ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE:	:	Case No. 11-1336
J.T.	:	On Appeal from the Licking County Court of Appeals Fifth Appellate District
A DELINQUENT CHILD	:	Court of Appeals Case No. 10 CA134
	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF DELINQUENT CHILD-APPELLANT J. T.

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EXPLANATION OF WHY THIS CASE PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION AND MATTERS OF PUBLIC OR GREAT GENERAL INTEREST

This Court should accept jurisdiction to address both a substantial constitutional question and matters of public or great general interest.

Appellant J.T.'s constitutional rights were violated when he was classified a Tier I juvenile sex offender registrant under Ohio's Senate Bill 10 ("S.B. 10"). His right to due process was violated when he was classified based solely on his offense, and not according to the facts of his case and his future risk to the community. Also, the application of S.B. 10 to J.T. violated the United States Constitution's prohibition against cruel and unusual punishments. This Court has accepted jurisdiction of *In the Matter of D.S.*, pending as case number 2008-1624, which addresses whether S.B. 10 is constitutional when applied to juveniles.

In its decision, the Fifth District Court of Appeals relied primarily on this Court's decision in *State v. Cook* (1998), 83 Ohio St.3d 404 in affirming J. T.'s classification as a Tier I juvenile sex offender registrant, finding that S.B. 10 is non-punitive and thus, constitutional. *In re J. T.,* 2011-Ohio-3324. ¶124-30. However, in *State v. Williams* 2011-Ohio-3374, this Court stated: "Following the enactment of S.B. 10, all doubt has been removed: R.C. 2950 is punitive." *Williams* at ¶15.

This Court should accept jurisdiction of J.T.'s appeal in order to give further guidance to Ohio's courts in applying the provisions of S.B. 10 to juveniles. Additionally, the Ninth District Court of Appeals held in *In re G.E.S.,* 2008-Ohio-4076, ¶37, that S.B. 10 vests juvenile courts with full discretion to determine whether to classify a delinquent child as a Tier I, Tier II or Tier III offender. Based on that decision, this Court should accept jurisdiction in this matter to give Ohio's courts a uniform system of applying S.B. 10's sex offender notification and registration provisions.

STATEMENT OF THE CASE AND FACTS

On April 28, 2010, the Licking County Prosecutor charged Appellant, by way of a complaint filed in the Licking County Juvenile Court, with six counts of Sexual Imposition, misdemeanors of the third degree; two counts of Menacing, felonies of the of the fourth degree and one count of Voyeurism, a misdemeanor of the third degree. (R. 5). On July 12, 2010, a bench trial commenced in the Licking County Common Pleas Court, Juvenile Division. (T. 4). During the trial, counts 2, 3, 4, 5, 7, 8, and 9 were dismissed either by the Court or the State, leaving two counts of Sexual Imposition for adjudication. (R. 39). On July 12th, the trial court found Appellant guilty of count one (sexual imposition) and one count of disorderly conduct, as a lesser included offense of count six. (T. 168; R. 39). On October 25, the trial court held a dispositional hearing. (T. Dispo. Hng. 3). Appellant was placed on a term of probation. (R. 59). The trial court also held a hearing to determine Appellant's sexual offender status, as required by the Revised Code. The trial court determined Appellant to be a Tier I sexual offender, and ordered him to comply with the requisite statutory registration scheme. (T. Dispo Hng. 15-16; R. 59, 60). The trial court filed its Judgment Entries on October 25, 2010. (R. 59, 60). Appellant perfected a timely appeal on November 24, 2010, to the Licking County Court of Appeals, Fifth Appellate District. On June 30, 2011, the Appellate Court upheld the judgment of the Licking County Juvenile Court. (R. 64).

Trial testimony revealed that during the 2009-2010 school year, Appellant was a student at Licking Heights High School located in Pataskala. (T. 18). P. W., also a student at the school, testified that on several occasions Appellant had touched her breasts with his hands during classes at the school. (T. 15-18). She also testified that she had told Appellant that such conduct was offensive to her, but that he had persisted until he

was expelled from school near the end of the school year. C. B., another student, testified that he had witnessed Appellant touching C.W.'s breasts during classes at the school. (T. 36). Both C. W. and C. B. also testified that C. W. and Appellant had a tempestuous relationship, (T. 15-18; 38; 46), but neither testified that it was ever a romantic or sexual relationship. Appellant testified that he had never touched C.W. in the manner she described. (T. 144).

