impinges the fundamental right of unfit defendants to be free from trial or sentencing? It specifically concerns the application of Illinois's SORA scheme to Juan Rodriguez, whose limited cognitive abilities are "estimated in at least the moderate level of mental retardation" and whom the circuit court found unfit to stand trial. (SAC. 16; SAR. A30; C. 5)[1] Although Rodriguez has never been able to live independently (SAC. 37), cannot discern right and wrong (SAC. 37, 41), and often attempts to conceal his diminished cognitive capacity despite being "readily and easily confused" in conversation (SAC. 15), the circuit court ordered him to comply with Illinois's SORA requirements.

1. The circuit court initially found Rodriguez not not guilty of aggravated criminal sexual abuse of 14-year-old K.J. stemming from an August 28, 2011 incident at Rodriguez's parents' home. (C. 4, 8; SAC. 11; SAR. D17) The State charged Rodriguez with aggravated criminal sexual abuse. (C. 4; SAC. 11) In light of Rodriguez's mental and physical disabilities, the circuit court ordered a behavioral clinical examination ("BCX") at his first hearing, which found that Rodriguez was unfit for trial and unable to assist in his defense. (SAC. 13, 16;

[1] Rodriguez cites to the common law record and report of proceedings from the State's appeal in case number 1-14-1255 as "SAC." and "SAR.," respectively. Rodriguez cites to the supplemental report of proceedings in this appeal as "SuppR."

SuppR. B2) The evaluating psychiatrist concluded that "[e]ven with intensive remedial services," Rodriguez was unlikely to attain fitness within a year. (SAC. 16-17) The State requested a second BCX, which confirmed that Rodriguez was unfit to stand trial. (C. 4-5; SAC. 26) After conducting a fitness hearing, the circuit court agreed that Rodriguez was unfit and unlikely to attain fitness. (C. 5; SAR. A30) The circuit court then continued the case for a discharge hearing pursuant to 725 ILCS 5/104-23(a) (2013). (C. 5; SAR. A30)

At a May 29, 2013, discharge hearing, the circuit court found that Rodriguez was sane at the time of the offense and thus found him "not not guilty" of aggravated criminal sexual abuse. (C. 8; SAR. D17) After entering its finding, the court ordered the Department of Human Services ("DHS") to evaluate Rodriguez's mental health needs and possible involuntary admission. (C. 8; SAR. D17) A DHS outpatient director found that Rodriguez did not need inpatient or outpatient mental health services. (C. 8-9; SAC. 55-56)

2. Though Rodriguez would not be imprisoned or civilly committed, the State moved to require Rodriguez to register under SORA. The circuit court denied that motion because Rodriguez was incapable of understanding or complying with SORA's requirements. (C. 9; SAR. I12-13) However, when the State appealed, the Illinois Appellate Court held that Rodriguez was required to register under SORA because an individual found "not not guilty" of a sex offense, even on the basis of unfitness, falls within SORA's definition of a "sex offender." (C. 10-12) (citing *People v. Cardona*, 2013 IL 114076, ¶ 25); *see also* 730 ILCS 150/2(A)(1)(d) (2015). On remand, the circuit court notified Rodriguez of his SORA registration obligation

over his counsel's objection. (R. B2-3, B5-10)

3. Rodriguez challenged the circuit court's order on appeal, arguing that SORA's definition of "sex offender" violates substantive due process both facially and as applied. The Illinois Appellate Court affirmed, holding that SORA's registration scheme is not punitive. *People v. Rodriguez*, 2018 IL App (1st) 151938, ¶¶ 2, 14-22.

Rodriguez filed a petition for leave to appeal to the Illinois Supreme Court. Rodriguez asked the Court to consider whether SORA's registration scheme is punitive and to determine whether Section 2(A)(1)(d) of SORA violates substantive due process, both facially and as applied to Rodriguez. The Illinois Supreme Court denied Rodriguez's PLA, but added a supervisory order requiring the Appellate Court to consider whether Rodriguez could challenge SORA's constitutionality. The Illinois Supreme Court asked the appellate court to consider whether its opinion in *People v. Bingham*, 2018 IL 122008–holding that appellate courts could not relieve a defendant of his SORA registration obligations on direct appeal where his registration requirements arose by operation of law–controlled Rodriguez's appeal from a circuit court order requiring registration.

4. On remand, the appellate court found *Bingham*'s holding inapposite, because Rodriguez appealed from an express order of the circuit court requiring him to register, not from registration as a matter of law. *People v. Rodriguez*, 2019 IL App (1st) 151938-B ¶¶ 8-10. However, it went on to reject Rodriguez's constitutional challenges on their merits.

