ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: D.S., adjudicated delinquent child	:	Case No. 2014-0607
	:	On Appeal from the Licking County Court of Appeals Fifth Appellate District
	:	C.A. Case No. 13CA58

AMENDED MEMORANDUM IN SUPPORT OF JURISDICTION OF MINOR CHILD-APPELLANT D.S.

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

Under the precedent set by the Fifth District below, a child's case can be reopened any time after disposition if the State discovers that it failed to prove a fact necessary to determine the child's eligibility for classification as a juvenile offender registrant. *Op.* at ¶ 47. The Fifth District's decision violates a child's right to be free from double jeopardy because it sanctioned the reopening of the fact-finding stage of the proceedings which allowed the State to prove facts necessary for the court to determine a child's age-eligibility for registration. *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684, paragraph one of the syllabus. Contrary to the Fifth District's holding, the only fact-finding a court is authorized to do under R.C. 2152.83(B) concerns the court's determination of the factors listed in R.C. 2152.83(D). Further, following this Court's juvenile registration decisions, the timing mechanism of R.C. 2152.83(B) is unconstitutional because it allows courts to enter multiple and successive punishments for juvenile offenders who are committed to a secure facility at initial disposition. *Raber* at paragraph two of the syllabus; ***Williams***, infra, at ¶ 16.

Finally, this Court has found that Senate Bill 10 is punitive, whether applied to adults or juveniles. *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, ¶ 16; and *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 11, 86. The fact that it is punitive makes the extension of registration requirements beyond the age jurisdiction of the juvenile court unconstitutional. Under Ohio law, the only instances in which the General Assembly's treatment of children as adults is constitutionally permissible is when youth are provided the same due process protections as youth who have been given blended sentences under R.C. 2152.13 or who have been transferred to adult court under the procedures set forth in

R.C. 2152.12. These protections do not exist for children whose cases occur wholly in adult court and who are classified as juvenile offender registrants.

This Court should accept jurisdiction of this appeal to ensure that the Double Jeopardy and Due Process rights of juveniles adjudicated delinquent of sexually oriented offenses are adequately protected.

STATEMENT OF THE CASE AND FACTS

On August 20, 2010, a complaint was filed in the Licking County Juvenile Court, alleging that then 14-year-old D.S. was delinquent of two counts of gross sexual imposition, violations of R.C. 2907.05(A)(4), felonies of the third degree if committed by an adult; and, one count of public indecency, a of R.C. 2907.09(B)(1), a second-degree misdemeanor. *Op.* at ¶ 2. The complaint alleged that the offenses occurred between August 1, 2009 and June 4, 2010, a period during which D.S. was 13 and 14 years old. *Op.* at ¶ 2.

On October 13, 2010, D.S. entered an admission to the two counts of gross sexual imposition; and, the State dismissed the public indecency charge. *Op.* at ¶ 3. On December 8, 2010, the juvenile court adjudicated D.S. delinquent, and for disposition, committed him to the Ohio Department of Youth Services ("DYS") for two consecutive six-month minimum commitments. *Op.* at ¶ 3. The juvenile court did not determine how old D.S. was when the offenses occurred. *Op.* at ¶3. Had he been 13 at the time of the offenses, he would not have been age eligible for sex offender registration. R.C. 2152.83(A); (B).

The court scheduled a classification hearing for D.S. for June 17, 2013, following his release from DYS. R.C. 2152.83(B)(1). *Op.* at ¶ 4. Before addressing classification, the juvenile court held an evidentiary hearing and allowed the State to present evidence to prove D.S.'s age at the time of the offenses, over defense counsel's objections. (T.pp. 3-37). Based

on the evidence presented, the court found that D.S. "committed * * * at least one count of gross sexual imposition when he was 14 years of age." *Op.* at ¶ 4. The court then heard arguments pertaining to classification and classified D.S. as a tier II juvenile offender registrant with a duty to comply with registration requirements every 180 days for 20 years. *Op.* at ¶ 4. D.S. filed a timely appeal to the Fifth District Court of Appeals. *In re D.S.*, 5th Dist. Licking No. 13CA58, 2014-Ohio-867.

On appeal, D.S. assigned error to the juvenile court's holding of an evidentiary hearing after his adjudication and disposition, the constitutionality of the imposition of a classification after initial disposition, and the constitutionality of the extension of a punitive sanction beyond the age jurisdiction of the juvenile court. *Op.* at ¶ 6-8. On March 3, 2014, the Fifth District affirmed D.S.'s classification. *Op.* at ¶ 82. Specifically, the court found that it was proper for the juvenile court to hear evidence related to D.S.'s age at the time of his classification because D.S. was committed to a secure facility at the time of his initial disposition. *Op.* at ¶ 47. The court also determined that R.C. 2152.83 was constitutional. *Op.* at ¶ 76. D.S. timely appeals.

ARGUMENT

FIRST PROPOSITION OF LAW

A juvenile court is without authority to hold an evidentiary hearing after a youth's adjudication and disposition in order to allow the State to prove that a child was age-eligible for registration under Senate Bill 10. *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684.

In *Raber*, this Court held that a trial court lacks authority to reopen a case to reconsider a final judgment; and, in particular, to do so in order to allow the State to prove a fact necessary to establish a defendant's registration eligibility. *Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684, at paragraph one of the syllabus. Although *Raber* concerned an adult offender, the

holding should apply to juvenile cases, where registration eligibility is predicated on a court's specific fact finding concerning a child's age at the time of the offense. *See* R.C. 2152.83.

According to R.C. 2152.83, a child is eligible for registration if the offense for which he is adjudicated is "a sexually oriented offense or a child-victim oriented offense," committed on or after January 1, 2002, and the child was 14, 15, 16, or 17 at the time of the offense. R.C. 2152.83(A)(1)(a)-(b); (B)(1)(a)-(b). For 16- and 17-year-olds, registration is mandatory. R.C. 2152.83(A)(1). But, for children who were 14 or 15 at the time of the offense, registration is discretionary, meaning that the court may decline to issue an order classifying the child as a juvenile offender registrant. R.C.2152.83(B)(2)(a). Those who were under 14 at the time of their offense are not eligible for registration. *In re B.D.*, 11th Dist. Portage No. 2011-P-0078, 2012-Ohio-4463, 975 N.E.2d 5, ¶ 27 ("Given the interplay between [R.C. 2152.83(A) and (B)], juveniles 13 years old or younger at the time they commit their offense are not subject to sex offender classification or registration."); *In re A.E.*, 184 Ohio App.3d 812, 2009-Ohio-6094, 922 N.E.2d 1017, ¶ 16 (5th Dist.) ("children that are 13 years of age and younger that are adjudicated delinquent for a sex offense are not subject to classification and registration.").

