

TABLE OF CONTENTS

Page No.

EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.....1

STATEMENT OF THE CASE AND FACTS.....1

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW.....2

PROPOSITION OF LAW I: The classification of a registration-eligible youth as a public registry-qualified juvenile offender registrant violates the juvenile’s right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution2

PROPOSITION OF LAW II: The classification of a registration-eligible youth as a public registry-qualified juvenile offender registrant violates the juvenile’s right to equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Ohio Constitution.....7

PROPOSITION OF LAW III: The classification of a registration-eligible youth as a public registry-qualified juvenile offender registrant violates the prohibition against cruel and unusual punishments as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Ohio Constitution.....11

CONCLUSION15

CERTIFICATE OF SERVICE15

APPENDIX

In re C.P., Athens County Court of Appeals
 Case No. 09CA41, Decision and Judgment Entry, (March 30, 2010)..... A-1

EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Minor child-Appellant C.P.'s constitutional rights were violated when he was classified as a public registry-qualified juvenile offender registrant ("PRQJOR") under Senate Bill 10 ("S.B. 10"). His classification as a PRQJOR violates the Due Process and Equal Protection Clauses of the United States and Ohio Constitutions, as well as the Eighth Amendment's prohibition against cruel and unusual punishments. This Court should accept jurisdiction in this case because it is currently considering the constitutionality of S.B. 10 in *In re Smith*, Case No. 2008-1624; *In re Adrian R.*, Case No. 2009-0189; and *State v. Bodyke*, Case No. 2008-2502. However, the outcome of *Smith*, *Adrian R.*, and *Bodyke* may not resolve all of the issues raised herein, as none of the pending cases addresses the PRQJOR provisions of S.B. 10. As such, C.P. requests that this Court accept jurisdiction and order briefing in his case.

STATEMENT OF THE CASE AND FACTS

On June 26, 2009, a complaint was filed in the Athens County Juvenile Court, alleging that then fifteen-year-old, C.P. ("Christopher"), was delinquent of two counts of rape, and one count of kidnapping with sexual motivation, violations of R.C. 2907.02 and 2905.01, respectively, each a felony of the first degree if committed by an adult. Shortly after the filing of the complaint, the State filed a motion to transfer jurisdiction to the Athens County Court of Common Pleas. The court denied the State's motion, finding that Christopher was amenable to rehabilitation in the juvenile system. On September 21, 2009, Christopher was indicted as a serious youthful offender. R.C. 2152.13.

Christopher entered admissions to the charges, after which the court imposed an aggregate three-year minimum commitment to the Ohio Department of Youth Services. In addition, the court imposed three prison terms to the Ohio Department of Rehabilitation and

Correction, which were suspended pending Christopher's successful completion of his juvenile dispositions. The court then advised Christopher as to his duties and obligations as a PRQJOR and Tier III juvenile offender registrant under R.C. 2152.86. Christopher appealed his classification to the Fourth District Court of Appeals. See *In the Matter of C.P.*, Athens App. No. 09CA41, 2010-Ohio-1484. The Fourth District affirmed Christopher's classification on March 30, 2010. *Id.* at ¶35. This appeal timely follows.

PROPOSITION OF LAW I: The classification of a registration-eligible youth as a public registry-qualified juvenile offender registrant violates the juvenile's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution.

The guarantees of the Due Process Clause apply to juveniles and adults alike. *Kent v. United States* (1966), 383 U.S. 541, 86 S. Ct. 1045; *In re Gault* (1967), 387 U.S. 1, 87 S. Ct. 1428; *In re Winship* (1970), 397 U.S. 358, 90 S. Ct. 1068. In *Gault*, the Supreme Court of the United States explicitly extended federal constitutional protections to children in juvenile delinquency proceedings. *Gault*, at 13-14. Though inexact, the proper standard for determining whether a juvenile's right to due process has been violated is fundamental fairness. *In re D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, ¶51, citing *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, ¶80. *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 543, 91 S. Ct. 1976.

Juvenile courts "occupy a unique place in our legal system." *C.S.*, at ¶65. The philosophy driving juvenile justice has been rooted in social welfare, rather than in the body of the law, with the objective of protecting a wayward child from evil influences, saving him from criminal prosecution, and providing him social and rehabilitative services. *Id.* at ¶66, citing *Kent*, at 554; see, also, *In re T.R.* (1990), 52 Ohio St.3d 6; *Children's Home of Marion City v. Fetter* (1914), 90 Ohio St. 110, 127, 11. This Court has found that "society should make every effort to avoid [treating wayward youth] as criminal before [they grow] to the full measure of adult

responsibility,” and that childish pranks as well as graver offenses “should seldom warrant adult sanctions.” *State v. Agler* (1969), 19 Ohio St.2d 70, 71, 249 N.E.2d 808. Still today, juvenile courts are to remain centrally concerned with the care, protection, development, treatment, and rehabilitation of youthful offenders who remain in the juvenile justice system. *In re Caldwell*, 76 Ohio St. 3d 156, 157 1996-Ohio-410; *In re Kirby*, 101 Ohio St.3d 312, 2004-Ohio-970. Thus, it is firmly established that a child is not a criminal by reason of any juvenile court adjudication; and civil disabilities, ordinarily following convictions, do not attach to children. *Agler*, at 73; R.C. 2151.357(H).