Rodriguez then filed a petition for leave to appeal to the Illinois Supreme

Court reiterating his request that the Court consider whether SORA's registration scheme is punitive and violates substantive due process, both facially and as applied to Rodriguez. The Illinois Supreme Court denied leave to appeal. *People v. Rodriguez*, 2019 WL 2240588. In a dissenting opinion, Justice Burke noted that three Justices voted to allow the petition, three voted to deny it, and one abstained. *Id.* at ¶ 1.

REASONS FOR GRANTING CERTIORARI

I. This Court should grant review to determine whether Illinois's current Sex Offender Registration Act ("SORA") scheme is punitive.

The circuit court ordered Juan Rodriguez to register as a "sex offender" under Illinois's Sex Offender Registration Act ("SORA"). However, SORA's definition of sex offender, which includes unfit defendants found "not not guilty" at a discharge hearing, is facially unconstitutional. 730 ILCS 150/2(A)(1)(d) (2014). That provision is subject to strict scrutiny because it impinges upon the fundamental right of unfit defendants to be free from punishment. Due process precludes trying an unfit defendant because the purpose of a criminal proceeding is to punish a defendant, and such criminal punishment cannot constitutionally be applied to unfit defendants. *Medina v. California*, 505 U.S. 437, 439 (1992) ("It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial."); *In re David D.*, 307 Ill. App. 3d 30, 33 (2d Dist. 1999); *see also People v. Murphy*, 72 Ill. 2d 421, 430 (1978) (failure to observe procedures adequate to protect a defendant's right not to be tried while unfit undermines his due process rights); *People v. Davis*, 25 Ill. App. 3d 1007, 1012 (5th Dist. 1975) ("A fundamental principle of our law is that a defendant in a criminal case must be fit to stand trial or be sentenced, otherwise he shall not stand trial or be sentenced.").

Section 2(A)(1)(d)'s application of a punitive SORA registration scheme to unfit defendants impinges upon their fundamental liberty interest to be free from criminal punishment. Section 2(A)(1)(d)'s definition unconstitutionally punishes

those who are unfit for trial or sentencing by creating affirmative disabilities and restraints that touch on nearly every aspect of their lives. 730 ILCS 150/7 (2014) (imposing in-person reporting requirements); 720 ILCS 5/11-9.3 (2014) (restricting child sex offenders' presence in areas frequented by children); and 720 ILCS 5/11-9.4-1 (2014) (making it unlawful for sex offenders to be present at a public park or in a park building, or to loiter within 500 feet of those locations).

As the Illinois Appellate Court recently observed, "[t]he current SORA Statutory Scheme certainly does place affirmative disabilities and restraints on registrants by restricting their movements and activities." *People v. Parker*, 2016 IL App (1st) 141597, ¶ 63. Yet *Parker* declined to explicitly decide whether SORA is primarily punitive in nature. 2016 IL App (1st) 141597, ¶ 66. In fact, no Illinois court has undertaken a detailed analysis of the current version of SORA. This Court's review is necessary to consider whether the punitive effects outweigh the nonpunitive nature of the legislature's intent.

Rodriguez acknowledges that this Court has held that Alaska's sex offender registration act did not violate the *ex post facto* clause of the U.S. Constitution because the notification requirements did not constitute punishment. *See Smith v. Doe*, 538 U.S. 84, 93 (2003). And some Illinois courts have cited the U.S. Supreme Court's analysis in *Doe* in the face of an *ex post facto* challenge. *See Konetski*, 233 Ill. 2d 185, 210 (2009); *People v. Fredericks*, 2014 IL App (1st) 122122 at ¶54. But *Smith* addresses an Alaska statute that was in effect in 2003 and was in many respects less onerous than the SORA Statutory Scheme under consideration here. *See* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of*

Unconstitutionality in Sex Offender Registration Laws, 63 HASTINGS L.J.1071, 1074 (May 2012) ("Despite significant changes to registration schemes over the past several years, courts and legislative bodies continue to rely on two Supreme Court opinions from the 2003 term to define the parameters of constitutionality in sex offender registration laws.").

The current version of Illinois' SORA, which no court has yet analyzed in accordance with the *Mendoza-Martinez* factors, is punitive. In Illinois, child sex offenders may not reside within 500 feet of a "school, park, or playground." 730 ILCS 150/8 (2014). SORA requires frequent in-person trips to law enforcement agencies upon various triggering events, such as moving, purchasing a new vehicle, obtaining a new job, attending school, opening a new email account, etc. 730 ILCS 150/3(a), (b), (c)(3), (c)(4) (2014). SORA establishes "heavy criminal penalties" for failing to comply with its onerous requirements. 730 ILCS 150/8-5 (2014) (first violation of Illinois' SORA is a Class 3 felony; second violation is a Class 2 felony). And Illinois does not afford registrants a mechanism for demonstrating that they do not present a current danger of recidivism and therefore should be exempt from SORA's requirements. Several jurisdictions have held that similar statutory schemes constitute punishment under *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). *See, e.g.*, *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (Michigan SORA); *Doe v. State*, 189 P.3d 999 (Alaska 2008); *Starkey v. Okla. Dept. of Corrections*, 305 P.3d 1004 (Okla. 2013); *State v. Letalien*, 985 A.2d 4 (Me. 2009). This Court should grant review to conduct that analysis on Illinois's SORA. It should find that it constitutes punishment for registrants and therefore fails strict

scrutiny when applied to unfit defendants like Rodriguez.