Ohio's courts of appeals have found that a juvenile court's failure to make a finding of fact regarding a child's age at the time of his offense, prior to classification, constitutes reversible error. *See, e.g., In re N.Z.*, 11th Dist. Lake Nos. 2010-L-023, 2010-L-035, 2010-L-041, 2011-Ohio-6845, ¶ 112; *In re J.M.*, 7th Dist. Jefferson No. 09 JE 21, 2010-Ohio-2700, ¶ 21. And, according to R.C. 2152.83, the only fact finding at a child's classification hearing is limited to the court's determination of the factors listed in R.C. 2152.83(D)(1)-(6). Under R.C. 2152.83(D), a juvenile court is authorized to consider: the nature of the offense; the child's remorse; the public interest and safety; the factors in R.C. 2950.11 and 2929.12; and, the results

of the child's treatment. Age is not one of the factors listed in R.C. 2152.83(D). Thus, the only time a juvenile court may lawfully make a factual determination as to a child's age at the time of the offense, is at the child's adjudication and disposition hearing. R.C. 2152.83(A)(1)(b); (B)(1)(b); (D)(1)-(6).

The complaint in this case did not allege, and the State did not prove how old D.S. was at the time of the offenses. *Op.* at ¶ 2. Instead, it alleged that the gross sexual imposition charges occurred between August 1, 2009 and June 4, 2010. *Op.* at ¶ 2. D.S.'s date of birth is November 30, 1995; thus, he was 13 years old for approximately four months during the time alleged in the complaint. *Op.* at ¶ 2. The complaint was never amended to specify that he was 14 when either one or the other offense occurred; nor does the record reflect that D.S. stipulated that he was age-eligible for registration at the time of his admission. (T.pp. 3-56). Therefore, although D.S. entered an admission to charges, the State needed to prove, and the juvenile court needed to find, that he was at least 14 at the time of the offenses. R.C. 2152.83(A); (B). But, neither happened prior to the court adjudicating D.S. delinquent and committing him to DYS. *Op.* at ¶ 3. Instead, the juvenile court held an evidentiary hearing two years and eight months after D.S. was adjudicated delinquent, and allowed the State to prove his age at the time of the offense in order to find that he was eligible for classification.

In *Raber*, this Court was faced with a similar problem. *Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684 at ¶ 2-8. Raber was convicted of sexual imposition, a registration-eligible offense. *Id.* at ¶ 2. But, according to R.C. 2950.01(B)(2)(a), a finding of consent, or lack thereof, is required before a court can classify the offender as a registrant when the victim is over 18 and not under the custodial authority of the offender. *Id.* The indictment did not allege whether the sexual conduct between Raber and his girlfriend was consensual and the State did

not present any evidence regarding consent at trial. *Id.* At sentencing, the parties disputed the issue of consent. *Id.* at ¶ 3, 8. The court directed each side to brief the question and took the matter under advisement. *Id.* But, the parties never submitted briefs; and, on December 1, 2008, the court entered its final judgment sentencing Raber to 60 days in jail, imposing a fine, and placing him on community control. *Id.* The court's order did not contain a registration requirement. *Id.* On March 2, 2010, more than 13 months after it journalized its sentencing entry in Raber's case, the trial court held "an evidentiary hearing * * * to determine whether Raber should be classified as a sex offender subject to Tier I registration." *Id.* at ¶ 9.

This Court vacated Raber's classification, finding that the trial court lacked authority to classify him when it did, and that because R.C. 2950.01(B)(2) specifically excepted consensual sexual conduct from being registration eligible, the State needed to prove the issue before Raber was convicted and sentenced. *Id.* at ¶ 17; 27. Because the State failed to prove lack of consent before Raber's conviction was entered, and failed to request permission to file supplemental briefing which might have demonstrated that the record supported such a finding, this Court found that Raber's trial court's act of "conducting a separate trial to determine whether the sexual activity at issue here was consensual" was unlawful. *Id.* at ¶ 18, 26. This Court also found that because Raber's conviction itself was valid, the State's failure to prove the issue of consent prior to Raber's sentencing hearing divested the trial court of jurisdiction to hold a subsequent evidentiary hearing to supply the facts necessary to establish that Raber was registration eligible. *Id.* at ¶ 21. Such is the case here.

Age is not an element of gross sexual imposition; nor is the date on which an offense is alleged to have occurred. R.C. 2907.05(A)(4); *State v. Pickett*, 8th Dist. Cuyahoga No. 88265, 2007-Ohio-3899, ¶ 22 ("The precise time and date of an offense are not ordinarily considered to

be essential elements of an offense; hence, the failure to provide specific times and dates in the indictment is not, in and of itself, a basis for dismissal of the charges."). Thus, the State is not required to prove age for a finding of delinquency for gross sexual imposition. But, a factual determination of a child's age at the time of the offense is required before he can be considered eligible for registration. R.C. 2152.83(A); (B). Under *Raber*, it is improper for a court to conduct an evidentiary hearing after final judgment to allow the State to prove a fact that should have been proven as part of the child's adjudicatory hearing.

That this is a delinquency matter should not change the effect that *Raber* has on this case. Although "juvenile court proceedings are civil, rather than criminal, in nature," this Court has long recognized that 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.'" (Emphasis sic.) *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 76, quoting *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 26, citing *Breed v. Jones*, 421 U.S. 519, 531, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975). And, this Court's finding that Senate Bill 10 is punitive applies equally to juvenile and adults. *See, e.g., Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, ¶ 16; *In re D.J.S.*, 130 Ohio St.3d 257, 2011-Ohio-5342, 957 N.E.2d 291, and *In re Cases held for the decision in In re D.J.S.*, 130 Ohio St.3d 253, 2011-Ohio-5349, 957 N.E.2d 288, (applying *State v. Williams* to juvenile cases). For these reasons D.S. asks this Court must accept jurisdiction of this case and find that *Raber* applies with equal force to juvenile proceedings.

SECOND PROPOSITION OF LAW

The timing mechanism of R.C. 2152.83(B) is unconstitutional because the imposition of classification at any time other than disposition violates the Double Jeopardy Clauses of the United States and Ohio Constitutions. *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects against the imposition of multiple criminal punishments for the same offense in successive proceedings. *Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684, at ¶ 22; *Hudson v. United States*, 522 U.S. 93, 99, 118 S.Ct. 488, 139 L.E.2d 450 (1997); *United States v. Husein*, 478 F.3d 318, 338 (6th Cir.2007). Juveniles have the same right against double jeopardy as adults. *In re Cross*, 96 Ohio St.3d 328, 332-33, 2002-Ohio-4183, 774 N.E.2d 258, citing *Breed,* 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346 (the Double Jeopardy Clause of the Fifth Amendment applies to juvenile delinquency proceedings). Because registration under Senate Bill 10 is punitive, classifying a child as a juvenile offender registrant at any time other than his initial adjudication and disposition violates double jeopardy.

