ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: C.P. Adjudicated Delinquent Child and Serious Youthful Offender	:	Case No. 2010-0731 On Appeal from the Athens County Court of Appeals Fourth Appellate District C.A. Case No. 09CA41

MERIT BRIEF OF APPELLANT C.P.

C. DAVID WARREN #0024763
Athens County Prosecuting Attorney

GEORGE REITMEIER #0065820
Assistant Athens County Prosecutor
(COUNSEL OF RECORD)

Athens County Prosecutor's Office
1 South Court Street
Athens, Ohio 45701
(740) 592-3208
(740) 592-3291 - Fax

COUNSEL FOR STATE OF OHIO

OFFICE OF THE OHIO PUBLIC DEFENDER

BROOKE M. BURNS #0080256
Assistant State Public Defender
(COUNSEL OF RECORD)

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
Brooke.Burns@opd.ohio.gov

COUNSEL FOR C.P.

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STATEMENT OF THE CASE AND FACTS

On June 26, 2009, a multi-count complaint was filed in the Athens County Juvenile Court, alleging that then fifteen-year-old, C.P., was delinquent of two counts of rape, and one count of kidnapping with sexual motivation, violations of R.C. 2907.02 and 2950.01, respectively, each a felony of the first degree if committed by an adult. (S-1). The complaints alleged that the victim was C.P.'s nephew, E.S. (July 29, 2009, T.pp. 11-14; S-1). Shortly after the filing of the complaint, the State filed a motion to transfer jurisdiction to the Athens County Court of Common Pleas. (July 29, 2009, T.p. 3).

On July 29, 2009, the juvenile court held a hearing pursuant to R.C. 2152.12, to determine whether to retain jurisdiction over C.P.'s case. (July 29, 2009, T.p. 3). C.P.'s mother appeared via teleconference. (July 29, 2009, T.p. 3). At C.P.'s hearing, the parties entered a joint stipulation that there was probable cause to believe that the alleged offenses occurred and that C.P. committed the offenses. (July 29, 2009, T.pp. 3, 8). The court then heard testimony from Tabitha P.,[1] C.P.'s half-sister and the mother of E.S., who informed the court about the effect the alleged incidents had on her son. (July 29, 2009, T.pp. 11-15). The State notified the court that C.P. had previously been adjudicated delinquent for committing a sexually oriented offense against his half-sister C.R., in Utah, and that he had undergone eighteen months of sex offender treatment as a result of his adjudication. (July 29, 2009, T.p. 21). Defense counsel advocated for the juvenile court to retain jurisdiction of C.P.'s case, referencing C.P.'s history of being physically and sexually abused, and his borderline mental illness. (July 29, 2009, T.pp. 26-27). The juvenile court took the matter under advisement. (July 29, 2009, T.p. 34).

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[1] As Tabitha and C.P. share the same last name, Tabitha's last name will be referenced only as "P."

Approximately one month later, the court reconvened and informed the parties that "I think we can have our best chance of working with C.P. in the juvenile system and I don't think everything has been exhaustively tried there." (Aug. 24, 2009, T.p. 2). The court denied the State's motion to transfer jurisdiction. (Aug. 24, 2009, T.p. 2). On September 21, 2009, following the initiating of a serious-youthful-offender (hereinafter "SYO") proceeding a grand jury returned an SYO indictment against C.P. R.C. 2152.13. (Sept. 23, 2009, T.p. 1; S-3).

C.P. appeared before the juvenile court for an adjudicatory hearing on September 23, 2009. (Sept. 23, 2009, T.pp. 1-16). The parties indicated that C.P. would be entering an admission to each charge in the indictment. (Sept. 23, 2009, T.p. 2). The juvenile court questioned C.P. concerning his understanding of the waiver form he had signed prior to the hearing, and accepted his admission. (Sept. 23, 2009, T.pp. 5-14). The court then found C.P. delinquent of each offense and designated him a SYO in relation to each offense. (S-7).

For disposition, the court imposed a three-year minimum commitment to the Ohio Department of Youth Services (hereinafter referenced as "DYS") on each count, set to run concurrently with each other. (Sept. 30, 2009, T.p. 13; S-7). In addition, the court imposed three suspended prison terms to the Ohio Department of Rehabilitation and Correction, which were stayed pending C.P.'s successful completion of his juvenile dispositions. (Sept. 30, 2009, T.p. 13; S-7). The court advised C.P. of his duties and obligations as a Tier III juvenile offender registrant and public registry-qualified juvenile offender registrant under R.C. 2152.86.[2] (Sept. 30, 2009, T.p. 16).

C.P. appealed his classification to the Fourth District Court of Appeals, arguing that R.C. 2152.86 violated his right to due process, equal protection, and the prohibition against cruel and

[2] C.P.'s placement on eSORN was stayed, pending his appeal.

unusual punishments. *In re C.P.*, Athens App. No. 09CA41, 2010-Ohio-14, ¶1. The court of appeals affirmed C.P.'s classification on March 30, 2010. Id.

ARGUMENT

Introduction

I. Development of the Juvenile Court

Prior to the juvenile court movement of the 19th century, the United States justice system treated children as adults. *In re Gault* (1967), 387 U.S. 1, 15, 97 S.Ct. 1428. Prior to the movement, children as young as seven years old[3] could be tried in adult criminal court and if found guilty, sentenced to long prison terms, and even death.[4] Early reformers, appalled by the reality of children facing lengthy prison sentences and exposure to "hardened adult criminals" were "profoundly convinced that society's duty to the child could not be confined by the concept of justice alone." *Gault* at 16. As such, there emerged a new reliance on the common law principle of parens patriae to develop a different kind of adjudicatory scheme for youth. Id. Reformers "believed that society's role was not to ascertain whether the child was 'guilty' or 'innocent,' but 'What is he, how has he become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career.'" Id. at 15.

Therefore, state legislatures created juvenile courts to function as "civil" not "criminal" bodies. Id. at 17. Acting in loco parentis, the juvenile court functions "to provide measures of

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[3] Prior to the 19th century, common law dictated that children under the age of seven were "infants," incapable of having criminal culpability; however, children seven and older could form the requisite criminal intent for committing an offense. See generally, Snyder and Stickmund, Office of Juvenile Justice and Delinquency Prevention, National Center for Juvenile Justice, Juvenile Offenders and Victims: 1999 National Report (September 1999) at ch. 4.

[4] The constitutionality of applying the death penalty to juvenile offenders was considered by the Supreme Court in 1988 in *Thompson v. Oklahoma* (1988), 487 U.S. 815, 108 S.Ct. 2687.

guidance and rehabilitation for the child and protection for society, not to affix criminal responsibility, guilt and punishment." *Kent v. United States* (1966), 383 U.S. 541, 554, 86 S.Ct. 1045.

