

IN THE SUPREME COURT OF OHIO

IN RE: M.W.,	)	
	)	Sup. Ct. No. 14-1759
	)	
Adjudicated Delinquent Child,	)	Ct. App. No. WD-13-089
	)	
	)	On Appeal from the Wood County
	)	Court of Appeals, Sixth Appellate
	)	District
	)	
	)	
	)	
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PLAINTIFF-APPELLEE, STATE OF OHIO'S,  
MEMORANDUM IN OPPOSITION TO JURISDICTION

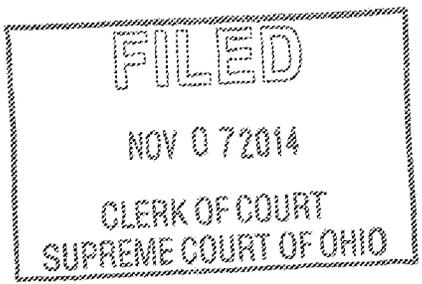
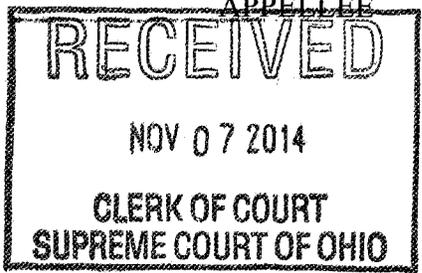
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David T. Harold (0072338)  
Assistant Prosecuting Attorney  
Counsel of Record  
Wood County Prosecutor's Office  
One Courthouse Square, Annex  
Bowling Green, Ohio 43402  
Tel: (419) 354-9250  
Fax: (419) 353-2904  
Email: [dharold@co.wood.oh.us](mailto:dharold@co.wood.oh.us)

Brooke M. Burns (0080256)  
Assistant State Public Defender  
Counsel of Record  
Office of the Ohio Public Defender  
250 East Broad Street, Suite 1400  
Columbus, OH 43215  
Tel: (614) 466-5394  
Fax: (614) 752-5167  
Email: [brooke.burns@opd.ohio.gov](mailto:brooke.burns@opd.ohio.gov)

COUNSEL FOR PLAINTIFF-  
APPELLEE

COUNSEL FOR DEFENDANT-  
APPELLANT



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EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION AND WHY LEAVE TO APPEAL SHOULD NOT BE GRANTED

Appellant seeks review of an issue arising out of R.C. 2152. 83(A). This issue, however, was properly disposed of at both the trial and appellate level. And there is no public or great general interest arising out of this case nor is there any substantial constitutional question.

The State recognizes that Appellant is asking that this Court hold this case for the decision in *In re D.S.*, Case No. 2014-0607 on the following argument: “This Court is currently reviewing whether the extension of juvenile registration beyond the age jurisdiction of the juvenile court is constitutional.” Appellant Memorandum at pg 4. But Appellant waived that argument in the lower court. Jurisdiction is, therefore, not appropriate over this appeal. In the alternative, however, if the Court grants review, the State asks that this case be scheduled for argument on the same day as *In re D.S.*, Case No. 2014-0607, so that the common issue can be considered together.

This case fails to present any unsettled constitutional issues or any other issue of public interest justifying further review by this Court. Appellee, therefore, respectfully submits that jurisdiction should be declined.

## STATEMENT OF THE CASE AND FACTS

The pertinent facts of this case were succinctly stated by the Sixth District Court of Appeals in *In re M.W.*, 6<sup>th</sup> Dist. Wood No. WD-13-089, 2014-Ohio-3758, ¶ 6-10.

The following undisputed facts are relevant to this appeal. This case stems from appellant's conduct in recording himself digitally penetrating a 14-year-old girl, storing these images on a mobile phone, and disseminating the recording to a third-party. Appellant also admitted to sending "sexts" of himself to other females. Notably, one of the girls appellant was "sexting" indicated that appellant had suggested to her that "he would hurt himself" if she did not cooperate in providing explicit photos of herself to him.

Appellant pled guilty to one count of pandering obscenity involving a minor, in violation of R.C. 2907.321(A)(1), a felony of the second degree. Following a dispositional hearing, appellant was given a stayed commitment to DYS and ordered to complete the treatment program at JRC in lieu of the DYS commitment.

Rather than cooperate with the treatment plan requirements by JRC, appellant's criminal conduct escalated. In January 2013, while at JRC, appellant violently hurled a chair at a staff member, called his counselor vulgar, abusive names, and made explicit sexual threats toward his counselor. This resulted in a new offense, assault of a corrections officer, a felony of the fifth degree. Following these events, appellant was unsuccessfully discharged from JRC and committed to DYS for a minimum period of six months to a maximum of age 21 to run concurrent to the original sentence.