ARGUMENT

PROPOSITION OF LAW ONE

I. THE APPLICATION OF S.B. 10 VIOLATES THE UNITED STATES CONSTITUTION'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS AS PROHIBITED BY THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION. (R. 60; T. Dispo Hng. 15-16).

In 2007, in response to the United States Congress' enactment of the Adam Walsh Act ("AWA"), the Ohio General Assembly passed Ohio's version of AWA, hereinafter referred to as S.B. 10. That statute drastically changed the sex offender classification system that had been in place for several years. S.B. 10 repealed the former conduct-based classification system of sexually oriented offenders, habitual sex offenders and sexual predators into a new, offense-based tier system. R.C. 2950.031 and 2950.032.

Because Appellant was seventeen at the time the offense was committed, and because of the nature of the offense, the trial court was required to classify him as a sex offender. R.C. 2152.83(A); 2152.831. Appellant asserts that such a mandatory scheme, as applied to him, is unconstitutional for the reasons discussed below.

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 (per curiam); *Robinson v. California* (1962), 370 U.S. 660, 666-667; *Louisiana ex rel. Francis v. Resweber* (1947), 329 U.S. 459, 463 (plurality opinion). The Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. *Atkins v. Virginia* (2002), 536 U.S. 304. That 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. 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 v. Simmons* (2005), 543 U.S. 551, 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 (plurality opinion). Given the history and tradition of the principles inherent in juvenile justice, it is imperative that the provisions of S.B. 10 be scrutinized against this standard to determine whether its application to juveniles comports with the basic concept of human dignity that lies at the core of the Eighth Amendment. Id. at 180.

Ohio's judicial system has long recognized the fundamental difference between children in the juvenile delinquency system and adults in the criminal justice system. *In re C.S.,* 115 Ohio St.3d 267. The philosophy driving juvenile justice has been rooted in social welfare, rather than in the body of the law. Id., citing *Kent v. United States* (1966), 383 U.S. 541, 554. The objectives of the juvenile court, from its inception, have been that courts would protect a wayward child from evil influences, save him from criminal prosecution, and provide him social and rehabilitative services. *In re T.R.* (1990), 52 Ohio St.3d 5, 15; *Children's Home of Marion City v. Fetter* (1914), 90 Ohio St. 110, 127. The Ohio Supreme 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 provision 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 sanction 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; *In re Kirby* (2004), 101 Ohio St.3d 312. 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. Id. at 73; R.C. 2151.357(H). The very purpose of the juvenile code was to avoid treating children as criminals and insulating them from the reputation and answerability of criminals. Id at 80. Under current precedent, the law is clear: "juvenile court proceedings are civil, rather than criminal, in nature." *In re Anderson,* 92 Ohio St.3d 63.

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 v. United States* (1966), 383 U.S. 541, at 554: *In re Winship* (1970), 397 U.S. 358, at 365-66. See, also, *In re Gault* (1966), 387 U.S. 1 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 what it is labeled). Further, 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. *State v. Walls,* 96 Ohio St.3d 437. (Emphasis sic). Notwithstanding the criminal aspects in juvenile delinquency proceedings, however, the unique characteristics of juveniles must be considered in determining dispositions and penalties that are associated with a finding
of delinquency.

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. Juvenile justice jurisprudence is replete with the recognition that major distinctions exist 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 those responsibilities. Id. The reasons that 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.

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 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 a 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 lengthy registration and illustrates the devastating consequences that result when the law is used to secure an adult consequence against a youthful defendant.

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. And 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 purposes underlying its enforcement, supported the conclusion that the imposition of the death penalty to persons under the age of sixteen violated the Eighth Amendment's prohibition against cruel and unusual punishments. *Thompson,* at 835. Although *Roper* and *Thompson* were both death penalty cases, the scientific and developmental research supporting those decisions applies to the circumstances in this case as well. Given the Supreme Court's understanding of juvenile development, no rational justification exists for juveniles to be automatically subjected to the highest level of registration and classification.

The Supreme Court in *Roper* recognized that, as capital punishment was to be reserved for a narrow category of the most series 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. The Court in *Roper* 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.

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. As argued above, S.B. 10 can no longer be seen as a purely civil remedy with no criminal implications. But perhaps one of the most disturbing concerns about the new law is that it is being applied to juveniles in the same way as it is to adults- solely based on the offense- thereby conferring adult penalties on juvenile offenders, who are less culpable than their adult counterparts. See *Roper,* at 571-572. 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 to the adult penalties associated with a criminal conviction for a sexually oriented offense should not be so haphazardly applied to Ohio's children.