Despite their civil label, however, delinquency laws feature inherently criminal aspects and the state’s goals in prosecuting a criminal action and in adjudicating a juvenile delinquency case are the same: to vindicate a vital interest in the enforcement of *criminal* laws. *C.S.*, at ¶76, citing *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, ¶26. (Emphasis sic). In truth, the modern version of the juvenile court imposes penalties that have serious implications on a child’s personal liberty. *Id.* at ¶66. The criminal aspects of juvenile delinquency have been highlighted with the advent of S.B. 10, which imposes on defendants and juvenile offenders, burdens that have historically been regarded as punishment and operate as affirmative disabilities and restraints. These aspects are perhaps most evident in the classification of PRQJORs.

Revised Code Section 2152.86 governs the classification of youth who are fourteen or older, have been adjudicated delinquent of certain sexually oriented offenses, and who have been designated a serious youthful offender in relation to that offense. R.C. 2152.86 (A)(1). Unlike children who are not serious youthful offenders, children who are classified under R.C. 2152.86 are automatically Tier III juvenile offender registrants, with a duty to comply with registration requirements every 90 days until death. R.C. 2152.86(B)(1); R.C. 2950.06(B)(3). This

mandatory classification occurs at the juvenile's disposition hearing, without the adult sentence ever being imposed. Moreover, those youth are automatically subject to the community notification provisions of R.C. 2950. Those youth are also included on the Ohio Attorney General's electronic Sex Offender Registration and Notification online database ("eSORN"). R.C. 2950.081. A PRQJOR may not petition the court for reclassification until twenty-five years after the date on which his registration duties commence. R.C. 2950.15.

Because PRQJORS are automatically subject to community notification and public registration, their personal information is forwarded to neighbors, school superintendents and principals; preschools, daycares; and all volunteer organizations where contact with minors may occur. R.C. 2950.11(A)-(F). The various organizations in turn are authorized to disseminate the information, which is then available to any member of the public upon request. R.C. 2950.11(A)-(F); 2950.081. This dissemination of information resembles shaming punishments, which are intended to inflict public disgrace. R.C. 2950.04(B); 2950.04(C). *Smith v. Doe* (2003), 538 U.S. 84, 98, 123 S. Ct. 1140. See, also, Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. Chi. L. Rev. 733, 739 (1998) ("Punishments widely described as 'shaming' penalties thus come in two basic but very different forms: those that rely on public exposure and aim at shaming; and those that do not rely on public exposure and aim at educating.").

Senate Bill 10 furthers the traditional aims of punishment: retribution and deterrence. *Smith v. Doe*, at 102. By classifying a juvenile offender as though he is an adult, the General Assembly is attempting to prospectively deter the commission of sexually oriented offenses. See *Roper v. Simmons* (2005), 543 U.S. 551, 571-572, 125 S. Ct. 1183 (found that the "penalogical justifications" for criminal sanctions do not apply to juveniles since juvenile offenders are less culpable than adult defendants and therefore are not amenable to retribution and deterrence).

The automatic placement of an offender into a tier without determining his likelihood to reoffend is also a form of retribution. *Tison v. Arizona* (1987), 481 U.S. 137, 180-181, 107 S. Ct. 1676 (“Retribution...has as its core logic the crude proportionality of “an eye for an eye.”).

If juvenile sex offender classification and registration is truly civil, then a juvenile cannot receive any of the civil disabilities ordinarily imposed by conviction of a crime. R.C. 2151.357(H). But if the effects of juvenile sex offender registration are punitive, then a juvenile cannot receive a punitive sanction unless he is transferred to the adult criminal system. R.C. 2152.12. The automatic classification of a serious youthful offender as a Tier III juvenile offender registrant with community notification, and the inclusion of a juvenile adjudication on eSORN, means there now is little, if any, distinction between juvenile and adult offenders.

In *D.H.*, this Court gave several reasons why R.C. 2152.13 enables juvenile courts to fulfill the mission of the juvenile justice system within the bounds of fundamental fairness. *Id.* at ¶54. Of the utmost importance was that, when a youth is given a serious youthful offender disposition, the child remains in the juvenile system, with their adult sentence stayed indefinitely, provided the youth is successfully rehabilitated. *D.H.*, at ¶18; R.C. 2152.13(D)(2)(1)(iii). Because the youth may never serve the adult portion of his sentence, the proper decision-maker for determining his disposition is the juvenile court. In fact, the juvenile court’s dispositional role is at the heart of the remaining differences between adult and juvenile court. *Id.* at ¶59. By providing juvenile courts with authority to craft appropriate juvenile dispositions for serious youthful offenders, R.C. 2152.13 maintains the integrity of the juvenile justice system, and distinguishes children from adults with adult sanctions. That integrity is lost when a child is classified as a PRQJOR, because he receives an adult sanction while remaining in the juvenile system.

The very purpose of the juvenile code was to avoid treating children as criminals and insulate them from the reputation and answerability of criminals. *Agler*, at 80. For that reason, juvenile adjudications have historically been shielded from the public eye. 18 U.S.C. § 5038(e) (“[N]either the name nor picture of any juvenile shall be made public in connection with a juvenile delinquency proceeding.”). This is in stark contrast to the public nature of adult criminal proceedings.