Today, juvenile courts continue to occupy a unique place in the legal system. *In re C.S.*, 116 Ohio St.3d 267, 2007-Ohio-4919, ¶65. In Ohio, juvenile delinquency provisions are to be liberally interpreted to "protect the public interest in removing the consequences of criminal behavior and the taint of criminality from children committing delinquent acts and to substitute therefore a program of supervision, care, and rehabilitation." *State ex rel. Plain Dealer Publishing Co. v. Geauga Cty. Court of Common Pleas, Juvenile Div.*, 90 Ohio St.3d 79, 83, 2000-Ohio-35 (citing R.C. 2151.01(B); cf. Juv.R. 1(B)(4)). This goal is achieved, in part, by providing avenues for anonymity and confidentiality to children. *In re T. R.* (1990), 52 Ohio St.3d 6, 15-16. Thus, juvenile proceedings are usually private; court records are confidential; and juvenile offenders have an opportunity to seal records later in life. Id. Based on the fundamental purposes of the juvenile court, "it is the law's policy 'to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.'" *Gault* at 24.

II. Ohio's Sex Offender Registration and Notification Law.

A. Megan's Law–House Bill 180.

Ohio's sex offender registration statute was enacted in 1963. *State v. Cook*, 83 Ohio St.3d 404, 406, 1998-Ohio-291. In 1996, however, the General Assembly amended Ohio's sex offender registration law as part of Am.Sub.H.B. 180, 146 Ohio Laws, Part II, 2560 (hereinafter referenced as "H.B. 180") in response to the ratification of the Jacob Wetterling Act,[5] which required that states either adopt sex offender registration laws comporting with federal

[5] The 1994 enactment of the Jacob Wetterling Act was prompted by the advent of Megan's Law, a sex offender registration act codified by the New Jersey Legislature. *Williams* at 516.

regulations or lose funding under the Public Health and Welfare Code. Id.; See, also, *State v. Williams*, 88 Ohio St.3d 513, 516, 2000-Ohio-428.

Under H.B. 180, sentencing courts were required to consider a number of factors in determining whether offenders, who had been convicted of or plead guilty to sexually oriented offenses, were sexually oriented offenders,[6] habitual sex offenders,[7] or sexual predators.[8] *Cook*, at 407; Former R.C. 2950.09(B)(2)(a)–(j) (Effective January 1, 1997). H. B. 180 did not contain a registration provision for juveniles.

B. The Enactment of Senate Bill 3–JSORN.

On January 1, 2002, the Ohio General Assembly enacted Am.Sub.S.B. 3, which governed sex offender registration and notification for juveniles who had been adjudicated delinquent of a sexually oriented offense. *State v. Longnecker*, 4th Dist. No. 02CA76, 2003-Ohio-6208, fn5. Senate Bill 3 (hereinafter referenced as "JSORN") classified children into the same three categories of sexually oriented offenders that existed for adults under H.B. 180. Former R.C. 2950.01(B), (E), and (J) (Enacted January 1, 2002; Repealed July 1, 2007). In fact, many of the substantive provisions containing a juvenile's registration duties were incorporated directly into the code sections that contained the adult sex offender registration regulations. R.C. 2950.03–2950.11 (Enacted January 1, 2002). Similar to the classification scheme for adult offenders classified under H.B. 180, JSORN also directed that a court consider a number of factors before

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[6] Individuals who were convicted of or plead guilty to a sexually oriented offense but who did not fit the description of habitual sex offender or a sexual predator. Former 2950.01(D) (Effective January 1, 1997; Repealed July 1, 2007).

[7] Individuals who had previously been convicted of or plead guilty to one or more sexually oriented offenses. Former R. C. 2950.01(B) (Effective January 1, 1997; Repealed July 1, 2007).

[8] Individuals who were found likely to engage in the future in one or more sexually oriented offenses. Former 2950.01(E) (Effective January 1, 1997; Repealed July 1, 2007). This designation was reserved for those who were convicted of a sexually violent predator specification or classified as such by the court at a classification hearing. Former R. C. 2950.09(A); *Williams* at 519.

making a determination as to whether a juvenile was a sexually oriented offender, habitual offender, or sexual predator. R.C. 2950.09 (Enacted January 1, 2002).

C. The Enactment of Senate Bill 5.

In 2003, the Ohio General Assembly amended Ohio's adult sex offender registration statutes to what is now known as Ohio's Sex Offender Registration and Notification Law (hereinafter referenced as "SORN"). Am.Sub.S.B. 5 (hereinafter referenced as "S.B. 5"). *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, ¶1. In addition to making the personal information of adult sex offender registrants as a matter of public record, increasing the frequency of registration duties for habitual sex offenders, and increasing the number of counties where a registered offender was required to register, S.B. 5 made the sexual predator label more permanent, with limited chance, if any at all, to have that classification removed.[9] Id. at ¶4. See Former R.C. 2950.07(B)(1), 150 Ohio Laws, Part IV, 6558, 6657. Under S.B. 5, juveniles with a sexual predator label retained the opportunity to have that classification removed at a later date, by either the judge who made the initial classification, or by that judge's successor. Id.

D. The Enactment of Senate Bill 10.

On July 27, 2006, the United States Congress enacted the Adam Walsh Act (hereinafter referenced as "AWA"), which tightened federal guidelines and requirements for sexually oriented offenders. And, similar to the directive in the Jacob Wetterling Act, all 50 states were required to enact similar legislation by July 27, 2009, or risk losing a portion of a federal law enforcement grant. Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification; Notice. 73 Fed. Reg. 128 (July 2, 2008) (Codified as 42 U.S.C.

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[9] S.B. 5 had also imposed residency restrictions on individuals who had been convicted of sexually oriented offenses; however, this Court found that the residency restrictions in former R.C. 2950.13 were not to apply retroactively. *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, syllabus.

16912). The 127th Session of the Ohio General Assembly enacted Ohio's version of the AWA—Am.Sub.S.B. 10 (hereinafter referenced as "S.B. 10")—to comply with the federal guidelines. The amended provisions of S.B. 10 took effect on January 1, 2008. *Ferguson* at fn1.

Senate Bill 10 drastically changed the landscape of Ohio's SORN and JSORN provisions.[10] The bill created a three-tiered, offense-based classification scheme, which eliminated the requirement that classification levels be determined after a full hearing. R.C. 2950.01(E), (F), and (G); Former R.C. 2950.09 (Repealed July 1, 2007). S.B. 10 increased the length of time that adult offenders in any classification level must register with county law enforcement; and increased the amount of information that registrants are required to give to local law enforcement officers. R.C. 2950.07(B); R.C. 2950.041(B) and (C). It also required that adults and children who were previously registering as sexually oriented offenders, habitual sex offenders, and sexual predators be re-classified into the new tier levels, based solely on their offense. R.C. 2950.031 and 2950.032. Recently, this Court severed R.C. 2950.031 and 2950.032, as those provisions violated the Separation of Powers Clause of the Ohio Constitution. *State v. Bodyke*, ___ Ohio St.3d. ___, 2010-Ohio-2424 (Ohio, June 3, 2010) (this Court reinstated the prior court-ordered classifications that had been imposed on reclassified offenders).

