2016 IL App (1st) 141763-U

FOURTH DIVISION
September 29, 2016

No. 1-14-1763



IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|---|---|---|
| PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 13 CR 7059 |
| | ) | |
| MICHAEL VAN HOOSE, | ) | Honorable |
| | ) | Thomas P. Fecarotta, Jr., |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Ellis and Justice McBride concurred in the judgment.

**ORDER**

*Held*: We affirm defendant's bench-trial conviction of aggravated sexual abuse because we find that the current sexual offender registration requirements and restrictions due not violate federal or state due process protections and do not subject defendant to disproportionate penalties.

¶ 1 Following a bench trial, the trial court convicted defendant Michael Van Hoose of aggravated criminal sexual abuse. He received a sentence of 36 months of probation and was ordered to register for life under the Sex Offender Registration Act (SORA) (730 ILCS 150/1 *et*

*seq.* (West 2012)). On appeal, defendant does not raise any errors with respect to his bench trial. Rather, he appeals the constitutionality of the SORA and related statutes. Defendant contends that these provisions impose lifelong affirmative disabilities and restraints such that they are punitive in nature, that they violate procedural and substantive due process, and that they violate his right not to be subject to disproportionate penalties under both the state and federal constitutions. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 Defendant was charged with aggravated criminal sexual abuse stemming from an incident of sexual touching in February 2012 involving his girlfriend's 9-year-old daughter.

¶ 4 The bench trial occurred in March 2014. The victim was 11 years old at the time of trial.[1] She testified that she, her mother, and her younger brother A. used to live with defendant and his parents. The victim described defendant as her "stepdad." The victim, her mother, and A. moved in with the victim's grandmother in November 2011, but the victim testified that she and A. would frequently stay over at defendant's home. A. would sleep in defendant's bed while the victim slept in a cot next to the bed.

¶ 5 In February 2012, the victim was 9 years old and A. was 5 years old. According to the victim, one night that month she and A. stayed over at defendant's house. A. fell asleep on the couch and the victim went to defendant's bedroom to change into her pajamas. Defendant had been showering and he entered the bedroom wearing only a towel around his waist while the victim was changing. The victim testified that she asked defendant if the bathroom was steamy so she could finish changing in there, but defendant stated that it was okay to finish changing in front of him. Defendant then asked her to sit next to him on the bed. He told her he was proud of

[1] The State offered a stipulation that defendant was born on February 10, 1981.

her, that she was "very mature," and asked if she "wanted to see something grown up." The victim was unsure, but ultimately said yes. Defendant stated that she was not old enough yet, but the victim persisted. Defendant briefly left the room, and then returned and closed the door.

¶ 6 Defendant played a video on the desktop computer in his bedroom. The victim testified that the video showed a woman holding an object, which defendant called an "adult toy," and the woman removed her clothes and put the toy in "her front private." Defendant asked the victim "that's what you do, right?" The victim responded no. Defendant told her that when the victim was little, her mother yelled at her for doing what the woman in the video did. Defendant told the victim to watch other videos that were on the computer screen and tell him if she did what she saw in the video and he would return shortly. The victim then watched another video showing a woman "touching [a] man's private." Defendant then returned and watched that video and another similar video with the victim; he told her that this was called "masturbating" and that "you can do it with a lot of other people." Defendant stated that her mother should not have yelled at her and she was "such a mature girl" and he was sorry for her.

¶ 7 Defendant asked the victim to sit on the bed again. He stood in front of her and removed his towel, wearing nothing underneath. Defendant asked the victim to touch his penis. The victim put her hands behind her back and said no. Defendant took the victim's left hand and placed it on his penis, which was "not hard," and started moving her hand back and forth. He told the victim this was normal and not to feel embarrassed. He instructed the victim to stroke his penis slowly and then shake it. The victim complied. Defendant stopped her and put lotion on her hands, rubbed her hands together, and again put them on his penis, which the victim indicated was "hard" at that point. The victim testified that she began crying and stated that she did not like this and she removed her hands. Defendant wiped the lotion from her hands with a towel. The victim

crawled to the opposite side of the bed. Defendant put his pants on and picked the victim up. He told her he was sorry and that he would not do it again. He also told her not to tell her mother. Defendant left the room. The victim eventually moved onto her cot and fell asleep.

¶ 8 The victim testified that in February 2013, when she was in fourth grade, her friend, M., asked the victim what was the worst thing that ever happened to her. The victim told M. that seeing her mother cry was the worst. However, the victim then stated, "that's not it," and told M. the worst thing that happened to her was "when my stepfather made me touch him" on "his private." At her friend's encouragement, the victim told her teacher, and the victim also told a school counselor that day.

¶ 9 The victim testified that she had started at a new school in December and the incident happened the following February, and her youngest brother, D., was not yet born at the time; he was born in June 2012. She testified that she continued to go to defendant's house after February 2012 and was glad to see him, until the time when she told M. about the incident. She denied previously viewing adult videos or observing sex toys in her mother's room.