In *Smith v. Doe*, the Supreme Court upheld the constitutionality of adult registration statutes, and in particular the public nature of adult sex offender classification. *Smith v. Doe*, at 106. Specifically, the Supreme Court found that Alaska’s public registration database did not violate the constitutional rights of its adult registrants, in part because, “our criminal law tradition insists on public indictment, public trial, and public imposition of sentence.” *Id.* at 99. Such cannot be said about the historical treatment of juvenile delinquency proceedings. *United States v. Juvenile Male*, 581 F.3d 977, 978 (9th Cir. 2009) (Amended January 5, 2010 by inserting one additional footnote and amending footnote 16).

Recently, in reviewing the constitutionality of Washington’s version of the juvenile SORNA provisions, the United States Court of Appeals for the Ninth Circuit noted that:

As a society, we generally refuse to punish our nation’s youth as harshly as we do our fellow adults, or to hold them to the same level of culpability as people who are older, wiser, and more mature. [* * *] Juvenile proceedings by and large take place away from the public eye, and delinquency adjudications do not become part of a young person’s permanent criminal record. Rather, young offenders, except those whose conduct a court deems deserving of treatment as adults, are classified as juvenile delinquents and placed in juvenile detention centers. Historically, an essential aspect of the juvenile justice system has been to maintain the privacy of the young offender and, contrary to our criminal law system, to shield him from the “dissemination of truthful information” and “[t]ransparency” that characterizes the punitive system in which we try adults.

Id. The Ninth Circuit held the public nature of the juvenile registration requirements was punitive, and thus, contrary to the history and purposes of juvenile justice. Id. at 979-985.

Ohio has created a system of juvenile justice in which adult treatment and sentencing is reserved for exceptional circumstances, and in which procedural rights are afforded to similarly situated juveniles. R.C. 2152.12 and 2152.13. However, R.C. 2152.86 has effectively placed children into the same categories as adults who are convicted of sexually oriented offences, without those children having been transferred into the adult system.

PROPOSITION OF LAW II: The classification of a registration-eligible youth as a public registry-qualified juvenile offender registrant violates the juvenile's right to equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Ohio Constitution.

The guarantee of equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances. Fourteenth Amendment to the United States Constitution; Ohio Const., Art 1, Sec.2. In order to be constitutional, a law must be applicable to all persons under like circumstances and not subject individuals to an arbitrary exercise of power. *Conley v. Shearer* (1992), 64 Ohio St.3d 284, 288-289. In other words, the Equal Protection Clause prevents the state from treating differently or arbitrarily, persons who are in all relevant respects alike. *Park Corp. v. Brook Park* (2004), 102 Ohio St.3d 166, 2004-Ohio-2237. The Equal Protection clause of the Ohio Constitution has been interpreted to be essentially identical in scope to the analogous provision of the U.S. Constitution. *State v. Brown* (1996), 117 Ohio App.3d 6, 10.

The United States Supreme Court has found that while children's constitutional rights are not "indistinguishable from those of adults *** children generally are protected by the same constitutional guarantees against governmental deprivations as are adults." The proper standard

of review for classifications based upon age is the rational basis test. *Massachusetts Board of Retirement v. Murgia* (1976), 427 U.S. 307, 315, 96 S. Ct. 2562. *Bellotti v. Baird* (1979), 443 U.S. 622, 635, 99 S. Ct. 3035. And this Court has observed:

Under a traditional equal protection analysis, class distinctions in legislation are permissible if they bear some rational relationship to a legitimate governmental objective. Departures from traditional equal protection principals are permitted only when burdens upon suspect classifications or abridgments of fundamental rights are involved.

State v. Thompkins (1996), 75 Ohio St.3d 558, quoting *State ex rel. Vana v. Maple Hts. City Council* (1990), 54 Ohio St.3d 91, 92.

Senate Bill 10 violates the Equal Protection Clauses of both the Ohio and United States Constitutions by treating similarly situated persons in vastly different ways. It subjects some juvenile sex offenders to mandatory classification and registration while others are subject to discretionary sex offender classification and registration. R.C. 2152.82; 2152.83. Some juvenile offenders are subject to public registration while others are not. R.C. 2950.081. And some juvenile offenders are not subject to any classification or registration orders. R.C. 2152.82; 2152.83. These classes are based largely on the age of the offender at the time they committed their offense, the existence or not of prior offenses, and whether the prosecutor pursued a serious youthful offender disposition.

Christopher was fifteen years old at the time he committed his offenses. Had he been thirteen years old at the time of his offenses, he would not be subject to any classification or registration, public or non-public. R.C. 2152.82; 2152.83. However, Christopher is a PRQJOR because he was fifteen years old at the time he committed his offenses and because he received a serious youthful offender disposition. R.C. 2152.86. Had Christopher not been sentenced as a serious youthful offender, he would have been a mandatory juvenile offender registrant, but not

subject to inclusion on eSORN or to automatic community notification. R.C. 2152.82; 2950.081. And had Christopher been thirteen years old at the time he committed his offenses, whether or not a serious youthful offender, he would not be subject to any registration. R.C. 2152.82; 2152.83. While the legislature may set more severe penalties for *acts* that it believes have greater consequence, under this penalty scheme the differences are not based on acts of greater consequence, since the conduct of the juvenile is identical or of the same felony classification.

The government objective of protecting the public from sexual offenders is not rationally related to the sex offender classification and registration statutes as they pertain to the PRQJOR class. The type of juvenile offender that the statutes intend to protect society from is one that is no longer amenable to rehabilitation by the juvenile justice system, and would be transferred to the adult criminal court system via bindover or have the adult portion of the serious youthful offender sentence invoked. Therefore, Christopher's classification as a public registrant—when he had not been moved into the criminal court system, thereby demonstrating that he is currently amenable to treatment and rehabilitation—is not rationally related to the State's interest in protecting the public from these offenders.