Implementation of S.B. 10 to juvenile cases is particularly cruel because juveniles have an inherent amenability to rehabilitation. See *Roper*, at 570. According to the Ohio Association of County Behavioral Health Authorities, the recidivism rates for Ohio juveniles who commit a sexual offense, with treatment, supervision, and support, is lower than any other group of offenders, at 4% - 10%. (See Ohio Association of Behavioral Health Authorities, *Juvenile Sex Offenders*; BEHAVIORAL HEALTH; DEVELOPING A BETTER UNDERSTANDING, 3:1 (2006). That means 90-96% of the juvenile offenders who are receiving appropriate treatment are not a danger to the public. Thus, the government's interest in protecting the public surely cannot be met by requiring juveniles to be subjected to the same application of S.B. 10 as adults. *Cook*, at 406.

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 interest of this disenfranchised group." Id. at 340, citing *Cal. Dep't of Corr. V. Morales* (1995), 514 U.S. 499, 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 necessary than when it comes to the case of legislating penalties for juveniles who have been adjudicated delinquent of a sexually oriented offense.

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. However, S.B. 10 has gone against the principles of juvenile jurisprudence, set forth by the Ohio Supreme Court's long-established history of effectively applying Ohio's criminal statutes to juvenile offenders. See, generally, *Agler,* at 71; *In re Caldwell,* 157. A lengthy registration period for a person who

committed juvenile sex offenses as a seventeen-year-old boy, with no regard to his likelihood to reoffend, is excessive and grossly disproportionate to the crime.

CONCLUSION

For the reasons set forth herein, Defendant-Appellant respectfully requests this Court to accept jurisdiction and decide this appeal on its merits.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true copy of the foregoing Memorandum in Support of Jurisdiction upon the Licking County Prosecutor, 20 S. 2d St., Newark, OH 43055, by U.S. regular mail, postage prepaid, this 5th day of August, 2011.

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APPENDIX

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IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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LICKING CO. JUVENILE CT.
NEWARK, OHIO
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OF APPEALS
LICKING COUNTY OH
GARY R. WALTERS

IN THE MATTER OF:

J.T.,

DELINQUENT CHILD

JUDGMENT ENTRY

Case No. 10-CA-134

For the reasons set forth stated in our accompanying Opinion, the judgment of the Licking County Court of Common Pleas, Juvenile Division, is affirmed. Costs assessed to Appellant.

HON. WILLIAM B. HOFFMAN

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS

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LICKING COUNTY OH
GARY R. WALTERS

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN THE MATTER OF:

J.T.,

DELINQUENT CHILD

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Julie A. Edwards, J.

Case No. 10-CA-134

OPINION

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of Common Pleas, Juvenile Division, Case No. A2010-0313

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

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Hoffman, J.

{¶1} Appellant J.T., a minor child, appeals his adjudication in the Licking County Court of Common Pleas, Juvenile Division. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} While seventeen years-old and a student at Licking Heights High School, Appellant was arrested for incidents involving several classmates at school.[1]

{¶3} On April 28, 2010, the State filed a complaint in the Licking County Court of Common Pleas, Juvenile Division, charging Appellant with six counts of sexual imposition, two counts of menacing and one count of voyeurism. The matter proceeded to a bench trial on July 12, 2010. The State dismissed all the counts except for two counts of sexual imposition. Via Judgment Entry of July 12, 2010, the trial court adjudicated Appellant delinquent of one count of sexual imposition, and one count of disorderly conduct, a lesser included offense. On October 25, 2010, the trial court conducted a dispositional hearing. Via Judgment Entry of the same date, the trial court classified Appellant a Tier I sexual offender.

{¶4} Appellant now appeals, assigning as error:

{¶5} "I. THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF SEXUAL IMPOSITION AS THAT

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[1] Additional facts will be included in our analysis of Appellant's first assignment of error.

VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WAS ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶6} "II. THE APPLICATION OF S.B. 10 VIOLATES THE UNITED STATES CONSTITUTION'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS. EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION."

I.

{¶7} An appellate court reviewing the sufficiency of the evidence examines the evidence admitted at trial and determines whether, after viewing the evidence most favorably to the state, the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. "On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins,* 78 Ohio St.3d 380, 390, 1997–Ohio–52 (Cook, J., concurring).