¶ 10 Defendant offered the testimony of his mother, A.V. She testified that there was not a cot in defendant's room in February 2012; the cot was not placed in his room until November 2012, after defendant was involved in a motorcycle accident. She testified that the children stayed over the weekend of February 25, 2012. She made dinner at 5:30 p.m. and defendant left just before 6 p.m. to work a midnight shift. A.V. told the children to get ready for bed, and the children slept in defendant's bed that night. She testified that defendant returned to the house just after 6 a.m. She testified that A. was not allowed to sleep on the couch because of bedwetting. She testified that defendant did not sleep in the bed with the children; he was either at work or he slept on the couch or the floor. She testified that the victim would use her master bathroom to change, not the

bathroom in the hallway near defendant's room, because the master bathroom was cleaner and defendant's bathroom was cold. She testified that defendant always got dressed before leaving the bathroom. On cross-examination, A.V. conceded that defendant if took a hot shower in his bathroom, it would produce a lot of steam. She conceded that her husband was unemployed, but she denied that defendant paid any of their bills.

¶ 11 Defendant testified that the victim's testimony was not true. He denied that she ever touched his penis. He testified that he was involved in a motorcycle accident on August 12, 2012 or 2013; he could not recall which year. He testified that the accident caused brain injury and memory problems. He testified that he was never in a bedroom alone with the victim on February 25, 2012, he never showed her pornographic material, and there was no cot in his room at that time. He testified that he was always dressed when he left the bathroom.

¶ 12 On cross-examination, defendant admitted that he had a computer in his bedroom and watched pornography on it, but not while the victim was present. He testified that the children's mother watched pornography in front of the victim.

¶ 13 The trial court found that the victim testified clearly and truthfully and was "detailed in the best manner possible" and "incredibly credible." The trial court found that defendant testified to a brain injury affecting his memory but had been very specific in regards to some details, which impaired his trustworthiness. The trial court found defendant guilty of aggravated criminal sexual abuse. The court sentenced defendant to 36 months of probation and admonished him to register as a sex offender. This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 A. The SORA Statutory Provisions

¶ 16 By virtue of defendant's conviction for aggravated criminal sexual abuse, he is classified as a "sexual predator" under the SORA. 730 ILCS 150/2(E)(1) (West 2012) (a "sexual predator" is any person convicted of aggravated criminal sexual abuse). As such, he is subject to lifetime registration requirements. 730 ILCS 150/7 (West 2012).

¶ 17 On appeal, defendant challenges the constitutionality of several provisions of SORA, arguing that recent amendments render the current version of the SORA "statutory scheme" more onerous and punitive than earlier versions. Specifically, he challenges the following provisions: 730 ILCS 150/2(E)(1) (West 2012) (sexual predator classification and expanding categories of offenders who must register for life); 730 ILCS 150/3 (West 2012) (broadening applicability of SORA registration; expanding number of agencies to which offender must register; shortening time period for registration; increasing registration fees; requiring itinerary if traveling; requiring in-person registration within three days where employed or going to school; and requiring offender to provide photograph, address, employer, telephone number, schools attended, all email and internet identities and websites, license plate number, ages of offender and victim, and information regarding distinguishing marks on offender's body); 730 ILCS 150/6 (West 2012) (requiring registrants to appear at request of law enforcement up to four times per year); 730 ILCS 150/7 (West 2012) (imposing retroactive and lengthier registration time periods, and imposing mandatory 10-year extension of registration period for failure to comply); and 730 ILCS 150/10 (West 2012) (increasing penalty for violations of SORA from class 4 to class 3 felony, and subsequent violations are class 2 felonies). Defendant also challenges the following related statutes: 720 ILCS 5/11-9.3, 9.4-1 (West 2012) (barring residency or presence near areas

frequented by children); 730 ILCS 5/5-5-3(*o*) (West 2012) (requiring annual renewal of driver's license); and 735 ILCS 5/21-101 (West 2012) (prohibiting petition to change name).

¶ 18 B. Standing

¶ 19 The State argues that defendant lacks standing to challenge the SORA's penalty provision (730 ILCS 150/10 (West 2012)), the location restriction statutes (720 ILCS 5/11-9.3, 9.4-1 (West 2012)), the driver's license renewal restriction (730 ILCS 5/5-5-3(o) (West 2012), and the prohibition on petitioning for a name change (735 ILCS 5/21-101 (West 2012)). The State asserts that none of these have been applied to him, and the only statute which immediately applies to him is the registration requirement.

¶ 20 To have proper standing to pursue a constitutional challenge, a party must demonstrate that he is " 'within the class aggrieved by the alleged constitutionality,' " that he has suffered or is in immediate danger of suffering a direct injury due to enforcement of the statutes, and the claimed injury "must be: (1) distinct and palpable; (2) fairly traceable to defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief." (Internal quotation marks omitted.) *People v. Pollard*, 2016 IL App (5th) 130514, ¶ 26.

¶ 21 In *People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶¶ 31–43, *appeal denied*, 2016 IL 120381, this court held that the defendant had standing to bring his due process and eighth amendment challenges to "the residency, employment, presence, driver's license and name-change restrictions in SORA because he had 'received punishment' in being convicted of a sex offense that automatically triggered application of these restrictions." *Id.* The court found that the statutes would automatically apply to the defendant, he would have to abide by them daily, he raised purely legal questions, and judicial economy was best served by addressing the challenges instead of requiring a separate civil suit. *Id.* ¶ 36. Further, the court found that the defendant was

not bringing a "generalized grievance common to all members of the public" and the fact that he had not yet violated the statutes did not deprive him of standing because he would be affected by the laws. *Id.* ¶¶ 41-42.