The United States Supreme Court scrutinized arbitrary age-based distinctions in sentencing juveniles over sixteen years of age when it abolished the death penalty for all juveniles under the age of eighteen. See, generally, *Roper*. The Court concluded that juveniles are “categorically less culpable than the average criminal.” *Roper*, at 567. In holding that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed, the Court laid out the differences between juveniles and adults to demonstrate that juvenile offenders cannot, with reliability, be classified among the worst offenders. Citing the lack of maturity, underdeveloped

sense of responsibility, and the susceptibility to negative influences that children have, the Court noted that the character of a child is not as well formed as an adult. *Roper*, at 570. These findings apply generally to all adolescents under the age of 18.

The S.B. 10 age-based distinctions are not rationally related to the government's stated objective in providing for public safety. First, it should be noted that the primary motivation in passing S.B. 10 was to comply with a federal mandate to all states to pass the Adam Walsh Act or risk a loss of federal funds. *State v. Williams*, 88 Ohio St.3d 513, 516, 2000-Ohio-428. Nevertheless, S.B. 10 provides no rationale for treating juvenile offenders different due to their age, or for treating serious youthful offenders who are demonstrating their amenability to treatment from juvenile offenders without a serious youthful offender disposition. Rather than demonstrating distinctions among juvenile offenders, what research actually shows is that adolescent offenders as a whole are significantly different from adult sex offenders in several ways. Juvenile offenders are: more responsive to treatment and do not appear to reoffend into adulthood; have fewer victims and engage in less serious and aggressive behaviors; do not have the same deviant sexual arousal and fantasies as adult offenders; do not fit the definition for pedophilia; and have low recidivism rates. (National Center on Sexual Behavior of Youth, July 2003, Number 1). The NCSBY defines "adolescent sex offenders" as "adolescents from age thirteen to seventeen who commit illegal sexual behavior as defined by the sex crime statutes of the jurisdiction in which the offense occurred." There is no distinction in these findings between a thirteen year old and a seventeen year old.

According to the Ohio Association of County Behavioral Health Authorities, the Ohio recidivism rates for juveniles who commit a sexual offense, with treatment, supervision, and support, are lower than any other group of offenders, at 4%-10%. That means 90% to 96% of

Virginia (2002), 536 U.S. 304, 122 S. Ct. 2242. This right flows from the basic “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” *Weems v. United States* (1910), 217 U.S. 349, 367, 30 S. Ct. 544. By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons. *Roper*, at 560.

The prohibition against cruel and unusual punishments must be “interpreted according to its text by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design.” *Id.* “To implement this framework [the Court] ha[s]... affirmed the necessity of referring to ‘the evolving standards of decency that mark the progress of a maturing society’ to determine which punishments are so disproportionate as to be cruel and unusual.” *Id.* at 561, quoting *Trop v. Dulles* (1958), 356 U.S. 86, 101, 78 S. Ct. 590 (plurality opinion).

As argued above, the United States Supreme Court has explained how the fundamental differences between adult and juvenile offenders begs for greater protection of juveniles when it comes to the penalties associated with that youth’s actions. *Thompson v. Oklahoma* (1988), 487 U.S. 815, 835, 108 S. Ct. 2687. Juvenile justice jurisprudence is replete with the recognition that there are major distinctions between the rights and duties of juveniles as compared with those of adults. *Thompson*, at 823. The age-based restrictions that control when a child may lawfully vote, drive, sit on a jury, marry without parental consent, and purchase tobacco and alcohol have clearly illustrated the value in lawmakers taking into consideration the mental capacity of a child to handle these responsibilities. *Id.* The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult. *Roper*, at 561-562, citing *Thompson*, at 835.

And, as it is generally agreed that punishment should be directly related to the personal culpability of a criminal defendant, since adolescents are less mature and responsible than adults, less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. *Thompson*, at 834-835, citing *California v. Brown* (1987), 479 U.S. 538, 545, 107 S. Ct. 837.

In *Roper*, the Supreme Court recognized that, “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” *Roper*, at 570. For example, a juvenile’s susceptibility to immature and irresponsible behavior means “their irresponsible conduct is not as morally reprehensible as that of an adult.” *Roper*, at 553 (citing *Thompson*, at 853). A juvenile’s vulnerability and comparative lack of control over his or her immediate surroundings mean that juveniles have a greater claim than adults, to be forgiven for failing to escape negative influences in their whole environment. *Roper*, at 553. “The reality that juveniles still struggle to define their identity means that it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.” *Id.* In addition, “[r]etribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.” *Id.* at 571. The fact that juveniles are categorically less culpable highlights the unfairness of automatic and lifetime registration and illustrates the devastating consequences that result when the law is used to secure an adult consequence against a youthful defendant. Given the Supreme Court’s understanding of juvenile development, there is no rational justification for juveniles to be automatically subjected to the highest level of registration and classification. And there is likewise no rational justification for a child to be placed on a public registry.

The Supreme Court in *Roper* recognized that, as capital punishment was to be reserved for a narrow category of the most serious crimes, and imposed against only those who were the most deserving of execution, juveniles could not be reliably classified among the worst offenders. *Roper*, at 569. The Court also found that retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished by reason of youth and immaturity. *Id.* Likewise, it is unclear that deterrence is a proper justification for punishing a juvenile offender, because the likelihood that a teenage offender has made the type of cost-benefit analysis that attaches the weight to the possibility of the death penalty is so remote as to be virtually nonexistent. *Id.* at 572.

