UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ARTHUR DOE, *et al*.,

Plaintiffs,

v.

JIM HOOD, Attorney General of the State of Mississippi, *et al*,

Defendants.

Case No. 3:16-cv-00789-CWR-FKB

CLASS ACTION

Oral Argument Requested

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

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INTRODUCTION

Plaintiffs challenge their continued inclusion on the Mississippi Sex Offender Registry ("MSOR") pursuant to a statute that was rendered unconstitutional by the United States Supreme Court more than a dozen years ago. Each of the named Plaintiffs has a conviction for Unnatural Intercourse or an out-of-state crime that the state considers to be an equivalent to Unnatural Intercourse. Each Plaintiff is forced by the State of Mississippi, by operation of the individual Defendants (collectively, "the State"), to submit to the MSOR and its multitude of extreme restrictions on liberty under Mississippi's Unnatural Intercourse statute—an antiquated law passed to criminalize conduct traditionally associated with homosexuality. The Supreme Court pronounced loudly and clearly in 2003 that such laws facially violate the Fourteenth Amendment. *See Lawrence v. Texas*, 539 U.S. 558 (2003) Refusing to listen, the State continues to mandate that people convicted under the Unnatural Intercourse statute, and statutes the State deems to be out-of-state equivalents to the Unnatural Intercourse statue, submit to the MSOR's punishing restrictions. Plaintiffs bring suit on their own behalf and on behalf of a class of similarly situated individuals seeking equitable relief to end the State's longstanding and continuing violation of their constitutional rights.

Plaintiff filed their facial challenge on October 7, 2016. Complaint, Dkt. #1. Twenty-seven days later, on November 3, 2016, plaintiffs moved this Court to certify the plaintiff class. Motion for Class Certification, Dkt. #20. On November 18, 2016—one court day before its opposition to Plaintiffs' class certification motion was due—the State made a motion for discovery, arguing that Plaintiffs' motion for class certification was premature. Motion for Discovery and Entry of a Scheduling Order, Dkt. #25. On November 21, 2016, the State opposed Plaintiffs' class certification motion by adopting its earlier motion for discovery. Defendants' Memoran-

dum in Opposition to Plaintiffs' Motion for Class Certification, Dkt. #30 (Defs.' Opp. to Class Cert.), Dkt. #30.

The state has failed to make any argument in opposition to the Plaintiffs' class certification motion beyond its request for discovery. There is nothing for discovery to illuminate on the issue of class certification—especially nothing in the *Plaintiffs'* knowledge or possession. Especially given the State's failure to present any argument against class certification on the merits of Plaintiffs' motion, this Court should grant the Plaintiffs' motions and certify the class.

ARGUMENT

The State's opposition to the class certification motion rests entirely on its motion for discovery. *See* Defs.' Opp. to Class Cert. Plaintiffs respectfully reference and incorporate their arguments in their opposition to the State's request for discovery, filed contemporaneously with this reply brief, as reasons for denying the State certification-related discovery and certifying the class.

On account of the State's mischaracterization of the scope of Plaintiff class in its briefing on the discovery motion, Plaintiffs address the parameters of the class here.

I. The Class Only Includes Individuals with Mississippi Unnatural Intercourse convictions or Out-of-State Convictions that Are *Only* Registrable in Mississippi Because they Are Treated as Equivalents to the Unnatural Intercourse Statute – a Statute that Simply Criminalizes Oral and Anal Sex with No Other Elements.

The State appears to believe that Plaintiffs seek to certify a prospective class that includes all individual subject to the MSOR for an out-of-state crime that has sodomy or similar wording in its title or as any element of the offense. Plaintiffs have not defined the class in this way. The class is defined as "all persons who have been or may in the future be subject to the MSOR for convictions for Unnatural Intercourse or convictions, like Louisiana CANS convictions, considered to be out-of-state equivalents to Unnatural Intercourse." Compl. ¶ 47. If the elements of an

out-of-state conviction make that conviction equivalent to a *different* registrable offense in Mississippi, the person with that conviction would not be included in the class and the State would remain free to subject him or her to the MSOR pursuant to the equivalent statute.