Shortly after arriving at DYS, appellant was administratively assessed additional confinement time upon the discovery of a letter he wrote describing a detailed plan to purchase drugs which he intended to utilize to facilitate the rape of a female DYS staff member.

On October 20, 2013, appellant was released from DYS, and a sex offender registration hearing was held. On November 19, 2013, the trial court issued an order classifying appellant as a Tier I juvenile sex offender registrant due to the nature of the underlying offense, the history of violent threats and actions (both prior to and after adjudication), and the failure to comply with treatment goals. This appeal ensued.

On appeal, Appellant raised two assignments of error. In the first assignment, Appellant complained that Ohio's "SORNA" laws, as they related to juveniles, violated a juveniles equal protection rights. In the second assignment, Appellant argued that R.C. 2152.83(A) violated due process rights of the juvenile and was punitive in nature because it forced offenders to participate in sexual offender registration after the age of majority—when, he opined, that the juvenile court lacked jurisdiction. The Sixth District Court of Appeals overruled those assignments and the adjudication and sentence—including sexual offender registration—were affirmed. *In re M.W.*, 6<sup>th</sup> Dist. Wood No. WD-13-089, 2014-Ohio-3758. Appellant's memorandum in support of jurisdiction relates to his second assignment of error on appeal.

## ARGUMENT

COUNTER-PROPOSITION OF LAW: The trial court did not err, more specifically it was not a violation of due process, when the juvenile court required that Appellant register as a sex offender after he reached the age of majority. If, however, that action is deemed to be unconstitutional, Appellant waived that issue by not raising it in the trial court.

### **A. The standard of review for waiver of a constitutional claim**

As was stipulated on appeal, Appellant did not raise a due process violation under the 14<sup>th</sup> Amendment of the United States Constitution at trial. That allegation of constitutional impropriety should, therefore, be waived. As was ruled in *In re J.J.*, 6<sup>th</sup> Dist. Erie No. E-11-018, 2012-Ohio-2550, ¶ 10:

Constitutional issues apparent at the time of the trial are waived unless brought to the attention of the trial court. *State v. Cargile*, 123 Ohio St.3d 343, 2009-Ohio-4939, 916 N.E.2d 775, ¶ 14, citing *State v. Awan*, 22 Ohio St.3d 120, 22 Ohio B. 199, 489 N.E.2d 277 (1986), syllabus. One raising an issue so waived may prevail on appeal only if it constitutes plain error pursuant to Crim.R. 52(B). “In order to prevail on a claim governed by the plain error standard, appellant must demonstrate that the outcome of his trial would clearly have been different but for the errors he alleges.” *State v. Jones*, 6<sup>th</sup> Dist. No. L-05-1101, 2006-Ohio-2351, ¶ 17. If R.C. 2907.02(A)(1)(c) is unconstitutional, the outcome of appellant’s adjudication would have been different because a conviction cannot be predicated on the violation of an unconstitutional statute. *State v. Reynolds*, 148 Ohio App.3d 578, 2002 Ohio 3811, 774 N.E.2d 347, ¶ 8 (2d Dist.).

*See also*, *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 522 N.E.2d 524 (1988). There was not an issue of plain error here, and a due process violation does not exist either. Indeed, several appellate courts have made similar findings when reviewing the issue of waiver and the constitutionality of R.C. 2152.83. *Accord In re I.A.*, 2<sup>nd</sup> Dist. Montgomery No. 25078, 2012-Ohio-4973, ¶ 4-5; *In re J.M.*, 7<sup>th</sup> Dist. Jefferson No. 09 JE 21, 2010-Ohio-2700, ¶ 64-65; *In re B.W.K.*, 11<sup>th</sup> Dist. Portage No. 2009-P-0058, 2010-Ohio-3050, ¶ 29; *In re B.D.*, 11<sup>th</sup> Dist. Portage

No. 2011-P-0078, 2012-Ohio-4463 ¶ 24. The State further recognizes, however, that the ability of this Court to either consider this issue as waived or address it on its merits is within its discretion.