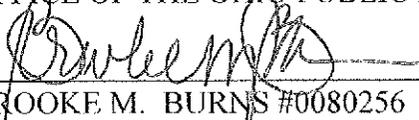
Just as juveniles cannot be subjected to capital punishment because that punishment is to be reserved for those who are the most culpable of the most serious crimes, so the adult penalties associated with a criminal conviction for a sexually oriented offense should not be so haphazardly applied to Ohio's children. The juvenile court expressly found that Christopher should not be bound over to the adult system. Yet, R.C. 2152.86 conferred on Christopher an automatic, public adult penalty that may be with him for the rest of his life. As such, Christopher's lifelong public registration—for acts committed when he was fifteen years old—is cruel and unusual.

CONCLUSION

For the reasons argued above, C.P. respectfully requests that this Court accept jurisdiction of this appeal.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION OF MINOR CHILD-APPELLANT C.P. was served by ordinary U.S. Mail, postage-prepaid, this 28th day of April, 2010, to Sabrina J. Ellis, Assistant Prosecuting Attorney, Athens County Prosecutor's Office, Athens County Courthouse, One South Court Street, Athens, Ohio 45701.



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COUNSEL FOR MINOR C.P.

IN THE SUPREME COURT OF OHIO

IN RE: C.P.,
A MINOR CHILD

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On Appeal from the
Athens County Court of Appeals
Fourth Appellate District

C.A. Case No. 09CA41

APPENDIX TO

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF MINOR CHILD-APPELLANT C.P.**

MAR 30 2010

Arthur, CLERK
COURT OF APPEALS

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

IN THE MATTER OF C.P.,
Adjudicated Delinquent Child
And Serious Youthful Offender.

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: Case No. 09CA41
:
: **DECISION AND**
: **JUDGMENT ENTRY**
:
:

APPEARANCES:

Timothy Young, Ohio State Public Defender, and Brooke M. Burns, Ohio State Assistant Public Defender, Columbus, Ohio, for Appellant.

C. David Warren, Athens County Prosecuting Attorney, and George J. Reitmeier, Athens County Assistant Prosecuting Attorney, Athens, Ohio, for Appellee.

Kline, J.:

{¶¶} C.P. appeals the judgment of the trial court, which classified him as a tier III juvenile offender registrant and a public registry-qualified juvenile offender registrant. On appeal, C.P. contends that Ohio's recently enacted registration laws are unconstitutional as applied to juveniles. Specifically, C.P. contends that the mandatory imposition of registrant status on serious youthful offenders is unconstitutional because it violates C.P.'s substantive due process rights, C.P.'s right to equal protection of the laws, and C.P.'s right to be free from cruel and unusual punishment. We disagree. First, C.P. fails to establish that the proceedings below infringed on a fundamental liberty interest of his. Second, C.P. fails to rebut our presumption that the statute is rationally related to a legitimate legislative purpose. Third, we have previously

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{¶2} C.P. also contends that his attorney's failure to raise these constitutional arguments shows that his attorney provided ineffective assistance. But we have found C.P.'s arguments to be without merit. As such, any objection raised by his attorney would have been appropriately denied. Accordingly, we affirm the judgment of the trial court.

I.

{¶3} On June 26, 2009, the Athens County Sheriff's Department filed a complaint that accused C.P. of two counts of rape and one count of kidnapping. That same day, the State filed a motion requesting the trial court bind C.P. over to Athens County Common Pleas Court. At a hearing, the trial court denied the State's motion to transfer jurisdiction on August 24, 2009.

{¶4} The grand jury indicted C.P. on September 14, 2009. See R.C. 2152.13. The indictment alleged that C.P. was delinquent because he engaged in conduct that if engaged in by an adult would be a crime against the laws of Ohio. Specifically, the indictment alleged two counts of rape in violation of R.C. 2907.02(A)(1)(b) and one count of kidnapping in violation of 2905.01(A)(4). The indictment also indicated that C.P. was eligible to be classified as a serious youthful offender. C.P. admitted to the allegations in the indictment.

{¶5} On September 30, 2009, the trial court held a dispositional hearing. According to a later entry, the trial court found C.P. to be delinquent based on his admissions. The trial court further found that "[p]ursuant to the parties' joint recommendation and R.C. 2152.11, the Court finds that a serious youthful offender dispositional sentence should

be imposed[.]” The trial court then classified C.P. as a tier III juvenile offender registrant and also classified C.P. as a public registry-qualified juvenile offender registrant.

{¶6} C.P. now appeals and raises the following assignments of error: I. “The trial court erred when it classified C.P. as a public registry-qualified juvenile offender registrant, as R.C. 2152.86 violates his right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution.” II. “The trial court erred when it classified C.P. as a public registry-qualified juvenile offender registrant as [R.C.] 2152.86 violates his right to equal protection under the law. Fourteenth Amendment to the United States Constitution; Article I, Section 2 of the Ohio Constitution.” III. “The trial court erred when it classified C.P. as a public registry-qualified juvenile offender registrant, in violation of the prohibition against cruel and unusual punishments. (Sept 30, 2009 Hearing; T.pp. 1-22; A-4). Eighth and Fourteenth Amendments to the United States Constitution; Section 9, Article I of the Ohio Constitution.” And IV. “[C.P.] was denied the effective assistance of counsel when trial counsel failed to object to the imposition of a classification that was unconstitutional. (Sept. 30, 2009 T.pp. 1-23; A-4)[.] Sixth and Fourteenth Amendments to the United States Constitution; Section 10, Article I of the Ohio Constitution.”