{¶8} In contrast, a court reviewing the manifest weight observes the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93–L–082. "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. An appellate court must defer to the factual

findings of the jury regarding the weight to be given to the evidence and credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶9} Appellant was adjudicated delinquent of sexual imposition, in violation of Ohio Revised Code Section 2907.06(A)(1):

{¶10} "(A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

{¶11} "(1) The offender knows that the sexual contact is offensive to the other person, or one of the other persons, or is reckless in that regard."

{¶12} Revised Code Section 2907.01(B) defines "sexual contact" as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person."

{¶13} At the July 12, 2010 adjudicatory hearing P.W., an alleged victim in this matter, testified:

{¶14} "Q. Okay. And you started not being friends, correct?

{¶15} "A. Right. We would get into - -

{¶16} "Q. And why is that?

{¶17} "A. We would get into arguments very often and he would harass me all the time. He would call me names, and he would violate my privacy, and I would always tell him to stop but he wouldn't listen.

{¶18} "Q. And how would he violate your privacy?

{¶19} "A. He would, like, graze my legs, and try and give me shoulder massages, trying to move up to my chest, and he would - - then I'd tell him no and then he'd get mad. And then, when he would get mad, he would call me names and start making fun of me and then causing us to get into another argument.

{¶20} "Q. And did he - - when you said he tried to touch your breasts, did he touch your breasts?

{¶21} "A. Yes.

{¶22} "Q. How did he do that?

{¶23} "A. He came from over top.

{¶24} "Q. What do you mean, like - -

{¶25} "A. Like he would move from my shoulders and then move down. He would graze and then I would tell him to stop.

{¶26} "Q. And he'd touch your breasts - -

{¶27} "A. Yes.

{¶28} "Q. - - actually? And when was that?

{¶29} "A. I remember the one incident - - it happened over multiple times, but the one incident I can actually put a date on was right after winter break, because we were in study hall and my boyfriend had just left the classroom and we started dating then, so, that's how I remember the exact date.

{¶30} "Q. Oh, okay.

{¶31} "A. So it was right after winter break?

{¶32} "Q. Right after winter break? And did you report it then?

{¶33} "A. No, I just - - I pretty much ignored it because I would tell him to stop, and then he'd stop for a while, and then he'd keep - - he would – he was consistent - -

{¶34} "Q. How - -

{¶35} "A. - - about trying.

{¶36} "Q. And how often did he touch your breasts?

{¶37} "A. About - - he would try about once a week, but he wouldn't - - I wouldn't let him do it very often, because I would tell him to stop. I would yell at him then we'd get into another argument.

{¶38} "Q. Okay. And - - but he succeeded once and that was over your shirt - -

{¶39} "A. Yeah.

{¶40} "Q. - - not under?

{¶41} "A. Huh-uh.

{¶42} "Q. Okay. And did he know that this was offensive to you? What did you tell him about that?

{¶43} "A. I made it clear. I made it very clear that I did not want him touching me at all.

{¶44} "Q. And how did you do that?

{¶45} "A. I would scream at him and tell him to stop."

{¶46} Tr. at 15-18.

{¶47} Another student at Licking Heights High School, C.B., testified to witnessing the incidents:

{¶48} "Q. Did you - - what did you – did you see [J.T.] do anything to [P.N.]?

{¶49} "A. I saw her - - saw him grope her.

{¶50} "Q. What do you mean 'grope her'?

{¶51} "A. Touch her breasts and her bottom.

{¶52} "Q. And when did you see that?

{¶53} "A. English and algebra.

{¶54} "Q. So, it would happen more than once?

{¶55} "A. Yes.

{¶56} "Q. Do you know when it happened?

{¶57} "A. Not the exact date, no.

{¶58} "Q. Did it happen this school year?

{¶59} "A. Yes.

{¶60} "* * *

{¶61} "Q. And, so, he touched her breasts a few times?

{¶62} "A. Yes.

{¶63} "Q. Was this over or under the clothes?

{¶64} "A. Over.

{¶65} "Q. And were [P.N.] and [J.T.] ever dating?

{¶66} "A. No."

{¶67} Tr. at 36-38.

{¶68} Another student, S.H., testified:

{¶69} "A. Yeah, like he would come up and, like, hug me and I'd tell him to, like, let go because, like, he wouldn't let go. And he'd just keep going and finally he'd, you know, stop and then he'd, like, give me a look like what the heck?