This Court's decision in *Raber* was twofold. The first holding concerned the State's failure to prove lack of consent prior to the imposition of Raber's sentence. (*See* First Proposition of Law). The second concerned the effect of the court classifying Raber after his sentencing hearing. *Raber* at ¶ 26. Unlike its predecessor, Senate Bill 10 is punitive. *Raber*, at ¶ 23, citing *Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108 at ¶ 16. Thus, the classification of an offender as a registrant is not merely a civil collateral consequence; instead, it is an "additional criminal punishment." *Raber* at ¶ 24. This designation is not limited to adult registrants, as this Court has also found that Senate Bill 10 is punishment for children. *Id.* at ¶ 23, citing *C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729. Therefore, because the juvenile court adjudicated D.S. delinquent and imposed disposition on December 8, 2010, its

imposition of a classification order in his case on June 17, 2013 constitutes successive punishments. *Raber* at ¶ 24; 26.

It is well established that "if a defendant has a legitimate expectation of finality, then an increase in that sentence is prohibited by the double jeopardy clause." *Id.* at ¶ 24, citing *United States v. Fogel*, 829 F.2d 77, 87 (D.C.Cir.1987). This Court held that "Raber had a legitimate expectation of finality in his sentence when the trial court entered its judgment of conviction;" therefore, "the protections of the Double Jeopardy Clause prohibited the trial court from reopening [the] case," and classifying him as a registrant. *Raber* at ¶ 26. The outcome here must be the same. *See* R.C. 2152.22(A).

D.S.'s expectation of finality in the fact-finding phase of the adjudicatory process is no different than Raber's, in that the State is required to prove all facts relating to a defendant's conviction and sentence beyond a reasonable doubt, at trial. *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (finding that a youth is entitled to an acquittal if the State fails to carry its burden of proof). Children have an expectation that the State puts forth all facts relevant and necessary for their adjudication, disposition, *and all punishments* before they are adjudicated delinquent and given a disposition. This Court has found that the Double Jeopardy Clauses of the United States and Ohio Constitutions protect defendants from being subject to a subsequent, separate trial, where the State is allowed to introduce new facts to impose additional punishments on him. *Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684 at ¶ 26.

Although the Ohio Revised Code allows youth to receive penalties that extend into their adulthood, it does so only in limited circumstances. R.C. 2152.12; 2152.13; 2152.14. And, such extensions require certain constitutional protections prior to invocation. *See* R.C. 2152.14(D). These statutory protections are lacking for juvenile offender registrants; and, R.C. 2152.83

provides no statutory mechanism that allows for suspension and potential future invocation of a child's registration requirements into adulthood. Because the Fifth District's decision violates children's rights to be free from multiple consecutive punishments, this Court must accept jurisdiction of this case.

THIRD PROPOSITION OF LAW

The imposition of a punitive sanction that extends beyond the age jurisdiction of the juvenile court violates the Due Process Clauses of the United States and Ohio Constitutions.

A juvenile court's power "is derived from Section 1, Article IV of the Constitution of Ohio, and the court is established and its jurisdiction is defined by [O.R.C.] Chapter 2151 * * *." *The State, ex rel. Schwartz, Judge v. Haines, Director of Mental Hygiene and Correction*, 172 Ohio St. 572, 573, 179 N.E.2d 46 (1962). Juvenile courts have exclusive jurisdiction over children who are alleged to be delinquent. R.C. 2151.23(A)(1). In delinquency proceedings, "child" means a person who is under 18 years of age, except as otherwise provided" in R.C. 2152.02(C)(2)-(6). R.C. 2152.02(C)(1); *In re Andrew*, 119 Ohio St.3d 466, 2008-Ohio-4791, 895 N.E.2d 166 ¶ 4-17.

Generally, the juvenile court's jurisdiction over a child terminates when the child turns 21. Specifically, R.C. 2152.22(A) provides that, once validly entered, dispositions made under R.C. 2152 "shall be temporary and shall continue for a period that is designated by the court in its order, until terminated or modified by the court or until the child attains twenty-one years of age." But, a narrow exception exists for youth who are subject to Ohio's juvenile registration and notification statutes.

Revised Code Section 2152.23(A)(15) authorizes juvenile courts to "conduct hearings, and to make determinations, adjudications, and orders authorized or required under sections

2152.82-2152.86[1] and Chapter 2950 of the Revised Code" for delinquent children. In turn, R.C. 2152.83(E) extends the jurisdiction of the juvenile court beyond the termination of a case, or beyond the age of 21, for juvenile offender registrants. Specifically, R.C. 2152.83(E) provides that "an order issued under R.C. 2152.83(A) 'and any determinations included in the order shall remain in effect for the period of time specified in' Chapter 2950," and "[t]he child's attainment of age 18 or 21 'does not affect or terminate the order, and the order remains in effect for the period of time described in this division." R.C. 2152.83(E). R.C. 2152.84 and .85 govern the hearings at which a child's classification may be revisited. According to R.C. 2152.84 and .85, juvenile courts may review, continue, modify, or terminate the registration duties of any juvenile offender registrant indefinitely.

When read together, R.C. 2152.83(E), 2152.84 and 2152.85 expressly grant juvenile courts jurisdiction over adults who were adjudicated delinquent children, where it would otherwise not exist. This is the only delinquency disposition that may extend beyond the age jurisdiction of the juvenile court. But, given both recent and well-established precedent from the this Court, this extension is contrary to the purposes of juvenile delinquency dispositions.

1. R.C. 2950 is Punitive.

As noted above, this Court has found that R.C. 2950 is punitive. (*See* Second Proposition of Law). *Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, at ¶ 16. That holding was extended to juvenile registration cases as well. *D.J.S.*, 130 Ohio St.3d 257, 2011-Ohio-5342, 957 N.E.2d 291; *Cases held for the decision in In re D.J.S.*, 130 Ohio St.3d 253, 2011-Ohio-5349, 957 N.E.2d 288; and *C.P.*, 131 Ohio St. 3d 513, 2012 Ohio 1446, 967 N.E.2d 729, at ¶ 11, 86.

[1] This Court found R.C. 2152.86 unconstitutional in *C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E. 2d 729, at ¶ 86.