II.

{¶7} In his first three assignments of error, C.P. challenges the constitutionality of Ohio’s recent changes to the treatment of juveniles who have committed a sexually oriented offense. The Ohio legislature enacted these changes via Senate Bill 10 (“S.B. 10”). Statutes enacted in Ohio, including S.B. 10, are “presumed to be constitutional.” *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, at ¶12, citing *State ex rel.*

Jackman v. Cuyahoga Cty. Court of Common Pleas (1967), 9 Ohio St.2d 159, 161.

This presumption remains unless C.P. can establish, "beyond reasonable doubt, that the statute is unconstitutional." *Ferguson* at ¶12, citing *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7, 13.

A. Due Process

{¶18} In his first assignment of error, C.P. contends that R.C. 2152.86 violates his right to due process. C.P.'s brief is unclear on precisely why he contends this statute violates his right to due process under the Fourteenth Amendment to the United States Constitution. Nonetheless, his brief contends that community notification and registration, as imposed by R.C. 2152.86, constitute punishment, and that the imposition of criminal punishment in a juvenile proceeding violates the juvenile's right to substantive due process. C.P. does not appear to contend that the procedures used to impose his classification were inadequate. "Though [C.P.] was afforded due process considerations as it relates to his designation as a serious youthful offender, he was denied due process when he was given an offense-based classification as a Tier III juvenile offender registrant with community notification, because the juvenile court did not have discretion in making that determination." C.P.'s brief at 11. C.P. contends that S.B. 10 impermissibly restrains the discretion of the trial court, but C.P. raises no argument claiming he was denied notice or an opportunity to be heard.

{¶19} Since C.P. relies on substantive due process, he must establish that the challenged provision violates a fundamental liberty interest. See *Reno v. Flores* (1993), 507 U.S. 292, 301-02 (substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless

the infringement is narrowly tailored to serve a compelling state interest.”) (Emphasis sic.).

{¶10} C.P. contends that public registration for sex offenders constitutes a shaming punishment. However, we find that Ohio’s present scheme of public notification of sex offenders is indistinguishable from *Smith v. Doe* (2003), 538 U.S. 84. In that case, the State of Alaska required certain offenders to register with the Alaska Department of Public Safety, and that department then disseminated the offender’s “name, aliases, address, photograph, physical description, description[,] license [and] identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with [the update] requirements . . . or cannot be located.” *Smith* at 90-91 (alterations in original, citations omitted).

{¶11} The United States Supreme Court rejected the argument that this notification constituted punishment because of its resemblance to colonial shaming punishments. “Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.” *Smith* at 98. This conclusion is one that other Ohio Courts of Appeals have reached. *State v. Maggy*, Trumbull App. No. 2008-T-0078, 2009-Ohio-3180, at ¶¶68-71; *State v. Williams*, Warren App. No. CA2008-02-029, 2008-Ohio-6195, at ¶¶61-66; *State v. Swank*, Lake App. No. 2008-L-019, 2008-Ohio-6059, at ¶85; *State v. King*, Miami App. No. 08-CA-02, 2008-Ohio-2594, at ¶¶17-20.

{¶12} We see no material difference in the nature of the dissemination of information between Ohio’s notification scheme and Alaska’s notification scheme. And C.P.

provides us with no argument that distinguishes *Smith* or the other cited cases above. We, therefore, find that the imposition of community notification requirements does not serve to render Ohio's community notification provisions punitive in nature.

{¶13} C.P. also argues that the imposition of notification requirements furthers the traditional penological goals of retribution and deterrence. Again, the United States Supreme Court rejected the argument that the presence of a deterrent purpose renders sanctions criminal in nature. *Smith* at 102, citing *Hudson v. United States* (1997), 522 U.S. 93, 105. The *Smith* Court also rejected the argument that the Alaska scheme's obligations were retributive by noting that "[t]he broad categories * * * and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Smith* at 102. Again, Ohio Courts have previously rejected C.P.'s argument. *Williams* at ¶67-72; *Sigler v. State*, Richland App. No. 08-CA-79, 2009-Ohio-2010, at ¶73; *State v. Byers*, Columbiana App. No. 07 CO 39, 2008-Ohio-5051, at ¶41; *King* at ¶21-22; *State v. Candela*, Ashtabula App. No. 2008-A-0068, 2009-Ohio-4096, at ¶26. But, See, *State v. Garner*, Lake App. No. 2008-L-087, 2009-Ohio-4448, at ¶31-34.