{¶70} "And like we went on this school field trip and I came back - - and we had to dress nice, so, I had a skirt on about to my knees. And he was, you know, trying to look up my skirt and stuff. And I was like - - you know, and he was like calling me, like, sexy and stuff. And like, I don't know, just to me it was like - - made me uncomfortable around him because, I don't know, it's just - - I don't think anybody should be doing that, especially if you don't know somebody that well because I don't - - like I had a class with him but I didn't know him as a person that well.

{¶71} "Q. And how is he trying to look up your skirt?

{¶72} "A. He was sitting at his desk and he - - and I walked by and he was like, you know, going like that. I was just like, you know, what are you doing?

{¶73} "Q. And, when he hugged you, did - - where were his hands?

{¶74} "A. Like he would wrap around me, like, squeeze me really tight. So it was like - - you know, like - - -almost like I couldn't move. And I would be like, you know, like stop, okay - - or, okay, that's enough kind of thing and he just wouldn't stop.

{¶75} "Q. Okay. Did he touch you in any inappropriate places?

{¶76} "A. One time he touched my butt and he, like, grazed my chest, but I don't know if the chest thing was on purpose or an accident.

{¶77} "Q. Okay. And what did you tell him when he was trying to look up your skirt?

{¶78} "A. To stop.

{¶79} "Q. Did he know that it was bothering you?

{¶80} "A. I don't know, but I thought he would get the idea when I gave him that look like stop doing that and stuff, but he didn't I guess.

{¶81} "Q. And you're not married to [J.T.], right?

{¶82} "A. No.

{¶83} "Q. I know that's a ridiculous question. What were the kind of things that [J.T.] was saying to you when he was talking to you?

{¶84} "A. Well, if I wouldn't talk to him or something like that, he would call me - -

{¶85} "Q. It's okay.

{¶86} "A. - - a bitch. And, you know, I'd just be like, okay, cause I didn't do anything; or he'd just mess around and call me that because of something. And then he'd be like, well, I'm just kidding. But you shouldn't mess around with something like that, because somebody could really think you're mad at them.

{¶87} "* * *

{¶88} "Q. How many times are you alleging that [J.T.] touched you inappropriately?

{¶89} "A. He only touched me inappropriately twice. But like the action, like the hugging and stuff, got a - - that was a little uncomfortable, and the names he called me, and looking up my skirt.

{¶90} Tr. at 54-57; 66-67.

{¶91} Another student A.L. testified,

{¶92} "Q. How did he touch you?

{¶93} "A. Just kind of like . . .

{¶94} "Q. It's okay. I know this is hard but you'll have to explain it to everyone so that they can hear you.

{¶95} "A. Like he would do like a back massage thing and his hands would go down like - - or try to go down my shirt, I guess.

{¶96} "Q. Okay. If you can kind of describe that - - how that was working.

{¶97} "A. Like he would be behind me and I'd be in front, I guess. Like I'd be - - just be sitting in a chair. And I guess he would come up to me and he would do that, sort of act like he had - - his hands would be on my shoulders and then they would, like, start going down. And, you know, at that point I would tell him to stop.

{¶98} "Q. Okay. And, so, during the massage his hands didn't stay on your shoulder - - shoulders?

{¶99} "A. No. No.

{¶100} "Q. Okay. And where did they end up?

{¶101} "A. About like right here, but I would stop him because they - - yeah.

{¶102} "* * *

{¶103} "Q. What other physical contact did you have with him during the year?

{¶104} "A. Like he would sort of kind of, like, touch them like straight on, I guess.

{¶105} "Q. Okay. What do you mean 'sort of, kind of, and then them'?

{¶106} "A. My breasts as 'them'.

{¶107} "Q. Okay.

{¶108} "A. Like - - just kind of - - not really straight on, more so like a bump, but that's where his hands would end up.

{¶109} "Q. Okay. Can you describe the situation that that happened in?

{¶110} "A. In the hallway walking from class to class or maybe on the bus.

{¶111} "Q. And what do you mean his hands ended up there?

{¶112} "A. Like he would bump into me and his hands would, like, go out and grab them.

{¶113} "* * *

{¶114} "Q. Okay. And on the bus how did that happen? And if you can show us - -

{¶115} "A. It was the same sort of back massage thing he was - - like he would be behind me. * * *

{¶116} "A. He would be behind me and it would kind of go - - it would start like that and I'm kind of like, you know, trying to get him off my shoulders by moving my shoulders. And then it would go, like, about this far and then I'd just take his hands and I'd move them.