2. The purpose of the juvenile justice system is rooted in rehabilitation.

Juvenile courts "occupy a unique place in our legal system." *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, at ¶ 65. Traditionally, the juvenile court has functioned "to provide measures of guidance and rehabilitation for the child and protection for society, not to affix criminal responsibility, guilt and punishment." *Kent v. United States*, 383 U.S. 541, 554, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). As such, the philosophy driving juvenile justice has been rooted in social welfare, rather than in the body of the law. *Id.* at 554.

The objective of the juvenile court from its inception, has been to protect wayward children from evil influences, save them from criminal prosecution, and to provide them social and rehabilitative services. *Children's Home of Marion City v. Fetter*, 90 Ohio St. 110, 127, 106 N.E. 761 (1914). This means that 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, 666 N.E.2d 1367; *In re Kirby*, 101 Ohio St.3d 312, 2004-Ohio-970, 804 N.E.2d 476; R.C. 2152.01.

This Court has recognized that "punishment is not the goal of the juvenile system, except as necessary to direct the child toward the goal of rehabilitation." *Caldwell* at 157. Thus, this Court directed that inquiries into the appropriateness of a disposition must begin with that premise and implement efforts to protect society during the period of rehabilitation. *Id.* Therefore, if registration under Senate Bill 10, although punitive, is necessary to protect society from delinquent acts of a child who is being rehabilitated and hold that child accountable; then, like other delinquency dispositions, it can only be in effect through the child's period of rehabilitation, which is until the age of 21. R.C. 2152.22(A). Once the child turns 21, the period of rehabilitation is over and all delinquency dispositions must cease.

3. Punishments that extend beyond the jurisdiction of the juvenile court are unconstitutional.

In *C.P.*, this Court recognized that lifetime registration and community notification for youth are especially harsh punishments for juveniles, because they run contrary to R.C. 2152.01's goals of rehabilitating the offender, aiding his mental and physical development, and anchor the juvenile offender to his crime. *C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, at ¶ 44, 47. This Court also noted that, once C.P. had fulfilled his juvenile commitment, his incarceration would be complete, but his punishment would continue. *Id.* Those same findings apply here.

"From a due process perspective, both the this Court and the United States Supreme Court have held that juveniles may be treated differently from adults:

> [O]ur acceptance of juvenile courts distinct from the adult criminal justice system assumes that juvenile offenders constitutionally may be treated differently from adults. * * * Viewed together, our cases show that although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for "concern, * * *, sympathy, and * * * paternal attention."

(Citation omitted.) *C.P.* at ¶ 72, citing *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979).

This Court was one of the first in the nation to recognize the importance of protecting the constitutional rights of juveniles subject to sex offender registration. Since then, other states have taken notice and followed this Court's lead. *See In the Interest of J.B., et al.*, CP-67-JV-0000726-2010 (York County Court of Common Pleas, Nov. 4, 2013), opinion available at http://www.jlc.org/blog/juvenile-court-judge-finds-pennsylvania-juvenile-sex-offender-registration-law-unconstitutional (accessed April 17, 2014). In December 2012, Pennsylvania's version of SORNA went into effect. 42 Pa.C.S. § 9799.10 *et seq.* And, in November 2013, a

Pennsylvania court found the law unconstitutional as applied to juvenile offenders, "both retroactively and prospectively." *J.B.* at 41. Citing this Court's decision in *C.P.*, as well as recent United States Supreme Court precedent, the court found that the new law runs counter to "the juvenile justice system, as a court of second chances." *Id.* at 33-34, citing *C.P.* at ¶ 41-51; *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 2026-2031, 161 L.Ed.2d 1 (2005) and *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 2471-2472, 176 L.Ed.2d 825 (2010).

J.B. has already garnered acclaim as a "landmark" decision. Scolforo, *York County judge's ruling on juvenile sex offenders called a 'landmark decision,'* York Dispatch (Nov. 9, 2013), available at http://www.yorkdispatch.com/breaking/ci_24 483313/york-county-judges-ruling-juvenile-sex-offenders-called (accessed Nov. 16, 2013). As such, York County District Attorney has indicated that he will appeal the decision. Editorial, *Our take: Right call on juvenile sex offenders by Judge Uhler*, York Daily Record, available at http://www.ydr.com/opinion/ci_24524751/our-take-right-call-juvenile-sex-offenders-by (accessed Nov. 16, 2013).

Classification of a child as a tier I, II, or III juvenile offender registrant is only warranted as long as the child is under the rehabilitative care of the juvenile court. Accordingly, this Court should accept jurisdiction of this case to examine the question of whether the extension of a punitive sanction imposed by the juvenile court may extend beyond the age jurisdiction of the juvenile court.

CONCLUSION

This case gives this Court the opportunity to review additional aspects of a law that it has already found to run afoul of certain constitutional rights for juvenile offenders. This Court should accept D.S.'s appeal because it raises a substantial constitutional question, concerns felony-level offenses, and is of great general interest.

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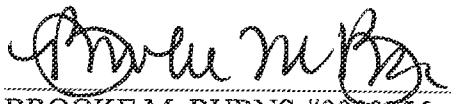
CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION OF MINOR CHILD-APPELLANT D.S. was served by ordinary U.S. Mail, postage-prepaid, this 17th day of April, 2014, to the office of Kenneth W. Oswalt, Licking County Prosecutor, 20 South Second Street, Newark, Ohio 43055.



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#415370

IN THE SUPREME COURT OF OHIO

IN RE: D.S., adjudicated delinquent child	:	Case No. 2014-0607
	:	On Appeal from the Licking County Court of Appeals Fifth Appellate District
	:	C.A. Case No. 13CA58

APPENDIX TO
MEMORANDUM IN SUPPORT OF JURISDICTION
OF MINOR CHILD-APPELLANT D.S.

FILED

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LICKING COUNTY OH
GARY R. WALTERS

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

IN RE: D.S.,

A MINOR CHILD

JUDGES:
Hon. William B. Hoffman, P.J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 13-CA-58

OPINION

CHARACTER OF PROCEEDING: Appeal from the Licking County Court of Common Pleas, Juvenile Division, Case No. A 2010-0578

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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41/822

Hoffman, P.J.

{¶1} Appellant D.S., a delinquent child, appeals the June 24, 2013 Judgment Entry entered by the Licking County Court of Common Pleas, Juvenile Division, denying his motion to dismiss and classifying him a Tier II Juvenile Sex Offender Registrant. Appellee is the state of Ohio.

STATEMENT OF THE CASE[1]

{¶2} On August 20, 2010, a complaint was filed in the Licking County Court of Common Pleas, Juvenile Division, alleging Appellant D.S. was delinquent by reason of having committed two counts of gross sexual imposition, in violation of R.C. 2907.05(A)(4), a felony of the third degree if committed by an adult, and one count of public indecency, in violation of R.C. 2907.09(B)(1), a second degree misdemeanor if committed by an adult. The complaint alleged the offenses occurred between August 1, 2009, and June 4, 2010. D.S.'s date of birth is November 30, 1995, as alleged in the complaint. Accordingly, D.S. could have been either 13 or 14 years of age at the time of the alleged offenses.