Some examples illustrate this point. Texas' "Homosexual Conduct" law, TEX. PENAL CODE ANN. § 21.06, prohibited "engag[ing] in deviate sexual behavior with a member of the same sex," and defined deviate sexual intercourse as "contact between any part of the genitals of one person and the mouth or anus of another person, [or] the penetration of the genitals or the anus of another person with an object." TEX. PENAL CODE ANN. § 21.01(1). An individual with a conviction under this law (presumably one that pre-dated *Lawrence*, although the statute remains on the books in Texas) would be made to register if he or she moved to Mississippi: the MSOR requires anyone to register for a conviction in another jurisdiction which, if committed in Mississippi, would be a registrable offense without regard to its designation elsewhere, MISS. CODE ANN. § 45-33-23(h)(xxi), and oral or anal sex is a crime that the MSOR deems registrable if committed in Mississippi. MISS. CODE ANN. § 97-29-59 (criminalizing oral and anal sex); MISS. CODE ANN. § 45-33-23(h)(xi) (making sodomy an offense subject to Mississippi's registration law). The same result would come from convictions under the Georgia "Sodomy" statute, prohibiting oral and anal sex with no other elements. O.C.G.A. § 16-6-2(a)(1). And with Virginia's former "Crimes Against Nature" statute, VA. CODE ANN. § 18.2-361(A), which until recently felonized "carnally know[ing] any male or female person by the anus or by or with the mouth, or voluntarily submits to such carnal knowledge." Each of these crimes, like Mississippi's Unnatural Intercourse statute, includes oral or anal sex as the *sole* element of the offense.

People with convictions under statutes that contain other elements that have no registrable equivalent in Mississippi are also included in the class. For instance, Louisiana's Crimes

Against Nature by Solicitation (CANS) statute, LA REV. STAT. ANN. § 14:89.2(A), prohibits "solicitation by a human being of another with the intent to engage in any unnatural carnal copulation for compensation." A Louisiana CANS conviction is treated as the equivalent of a Mississippi Unnatural Intercourse conviction because the elements include oral or anal sex, but it could also be treated as an equivalent of Mississippi's prostitution statute, MISS. CODE ANN. § 97-29-49. But because Mississippi does not require registration for prostitution, *see* MISS. CODE ANN. § 45-33-23(h), there is no other registrable equivalent under the MSOR for a Louisiana CANS conviction.[1]

A different result comes when considering state sodomy laws that also require an additional element, the equivalent of which alone is registrable in Mississippi. For instance, Alabama's "Sodomy in the First Degree" criminalizes "deviate sexual intercourse" only when done a) with "forcible compulsion"; b) "with a person who is incapable of consent by reason of being physically helpless or mentally incapacitated"; or c) by someone "16 years old or older" who "engages in deviate sexual intercourse with a person who is less than 12 years old." ALA. CODE. § 13A-6-63(a). Apart from the "deviate" (i.e., meaning involving oral or anal sex) element, the Alabama law is equivalent to Mississippi's Sexual Battery law, which prohibits "sexual penetra-

[1] The State's apparent contention that because the facts of *Lawrence* itself involved "non-commercial" activity, Defendant's Motion for Discovery, Dkt. #26, at 6, the State can subject individuals with a CANS conviction on account of the solicitation element exposes the failure of its argument. By the State's telling, *Lawrence* is limited to its exact facts, and the State remains free to criminalize, punish, and register individuals who engage in oral or anal sex under the Unnatural Intercourse statute and the MSOR if their activity falls outside of the precise facts of *Lawrence*. In the State's view, this is true even though Prostitution is not registrable under the MSOR. The State's argument that CANS convictions involve commercial activity and thus fall outside of *Lawrence* exposes the incoherence of its position. The State is not in effect examining the facts behind each individual Unnatural Intercourse conviction to determine whether it is otherwise registrable. Instead, it is applying the Unnatural Intercourse statute with no further inquiry, because Plaintiffs' activity would not be registrable had they been convicted of Prostitution. This is the heart of Plaintiffs' Equal Protection claim.

tion with: (a) [a]nother person without his or her consent; (b) [a] mentally defective, mental incapacitated or physically helpless person; … or (d) [a] child under the age of fourteen (14) years old age, if the person is twenty-four (24) or more months older than the child." MISS. CODE ANN. § 97-3-95. Sexual battery is a registrable offense in Mississippi. MISS. CODE ANN. § 45-33-23(h)(iv). Given that every Alabama "Sodomy in the First Degree" conviction would have another registrable Mississippi equivalent than Unnatural Intercourse, individuals with "Sodomy in the First Degree" are not "subject to the MSOR for convictions … considered to be out-of-state equivalents to Unnatural Intercourse," Compl. ¶ 47, because they are subject to the MSOR for convictions considered to be out-of-equivalent to other registrable Mississippi offenses. A great number of state statutes involving sodomy fit this bill, as they include force, another lack of consent, or the involvement of minors. *See, e.g.*, MO. REV. STAT. § 566.062 (Missouri, "Statutory Sodomy," requiring a victim less than fourteen years old as a necessary element); CAL. PENAL CODE § 286 (California, "Sodomy," requiring force or activity with children as necessary elements); VA. CODE ANN. § 18.2-67.1 (Virginia, "Forcible Sodomy," requiring victim under 13 years old or act done by force, threat, intimidation, or through victim's "mental incapacity or physical helplessness").