II. This Court should also grant review to determine whether Section 2(A)(1)(d) of SORA violates substantive due process, both facially under rational basis review and as applied to Rodriguez.

Even if this Court does not recognize the fundamental liberty interests upon which Section 2(A)(1)(d) impinges and declines to apply strict scrutiny, that section remains unconstitutional under rational basis review and as applied to Rodriguez. This Court should also grant review to assess the constitutionality of Section 2(A)(1)(d) under those theories.

If a statute does not impact a fundamental right, it still violates substantive due process if it bears no rational relationship to the public interest the statute is intended to serve. *In re R.C.*, 195 Ill. 2d at 303. To survive rational basis review, a statute must bear a rational relationship to the legislature's intended goal. *People v. Cornelius*, 213 Ill. 2d 178, 204 (2004). Section 2(A)(1)(d) is both over-inclusive, in that it needlessly restricts the liberty of unfit defendants unlikely to recidivate, and under-inclusive, in that it does not ensure that the State's resources are directed at those offenders who pose an actual risk of re-offending. It thus fails to bear a rational relationship to the goal of protecting the public from potential sex offenders. *See State v. Dykes*, 744 S.E.2d 505, 510 (S.C. 2013) ("The complete absence of any opportunity for judicial review to assess a risk of re-offending . . . is arbitrary and cannot be deemed rationally related to . . . protecting the public from those with a high risk of re-offending.").

A rational system would protect the liberty interests of unfit defendants who pose no risk of committing further sexual offenses. The unintended consequences of

the registry would be minimized; the registry would be honed into a truly effective tool for identifying those who pose a real risk to society; and valuable resources could be redirected at ensuring that truly dangerous offenders are effectively monitored. Because SORA fails to accomplish any of those goals, it fails rational basis review.

Furthermore, Section 2(A)(1)(d)'s definition is unconstitutional as applied to Rodriguez. The well-developed facts in the record regarding Rodriguez's mental and physical disabilities establish that Section 2(A)(1)(d) is especially deleterious to his substantive due process rights. Rodriguez suffers from significant cognitive defects that are "estimated in at least the moderate level of mental retardation," has poor long- and short-term memory, and has "significant impairments of registration and immediate recall of new information." (SAC. 16) A psychiatrist found Rodriguez unable to understand the concept of a trial or a plea, to understand the role of various courtroom personnel, or to recall information about the trial process after it was explained to him in simplified form. (SAC. 15) Rodriguez "is readily and easily confused and answers many questions with circumstantial or tangential response," often "attempt[ing] to come across as more competent and capable than his actual cognitive skills." (SAC. 15) Because of those cognitive defects, Rodriguez resides with his sister, who acts as his caretaker. (SAC. 28; SAR. H5-6, I8; R. B4) According to Rodriguez's sister, he has never been able to live independently, and he spends much of his time watching children's television programs such as "Sponge Bob and Dora the Explorer." (SAC. 37) She reported that there have never been any other complaints that he has made sexual advances towards anyone. (SAC. 37)

She added that his "mind and heart is like a little baby" and he does not have the ability to discern right and wrong, an opinion with which a board certified psychologist agreed when finding Rodriguez legally insane at the time of the offense. (SAC. 37, 41) Rodriguez also suffers from significant health problems. He was born with a heart condition that required three open-heart surgeries and, eventually, a heart transplant at age nine, all of which continue to affect him today. (SAC. 15-16, 28-29, 37)

Given Rodriguez's cognitive and physical defects that make reoffending next to impossible, Section 2(A)(1)(d) of SORA is unconstitutional as applied to him. As the circuit court initially noted in this case, because Rodriguez "is never going to be able to understand the requirements of registration," it "does not make sense" to apply those requirements to him. (SAR. I12) Rodriguez "does not understand what's happening in the courtroom . . . much less any requirement that may be required of him through [SORA]." (R. B2-3)

Section 2(A)(1)(d) is unconstitutional under rational basis review and as applied to Rodriguez. This Court should also grant review to assess the constitutionality of Section 2(A)(1)(d) under those theories.

CONCLUSION

For the foregoing reasons, Petitioner Juan Rodriguez, respectfully prays that a writ of certiorari issue to review the judgment of the Illinois Appellate Court.

Respectfully submitted,

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