{¶3} On October 13, 2010, D.S. entered an admission to the two counts of gross sexual imposition. The State dismissed the charge of public indecency. On December 8, 2010, the juvenile court adjudicated Appellant a delinquent child and committed him to the Ohio Department of Youth Services for two consecutive six month minimum terms. The juvenile court's disposition entry did not include a determination as to how old D.S. was at the time the offenses were committed. The December 8, 2010

[1] A rendition of the underlying facts supporting D.S.'s conviction is unnecessary for our resolution of this appeal.

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disposition entry states, "classification as a juvenile sex offender registrant is deferred or delayed pending efforts at rehabilitation while committed to ODYS."

{¶4} On June 17, 2013, following D.S.'s release from ODYS, the trial court conducted a classification hearing. The trial court considered evidence as to the age of D.S. at the time the offenses were committed. The court determined D.S. was fourteen years of age at the time at least one of the offenses was committed; therefore, D.S. was subject to classification. Following the classification hearing, via Judgment Entry of June 24, 2013, the trial court overruled Appellant's motion to dismiss and the juvenile court classified D.S. a Tier II Juvenile Sex Offender Registrant with a duty to comply with registration requirements every 180 days for 20 years.

{¶5} D.S. now appeals, assigning as error:

{¶6} "I. THE LICKING COUNTY JUVENILE COURT ERRED WHEN IT HELD AN EVIDENTIARY HEARING ON JUNE 17, 2013 TO DETERMINE WHETHER D.S. WAS AGE-ELIGIBLE FOR REGISTRATION UNDER SENATE BILL 10, BECAUSE THAT DETERMINATION COULD ONLY HAVE BEEN LAWFULLY MADE ON DECEMBER 18, 2010, WHEN THE COURT ADJUDICATED D.S. DELINQUENT.

{¶7} "II. THE LICKING COUNTY JUVENILE COURT ERRED WHEN IT CLASSIFIED D.S. AS A TIER II JUVENILE OFFENDER REGISTRANT, BECAUSE THE IMPOSITION OF A DISPOSITION AT ANY TIME OTHER THAN AT THE DISPOSITION HEARING VIOLATES THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND OHIO CONSTITUTIONS.

{¶8} "III. THE LICKING COUNTY JUVENILE COURT ERRED WHEN IT CLASSIFIED D.S. AS A TIER II JUVENILE REGISTRANT, BECAUSE THE

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IMPOSITION OF A PUNITIVE SANCTION THAT EXTENDS BEYOND THE AGE JURISDICTION OF THE JUVENILE COURT VIOLATES DUE PROCESS.

{¶9} "IV. D.S. WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO CHALLENGE THE CONSTITUTIONALITY OF A CLASSIFICATION THAT EXTENDED BEYOND THE JURISDICTION OF THE JUVENILE COURT. FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION."

I.

{¶10} In the first assignment of error, Appellant argues the juvenile court erred in considering evidence at the classification hearing subsequent to his original adjudication as being delinquent and disposition thereon to determine whether he was age eligible for registration under S.B. 10.

{¶11} Ohio Revised Code Section 2152.83 provides,

{¶12} "(A)(1) The court that adjudicates a child a delinquent child shall issue as part of the dispositional order or, if the court commits the child for the delinquent act to the custody of a secure facility, shall issue at the time of the child's release from the secure facility an order that classifies the child a juvenile offender registrant and specifies that the child has a duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code if all of the following apply:

{¶13} "(a) The act for which the child is or was adjudicated a delinquent child is a sexually oriented offense or a child-victim oriented offense that the child committed on or after January 1, 2002.

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{¶14} "(b) The child was sixteen or seventeen years of age at the time of committing the offense.

{¶15} "(c) The court was not required to classify the child a juvenile offender registrant under section 2152.82 of the Revised Code or as both a juvenile offender registrant and a public registry-qualified juvenile offender registrant under section 2152.86 of the Revised Code.

{¶16} "(2) Prior to issuing the order required by division (A)(2) of this section, the judge shall conduct a hearing under section 2152.831 of the Revised Code, except as otherwise provided in that section, to determine whether the child is a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender. When a judge issues an order under division (A)(1) of this section, the judge shall include in the order the determinations identified in division (B)(5) of section 2152.82 of the Revised Code.

{¶17} "(B)(1) The court that adjudicates a child a delinquent child, on the judge's own motion, may conduct at the time of disposition of the child *or, if the court commits the child for the delinquent act to the custody of a secure facility, may conduct at the time of the child's release from the secure facility a hearing for the purposes described in division (B)(2) of this section if all of the following apply:*

{¶18} "(a) The act for which the child is adjudicated a delinquent child is a sexually oriented offense or a child-victim oriented offense that the child committed on or after January 1, 2002.

{¶19} "(b) *The child was fourteen or fifteen years of age* at the time of committing the offense.

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{¶20} "(c) The court was not required to classify the child a juvenile offender registrant under section 2152.82 of the Revised Code or as both a juvenile offender registrant and a public registry-qualified juvenile offender registrant under section 2152.86 of the Revised Code.

{¶21} "(2) *A judge shall conduct a hearing under division (B)(1) of this section to review the effectiveness of the disposition made of the child and of any treatment provided for the child placed in a secure setting and to determine whether the child should be classified a juvenile offender registrant. The judge may conduct the hearing on the judge's own initiative or based upon a recommendation of an officer or employee of the department of youth services, a probation officer, an employee of the court, or a prosecutor or law enforcement officer. If the judge conducts the hearing, upon completion of the hearing, the judge, in the judge's discretion and after consideration of the factors listed in division (E) of this section, shall do either of the following:*

{¶22} *"(a) Decline to issue an order that classifies the child a juvenile offender registrant and specifies that the child has a duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code;*

{¶23} *"(b) Issue an order that classifies the child a juvenile offender registrant and specifies that the child has a duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code and that states the determination that the judge makes at the hearing held pursuant to section 2152.831 of the Revised Code as to whether the child is a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender.*

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{¶24} "(C)(1) Prior to issuing an order under division (B)(2)(b) of this section , the judge shall conduct a hearing under section 2152.831 of the Revised Code to determine whether the child is a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender. The judge may hold the hearing at the same time as the hearing under division (B) of this section.****"

{¶25} (Emphasis added.)

{¶26} In support of his argument, Appellant cites the Ohio Supreme Court decision in *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636.