One of the most drastic of the amendments in the Bill created a new class of juvenile sex offender registrants, known as public registry-qualified juvenile offender registrants (hereinafter referenced as "PRQJORs"). A PRQJOR is a juvenile who has been adjudicated delinquent of one of several specific sexually oriented offenses, and who was found to be an SYO in relation to that offense. R.C. 2152.86. For such youth, their classification as a Tier III registrant,

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[10] The Sex Offender Registration and Notification portions of the Adam Walsh Act are known as, "SORNA" and will be referenced as such throughout the remainder of this brief.

community notification, and their inclusion on the Ohio Attorney General's electronic sex offender registration and notification database (hereinafter referenced as "eSORN") is mandatory. R.C. 2152.82 and 2152.86.

III. A Review of R.C. 2152.86: Public Registry-Qualified Juvenile Offender Registrants

Revised Code Section 2152.86 governs the classification of juvenile offender registrants as PRQJORs. Before a registration age-eligible child may be classified as a PRQJOR, the State must first initiate serious youthful proceedings by one of the following methods: obtaining an SYO indictment against the child or obtaining a waiver thereof; requesting an SYO disposition against the child in the original complaint; or filing a notice of intent to seek an SYO disposition within twenty days of the child's first appearance on the complaint, or within twenty days of the court's decision not to transfer the proceedings to the court of common pleas under R.C. 2152.12. R.C. 2152.13(A)(1)-(4). In addition, the court must find the child delinquent of committing, attempting to commit, conspiring to commit or complicity to commit: rape; gross sexual imposition on a child under the age of twelve; sexual battery with a child under the age of twelve; or aggravated murder, murder, or kidnapping with a purpose to gratify the sexual needs or desires of the child. R.C. 2152.86(A)(1).

Unlike other registration-eligible youth, children who are classified under R.C. 2152.86 are automatically classified as Tier III juvenile offender registrants, with a duty to comply with registration requirements every 90 days until death.[11] R.C. 2152.86(B)(1); R.C. 2950.06(B)(3). Unlike other juvenile offender registrants, a youth with a PRQJOR classification cannot request reclassification until twenty-five years after the date on which his registration duties commenced. R.C. 2950.15(C)(2).

[11] Notably, this means that the youth carries a penalty associated with a juvenile disposition well beyond the age jurisdiction of the juvenile court. See R.C. 2151.23.

Though all juvenile offender registrants must register personally with the sheriff within three days of entering into a county where they will reside or be temporarily domiciled, a PRQJOR youth must comply with additional registration requirements. R.C. 2950.04(A)(3)(b). PRQJORs must register their place of employment, education, any change of vehicle information, email addresses, internet identifiers, and telephone numbers in any county where they attend school or work for more than three days or for more than fourteen days in a calendar year, regardless of whether that youth resides or has a temporary domicile in that county. R.C. 2950.04(A)(3)(b).

Further, and unlike other juvenile offender registrants, PRQJORs are automatically subject to community notification provisions, pursuant to R.C. 2950.11. As part of community notification, local Sheriffs disseminate their personal information to neighbors, the local children's services agencies, school officials, day care centers, local universities, and volunteer organizations in contact with minors. R. C. 2950.11(A). These entities receive the youth's residence, place of employment, school, as well as the adjudicated offense, and a photograph. R.C. 2950.11(B). In addition to community and victim notification, PRQJORs are also included in the internet sex offender database maintained by the Ohio Attorney General (hereinafter referenced as "eSORN"), pursuant to R.C. 2950.081 and R.C. 2950.13, which is updated every 90 days. The registration duties of the PRQJOR are nearly identical to the adult provisions of S.B. 10.[12]

[12] The only discernable difference between an adult offender registrant and a PRQJOR appears to be that residency restrictions do not apply to any juvenile offender registrants. R.C. 2950.034.

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.

A. Due Process Considerations in Juvenile Court Proceedings.

The guarantees of the Due Process Clause apply to juveniles and adults alike. *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. The Court determined that a child's interest in delinquency proceedings is not adequately protected without the adherence to due process principles. Id. at 30-31.

Despite the recognition that children enjoy the protections of the Due Process Clause, the standard as to whether due process requirements are met in juvenile proceedings is inexact. *In re D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, ¶51, citing *C.S.* at ¶80; See, also, *Cafeteria Workers v. McElroy* (1961), 367 U.S. 886, 895, 81 S.Ct. 1743. "Due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *D.H.* at ¶52, citing *McElroy* at 895. "Rather, the phrase expresses the requirement of fundamental fairness, a requirement whose meaning can be as opaque as its importance is lofty." Id., citing *Lassiter v. Dept. of Social Servs. Of Durham Cty., North Carolina* (1981), 452 U.S. 18, 25, 101 S.Ct. 2153; See, also, *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 543, 91 S.Ct. 1976 (the applicable due process standard in juvenile proceedings, as developed by *Gault* and *Winship*, is fundamental fairness). Thus, applying the Due Process Clause is an "uncertain enterprise which must discover what fundamental fairness consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake." Id., citing *Lassiter* at 25.

The United States Supreme Court has framed questions regarding due process around three considerations: 1) the private interest affected by the government's official action; 2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and 3) the government's interest, including the function involved and the fiscal and administrative burdens that additional or substitute procedural requirement would entail. *Mathews v. Eldridge* (1976), 424 U.S. 319, 96 S.Ct. 893. And while there is no constitutional right to be treated like a juvenile, it is well established that youth in Ohio do have an interest in not being prosecuted as adults or in receiving adult penalties and sanctions without being transferred to the adult system.

B. The Unique Role of the Juvenile Justice System.

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. Id. at ¶66, citing *Kent* at 554. The objective of the juvenile court, from its inception, has been that courts would protect a wayward child from evil influences, save him from criminal prosecution, and provide him social and rehabilitative services. *T.R.* at 15; *Children's Home of Marion City v. Fetter* (1914), 90 Ohio St. 110, 127. As such, "juvenile court proceedings are civil, rather than criminal, in nature." *In re Anderson*, 92 Ohio St.3d 63, 2001-Ohio-131.

Further, this Court has found that,

> [t]he Juvenile Court stands as a monument to the enlightened conviction that wayward boys may become good men and that society should make every effort to avoid their being attained as criminal before growing to the full measure of adult responsibility. Its existence, together with the substantive provisions of the Juvenile Code, reflects the considered opinion of society that childish pranks and other youthful indiscretions, as well as graver offenses, should seldom warrant adult sanctions and that the decided emphasis should be upon individual, corrective treatment.

State v. Agler (1969), 19 Ohio St.2d 70, 71. 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).