The Fifth District reached a similar conclusion in *Pollard*, where the defendant also challenged the constitutionality of the SORA, the Sex Offender Community Notification Law (730 ILCS 152/101 *et seq* (West 2012)), and related statutes on grounds that they violated the due process and proportionate penalties clauses. *Pollard*, 2016 IL App (5th) 130514, ¶ 1. The court held that the "registration restrictions, residency restrictions, employment restrictions, restrictions on where he may be present, and restrictions on his privileges to drive or change his name" would automatically apply to the defendant for his lifetime and a favorable ruling from the court would redress the alleged injuries. *Id.* ¶ 27. Accordingly, relying on *Avila-Briones*, the Fifth District court found that the defendant had standing. *Id.*

¶ 22 Drawing a slight distinction from *Avila-Briones*, the First District, Fifth Division found that the juvenile respondent lacked standing to challenge the penalty provision in section 10 of the SORA "because he is not suffering or in immediate danger of suffering a direct injury as a result of enforcement of this provision." *In re A.C.*, 2016 IL App (1st) 153047, ¶ 24, *appeal denied* 2016 IL 120932. In *A.C.*, the respondent challenged several provisions of the SORA and the Notification Law, but the State challenged the respondent's standing only as to section 10, arguing that he lacked because he had not been charged with violating it. *Id.* In finding that the respondent did not have standing to challenge this provision, the court held that section 10 did not automatically apply to a sexual offender. *Id.* Rather, "it first requires that respondent fail to abide by the registration requirements, and then he must be charged with a violation and convicted after a trial." *Id.*

¶ 23 In light of *Avila-Briones*, *Pollard*, and *A.C.*, we conclude that defendant in the present case has standing to bring his constitutional challenges against the registration requirements and other restrictions in the SORA and the provisions imposing location restrictions (720 ILCS 5/11-9.3, 9.4-1 (West 2012)), driver's license renewal restrictions (730 ILCS 5/5-5-3(o) (West 2012), and prohibitions on petitioning for a name change (735 ILCS 5/21-101 (West 2012)). Similar to the defendants in *Avila-Briones* and *Pollard*, these provisions will automatically apply to defendant for his natural life because he is considered a "sexual predator" under the SORA. However, defendant lacks standing to challenge the penalty provision in section 10 "because he is not suffering or in immediate danger of suffering a direct injury as a result of enforcement of this provision." *A.C.*, 2016 IL App (1st) 153047, ¶ 24. There is no indication that defendant failed to comply with the SORA registration requirements applicable to him and is being charged with a felony pursuant to section 10.

¶ 24 C. Standard of Review

¶ 25 We now turn to defendant's constitutional challenges. We review *de novo* a challenge to the constitutionality of a statute on appeal. *People v. Mosley*, 2015 IL 115872, ¶ 22. Statutes are presumed to be constitutional and, in order to overcome this strong presumption, the defendant must "clearly establish its invalidity." *Id.* "A court will affirm the constitutionality of a statute or ordinance if it is 'reasonably capable of such a determination' and 'will resolve any doubt as to the statute's construction in favor of its validity.' " *Jackson v. City of Chicago*, 2012 IL App (1st) 111044, ¶ 20 (quoting *People v. One 1998 GMC*, 2011 IL 110236, ¶ 20).

¶ 26 D. *Kennedy v. Mendoza-Martinez*

¶ 27 As the foundation of his claims on appeal, defendant argues that the current SORA statutory scheme has become punitive in nature. He urges this court to re-evaluate it under the

factors outlined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Defendant argues that although the Illinois Supreme Court has found previous versions of SORA to be non-punitive, these cases either did not employ the *Mendoza-Martinez* test or did not actually analyze SORA under the test. He argues that if the provisions are classified as punitive, this triggers a panoply of constitutional rights associated with criminal prosecution.

¶ 28 Our supreme court has determined that the SORA does not constitute punishment. See *People v. Adams*, 144 Ill. 2d 381, 386-90 (1991); (registration requirement did not impose punishment and even if it did, it was not cruel or unusual); *People v. Malchow*, 193 Ill. 2d 413, 421-24 (2000) (in defendant's *ex post facto* challenge, the court found the community notification provisions were not punitive under the *Mendoza-Martinez* test); *In re J.W.*, 204 Ill. 2d 50, 75 (2003) (holding that the SORA is not punitive as applied to juveniles and does not constitute cruel and unusual punishment); *People v. Cornelius*, 213 Ill. 2d 178, 206-07 (2004) (in the defendant's *ex post facto* challenge to the provision providing for dissemination of offenders' information on the Internet, the court held this provision was not punitive under *Mendoza-Martinez* test); *People ex rel. Birkett v. Konetski*, 233 Ill. 2d 185, 207 (2009) (registration requirement did not constitute punishment for purposes of proportionate penalties clause, eighth amendment protection against cruel and unusual punishment, and amendments to the SORA reclassifying the respondent as a "sexual predator" and increasing the length of the period of registration did not violate *ex post facto* protections); *People v. Cardona*, 2013 IL 114076, ¶ 24 (observing that sex offender registration requirement was not punishment).