{¶27} In *Raber*, the defendant, an adult offender, was convicted of sexual imposition; therefore, according to R.C. 2950.01(B)(2)(a), a finding of consent, or lack thereof, was required before the court could classify the offender as a registrant when the victim was over eighteen years of age and not under the custody of the offender. The indictment did not allege whether the sexual conduct between Raber and his girlfriend was consensual. At sentencing, the issue remained disputed. The trial court sentenced Raber to sixty days in jail, plus a fine and community control. The sentencing entry did not contain a registration requirement.

{¶28} On March 2, 2010, thirteen months after sentencing, the trial court held an evidentiary hearing to determine whether Raber should be classified a Tier I sex offender subject to registration. During the hearing, the victim testified she had consented to vaginal intercourse, but not anal intercourse. Based upon the testimony, the trial court determined the intercourse was not consensual, and proceeded in classifying Raber a Tier I sex offender.

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{¶29} The Supreme Court of Ohio vacated the classification finding the trial court lacked authority to classify Raber. The Court found R.C. 2950.01(B)(2) specifically excepted consensual conduct from being registration eligible, and the State needed to prove the issue before Raber was convicted and sentenced.

{¶30} The Raber court held:

{¶31} "In this case, at the November 26, 2008 sentencing hearing, the state failed to prove the lack of consent to the sexual activity, nor did it file a supplemental brief pointing to evidence in the record demonstrating a lack of consent. The court thereafter entered a judgment of conviction without finding Raber to be a sex offender subject to Tier I registration and without notifying him of a duty to register, presumably on its determination that no duty existed based on the sexual activity's being consensual.

{¶32} "A presumption of regularity attaches to all judicial proceedings. *See, e.g., State v. Edwards,* 157 Ohio St. 175, 183, 105 N.E.2d 259 (1952); *State v. Sweet,* 72 Ohio St.3d 375, 376, 650 N.E.2d 450 (1995); *State v. Robb,* 88 Ohio St.3d 59, 87, 723 N.E.2d 1019 (2000). Here, the record is silent regarding the trial court's reasoning for not classifying Raber as a sex offender subject to registration in its judgment of conviction, and therefore '[t]here is no showing of irregularity to contradict the presumption of regularity accorded all judicial proceedings.' *Sweet,* 72 Ohio St.3d at 376, 650 N.E.2d 450.

{¶33} "*Reconsideration of Final Judgments*

{¶34} "We have previously recognized that 'trial courts lack authority to reconsider their own valid final judgments in criminal cases.' *State ex rel. White v.*

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Junkin, 80 Ohio St.3d 335, 338, 686 N.E.2d 267 (1997), citing *State ex rel. Hansen v. Reed,* 63 Ohio St.3d 597, 589 N.E.2d 1324 (1992). And although trial courts retain continuing jurisdiction to correct a void sentence and to correct a clerical error in a judgment, *State ex rel. Cruzado v. Zaleski,* 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 263, ¶ 19, neither of those exceptions to the general rule applies here.

{¶35} "The trial court had no mandatory duty to impose sex-offender registration after determining the sexual activity to be consensual and considering the ages of those involved. The state fails to demonstrate a clerical mistake, which, as we explained in *Cruzado,* "refers to a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment." *Id.* at ¶ 19, quoting *State v. Brown,* 136 Ohio App.3d 816, 819–820, 737 N.E.2d 1057 (3d Dist.2000). Nothing in the record demonstrates error by the trial court in failing to classify Raber as a sex offender in its original judgment of conviction.

{¶36} "*Double Jeopardy*

{¶37} "This court previously upheld the prior sex-offender registration statutes enacted by the General Assembly against constitutional challenge. In *State v. Williams,* 88 Ohio St.3d 513, 528, 728 N.E.2d 342 (2000), we held that because Megan's Law did not impose punishment, it necessarily did not violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. And in *State v. Ferguson,* 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, we concluded that sex-offender registration remained a civil, remedial regulatory scheme notwithstanding amendments to Megan's Law enacted by Am.Sub.S.B. No. 5, effective July 31, 2003, that increased burdens on

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sex offenders, because the amended statute did not impose criminal punishment. *Id.* at ¶ 39, 43.

{¶38} "However, in *Williams,* 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, we determined that the registration duties imposed by S.B. 10 could no longer be considered civil in nature, holding that 'R.C. Chapter 2950 is punitive.' *Id.* at ¶ 16. And *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, stands for the proposition that S.B. 10 violates Ohio's constitutional prohibition against cruel and unusual punishment by imposing an automatic, lifetime requirement of sex-offender registration and notification on certain juvenile offenders. *Id.* at ¶ 86. Thus, our cases hold that S.B. 10 imposes additional criminal punishment on those convicted of sexually oriented offenses.

{¶39} "The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects against the imposition of multiple criminal punishments for the same offense in successive proceedings. *Hudson v. United States,* 522 U.S. 93, 99, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997); *United States v. Husein,* 478 F.3d 318, 338 (6th Cir.2007). As the United States Court of Appeals for the D.C. Circuit has explained, 'If a defendant has a legitimate expectation of finality, then an increase in that sentence is prohibited by the double jeopardy clause.' *United States v. Fogel,* 829 F.2d 77, 87 (D.C.Cir.1987).

{¶40} "Although we have recognized that '[w]here * * * the sentence imposed was unlawful and thus void, there can be no reasonable, legitimate expectation of finality in it,' *State v. Simpkins,* 117 Ohio St.3d 420, 2008-Ohio-1197, 884 N.E.2d 568, ¶ 36, the judgment of conviction entered in this case is neither unlawful nor void. And

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although trial courts 'possess inherent authority to correct errors in judgment entries so that the record speaks the truth,' *State ex rel. Fogle v. Steiner*, 74 Ohio St.3d 158, 163–164, 656 N.E.2d 1288 (1995), the decision not to classify Raber as a Tier I sex offender was not a clerical error.

{¶41} "Accordingly, Raber had a legitimate expectation of finality in his sentence when the trial court entered its judgment of conviction on December 1, 2008, and the protections of the Double Jeopardy Clause prohibited the trial court from reopening this case, conducting a separate trial to determine whether the sexual activity at issue here was consensual, and classifying Raber as a sex offender subject to Tier I registration.

{¶42} "Conclusion

{¶43} "The trial court lacked authority to reopen this case to reconsider the final judgment it had entered, and the protections against double jeopardy barred it from classifying Raber as a Tier I sex offender more than a year after it imposed sentence. Accordingly, the judgment of the court of appeals is reversed."