While juvenile court proceedings have not been held to be "criminal prosecutions," such proceedings also have not been regarded as devoid of criminal aspects merely because they are given a civil label. *Kent* at 554; *Winship* at 365-66. See, also, *Gault* at 17 (noting that the term "delinquent" offers only slightly less stigma than the term "criminal" and that a "commitment" is an incarceration regardless of its label). Juvenile 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 in original). In truth, the modern version of the juvenile court imposes penalties that have serious implications on a child's personal liberty. Id. at ¶66. With the imposition of significant penalties by juvenile courts has come an "increasing recognition of due process rights and constitutional scrutiny of police action." Id. at ¶69.

C. The Evolution of Ohio's SORN and JSORN Laws From a Civil to a Criminal Penalty.

The criminal aspects of juvenile delinquency have been highlighted with the advent of S.B. 10, which has drastically changed the penalties associated with delinquency adjudications for sexually oriented juvenile offenders in Ohio. S.B. 10 imposes on defendants and juvenile

offenders burdens that have historically been regarded as punishment which operate as affirmative disabilities and restraints.

While registering as a sex offender may have adverse consequences to a defendant or juvenile offender "running from mild personal embarrassment to social ostracism," the notification of where that individual lives causes S.B. 10 to resemble colonial punishments of "public shaming, humiliation, and banishment." *Smith v. Doe* (2003), 538 U.S. 84, 98, 123 S.Ct. 1140. For example, a youth who is fourteen years of age or older, has been adjudicated delinquent of certain sexually oriented offenses, and has been designated an SYO, is automatically placed on the public registry and subject to community notification. R.C. 2152.86; 2950.081. Their personal information can then be 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). All of the various organizations in turn are authorized to disseminate the information, and the information is 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). See 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."). See, also, Paul Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U.L. Rev. 201, 202 (1996) (noting that "criminal sanctions signal condemnation").

Senate Bill 10 also furthers the traditional aims of punishment: retribution and deterrence. *Smith v. Doe* at 102. By placing a juvenile offender into a tier that is based on the offense that he

or she committed, and without determining whether the youth is likely to commit another sexual offense in the future, 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 whether he or she is likely 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.").

As Justice Lanzinger reasoned when comparing the then current version of the sex offender law to the one at issue in *Cook*, the current sex offender registration laws impose severe obligations on offenders, including the duty to comply with public registration for the rest of their lives. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶¶ 45 (Lanzinger, J., dissenting, "I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions.").

D. R.C. 2152.86 Violates the Due Process Rights of Children.

Imbedded within the juvenile provisions of S.B. 10 is the juvenile court's ability to determine various aspects of a child's duty to register and if so, the frequency and duration of that registration. A majority of the appellate districts in Ohio have read R.C. 2950.01, 2152.82 and 2152.83 to vest juvenile courts with discretion to determine a juvenile offender registrant's

tier classification.[13] This interpretation of S.B. 10 provides juvenile offender registrants with protections to ensure that their classifications are determined on a case-by-case basis, wherein the court is able to take into consideration their youth, and what effect treatment has had on their likelihood to reoffend in the future.

Revised Code Section 2152.86 provides no such protection; rather, the statute requires that, once a court makes a determination that a child is an SYO in relation to their adjudication for a particular sexually oriented offense, the court has no choice but to automatically classify the child as a PRQJOR, 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). And, unlike other Tier III juvenile offender registrants, these juveniles appear on eSORN and the juvenile courts lack the discretion to determine whether a PRQJOR should be subject to community notification.

Recently, in *D.H.*, this Court considered whether Ohio's juvenile blended-sentencing scheme offended due process. *D.H.* at ¶53. At issue in *D.H.* was whether R.C. 2152.13(D)(2)(a)(i), which requires a juvenile judge to consider certain factors before imposing a serious-youthful-offender dispositional sentence, violated the Due Process Clauses of the United States and Ohio Constitutions. Id. at paragraph one of the syllabus. This Court was asked to determine whether constitutional jury trial rights, as applied to adult felony sentencing enhancements in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, also applied to children who were subject to Ohio's serious-youthful-offender statutes. Id. at ¶15. It found that, in the context of serious-youthful-offender dispositions, the constitutional right to a jury trial did not apply to

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[13] *In re Antwon C.*, 182 Ohio App. 3d 237, 2009-Ohio-2567; *In re C.A.*, 2nd Dist. No. 23022, 2009-Ohio-3303; *In re A.R.R.*, 4th Dist. No. 09CA3105, 2009-Ohio-7067; *In re R.D.*, 5th Dist. No. 09 CA 97, 2010-Ohio-2986, ¶22; *In re J.K.*, 6th Dist. Nos. WD-09-054, WD-09-055, 2010-Ohio-1474, ¶10-11; *In re J.M.*, 7th Dist. No. 09 JE 21, 2010-Ohio-2700, ¶14; *In re P.M.*, 8th Dist. No. 1922, 2009-Ohio-1694; *In re R.J.G.*, 11th Dist. No. 2008-L-187, 2009-Ohio-6150, ¶17; and *In re S.R.P.*, 12th Dist. No. CA2007-11-027, 2009-Ohio-11, ¶43.

children. Id. at paragraph two of the syllabus. The rationale in *D.H.* rested on the procedures built into R.C. 2152.13 and the determination that the process by which youth become subject to an SYO disposition is fundamentally fair. Id. at ¶54.

In *D.H.*, this Court gave several reasons for finding R.C. 2152.13 to be constitutionally sound. First, this Court noted that youth who are subject to SYO dispositions have a right to a jury pursuant to R.C. 2152.13(C)(1), and that D.H. had availed himself of that right. Id. at ¶3. It highlighted the fact that a jury had found D.H. eligible for a serious-youthful-offender disposition prior to the court imposing a juvenile disposition and adult sentence. Id. Second, this Court found 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. Id. at ¶18; R.C. 2152.13(D)(2)(a)(iii). Third, it examined the rights afforded a youth who is in danger of having his or her adult sentence invoked – emphasizing that the youth has a right to counsel which cannot be waived, and has the right to present evidence on his own behalf. Id. at ¶37.

In so holding, this Court compared the purposes of juvenile dispositions and adult felony sentencing, and found that the protections imbedded in the procedures enumerated in R.C. 2152.13 enable juvenile courts to fulfill the mission of the juvenile justice system within the bounds of fundamental fairness. Id. at ¶54. Specifically, this Court found that:

> [t]he jury plays an important role in the adjudicative portion of Ohio's serious-youthful-offender disposition statutory scheme. Only the jury's factual determination makes the juvenile defendant eligible for a disposition that might include an adult stayed sentence.

Id. at ¶54. It concluded that juvenile courts do not need to be transformed into "full-blown adult trials" and dispositions in order to preserve a juvenile's due process rights, for "if the formalities

of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence." Id. at ¶60, citing to *McKeiver* at 551.