¶ 29 Although defendant recognizes these prior holdings, he urges this court to re-evaluate the current SORA statutory scheme under the *Mendoza-Martinez* test in light of recent amendments.

Under the *Mendoza-Martinez* test, we examine seven factors to determine whether a civil statue has a punitive effect despite its nonpunitive intent:

¶ 30 "(1) whether the sanction involves an affirmative disability or restraint; (2) whether the sanction has been historically regarded as punishment; (3) whether the sanction comes into play only on a finding of *scienter*; (4) whether operation of the sanction will promote retribution and deterrence; (5) whether the behavior to which the sanction applies is already a crime; (6) whether an alternative purpose to which the sanction may rationally be connected is assignable to it; and (7) whether the sanction appears excessive in relation to the alternative purpose assigned." *People v Fredericks*, 2014 IL App (1st) 122122, ¶ 58 (citing (*Malchow*, 193 Ill. 2d at 421 (citing *Mendoza-Martinez,* 372 U.S. at 168-69)).

¶ 31 In Illinois, the punitive effect of the challenged provisions must be demonstrated by "the clearest proof." (Internal quotation marks omitted.) *Malchow,* 193 Ill. 2d at 421.

¶ 32 In support of his argument, defendant relies on cases from foreign jurisdictions. In a motion to cite additional authority, defendant also cites to a recent case from the United States Court of Appeals for the Sixth Circuit which held that retroactive imposition of amendments to Michigan's sex offender laws had a punitive effect in violation of the constitutional prohibition against *ex post facto* laws. *Does v. Snyder*, __ F.3d __, 2016 WL 4473231 (6th Cir. 2016). However, "cases from foreign jurisdictions are not precedential or binding on this court." *A.C.*, 2016 IL App (1st) ¶47. " 'When there is Illinois case law directly on point, we need not look to case law from other states for guidance,' when we have our own precedent to follow." *Id.* (quoting *Kostal v. Pinkus Dermatopathology Laboratory, P.C.*, 357 Ill. App. 3d 381, 395 (2005)).

¶ 33 This court has already evaluated and upheld the constitutionality of the 2013 SORA regime. For example, in the context of an *ex post facto* challenge to an amendment retroactively requiring lifetime registration under the SORA, this court in *Fredericks*, 2014 IL App (1st) 122122, ¶¶ 58-61, held that under the *Mendoza-Martinez* test, the amendment did not violate *ex post facto* protections or render the SORA punitive. The court noted that our supreme court in *Malchow* found the SORA nonpunitive under the *Mendoza-Martinez* factors. *Id.* Although the court held that some of the factors weighed more heavily in favor of the defendant in *Fredericks* than they did for the defendant in *Malchow*, the court declined to depart from our supreme court precedent because sex offender registration was still "a civil regulatory scheme" which "serves the purpose of protecting the public from sex offenders," and the amendments expanding registration requirements were limited in their application to "defendants who have committed a new felony and have thus shown a general tendency to recidivate." *Id.* ¶¶ 59-60. "The fact that the [SORA] did not require defendant to commit another sex offense before subjecting him to lifetime registration is insufficient reason to now conclude that sex offender registration is punitive." *Id.* ¶ 60.

¶ 34 More recently, in *A.C.*, 2016 IL App (1st) 153047, ¶ 72, the respondent similarly argued that the current versions of the SORA and the Notification Law have become punitive under the *Mendoza-Martinez* test. The First District, Fifth Division court recognized that the "Illinois Supreme Court has repeatedly held that SORA and the Notification Law do not constitute punishment" and that it was bound by this precedent. *Id.* ¶ 70 (citing *Adams,* 144 Ill. 2d at 387–89; *Malchow,* 193 Ill. 2d at 419–24; *Cornelius,* 213 Ill. 2d at 207–09; *Cardona,* 2013 IL 114076, ¶ 24; *J.W.*, 204 Ill. 2d at 74–75; *Konetski,* 233 Ill. 2d at 206). It observed that our supreme court previously undertook a *Mendoza-Martinez* analysis in *Malchow* and *Cornelius*, and it was

therefore "bound by our supreme court's decisions in *Malchow* and *Cornelius* and we do not find a punitive intent behind the challenged provisions in SORA and the Notification Law." *Id.* ¶ 77. In addition, the court analyzed the recent changes to the laws and determined that they "reflect social changes and do not manifest a punitive bent." *Id.* Although recent amendments expanded the scope of who must register and shortened the registration time period, such changes merely demonstrated "an awareness that such crimes demonstrate a heightened danger of future harm and the shortened time period reflects an individual's increased mobility, both of which are rationally related to protecting the public by closely monitoring convicted sex offenders." *Id.* Additionally, the court held that amendments increasing the amount of information that a sex offender must disclose and increasing registration fees also did not evince a punitive intent, as they showed the legislature's determination that "society has become increasingly digital since 1998," and the administrative fees could be waived for indigence. *Id.* ¶ 78.

¶ 35 Accordingly, based on our supreme court precedent and guided by the analysis in *Fredericks* and *A.C.*, we reject defendant's contention that the current version of the SORA and related statutes have transformed into a punitive regime. Defendant has not demonstrated by "the clearest proof" that the SORA now inflicts any punishment. *Malchow,* 193 Ill. 2d at 421.