{¶14} In addition, C.P. never explains what the foregoing arguments are intended to prove in regard to his argument that S.B. 10 violates substantive due process. Generally, courts have considered whether the restrictions of laws like S.B. 10 are punitive or regulatory in the context of an ex post facto argument or an argument that the restrictions violated the Eighth Amendment's prohibition on cruel and unusual punishment. The United States Constitution prohibits state governments from enacting ex post facto laws. Clause 1, Section 10, Article I, United States Constitution. This

prohibition applies only to criminal laws. See *Lynce v. Mathis* (1997), 519 U.S. 433, 441. The Eighth Amendment to the United States Constitution prohibits a state from imposing a cruel and unusual punishment. *State v. Hairston*, 118 Ohio St.3d 289, 2008-Ohio-2338, at ¶12. Again, this provision applies only if the sanctions imposed are punitive, which is to say criminal in nature. *State ex rel. Brown v. Dayton Malleable, Inc.* (1982), 1 Ohio St.3d 151, 158, fn. 5, citing *Ingraham v. Wright* (1977), 430 U.S. 651. Therefore, most of the cases which have considered whether S.B. 10's notification requirements are punitive in nature do so by addressing whether S.B. 10 violates either the ex post facto clause or the Eighth Amendment's prohibition on cruel and unusual punishment.

{¶15} Here, C.P. presumes that the imposition of criminal sanctions in a juvenile proceeding must be a violation of his substantive due process rights. C.P. reasons that "[t]he very purpose of the juvenile code was to avoid treating children as criminals and insulating them from the reputation and answerability of criminals." C.P.'s brief at 12. This is C.P.'s only argument that might distinguish the facts of this case from those in *Smith*. The mere fact that community notification provisions might conflict with the principles of juvenile law does not establish a violation of due process. To establish such a violation, C.P. would need to demonstrate that he had a fundamental right to not be treated like an adult in this proceeding. At best, C.P. has demonstrated that the juvenile code has some provisions that are in tension with the juvenile code's stated purposes. But this is to be expected. Legislatures need to reconcile competing concerns and interests. In so doing, the resulting legislation often includes provisions

motivated by those competing interests, and this is not a sufficient basis for finding a statute unconstitutional.

{¶16} C.P. also cites an opinion of the United States Court of Appeals for the Ninth Circuit. *United States v. Juvenile Male* (C.A.9, 2009), 581 F.3d 977. In that case, the Ninth Circuit Court of Appeals found that provisions of the federal juvenile code imposed an unconstitutional ex post facto punishment on juveniles. *Juvenile Male* at 993. However, C.P. raises no argument under the ex post facto clause in the present case. Presuming arguendo, we accept the Ninth Circuit's analysis and concluded that the registration requirements imposed against C.P. under S.B. 10 constitute criminal punishment. Nonetheless, this alone fails to demonstrate an unconstitutional denial of either substantive or procedural due process.

{¶17} Accordingly, we overrule C.P.'s first assignment of error.

B. Equal Protection Clause

{¶18} The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that: "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." Section 1, Fourteenth Amendment to the United States Constitution. The Ohio Constitution provides that "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit[.]" Section 2, Article I of the Ohio Constitution. "The limit placed upon governmental action by the Equal Protection Clauses of the Ohio and United States Constitutions are nearly identical." *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 424, 1994-Ohio-38.

{¶19} Unless the government restriction at issue targets a suspect class or infringes on a fundamental right, we review the restriction merely to ensure that it is rationally related

to some governmental interest. *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, at ¶82; *Vacco v. Quill* (1997), 521 U.S. 793, 799. "The vast weight of authority requires that, when utilizing the 'rational basis' test, the courts defer to the legislature on the issue of constitutionality. 'We do not inquire whether this statute is wise or desirable * * *. * * * Misguided laws may nonetheless be constitutional.'" *Morris v. Savoy* (1991), 61 Ohio St.3d 684, 692, quoting *James v. Strange* (1972), 407 U.S. 128, 133. C.P. concedes that rational basis is the appropriate standard of review. C.P.'s brief at 17.

{¶20} C.P. argues that "[t]he provisions of S.B. 10 violate the Equal Protection Clauses of both the Ohio and United States Constitutions by treating similarly situated persons in vastly different ways. It subjects some juvenile offenders to mandatory classification and registration while others are subject to discretionary sex offender classification and registration." C.P.'s brief at 15. C.P. raises three different distinctions that he argues are not rationally related to any legitimate goal.

{¶21} First, juveniles who were fourteen or fifteen years old at the time of their offense are subject to discretionary classification. See *In re J.M.*, Pike App. No. 08CA782, 2009-Ohio-4574, at ¶68-72; R.C. 2152.83(B)(1). However, if the juvenile has a prior adjudication for a sexually oriented offense or was sixteen or seventeen years old at the time of the offense then that juvenile is subject to mandatory sex offender classification and registration. R.C. 2152.82(A); R.C. 2152.83(A)(1).

{¶22} Second, a juvenile who is fourteen years old or older at the time of the offense may be subject to classification and registration, but a juvenile younger than fourteen at

the time of the offense is not subject to classification or registration at all. See R.C. 2152.82(A); R.C. 2152.83(A)(1) & (B)(1).

{¶23} Third, a juvenile who is fourteen years old or older at the time of the offense and is designated a serious youthful offender is automatically subject to the public registry so long as the offense is within an enumerated list. R.C. 2152.86(A)(1). However, a juvenile offender the same age who is not designated a serious youthful offender is not subject to the public registry. See R.C. 2152.82; R.C. 2152.83; R.C. 2152.86. Finally, juvenile offenders who are thirteen years old or younger at the time of their offense and have been designated serious youthful offenders are not subject to any classification or registration, or the public registry. See R.C. 2152.86.

{¶24} However, in examining these provisions, we find that the general assembly has enacted provisions that are more likely to impose registration and public registry requirements on offenders who are older or who have previously been adjudicated delinquent for committing sexually oriented offenses. The purpose of the notification and public registry provisions is to protect the public. See *State v. Cook*, 83 Ohio St.3d 404, 413, 1998-Ohio-291.