Further, this Court found that, "despite the jury's role in the adjudicative phase, removing the jury from the dispositional phase does not violate due process." *D.H.* at ¶55. In so holding, it highlighted the role of the juvenile court in determining the disposition for a delinquent child. Id. at ¶55. Specifically, this Court stated that,

> [t]he [juvenile] court's dispositional role is at the heart of the remaining differences between juvenile and adult courts. It is there that the expertise of a juvenile judge is necessary. The judge, given the factors set forth in R.C. 2152.13(D)(2)(a)(i), must assess the strengths and weaknesses of the juvenile system vis-à-vis a particular child to determine how this particular juvenile fits within the system and whether the system is equipped to deal with the child successfully. That assessment requires as much familiarity with the juvenile justice system as it does a familiarity with the facts of the case. To leave that determination to an expert, given the juvenile system's goal of rehabilitation, does not offend fundamental fairness, especially since the adult portion of the blended sentence that the judge imposes upon a jury verdict is not immediately, and may never be enforced.

Id. at ¶59.

This Court found in *D.H.* that the juvenile court's role was vital to the determination of an SYO's disposition; however, 2152.86 erases that discretion for purposes of sex offender classification, requiring a court to automatically classify an SYO as a Tier III juvenile offender registrant and PRQJOR, without any consideration as to what classification would be most appropriate for that child. This places youth like C.P. in a decidedly different position than youth who were not classified under R.C. 2152.86, in that, those youth have the full benefit of the juvenile court's dispositional expertise in making a determination as to their registration. Considering that the PRQJOR classification is the most restrictive and the most public of all the juvenile classification levels, the fact that courts have no power when it comes to its imposition is completely contrary to this Court's finding in *D.H.* and to due process principles.

Because R.C. 2152.86 does not provide the juvenile court with any discretion in determining to what tier level to assign an SYO with an adjudication for a sexually oriented offense, the General Assembly has effectively subverted one of the "remaining differences between juvenile and adult courts." Id. This is particularly disturbing when considering that R.C. 2152.86 is requiring juvenile courts to confer adult penalties on children, despite the fact that those youth remain in the juvenile system.

Given the automatic classification as a Tier III juvenile offender registrant with community notification, and the inclusion of a juvenile adjudication on eSORN, there now exists virtually no distinction between a PRQJOR and an adult offender registrant. This is of particular significance in this case, because the juvenile court expressly found C.P. to be amenable to rehabilitation in the juvenile system. (Sept. 23, 2009 T.p. 2).

Like this Court found in *D.H.*, C.P. was afforded certain due process rights related to his initial designation as an SYO, including the right to grand jury determination of probable cause and trial by jury in the juvenile court. R.C. 2152.13. But, he was denied due process because R.C. 2152.86 required the court to give him a lifetime, offense-based, and public Tier III classification, immediately following his SYO designation. This is a drastic departure from the way in which SYO dispositions are imposed, and from every other procedure in juvenile court.

For example, in order for a court to invoke the adult portion of an SYO's sentence, the State must first file a motion with the juvenile court, alleging that there is probable cause to believe that the youth has committed an act that is a violation of the rules of the institution wherein he is housed, and that the violation also: could be charged as a felony or first-degree misdemeanor; or that the youth has engaged in conduct that creates a substantial risk to the safety or security of the institution, the community, or the victim. R.C. 2152.14(A)(2)(a)-(b). Before a

court may invoke the adult portion of the youth's sentence, the court must hold a hearing at which the youth has the right to be present, to receive notice of the grounds upon which the adult sentence portion is sought to be invoked, to be represented by counsel, to be advised of the procedures set forth in the juvenile rules, and to present evidence on his own behalf. R.C. 2152.14(D). The juvenile court's decision to invoke must be based on clear and convincing evidence. R.C. 2152.14(D). Thus, an SYO has the opportunity to be heard, to present evidence, and to be represented by counsel before a court may invoke the adult portion of his sentence. However, this is not true for a child with a PRQJOR classification.

Despite having due process protections prior to the invocation of his adult incarceration, one of the PRQJOR's adult consequences attaches immediately, notwithstanding the youth's compliance with his traditional juvenile disposition. R.C. 2152.14. As such, PRQJORs have no opportunity to be heard on the issue of their classification. They are not given the right to present evidence that shows they should not be subject to a lifetime of public registration. And their counsel plays no role on the issue of classification. As the Supreme Court has found, there is "no place in our system of law for reaching a result of such tremendous consequences without ceremony – without hearing, without effective assistance of counsel, without a statement of reasons." *Kent* at 554.

Ohio has created a system of juvenile justice in which adult treatment and sentencing is reserved for exceptional circumstances, in which procedural rights are afforded to similarly situated juveniles. R.C. 2152.12 and 2152.13. Despite the fact that C.P.'s case was kept in the juvenile system, he was given an adult sex offender classification—automatic, lifetime, and public—without being transferred to the adult system and without having his SYO disposition

invoked. This classification mechanism isolates PRQJORs from both the juvenile and the adult system, as it robs the child of the due process that each system affords.

Finally, C.P.'s placement on eSORN ignores the history and purpose of the juvenile justice system, which was to avoid treating children as criminals and insulating them from the reputation and answerability of criminals. *Agler* at 80. As such, the public registration provisions of R.C. 2152.86 offend due process.

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."). Across the country, and in this State's jurisprudence, juvenile court records have historically been kept private. Juv.R. 37(B); *Scripps Howard Broadcasting Company v. Cuyahoga County Court of Common Pleas* (1995), 73 Ohio St.3d 19, 22 (This Court found that the purpose of Juv.R. 37 (B) was to "keep confidential juvenile court records involving children, since their welfare is at stake."). This is in stark contrast to the public nature of adult criminal proceedings. See, generally, *Smith v. Doe* (2003), 538 U.S. 84, 123 S.Ct. 1140.

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. Id. 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.

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. The avowed priority of our juvenile justice system (in theory if not always in practice) has, historically, been rehabilitation rather than retribution. 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.

United States v. Juvenile Male (Jan. 5, 2010), 590 F.3d 924, 926, 2010 U.S. App. LEXIS 276. The Ninth Circuit held that the retroactive application of Washington's new juvenile sex offender registration and notification provisions was unconstitutional, in part because 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. Similar to the statute at issue in *Juvenile Male*, R.C. 2152.86 is contrary to the history and purposes of the juvenile justice system and its treatment of juvenile offenders.

Rather than serve as a rehabilitative component of the child's treatment in the system, registration and public registration under R.C. 2152.86 acts as a retributive penalty, criminalizing a juvenile adjudication. And by publicizing the youth's personal information on eSORN, S.B. 10 fails to protect a youth's welfare; rather, it jeopardizes it. Michael Caldwell, Michael Ziemke, & Michael Vitacco, *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles,* PSYCHOLOGY, PUBLIC POLICY, AND LAW, VOL. 14, NO. 2, 89-114, 107 (2008) ("Juveniles affected by SORNA will be subject to adult sanctions without the benefit of the same degree of due process protections afforded adult offenders. The traditional juvenile court priority of protecting juveniles from adult sanctions and long-term stigmatization will be

largely abandoned by public registration, and the traditional confidentiality afforded juvenile records will be compromised."). As such, R.C. 2152.86 violates the Due Process Clauses of the United States and Ohio Constitutions.