¶ 36 E. Due Process

¶ 37 i. Procedural Due Process

¶ 38 Defendant asserts that the current SORA statutory scheme violates the due process clauses of the United States and Illinois Constitutions. U.S. Const. amend. XIV; Ill. Const.1970, art. I, § 2. He first contends that it violates his right to procedural due process because it infringes on a fundamental liberty interest without providing procedural safeguards.

¶ 39 "The procedural due process clause entitles individuals to certain procedures before the State may deprive them of a life, liberty, or property interest." *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 88. In determining how much process is required, courts consider three factors: "(1) the private interest that will be affected by the government action; (2) the risk of an erroneous deprivation of that private interest through the procedures used and the probable value of additional procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that additional procedures would entail." *Id.*

¶ 40 Defendant acknowledges that Illinois has not recognized the right to be free from sex offender registration as a fundamental right. He relies on cases from other jurisdictions in asserting that "the calculus has changed where a registrant is faced with the burdens imposed under the current SORA regime." He asserts that the missing procedural safeguard here is a mechanism to evaluate an individual offender's risk of recidivism, which would ensure that the burdens of the registration are placed only on those likely to re-offend.

¶ 41 As noted in *Avila-Briones*, the United States Supreme Court has rejected the argument that due process requires the additional procedure of assessing risk of re-offending before subjecting an offender to the restrictions and requirements of sexual offender registration laws. *Avila–Briones*, 2015 IL App (1st) 132221, ¶ 89 (citing *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003)). The *Avila-Briones* court explained that in *Doe*

> "the Court held that Connecticut was not required to hold a 'hearing to determine whether [sex offenders] are likely to be currently dangerous' before requiring them to register. *Id.* at 4. The Court noted that Connecticut's sex-offender registration system 'turn[ed] on an offender's conviction alone—a fact that a convicted offender has already had a procedurally safeguarded

> opportunity to contest.' *Id.* at 7. Because the defendant's current dangerousness was 'of no consequence' under Connecticut law, individuals were not entitled to a hearing to prove something that had no relevance to their registration. *Id.* The Court concluded, 'Unless respondent can show that [Connecticut's] *substantive* rule of law is defective (by conflicting with a provision of the Constitution), any hearing on current dangerousness is a bootless exercise.' (Emphasis in original.) *Id.* at 7–8." *Avila–Briones*, 2015 IL App (1st) 132221, ¶ 91.

¶ 42 Our court adopted this reasoning "when faced with arguments that sex offenders in Illinois should have an opportunity to show whether they are likely to reoffend" because our state's system is similarly "based entirely on the offense for which a sex offender has been convicted. A sex offender's likelihood to reoffend is not relevant to that assessment." *Avila–Briones*, 2015 IL App (1st) 132221, ¶ 92. Thus, a "defendant had no right to a procedure where he could prove a fact that had no relevance to his registration." *Id.*

¶ 43 Along the same lines, in *A.C.*, 2016 IL App (1st) 153047, ¶¶ 59-66, this court observed that Illinois precedent holds that "SORA and the Notification Law do not implicate protected liberty or property interests" and it found that imposing registration requirements without an individualized determination of risk did not violate a protected liberty interest or the minor's procedural due process rights. See also *Konetski*, 233 Ill.2d at 200-06 (SORA registration obligations did not violate minor's procedural due process rights and he was not entitled to additional procedural safeguard of a jury trial); *In re J.R.*, 341 Ill. App. 3d at 795-800 (finding that juvenile's procedural due process rights were not violated by imposing registration requirement without initial individualized determination of current dangerousness as registration

requirement was triggered upon adjudication for a specified offense and current dangerousness was not relevant to registration obligation); *Pollard,* 2016 IL App (5th) 130514, ¶¶ 46-48 (relying on *Avila-Briones* in finding the defendant's procedural due process rights were not violated as the defendant enjoyed several procedural safeguards associated with his criminal proceedings and the registration obligations were "not sufficiently burdensome to mandate the additional procedural protection of a mechanism to determine his risk of recidivism.")

¶ 44 Accordingly, we find that, as in *Avila-Briones*, *A.C.*, and other Illinois cases, we need not resolve whether the current SORA regime deprives defendant of a fundamental liberty interest because "even if we were to assume that these laws affect defendant's liberty or property interests, no additional procedures would be necessary to satisfy due process." *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 89.

¶ 45 ii. Substantive Due Process

¶ 46 Defendant next contends that the current SORA statutory scheme violates his substantive due process rights. Defendant asserts that because the scheme requires all convicted sex offenders to register without consideration of the risk of recidivism, it fails under strict scrutiny analysis. Alternatively, he argues that even under rational basis review, the scheme must fail because it is over-inclusive.

¶ 47 "Substantive due process bars the government from arbitrarily exercising its power without the reasonable justification of serving a legitimate interest." *Pollard,* 2016 IL App (5th) 130514, ¶ 31 (citing *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). In determining whether a statute violates due process, we must first " 'determine the nature of the right purportedly infringed upon by the statute.' " *Id.* (quoting *In re J.W.*, 204 Ill. 2d 50, 66 (2003)). If a fundamental constitutional right is involved, we employ strict scrutiny analysis to determine if

the statute serves a compelling government interest and is narrowly tailored to serve that interest. *Id.* ¶ 32 (citing *Cornelius*, 213 Ill. 2d at 204).