{¶117} "Q. And, so, on the bus you said that he touched your breasts. Did he touch your breasts on the bus? I'm sorry, I just want a clarification.

{¶118} "A. He attempted to. I mean - - "

{¶119} Tr. at 79-80; 81-82; 85-88.

{¶120} Appellant argues the evidence failed to prove the "physical contact" was for sexual arousal or gratification which is necessary to establish "sexual contact". However, there is no requirement there be direct testimony regarding sexual arousal or gratification. *State v. Astley* (1987), 36 Ohio App.3d 247, 523 N.E.2d 322; *State v. Cobb* (1991), 81 Ohio App.3d 179, 610 N.E.2d 1009; *In Re Anderson* (1996), 116 Ohio App.3d 441, 688 N.E.2d 545; *State v. Brady* (July 9, 2001), Stark App. No.2000CA00223, 2001 WL 815574. In the absence of direct testimony regarding sexual arousal or gratification, the trier of fact may infer Appellant was motivated by

desires for sexual arousement or gratification from the "type, nature and circumstances of the contact, along with the personality of the defendant." *State v. Cobb* (1991), 81 Ohio App.3d at 185, 610 N.E.2d 1009; *State v. Brady,* supra (citing *Cobb*).

{¶121} Based upon the testimonial evidence set forth above, Appellant frequently engaged in inappropriate touching of female classmates, often while offering to massage or hug them. We find there is substantial credible evidence from which the trier-of-fact could find all the elements of sexual imposition have been met, and Appellant's adjudication is not against the manifest weight nor sufficiency of the evidence.

{¶122} The first assignment of error is overruled.

II.

{¶123} In the second assignment of error, Appellant maintains his classification as a Tier I sexual offender is unconstitutional.

{¶124} However, in *State v. Cook*, the Ohio Supreme Court determined the sex offender registration statutes are remedial in nature, not criminal and punitive. *State v. Cook* (1998), 83 Ohio St.3d 404.

{¶125} In *In re Adrian R.*, this Court cited *Cook*, holding:

{¶126} "Moreover, in *State v. Cook* (1998), 83 Ohio St.3d 404, supra, the Ohio Supreme Court found the former version of R.C. 2950 constitutional. Senate Bill 10 amended R.C. 2950 so that classification is no longer based on an individualized analysis. Instead, classification is now based on the type of crime committed. In addition, Senate Bill 10 increased the reporting requirements.

{¶127} "In *Cook,* the Ohio Supreme Court determined that the old system effective in 1997 was 'retroactive' because it looked to the prior conviction as a starting point for regulation. *Cook,* 83 Ohio St.3d at 410. Even so, the Court upheld the old system because it had a valid remedial and non-punitive purpose. The *Cook* court determined that Ohio's sex offender statutes did not violate the Ex Post Facto clause of the United States Constitution, finding:

{¶128} "R.C. Chapter 2950 serves the solely remedial purpose of protecting the public. Thus, there is no clear proof that R.C. Chapter 2950 is punitive in its effect. We do not deny that the notification requirements may be a detriment to registrants, but the sting of public censure does not convert a remedial statute into a punitive one. *Kurth Ranch,* 511 U.S. at 777, 114 S.Ct. at 1945, 128 L.Ed.2d at 777, fn. 14. Accordingly, we find that the registration and notification provisions of R.C. Chapter 2950 do not violate the Ex Post Facto Clause because its provisions serve the remedial purpose of protecting the public. *Cook,* 83 Ohio St.3d at 423.***

{¶129} "***We also find that Senate Bill 10 does not amount to cruel and unusual punishment. In *Cook,* supra, the Supreme Court concluded that sexual offender notification and registration requirements are not punitive in nature; rather, they are remedial measures designed to protect the public. Therefore, such measures do not implicate the protections against cruel and unusual punishment. *Cook,* at 423. See also, *State v. Keibler,* Auglaize App. No. 2-99-51, 2000-Ohio-1666."

{¶130} Pursuant to this Court's precedent in *In re Adrian R.*, we overrule Appellant's second assignment of error.

{¶131} The judgment of the Licking County Court of Common Pleas, Juvenile Division, is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Edwards, J. concur

HON. WILLIAM B. HOFFMAN

HON. W. SCOTT GWIN

HON. JULIE A. EDWARDS