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.

A. Equal Protection Considerations

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. The Ohio Constitution provides, "all political power is inherent in the people. Government is instituted for their equal protection and benefit..." Ohio Constitution, Art. I, 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, 1992-Ohio-133. 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. *Sorrell v. Thevenir* (1994), 69 Ohio St.3d 415, 424.

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." *Bellotti v. Baird* (1979), 443 U.S. 622, 635, 99 S.Ct. 3035.

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, 1996-Ohio-264, quoting *State ex rel. Vana v. Maple Hts. City Council* (1990), 54 Ohio St.3d 91, 92.

B. R.C. 2152.86 Violates the Equal Protection Clause of the U.S. and Ohio Constitutions

The purpose of R.C. 2950 was purported to be to "promote public safety and bolster the public's confidence in Ohio's criminal and mental health systems." R.C. 2950.02(A)(6); *Cook* at 417. But 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. A review of the juvenile provisions of S.B. 10 shows how the PRQJOR provisions offend equal protection principles, as the statute makes multiple age-based distinctions with no rational basis for doing so.

Senate Bill 10 treats 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 publication of their registration information on the internet, while others are not. R.C. 2152.86; 2950.081. And some juvenile offenders are not subject to any classification or registration orders, notwithstanding the nature of their offense or their status as an SYO. R.C. 2152.82; 2152.83, 2152.86. Specifically:

> Juveniles who were fourteen years old or older at the time of committing their offense and have been designated serious youthful offenders are automatically subject to the Tier III classification, community notification and eSORN. R.C. 2152.86.
>
> Juvenile offenders age fourteen to seventeen who are subject to classification and registration but not designated serious youthful offenders are not subject to the Tier III classification, community notification and eSORN. R.C. 2152.82, 2152.83.
>
> Juveniles who were thirteen years old or younger at the time of committing their offense and have been designated serious youthful offenders are not subject to any classification or registration, or the Tier III classification, community notification and eSORN. R.C. 2152.86.

C.P. is a PRQJOR because he was fifteen years old at the time he committed his offenses and was designated an SYO after the prosecutor initiated those proceedings pursuant to R.C. 2152.13. R.C. 2152.86; (Sept. 30, 2009 T.pp. 1-22). Had he not been sentenced as an SYO, he would have been a mandatory juvenile offender registrant, but he would not have been subject to inclusion on eSORN or to automatic community notification. R.C. 2152.82; 2950.081. Also, because he was from a county under the authority of the Fourth District, the juvenile court could have used its discretion in determining whether to classify him as a Tier I, II, or III juvenile offender registrant. R.C. 2152.01(E)-(G); *In re J.M.*, 4th Dist. No. 08CA782, 2009-Ohio-4574. And, were it not for the PRQJOR classification, he would not have to register in every county where he works and goes to school. R.C. 2950.04. Further, had C.P. been thirteen years old at the time he committed his offenses, whether or not an SYO, he would not have been subject to any registration at all. R.C. 2152.82; 2152.83, 2152.86. While the legislature may set more severe penalties for *acts* that it believes have greater consequences, 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 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.

(1) Mandatory vs. Discretionary Classification and Registration:

Some youth who were fourteen or fifteen at the time of their offense are subject only to discretionary classification. R.C. 2152.83. Those youth, if committed to a secure facility, are assessed for the effectiveness of their disposition and of any treatment provided to the child to determine whether the child should be classified as a juvenile offender registrant. R.C. 2152.83(B)(2). Yet, juveniles who are subject to mandatory classification and registration, including PRQJORs, are not entitled to this review. R.C. 2152.82, 2152.86.

(2) Offenders who were thirteen years old or younger vs. fourteen years old or older:

Pursuant to S.B.10, youth were fourteen to seventeen years old are either mandatory or discretionary registrants; while youth thirteen or younger are not subject to any registration. See, R.C. 2152.82, 2152.83, 2152.86. But a juvenile who was fourteen or older at the time of their offense, and who receives an SYO disposition is automatically considered a PRQJOR; while a juvenile thirteen or younger who receives an SYO disposition is not subject to any classification or registration. R.C. 2152.86. There is no rational basis for this radical difference in sentencing based solely upon a child's slightly different chronological age.

In Ohio, a child as young as ten years old can receive an SYO disposition. R.C. 2152.11. Yet, that same child is not subject to any classification or registration at all. But a child who was fourteen to seventeen years old at the time of their offense, with an SYO disposition will automatically receive the harshest classification – the PRQJOR classification. C.P. was fifteen years old at the time he committed his offenses. Had he been thirteen years old at the time, he would not be subject to any classification or registration, public or non-public.

(3) Public Classification and Registration vs. Non-Public Classification and Registration:

A juvenile offender is only subject to automatic community notification and inclusion on eSORN if he receives an SYO disposition. R.C. 2152.86. A discretionary SYO proceeding is initiated by the county prosecutor's office. R.C. 2152.13(A). Upon adjudication, the juvenile is subject to receive a traditional juvenile disposition as well as an adult criminal punishment if the juvenile court makes certain statutory findings. R.C. 2152.13(D)(2)(a)(i). If the juvenile receives an SYO disposition (and was fourteen or older at the time of the offense), that juvenile is automatically subject to lifetime public registration, pursuant to S.B. 10. And, as argued above, there is no distinction, save the residency restriction applicable only to adults, between a PRQJOR and an adult sex offender who is subject to Tier III. (See Proposition of Law I). Therefore, the PRQJOR is receiving the same registration consequence as an adult offender.

This type of classification would make sense only if the child classified as a PRQJOR had been transferred to the adult system, or had their adult sentence invoked. This is because 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. But, classifying a juvenile who has not been transferred to the criminal court system—thereby demonstrating he is currently amenable to treatment and rehabilitation—as a public registrant, is not rationally related to the State's governmental interests in protecting the public from these offenders or in rehabilitating juvenile 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 to the U.S. Constitution forbid imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed, the Court highlighted 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. Id. at 570. These findings apply generally to all adolescents under the age of 18.

Although *Roper* is a death penalty case, its basis in current scientific and developmental research applies to the circumstances in this case. (See Proposition of Law III). Given the Supreme Court's understanding of juvenile development in *Roper,* there is no rational justification for juveniles to be automatically subject to classification as a lifetime registrant. And there is no justification for classifying a child as a public registrant.

Senate Bill 10's age-based distinctions are not rationally related to the government's stated objectives in providing for public safety or in rehabilitating juvenile offenders. 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. As such, the General Assembly has failed to provide any reasons justifying the disparate treatment of the varying classes of juvenile offender registrants.