¶ 48 Our supreme court has repeatedly rejected the argument that the SORA and the Notification Law implicate fundamental rights triggering strict scrutiny analysis. See *Cornelius*, 213 Ill. 2d at 204; *J.W.*, 204 Ill. 2d at 67; *Adams*, 144 Ill. 2d at 390; *Malchow*, 193 Ill. 2d at 425–26. Our appellate court has likewise rejected this argument. See *J.R.*, 341 Ill. App. 3d at 792 (analyzing substantive due process challenge to the SORA and Notification Law under rational basis); *T.C.*, 384 Ill. App. 3d at 874-75 (finding that the SORA registration requirements and restrictions did not deprive the respondent of a protected liberty interest); *A.C.*, 2016 IL App (1st) 153047, ¶¶ 38, 43 (the SORA and the Notification Law do not implicate fundamental rights); *Fredericks*, 2014 IL App (1st) 122122, ¶ 40 (lifetime sex offender registration is not a constraint on liberty); *Avila–Briones*, 2015 IL App (1st) 132221, ¶ 74 ("the weight of authority shows that laws similar to the Statutory Scheme do not affect fundamental rights. Our supreme court has stated that SORA does not affect fundamental rights"). See also *Pollard*, 2016 IL App (5th) 130514, ¶ 35 (the category of "fundamental rights" is a narrow one, and "[o]ur supreme court has held that sex offender registration provisions do not affect fundamental rights.")

¶ 49 Accordingly, as a fundamental right is not at issue, we analyze defendant's claim under the rational basis standard, which examines "(1) whether there is a legitimate state interest behind the statutes; and, if so, (2) whether the statutes are rationally related to that legitimate state interest." *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 81.

¶ 50 In support of his argument, defendant relies on a case from South Carolina concerning a GPS monitoring statute. As noted, Illinois courts have already upheld Illinois' current SORA

regime under rational basis review, and we need not resort to cases from other jurisdictions when on-point Illinois case law exists. *Kostal*, 357 Ill. App. 3d at 395.

¶ 51 Defendant asserts that the scheme fails because it lacks any mechanism to determine an offender's risk of re-offending and is therefore over-inclusive. A similar argument was advanced in *Avila-Briones*. There, the court recognized that the scheme "may be over-inclusive" and burden "individuals who pose no threat to the public because they will not reoffend." *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 84. However, the court nevertheless concluded that the regime "still has a rational relationship to protecting the public." *Id.*

> "As our supreme court has held, SORA and the Notification Law help law enforcement and private individuals keep track of sex offenders by providing information about their presence and offenses. *Cornelius,* 213 Ill. 2d at 205; *J.W.,* 204 Ill. 2d at 67–68. Similarly, by keeping sex offenders who have committed offenses against children away from areas where children are present (*e.g.,* school property and parks) and out of professions where they could come in contact with children (*e.g.,* driving an ice cream truck, being a shopping-mall Santa Claus) or vulnerable people (*e.g.,* driving an emergency services vehicle), the legislature could have rationally sought to avoid giving certain offenders the opportunity to reoffend. Whether or not the Statutory Scheme is a finely-tuned response to the threat of sex-offender recidivism is not a question for rational-basis review; that is a question for the legislature." *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 84.

¶ 52 Similarly, the Fifth District court in *Pollard* observed that "[i]t is well established that there is a legitimate state interest behind the SORA Statutory Scheme. It serves the goal of

protecting the public from sex offenders." *Pollard*, 2016 IL App (5th) 130514, ¶ 39. The court found "a direct relationship between the residency, employment, and presence restrictions of sex offenders and the protection of children." *Id.* ¶ 41. The court observed that "[a]lthough the SORA Statutory Scheme may be overinclusive, thereby imposing burdens on offenders who pose no threat to the public because they will not reoffend, there is a rational relationship between the registration, notification, and restrictions of sex offenders and the protection of the public from such offenders." *Id.* ¶ 42. The court held that the SORA scheme "advance[ed] the government's legitimate goal to protect children from sexual predators." *Id.* ¶ 43 (citing *Cornelius*, 213 Ill. 2d at 205; *J.W.*, 204 Ill. 2d at 67-68).

¶ 53 Based on the above analysis, we find that defendant's claim fails under rational basis review. The current SORA regime is rationally related to the legitimate government purpose of protecting children from sexual offenders by keeping them away from areas where children are likely to congregate and assisting law enforcement in monitoring their whereabouts. As this court observed in *Avila-Briones*, "under rational-basis review, a statute 'is not fatally infirm merely because it may be somewhat underinclusive or overinclusive.' " *Avila-Briones*, 2015 IL App (1st) 132221, ¶ 83 (quoting *Maddux v. Blagojevich,* 233 Ill. 2d 508, 547 (2009)). A law "need not be in every respect logically consistent with its aims to be constitutional." (Internal quotation marks omitted.) *Id.* "As long as the legislation has a rational relationship to the government objectives, it is valid even if it is to some extent overinclusive, underinclusive, or both." *Pollard*, 2016 IL App (5th) 130514, ¶ 42. We find that the current SORA Statutory Scheme does not violate substantive due process rights because it does not affect a fundamental right and it is rationally related to the governmental purpose of protecting the public from sex offenders.