{¶44} We find *Raber* to be factually and procedurally distinguishable from the case at hand. Raber was classified pursuant to R.C. 2950.01(B)(2) as an adult sexual offender. The same statute is not applicable to Appellant, D.S. a juvenile offender. Rather, as set forth above, the juvenile statute applicable herein specifically provides for the classification hearing to occur upon Appellant's release from ODYS.

{¶45} R.C. 2950.03(A)(3) states,

{¶46} "(3) If the person is a delinquent child who is classified a juvenile offender registrant on or after January 1, 2008, the judge shall provide the notice to the delinquent child at the time specified in division (B) of section 2152.82, division (C) of

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section 2152.83, division (C) of section 2152.84, or division (E) of section 2152.85 of the Revised Code, whichever is applicable."

{¶47} We find Appellant's age at the time of the offense and the effect thereof on his classification were properly considered at the classification hearing. The complaint adequately set forth the time parameters of the offenses, Appellant's date of birth, raising the issue as to whether Appellant was fourteen years of age at the time of the offense. Whether Appellant D.S. was "subject to registration" was an issue properly to be determined during the trial court's hearing on registration/classification. It was not an issue that needed to be determined at his original disposition because of his commitment to a secure facility.

{¶48} Pursuant to R.C. 2152.83(B)(2), the trial court was directed to hold a hearing to determine whether the delinquent child had been rehabilitated during the time of commitment. If the trial court determined the juvenile had not been adequately rehabilitated, the issue of whether the juvenile was subject to registration and classification was properly before the trial court. The State and delinquent child could and did present evidence regarding the juvenile's treatment progress, behaviors while incarcerated, and other relevant information. Appellant's age became a factor relative to classification properly considered at that time.

{¶49} Appellant cites the Seventh District Court of Appeals' decision in *In re J.M.*, 7th Dist. No. 09JE21, 2010-Ohio-2700 and the Eleventh District Court of Appeals' decision in *In re N.Z.*, 11th Dist. Nos. 2010-L-023, 2010-L035, 2010-L-041, 2011-Ohio-6845. However, we find these cases procedurally distinguishable from the case sub judice. *In re J.M.* and *In re N.Z.* did not involve procedural situations in which the trial

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courts considered evidence at the classification hearing on the issue of age prior to the classification. Rather, in both cases, the appellate courts remanded the matter to the trial courts for reclassification hearings to consider evidence on the issue of age.

{¶50} Appellant D.S.'s first assignment of error is overruled.

II. and III.

{¶51} Appellant's second and third assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶52} In the second assignment of error, Appellant argues his classification as a Tier II Juvenile Sex Offender Registrant violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution.

{¶53} In the third assignment of error, Appellant maintains the trial court erred in imposing a punitive sanction extending beyond the age jurisdiction of the juvenile court, violating Appellant's right to Due Process.

{¶54} The Double Jeopardy Clause of the Fifth Amendment protects against the imposition of multiple criminal punishments for the same offense in successive proceedings.

{¶55} R.C. 2152.83(E) provides,

{¶56} "(E) An order issued under division (A) or (B) of this section and any determinations included in the order shall remain in effect for the period of time specified in section 2950.07 of the Revised Code, subject to a modification or termination of the order under section 2152.84 of the Revised Code, and section 2152.851 of the Revised Code applies regarding the order and the determinations. *The child's attainment of eighteen or twenty-one years of age does not affect or terminate*

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the order, and the order remains in effect for the period of time described in this division."

{¶57} The statute, therefore, specifically, continues the jurisdiction of the juvenile court to classify the juvenile beyond their twenty-first birthday. The legislature retains the power to define the jurisdiction of the courts as long as powers inherently reserved for the judiciary are not infringed upon. *Seventh Urban, Inc. v. University Circle,* (1981) 67 Ohio St.2d 19.

{¶58} In the case at bar, the classification of D.S. as a juvenile offender registrant was not mandatory under the circumstances of this case because D.S. was fourteen years old at the time of at least one offense, did not have a prior adjudication for a sexually oriented offense, and had not been labeled a serious youthful offender. See R.C. 2152.83(B)(1), 2152.82, and 2152.86. As classification was not mandated by statute, the juvenile court was given the broad discretion to determine whether D.S. should be classified as a juvenile offender registrant and under which tier D.S. should be placed.

{¶59} Recently, this Court addressed the issues raised herein in *In Re D.R., a Minor Child* 5th Dist No. 13CA27, 2014-Ohio-588, holding:

{¶60} "Laws limiting rights, other than fundamental rights, are constitutional with respect to substantive due process and equal protection if the laws are rationally related to a legitimate goal of government. *State v. Thompkins* (1996), 75 Ohio St.3d 558.

{¶61} "* * *

{¶62} In the case at bar, we cannot say that the classification authorized by R.C. 2152.83(B) is irrational. Pursuant to R.C. 2152.83(B), the juvenile court judge retains

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discretion to deal individually with juvenile offenders. *In Re C.P.*, (citation omitted). 'Fundamental fairness requires that the judge decide the appropriateness of any such penalty.' Id. at ¶78. Although imposition of R.C. 2152.83(B) registration requirements may be punitive, they may help achieve the goal of rehabilitation by motivating the juvenile to comply with treatment in order to reduce or eliminate the registration requirement. *In Re I.A*, 2nd Dist. Montgomery No. 25078, 2012 Ohio 4973.

{¶63} "Accordingly, D.R. has failed to show that a JOR classification that extends beyond a child's twenty-first birthday violates either the United States or Ohio constitutional prohibitions against cruel and unusual punishment or the requirements of due process.

{¶64} "* * *

{¶65} "In her second assignment of error, D.R. contends that the juvenile court erred by classifying D.R. upon release from a secure facility rather than at the time of disposition. Classifying a juvenile at any time other than disposition, D.R. argues, violates the Double Jeopardy Clause of the Fourteenth Amendment to the United States Constitution, by imposing multiple criminal punishments for the same offense in successive proceedings.

{¶66} "The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution protect criminal defendants against multiple prosecutions for the same offense. The Ohio Supreme Court has recognized that '[t]he protections afforded by the two Double Jeopardy Clauses are coextensive.' *State v. Martello*, 97 Ohio St.3d 398, 2002–Ohio–6661, 780

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N.E.2d 250, ¶ 7, *citing State v. Gustafson,* 76 Ohio St.3d 425, 432, 668 N.E.2d 435(1996).