As such, there is no rationale for denying mandatory registrants, including PRQJORs, the review hearing that is held for discretionary registrants pursuant to R.C. 2152.83(B)(2). Further, there is no evidence that the age distinctions which call for classification of youth over fourteen, but not youth thirteen or under, are based on recidivism rates or any other empirical evidence.

Moreover, there is no rational connection between the legislature's objective of protecting the public and its decision to allow prosecutors total discretion in deciding which juvenile offenders to single out for adult treatment in the case of SYO youth who are automatically classified as PRQJORs. For example, if two juveniles in different counties commit essentially the same offense, and are in all other ways alike in terms of their personal factors, one juvenile could receive an SYO sentence and hence be subject to public registration, while the other remains a juvenile non-public registrant – depending solely upon the different philosophies of two prosecutors. R.C. 2152.12.

While the legislature may impose special burdens on defined classes in order to achieve permissible ends, equal protection requires that the distinctions drawn are relevant to the purpose for which the classification is made. *Rinaldi v. Yeager* (1966), 384 U.S. 305, 309, 86 S.Ct. 1497 (there must be some rationality in the nature of the classes singled out). The provisions of S.B. 10 do not demonstrate such relevance.

For example, studies have shown that the SORNA criteria for tier assignment does not "predict re-offense of any kind" for juvenile offenders. *Caldwell, et. al.* at 104. In fact, researchers have found that "sexual recidivism-specific measures and the proposed tier classifications will not correctly identify adolescents *most at risk* for sexual offense." Id. (Emphasis added). Instead, SORNA's provisions indicate that juvenile sex offenders are on a "singular trajectory to becoming adult sexual offenders," when that finding "is not supported by [empirical data], is inconsistent with the fundamental purpose of the juvenile court, and may actually impede the rehabilitation of youth who [are] adjudicated for [a] sexual offense." Id.

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:

- Adolescent sex offenders are considered to be more responsive to treatment than adult sex offenders and do not appear to continue re-offending into adulthood, especially when provided with appropriate treatment.
- Adolescent sex offenders have fewer numbers of victims than adult offenders and, on average, engage in less serious and aggressive behaviors.
- Most adolescents do not have deviant sexual arousal and/or the deviant sexual fantasies that many adult sex offenders have.
- Most adolescents are not sexual predators nor do they meet the accepted criteria for pedophilia.
- Few adolescents appear to have the same long-term tendencies to commit sexual offenses as some adult offenders.
- Across a number of treatment research studies, the overall sexual recidivism rate for adolescent sex offenders who receive treatment is low in most US settings as compared to adults. Adolescents who offend against young children tend to have slightly lower sexual recidivism rates than adolescents who sexually offend against other teens.

(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, who receive treatment, supervision, and support, are lower than any other group of offenders, at 4%-10%. That means 90% to 96% of the juvenile offenders receiving appropriate treatment are not a danger to the public. The government's interest in protecting the public surely cannot be met by placing juveniles who are not a danger to the public on the registry. In addition, this recidivism rate is low compared to the

recidivism rates of youth in the general population at DYS, which shows 30% of youth will commit a subsequent crime or parole violation within the first year of release; and 50% of youth will commit a subsequent crime or parole violation within three years of release. Juvenile sex offenders are the *least likely* delinquent population to reoffend.

Public registration may actually *increase* recidivism because juveniles will find it difficult if not impossible to transition into society, attend school, find employment, and find homes with family members or others who will allow their neighbors to receive community notification postcards or allow their addresses to be listed on a public sex offender website. And including juveniles who are not a risk to public safety dilutes the purpose and effect of the registration scheme and the purpose of the juvenile court. "Over-inclusive public notification can actually be harmful to public safety by diluting the ability to identify the most dangerous offenders and by disrupting the stability of low-risk offenders in ways that may increase their risk of re-offense; therefore, NAESV believes that internet disclosure and community notification should be limited to those offenders who pose the highest risk of re-offense." The National Alliance to End Sexual Violence, *Legislative Analysis: The Adam Walsh Child Protection & Safety Act of 2006,* available at www.naesv.org.

Despite the lack of evidence supporting the need for disparate treatment under S.B. 10, the General Assembly gives no rationale for treating thirteen-year-old offenders differently from fourteen or older offenders, or for treating certain serious youthful offenders who have demonstrated their amenability to treatment in the juvenile system, different from juvenile offenders without a serious youthful offender disposition.

In sum, S.B. 10 treats a variety of juveniles who have been adjudicated delinquent for a sexual offense differently, based on the juvenile's age; and in some cases on a prosecutor's

decision to pursue an SYO proceeding. The classification and registration scheme allows for similarly-situated children to receive disparate treatment without any rational basis whatsoever. The inequitable treatment of juvenile offender registrants under R.C. 2152.86 cannot withstand constitutional scrutiny. As such, R.C. 2152.86 violates the United States and Ohio Constitutions.

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.

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment. The provision is applicable to the states through the Fourteenth Amendment. *Furman* v. *Georgia* (1972), 408 U.S. 238, 239, 92 S.Ct. 2726 (per curiam); *Robinson* v. *California* (1962), 370 U.S. 660, 666-667, 82 S.Ct. 1417; *Louisiana ex rel. Francis* v. *Resweber* (1947), 329 U.S. 459, 463, 67 S.Ct. 374 (plurality opinion). The Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. *Atkins* v. *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). Given the history and tradition of the principals inherent in juvenile justice, it is imperative that the provisions of R.C. 2152.86 be scrutinized against this standard to determine whether its application comports with the basic concept of human dignity that lies at the core of the Eighth Amendment. Id. at 180.

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 reinforces the belief that 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, punishment should be directly related to the personal culpability of a criminal defendant; therefore, since adolescents are less mature and responsible than adults, reduced culpability should be attributed 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 means 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 than adults highlights the unfairness of automatic, public, lifetime registration and illustrates the devastating consequences that result when the law is used to secure an adult consequence against a child offender.

The Supreme Court's acknowledgment of the unique characteristics of juveniles came when the Court abolished the death penalty for all juvenile offenders under the age of eighteen. *Roper* at 570-571; See, also, *Brief of the American Medical Association*, et. al. as *Amici Curiae* for Respondent Simmons, (which argued adolescent offenders at sixteen and seventeen do not have adult levels of judgment, impulse control, or ability to assess risks).[14] But previously, in *Thompson*, the Court found that the reduced culpability of juvenile offenders, coupled with the fact that the application of the death penalty did not measurably contribute to the essential

[14] *Roper v. Simmons Amici* Briefs available at http://www.abanet.org/crimjust/juvjus/simmons/simmonsamicus/

purposes underlying its enforcement, supported the conclusion that the imposition of the death penalty to persons under the age of sixteen violates the Eighth Amendment's prohibition against cruel and unusual punishments. *Thompson* at 835.

In *Roper*, the Court 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. Furthermore, the Court found that the penological justifications for the death penalty—namely retribution and deterrence—apply to children with less force than to adults. Id. at 571. 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.