¶ 54 F. Eighth Amendment and Proportionate Penalties Clauses

¶ 55 In his final claim on appeal, defendant argues that the most recent version of the SORA violates the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11) because it has transformed into a punitive regime and its cumulative effect is akin to probation or mandatory supervised release. Defendant argues that Illinois cases holding otherwise, such as *Konetski, Adams, Malchow,* and *J.W.*, are based on obsolete analyses concerning prior versions of the SORA, or the cases are distinguishable because they involved juvenile offenders who receive more protection under the SORA. He asserts that in light of his offense, the registration requirements and other restrictions are grossly disproportionate and fail to take into account his rehabilitative potential.

¶ 56 Under the eighth amendment, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. This amendment incorporates a "narrow proportionality principle" which precludes "grossly disproportionate" sentences. (Internal quotation marks omitted.) *Graham v. Florida,* 560 U.S. 48, 59-60 (2010). The proportionate penalties clause in Illinois' constitution similarly requires all penalties to be "determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. We interpret our proportionate penalties clause in a coextensive manner with the eighth amendment. *People v. Patterson,* 2014 IL 115102, ¶ 106; *Avila-Briones,* 2015 IL App (1st) 132221, ¶ 55.

¶ 57 Initially, we observe that "[o]nly governmental action that inflicts 'punishment' may be restricted by the eighth amendment and the proportionate penalties clause." *Avila-Briones,* 2015 IL App (1st) 132221, ¶ 46 (citing *Konetski,* 233 Ill. 2d at 207) As previously discussed, the United States Supreme court and our supreme court have determined that sex offender

registration and notification requirements and restrictions do not impose punishment. *Smith,* 538 U.S. at 105-06; *Konetski,* 233 Ill. 2d at 207; *Cornelius,* 213 Ill. 2d at 206-07; *J.W.*, 204 Ill. 2d at 75; *Malchow,* 193 Ill. 2d at 424. Accordingly, our precedent, by which we are undoubtedly bound, holds that the SORA registration provisions are not punitive.

¶ 58 Defendant acknowledges this precedent. However, similar to the defendants in *Avila-Briones,* 2015 IL App (1st) 132221, ¶ 51, *Pollard,* 2016 IL App (5th) 130514, ¶ 53, and *A.C.*, 2016 IL App (1st) 153047, ¶ 68, he contends that the current SORA statutory scheme is more onerous than previous versions and is akin to probation, parole, or mandatory supervised release, and that the punishment is grossly disproportionate in his case.

¶ 59 Both the *Pollard* and *Avila-Briones* courts "declined to revisit the issue of whether the SORA Statutory Scheme constituted punishment because, even assuming that it did," the courts held that the scheme "did not violate the eighth amendment or the proportionate penalties clause." *Pollard,* 2016 IL App (5th) 130514, ¶ 55 (citing *Avila-Briones,* 2015 IL App (1st) 132221, ¶ 51). In *Avila-Briones,* this court held that "even if the Statutory Scheme were a system of 'punishment' - a question we do not decide - it is not grossly disproportionate to defendant's offense." *Avila-Briones,* 2015 IL App (1st) 132221, ¶ 67. There, the 23-year-old defendant was convicted of ten counts of aggravated criminal sexual abuse of the 16-year-old victim, with whom he had a romantic relationship, and he was sentenced to 6 years' imprisonment and was subject to lifetime registration under the SORA. *Id.* ¶¶ 5-6, 14. The court rejected the defendant's assertion that the lifetime registration and other SORA restrictions and requirements with which he must comply violated the cruel and unusual punishment or disproportionate penalties clauses. *Id.* The court emphasized the government objective of protecting children from the psychological and physical damage of sexual assault. *Id.* ¶ 60. It also rejected the defendant's attempt to

diminish the seriousness of his crime because he did not employ force. *Id.* ¶ 60. In ruling, the court emphasized that lifetime monitoring of sex offenders served "legitimate penological goals" aimed at keeping child sexual offenders away from minors. *Id.* ¶ 61.

¶ 60 In *Pollard*, the court similarly rejected the defendant's argument that the SORA's registration requirements and restrictions inflicted punishment disproportionate to his particular crime. *Pollard*, 2016 IL App (5th) 130514, ¶ 56. The court observed that the 50-year-old-defendant committed an act of sexual penetration with a 5-year-old victim. *Id.* at ¶ 57. It recognized that our supreme court "has held that protecting children is a government objective of surpassing importance *** and that children suffer psychological damage as a result of sexual assault that may be even more pernicious than physical damage." (Internal quotation marks omitted.) *Id.* It further held that the registration requirements and restrictions served the legitimate penological goals of keeping child sex offenders away from children. *Id.* "Although the defendant will be monitored and constrained by the limits on his freedom for the rest of his life, assuming that the prohibitions and requirements of the SORA Statutory Scheme are punishment, they are punishment far less severe than prison." *Id.* On that basis, the *Pollard* court held that even if the current version of the SORA has become punitive, it was "not grossly disproportionate to the defendant's offense" and it rejected his eighth amendment and proportionate penalties clause challenge. *Id.* ¶ 59.