{¶25} C.P. contends that "these classifications are based on age and, in only some cases, prior offense. Under the rational basis review, these classifications cannot survive. * * * There is simply no evidence at all that a sixteen-year-old offender (mandatory) is more likely to re-offend than a fifteen-year-old offender (discretionary)." C.P.'s brief at 17-18. However, as we noted above, validly enacted statutes are presumed to be constitutional. The State need not introduce evidence justifying a statute. We do not review a statute under the rational basis test to determine whether

the legislature's decisions are wise or supported by evidence, but only to determine if the enacted statute is rationally related to a legitimate governmental aim. Here, the legitimate governmental aim is the protection of the public. The General Assembly concluded that juveniles who were older when they committed their offenses or who had previously been adjudicated delinquent for committing a sexually oriented offense are more likely to reoffend. And we find that these conclusions are rationally related to the legislative goal of protecting the public.

{¶26} C.P. also cites *Roper v. Simmons* (2005), 543 U.S. 551. We do not find this case persuasive as it deals with the question of whether applying the death penalty to juveniles violates the Eighth Amendment's prohibition on cruel and unusual punishment. *Roper* at 578-79.

{¶27} Finally, C.P. cites statistical studies to demonstrate that the recidivist rates of juvenile sex offenders are relatively low. Even if we accept this as true, nonetheless this does not demonstrate that S.B. 10's provisions related to the classification and notification of juvenile offenders violates the Equal Protection Clauses of the Ohio or United States Constitutions. C.P. contends that if the legislature were really concerned with recidivism and protecting the public then the legislature would have enacted a notification regime for juveniles who are adjudicated delinquent for theft offenses. However, the legislature may have concluded that the harm of a juvenile reoffending by means of a theft offense is not as great as the harm of a juvenile reoffending by means of a sexually oriented offense. In any event, as we noted above, when reviewing a statute using the rational basis test, we do not review the wisdom of the enacted legislation. Even if we accepted C.P.'s arguments that S.B. 10's structure in regard to

juveniles is unwise and counterproductive, nonetheless, we would conclude that the act is constitutional.

{¶28} Accordingly, we overrule C.P.'s second assignment of error.

C. Eighth Amendment

{¶29} C.P. next contends that the imposition of S.B. 10's classification and notification scheme violates his Eighth Amendment rights. The Eighth Amendment of the United State Constitution provides that "cruel and unusual punishments [shall not be] inflicted." However, we have previously rejected Eighth Amendment challenges to S.B. 10 by juveniles. See, e.g., *In re T.M.*, Adams App. No. 08CA863, 2009-Ohio-4224, at ¶32. We see no reason to revisit this conclusion at this time. C.P. concentrates this section of his brief on the issue of why the Eighth Amendment provides higher protections for juveniles than adults. However, unless the sanction constitutes a punishment, this jurisprudence is not relevant. C.P. does cite to the Ninth Circuit case, *United States v. Juvenile Male*, above in the section of his brief concerning substantive due process. However, we have reviewed this case and find that we rejected these arguments in the *T.M.* case. We see no reason to revisit that conclusion in the present case. And C.P. provides no argument in this section that explains why registration and notification constitutes punishment here.

{¶30} Accordingly, we overrule C.P.'s third assignment of error.

III.

{¶31} Finally, C.P. contends in his fourth assignment of error that his trial counsel provided ineffective assistance for failing to raise these constitutional objections to S.B.

10.

{¶32} “In Ohio, a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel’s ineffectiveness.” *State v. Countryman*, Washington App. No. 08CA12, 2008-Ohio-6700, at ¶20, quoting *State v. Wright*, Washington App. No. 00CA39, 2001-Ohio-2473; *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-56, cert. den. *Hamblin v. Ohio* (1988) 488 U.S. 975. To secure reversal for the ineffective assistance of counsel, one must show two things: (1) “that counsel’s performance was deficient * * *” which “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment[.]” and (2) “that the deficient performance prejudiced the defense * * * [.]” which “requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Strickland v. Washington* (1984), 466 U.S. 668, 687. See, also, *Countryman* at ¶20. “Failure to satisfy either prong is fatal as the accused’s burden requires proof of both elements.” *State v. Hall*, Adams App. No. 07CA837, 2007-Ohio-6091, at ¶11, citing *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, at ¶205.

{¶33} In reviewing the performance of trial counsel, an appellate court must bear in mind that it should “ordinarily refrain from second-guessing strategic decisions counsel make[s] at trial, even where counsel’s trial strategy was questionable.” *State v. Rinehart*, Ross App. No. 07CA2983, 2008-Ohio-5770, at ¶50, quoting *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, at ¶152.

{¶34} Here, we have rejected all of C.P.’s arguments that purport to demonstrate that S.B. 10 is unconstitutional. We find that had C.P.’s trial counsel raised those arguments, the trial court should have rejected them anyway. As such, C.P. cannot

demonstrate that his counsel's performance was deficient under the first prong of the *Strickland* test.

{¶35} Accordingly, we overrule C.P.'s fourth assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, and Appellant pay the costs herein taxed.

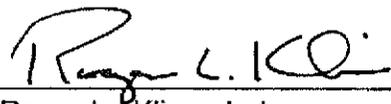
The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

McFarland, P.J. and Abele, J.: Concur in Judgment and Opinion

For the Court

BY: 

Roger L. Kline, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.