Although *Roper* and *Thompson* were both death penalty cases, the scientific and developmental research supporting those decisions applies to other juvenile dispositions as well. For instance, the Supreme Court recently relied on the same reasoning when it found that life-without-the-possibility-of-parole sentences were unconstitutional for juvenile offenders who are convicted of non-capital offenses. *Graham v. Florida* (2010), ___ U.S. ___, 130 S.Ct. 2011; 176 L. Ed. 2d 825.

Graham was charged with armed burglary and attempted armed robbery for offenses that occurred approximately one month prior to his eighteenth birthday. Id. at 2019. At the time of those offenses, Graham was on probation for another burglary that he committed when he was sixteen years old. Id. at 2018-2019. He was convicted and sentenced to life in prison on the armed burglary charge and fifteen years on the attempted armed robbery. Id. at 2020. Since

Florida had abolished its parole system, the only way Graham could have been released from prison was if he was subsequently granted executive clemency. Id.

Relying on the reasoning it employed in *Roper*, the Supreme Court found that the Eighth Amendment did not permit the State to deny a juvenile the chance to "demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child." Id. at 2029. In reaching its conclusion, the Court found that not only was the age of the offender relevant to its consideration of proportionality, but that the type of offense committed was also vital for a determination of whether a sentence was cruel and unusual. Id. The Court found that there was a significant difference between imposing a lifelong sanction for murder and imposing that same sanction for a non-homicide offense. Id.

The Court opined that:

> As for the punishment, life without parole is "the second most severe penalty permitted by law." *Harmelin*, 501 U.S., at 1001, 111 S.Ct. 2680, 115 L. Ed. 2d 836 (opinion of KENNEDY, J.). It is true that a death sentence is "unique in its severity and irrevocability," *Gregg* v. *Georgia*, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L. Ed. 2d 859 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); yet life without parole sentences share some characteristics with death sentences that are shared by no other sentences. The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency -- the remote possibility of which does not mitigate the harshness of the sentence. *Solem,* 463 U.S., at 300-301, 103 S.Ct. 3001, 77 L. Ed. 2d 637. As one court observed in overturning a life without parole sentence for a juvenile defendant, this sentence "<u>means denial of hope; it means that good behavior and character improvement are immaterial</u>; it means that whatever the future might hold in store for the mind and spirit of [the convict], he will remain in prison for the rest of his days." *Naovarath* v. *State*, 105 Nev. 525, 526, 779 P.2d 944 (1989).

Id. at 2028. (Emphasis added.) Thus, the Court determined that a life sentence for a juvenile was a pronouncement that the juvenile was "incorrigible" and would be a danger to society for the rest of his life. Id. at 2029. The Court found that "the characteristics of juveniles make that

judgment questionable." Id. Further, the Court found it impossible to reconcile the rehabilitative potential of juveniles with a lifetime prison sentence. Id.

Similar reasoning applies to the circumstances in this case as well. The PRQJOR classification is a lifetime sanction, with no guarantee that the child will ever be removed from the registry. The public nature of his registration makes the danger with that classification irrevocable. Once the child's picture has been placed on eSORN, there is little that can be done to cure the effect that his public registry will have already had. Neighbors, landlords, employers, coworkers and the public at large will have access to his juvenile adjudication and will see that he has been classified among the worst of the worst offenders. And, since the duration of the PRQJOR is until death, he will always be in that group. Though the PRQJOR has an opportunity to petition the court for reclassification twenty-five years after the commencement of his registration duties, the reality is that, with his information posted publicly for that length of time, there is little possibility that he will ever be able to rid himself of the stain and stigma that attached to him as a result of something he did as a child. And although he will age on the registry, his victim will not. Thus, as time passes it will start to appear as though he was an adult offender, with a child victim, even though he committed his offense when he was a child. As a result, he will forever be known as the most dangerous of all sexually oriented offenders, even though his classification was not based on any significant personal factors or empirical data. (See Propositions of Law I and II).

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 too should the adult penalties associated with a criminal conviction for a sexually oriented offense not be so haphazardly applied to Ohio's children. The juvenile court expressly found that C.P. should not

be transferred to the adult system. (Aug. 24, 2009 T.p. 2, S-17). Yet, R.C. 2152.86 conferred on him an automatic, public, and lifetime penalty, typically reserved for adult offenders. As such, C.P.'s lifelong public registration—for acts committed when he was fifteen years old—is cruel and unusual.

When it comes to laws that involve sex offenders, the passions of the majority must be tempered with reason. Joseph Lester, *The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 Akron L. Rev. 339, 340 (2007). "Overborne by a mob mentality for justice, officials at every level of government are enacting laws that effectively exile convicted sex offenders from their midst with little contemplation as to the appropriateness or constitutionality of their actions." Id. Politicians across the country have approved almost every measure that deals with sex offenders in order to appear strong on crime. Id. "Given that the sex-offender lobby is neither large nor vocal, it is up to the courts to protect the interests of this disenfranchised group." Id. at 340, citing *Cal. Dep't of Corr. v. Morales* (1995), 514 U.S. 499, 115 S.Ct. 1597, 522 (Stevens, J., dissenting). ("The danger of legislative overreaching...is particularly acute when the target of the legislation is a narrow group as unpopular (to put it mildly) as multiple murderers [or sex offenders]. There is obviously little legislative hay to be made in cultivating the multiple-murderer [or sex-offender] vote."). See, *also*, Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261, 1267 (Summer, 1998) ("That sex offenders are deserving of disdain is not the issue, for they surely are. The issue, rather, is whether they deserve the protection of the Constitution, which they surely do."). This protection is perhaps no more urgently needed than by children who have been adjudicated delinquent of a sexually oriented offense.

CONCLUSION

Revised Code Section 2152.86 robs a child of his right to due process, equal protection, and right to be protected against cruel and unusual punishment. As such it violates both the United States and Ohio Constitutions.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

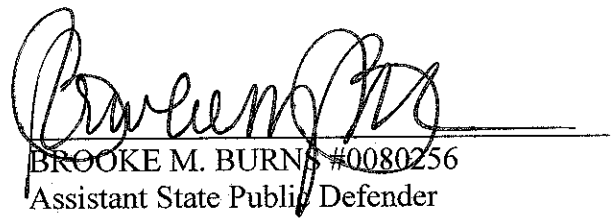
BROOKE M. BURNS #0080256
Assistant State Public Defender
(Counsel of Record)

250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
Brooke.Burns@opd.ohio.gov

COUNSEL FOR C.P.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **MERIT BRIEF OF APPELLANT C.P. and the APPENDIX TO THE MERIT BRIEF OF APPELLANT C.P.** was forwarded by regular U.S. Mail, postage prepaid, this 30th day of September, 2010, to the office of George Reitmeier, Assistant Athens County Prosecutor, 1 South Court Street, Athens, Ohio 45701.



BROOKE M. BURNS #0080256
Assistant State Public Defender

COUNSEL FOR C.P.

#328753