For this reason, the State's alarmist rhetoric about "child molesters, rapists, and other sexual predators," Defendants' Brief in Support of Motion for Discovery, Dkt. #26, at 7, being removed from the MSOR is misplaced. Any individual convicted of a crime that includes child molestation or rape (or sexual battery of any kind) would remain registrable under a different equivalent Mississippi statute. Only those with out-of-state convictions that are only registrable under the MSOR as being equivalent to the unconstitutional Unnatural Intercourse statute would obtain the relief the Plaintiff class seeks in this action.

II. The Plaintiff Class Includes Individuals with Multiple Convictions.

The prospective class does include individuals who have convictions under Mississippi's Unnatural Intercourse statute, or convictions considered to be out-of-statute equivalents, as well as another registrable offense or offenses. Multiple registrable offenses result in increased disabilities under the MSOR, and people cannot be made to suffer increased penalties on account of a conviction under an unconstitutional statute or scheme. However, inclusion of people with multiple registrable offenses in the class does not mean that relief in this case will result in removal from the MSOR.

The MSOR provides for three tiers of registrable sex offenses, each with its own minimum duration of registration. Tier 1 requires registration for a minimum of fifteen years; Tier 2 for a minimum of twenty-five years; and Tier 3 requires lifetime registration. MISS. CODE ANN. § 45-33-47(2)(a-d). A first offense for Unnatural Intercourse or a conviction considered to be an out-of-state equivalent to Unnatural Intercourse is a Tier 2 offense and carries a minimum registration requirement of twenty-five years. MISS. CODE ANN. § 45-33-47(2)(c)(i)(2, 6, 7). A second offense for Unnatural Intercourse or conviction considered to be an out-of-state equivalent requires the offender to register for his or her lifetime without the possibility of relief from registration. MISS. CODE ANN. § 45-33-47(2)(d)(xvi).

For example, someone with a conviction from 2000 for Obscene Electronic Communication, MISS CODE. ANN. § 97-29-45(1)(a), would be required to register for a minimum of fifteen years based on that conviction alone. MISS. CODE ANN. § 45-33-47(2)(b)(i)(4). If that same person had an Unnatural Intercourse conviction from 1998, he or she would normally be required to register for a minimum of twenty-five years based on that conviction alone, MISS. CODE ANN. § 45-33-47(2)(c)(i)(2), but the MSOR mandates that any offender with two separate registrable

convictions "is subject to lifetime registration and shall not be eligible to petition to be relieved of the duty to register." MISS. CODE ANN. § 45-33-47(2)(e).

Removing the Unnatural Intercourse conviction (or out-of-state conviction considered to be an equivalent) from the MSOR would remove the automatic lifetime registration pursuant to MISS. CODE ANN. § 45-33-47(2)(e) and allow that individual to petition for removal at the expiration of the term of registration for the other conviction. For instance, in the example above, the person with a Obscene Electronic Communication conviction from 2000 and an Unnatural Intercourse conviction from 1998 would, with the removal of the Unnatural Intercourse conviction from the registry's consideration, escape the lifetime registration requirement, as well as Unnatural Intercourse's twenty-five year registration requirement, and be eligible to immediately petition for removal from the registry as the fifteen year registration requirement for Obscene Electronic Communication conviction alone would have already run.

Relief for class members with multiple registrable convictions need not, and should not, be complete removal from the registry. Plaintiffs seek only to remedy the wrong attendant to the State's enforcement of an unconstitutional statute. Individuals with multiple registrable offenses suffer collateral consequences of the State's unconstitutional actions which should be remedied in this action.

CONCLUSION

For the foregoing reasons, and for those contained in their opening brief, Plaintiffs respectfully request that this Court grant their motion for class certification.

Dated: December 1, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this day I, Ghita Schwarz, Counsel for Plaintiffs, electronically filed the foregoing document with the Clerk of the Court using the ECF system which sent notice of such filing to the following:

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THIS, the 1st of December, 2016.

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