{¶67} "The principle behind the Double Jeopardy Clause ' 'is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for the alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.' ' *State v. Roberts,* 119 Ohio St.3d 294, 2008–Ohio–3835, 893 N.E.2d 818, ¶ 11, *quoting Green v. United States,* 355 U.S. 184, 187–188, 78 S.Ct. 221, 2 L.Ed.2d 199(1957). The federal and state constitutions' double jeopardy protection further guards citizens against cumulative punishments for the 'same offense.' *State v. Moss,* 69 Ohio St.2d 515, 518, 433 N.E.2d 181(1982). '[T]he Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.' *Missouri v. Hunter,* 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535, 542(1983). *See, also, Moss,* 69 Ohio St.2d at 518, 433 N.E.2d at 184–185. In *Ohio v. Johnson,* 467 U.S. 493, 499, 104 S.Ct. 2536, 81 L.Ed.2d 425(1984), the United States Supreme Court stated:

{¶68} '" * * * Because the substantive power to prescribe crimes and determine punishments is vested with the legislature, *United States v. Wiltberger,* 5 Wheat. 76, 93, 5 L.Ed. 37 (1820), the question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent, see *Missouri v. Hunter,* 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535 (1983). * * * '

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{¶69} "The Double Jeopardy Clause of the federal constitution 'protects only against the imposition of multiple criminal punishments for the same offense, * * * and then only when such occurs in successive proceedings.' (Citations omitted.) *Hudson v. United States,* 522 U.S. 93, 99, 118 S.Ct. 488 (1997); *State v. Raber,* 134 Ohio St.3d 350, 2012–Ohio–5636, 982 N.E.2d 684, ¶ 24; *State v. Martello,* 97 Ohio St.3d 398, 2002–Ohio–6661, ¶ 8. 'If pursued in a single proceeding, * * * multiple punishment may constitutionally be imposed [.]' *State v. Gustafson,* 76 Ohio St.3d 425, 437, 668 N.E.2d 435(1996).

{¶70} "D.R. relies primarily on *State v. Raber* in which the Ohio Supreme Court held that the trial court lacked authority to re-open sentencing to classify the defendant a sex offender more than one year after it imposed its original sentence. 134 Ohio St.3d 350, 2012–Ohio–5636, 982 N.E.2d 684, ¶ 4. The Supreme Court further stated, 'Because sex-offender registration is now punitive in nature, double-jeopardy protections barred the court from subsequently classifying Raber as a Tier I sex offender at a new proceeding held more than a year after its original sentence.' *Id.*

{¶71} "However, in the case at bar, the court's ability to classify D.R. arose from the clause of R.C. 2152.83(B)(1) granting the court jurisdiction to issue an order classifying D.R. as part of the dispositional order. *State ex rel. Jean–Baptiste v. Kirsch,* 134 Ohio St.3d 421, 2012–Ohio–5697, 983 N.E.2d 302, ¶ 24. In *Jean–Baptiste,* Jean–Baptiste was released from custody on January 18, 2010, which was also the date of his 21st birthday. *Id* . ¶ 5. However, the JOR classification hearing did not occur until February 8, 2010. *Id.* In *Jean–Baptiste,* the Supreme Court observed,

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{¶72} "'Because Jean–Baptiste was adjudicated a delinquent child and was committed to a secure facility, the statute [R.C. 2152.83(A)(1)] is clear that the court must issue the order classifying the child as a juvenile-offender registrant at the time the child is released from the secure facility—not afterward. The statute is logical, given that the juvenile-offender registrant may be subject to certain registration requirements upon his or her release into the community. Because Jean–Baptiste was released on the day that he turned 21 and because R.C. 2152.83 specifies that classification must occur when a child is released from a secure facility, the juvenile court patently and unambiguously lacks jurisdiction to classify Jean–Baptiste after his 21st birthday, when he was no longer a child.' *Id.*, ¶ 28.

{¶73} "In the case at bar, D.R. had not attained the age of 21 at the time of the classification and was therefore still subject to the jurisdiction of the juvenile court. Like R.C. 2152.83(A)(1), the statute by which D.R.'s hearing was held in the case at bar, R.C. 2152.83(B), provides that the court may issue the order classifying the child as a JOR at the time the child is released from the secured facility. This Court found the classification process was not a new proceeding but rather a continuation of the original delinquency case. *In re B.D.*, 5th Dist Guernsey No. 11–CA–27, 2012–Ohio–2223, 970 N.E.2d 1178, ¶ Accordingly, multiple punishments have not been imposed in D.R.'s case in subsequent proceedings. (Footnote omitted.)

{¶74} "We note the Ohio Supreme Court has recognized a split between appellate districts on when the classification hearing must occur and has certified the following question: 'If a court commits a child to a secure facility, does R.C.

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2152.83(B)(1) permit the court to conduct a classification hearing at the time of disposition?' *In re I.A.*, 134 Ohio St.3d 1447, 2013–Ohio–347, 982 N.E.2d 726."

{¶75} "D.R.'s second assignment of error is overruled."

{¶76} In accordance with this Court's holding in *In re D.R.*, supra, Appellant's second and third assignments of error are overruled.

IV.

{¶77} In the fourth assignment of error, Appellant maintains based upon cumulative errors in the trial court's classification D.S. he was denied the effective assistance of trial counsel. We disagree.

{¶78} To succeed on a claim of ineffectiveness, an appellant must satisfy a two-prong test. Initially, an appellant must show trial counsel acted incompetently. *See, Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 689, citing *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158 (1955). "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland,* 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690.

{¶79} Even if an appellant shows counsel was incompetent, the appellant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the appellant must show that "there is a reasonable probability that, but for counsel's

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unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. The United States Supreme Court and the Ohio Supreme Court have held a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Bradley* at 143, 538 N.E.2d 373, quoting *Strickland* at 697. Accordingly, we will direct our attention to the second prong of the *Strickland* test. *In re Huffman,* 5th Dist. Stark No.2005–CA–00107, 2005–Ohio–4725, ¶ 22.

{¶80} Based upon our analysis and disposition of Appellant's first, second and third assignments of error, we do not find Appellant has demonstrated the ineffective assistance of trial counsel in that he has not shown the outcome of the classification hearing would have been different but for any presumed error.

{¶81} The fourth assignment of error is overruled.

{¶82} Appellant D.S.'s classification as a Tier II Juvenile Sex Offender Registrant in the Licking County Court of Common Pleas, Juvenile Division, is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Wise, J. concur

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

HON. JOHN W. WISE

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FILED

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

2014 MAR -3 P 3:19

CLERK OF COURTS
OF APPEALS
LICKING COUNTY OH
GARY R. WALTERS

IN RE: D.S.,

A MINOR CHILD

JUDGMENT ENTRY

Case No. 13-CA-58

For the reasons stated in our accompanying Opinion, Appellant's classification as a Tier II Juvenile Sex Offender Registrant in the Licking County Court of Common Pleas, Juvenile Division, is affirmed. Costs to Appellant.

HON. WILLIAM B. HOFFMAN

HON. SHEILA G. FARMER

HON. JOHN W. WISE

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