¶ 61 Our court again rejected the argument that the 2013 versions of the SORA and the Notification Law have become punitive in violation of the eighth amendment and the prohibition on disproportionate penalties in *A.C.*, 2016 IL App (1st) 153047, ¶ 77. The *A.C.* court noted that the "Illinois Supreme Court has repeatedly held that SORA and the Notification Law do not constitute punishment." *Id.* ¶ 70 (citing *Adams*, 144 Ill. 2d at 387-89; *Malchow*, 193 Ill. 2d at

419-24; *Cornelius*, 213 Ill. 2d at 207-09; *Cardona*, 2013 IL 114076, ¶ 24; *J.W.*, 204 Ill. 2d at 74-75; *Konetski*, 233 Ill. 2d at 206). The court observed that our supreme court found the 1998 version of SORA and the Notification Law nonpunitive in *Malchow* and *Cornelius*. *Id.* ¶ 74 (citing *Malchow*, 193 Ill. 2d at 421-24; *Cornelius*, 213 Ill. 2d at 207-09). As such, the *A.C.* court held that it was

> "bound by our supreme court's decisions in *Malchow* and *Cornelius* and we do not find a punitive intent behind the challenged provisions in SORA and the Notification Law. *** Although he contends that SORA and the Notification Law have evolved to become more punitive, these changes reflect social changes and do not manifest a punitive bent. We acknowledge that the scope of who must register has expanded to include those who commit certain 'precursor' crimes and the time period for registration was shortened. However, these changes reflect an awareness that such crimes demonstrate a heightened danger of future harm and the shortened time period reflects an individual's increased mobility, both of which are rationally related to protecting the public by closely monitoring convicted sex offenders.
>
> Respondent also complains that a sex offender must provide more information, such as social media information, but this simply demonstrates the legislature's recognition that society has become increasingly digital since 1998. We also find no punitive purpose behind the registration fees, as a waiver is available in case of indigence and the fees are for administrative purposes. 730 ILCS 150/3(c)(6) (West 2014)." *Id.* ¶¶ 77-78.

¶ 62 The *A.C.* court therefore found no punitive intent behind the challenged provisions and rejected the respondent's arguments based on the eighth amendment and proportionate penalties clauses. *Id.* ¶ 79. See also *Fredericks*, 2014 IL App (1st) 122122, ¶¶ 58-61 (finding a 2013 amendment lengthening the period of registration retroactively as to the defendant did not transform the SORA into a punishment under *Mendoza-Martinez*).

¶ 63 In the present case, we similarly conclude that even if we were to find the SORA as it currently stands has transformed into a system of punishment, which we do not find, we would nevertheless hold that the lifetime registration requirements and other restrictions are not grossly disproportionate to defendant's offense. Here, the 31-year-old defendant showed the 9-year-old victim, who looked to defendant as a father figure, pornographic videos on the computer. He then exposed his penis to her and placed her hand on his penis, directed her in how to rub it, and added lotion to her hands. As prior courts have emphasized, we recognize the important government objective of protecting children from the psychological harm wrought by such experiences, and the legitimate penological goals of keeping child sexual offenders away from minors. *Avila-Briones*, 2015 IL App (1st) 132221, ¶¶ 60-61; *Pollard*, 2016 IL App (5th) 130514, ¶¶ 57-59.

¶ 64 Defendant also asserts that his case was comparable to *People v. Miller*, 202 Ill. 2d 328, 330 (2002), where our supreme court held that the 15-year-old defendant's mandatory life sentence violated the proportionate penalties clause as it was grossly disproportionate to the defendant's conduct. The supreme court emphasized the juvenile defendant's young age and the fact that he was convicted of two counts of murder under an accountability theory where he stood as a lookout and never handled a gun. *Id.* at 341-42.

¶ 65 The defendant in *Avila-Briones* raised the same argument based on *Miller*. The *Avila-Briones* court found *Miller* distinguishable because the defendant in *Avila-Briones* was not an adolescent at the time of the offense and was not convicted under an accountability theory, demonstrating neither rehabilitative potential nor diminished culpability. *Avila-Briones,* 2015 IL App (1st) 132221, ¶ 65. The court held that the lifetime registration requirement and other SORA restrictions "harsh as they may be, are not as onerous as the juvenile's life sentence in *Miller.*" *Id.* The *Avila-Briones* court observed that "the United States Supreme Court has held that lifelong terms of incarceration do not violate the eighth amendment, even when the offender has been convicted of offenses that are minor compared to having sex with a minor." *Id.* ¶ 66. The court reasoned that the defendant had not been sentenced to life in prison or even a lengthy prison term, and although he would be "monitored and bound by strict limits on his freedom for the rest of his life, *** even the system of 'harsh probation' with which he takes issue is not the same as a lifetime of incarceration." *Id.* For the same reasons the court stated in *Avila-Briones*, we similarly conclude that *Miller* is not comparable to defendant's case.

¶ 66 III. CONCLUSION

¶ 67 For the reasons stated above, we affirm defendant's conviction of aggravated criminal sexual abuse.

¶ 68 Affirmed.