**B. The Juvenile Court retains subject matter jurisdiction over the issue of sexual offender classification of juvenile offenders who are now adults.**

As to the concept of subject matter jurisdiction in a juvenile case, it was held in *In re Burton S.*, 136 Ohio App.3d 386, 391, 736 N.E.2d 928 (6<sup>th</sup> Dist. 1999):

A court has jurisdiction to rule on a controversy between parties if it has obtained personal jurisdiction over the parties and possesses subject matter jurisdiction over the parties' claims. The subject matter jurisdiction of a court is a court's "power to hear and decide a case upon its merits[.]" *Morrison v. Steiner* (1972), 32 Ohio St. 2d 86, 290 N.E.2d 841, paragraph one of the syllabus. A court's subject matter jurisdiction is invoked by the filing of a complaint. See *Wilson v. Ohio Dept. of Rehab. & Corr.* (1991), 73 Ohio App. 3d 496, 499, 597 N.E.2d 1148. Once a court of competent jurisdiction acquires jurisdiction over an action, its authority continues until a final judgment on the merits of the dispute before it has been issued. *John Weenink & Sons Co. v. Court of Common Pleas* (1948), 150 Ohio St. 349, 82 N.E.2d 730, paragraph three of the syllabus. The defense of lack of subject matter jurisdiction can never be waived. *Time Warner AxS v. Pub. Util. Comm.* (1996), 75 Ohio St. 3d 229, 233, 661 N.E.2d 1097. Objections based upon lack of subject matter jurisdiction may be raised at any stage of the proceedings, *In re Byard* (1996), 74 Ohio St. 3d 294, 296, 658 N.E.2d 735, and may even be raised for the first time on appeal. *Jenkins v. Keller* (1966), 6 Ohio St. 2d 122, 216 N.E.2d 379, paragraph five of the syllabus.

This concept was also treated by the 12<sup>th</sup> District Court of Appeals, as it relates to subject matter jurisdiction and R.C. 2152.83 in *In re T.D.*, 12<sup>th</sup> Dist. Clinton No. CA2010-01-002, 2010-Ohio-6081, ¶ 31-33.

“[W]here it is apparent from the allegations that the matter alleged is within the class of cases in which a particular court has been empowered to act, jurisdiction is present. Any subsequent error in

the proceedings is only error in the “exercise of jurisdiction,” as distinguished from the want of jurisdiction in the first instance. \* \* \*” *State v. Filiaggi*, 86 Ohio St.3d 230, 240, 1999-Ohio-99, 714 N.E.2d 867, quoting *In re Waite* (1991), 188 Mich.App. 189, 200, 468 N.W.2d 912.

Put another way, “[o]nce a tribunal has jurisdiction over both the subject matter of an action and the parties to it, ‘\* \* \* the right to hear and determine is perfect; and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred \* \* \*.’” *State ex rel. Pizza v. Rayford* (1992), 62 Ohio St.3d 382, 384, 582 N.E.2d 992, quoting *Sheldon’s Lessee v. Newton* (1854), 3 Ohio St. 494, 499.

It is well established that, if a court rules upon a matter over which it does not possess subject matter jurisdiction, the resulting judgment is void. *Pratts* at P12, quoting *State v. Parker*, 95 Ohio St.3d 524, 2002 Ohio 2833, P22, 769 N.E.2d 846 (Cook, J., dissenting). By contrast, when a court possesses jurisdiction over a subject but improperly exercises that jurisdiction, the resulting judgment is voidable. *Pratts* at P12. Whereas an appeal from a void judgment must be dismissed with no further action taken, an appeal from a voidable judgment may be remanded for the lower court to proceed from the point at which the error occurred. *Id.* at P21, 22.

*Accord In re J.A.D.*, 11<sup>th</sup> Dist. Portage No. 2012-P-0006, 2012-Ohio-5226, ¶ 17; *In re K.S.R.*, 11<sup>th</sup> Dist. Portage Nos. 2011-P-0061, 2011-P-0062, 2012-Ohio-6217, ¶ 19.

In all the aforementioned juvenile cases concerning R.C. 2151.83, the appellate courts found that the juvenile court had jurisdiction to make the sex offender classification; although, the specific issue in those cases was at what point in the proceedings was that determination appropriate. The courts implicitly found, however, that the juvenile court retained subject matter jurisdiction to conduct sexual offender classifications, and the auspices for that comes from R.C. 2151.83. This Court’s decision in *In re I.A.*, 140 Ohio St.3d 203, 203-208, 2014-Ohio-3155, 16 N.E.3d 653, furthermore, recognizes that the juvenile court has the jurisdiction to make juvenile-

offender-registrant classification. And the Fifth District Court of Appeals as well as the Seventh District Court of Appeals expressly have found that the juvenile court retains subject matter jurisdiction, as it applies to R.C. 2151.83. *In re D.R.*, 5<sup>th</sup> Dist. Knox No. 13CA27, 2014-Ohio-588, ¶ 8-10; *In re M.R.*, 7<sup>th</sup> Dist. Jefferson No. 13 JE 30, 2014-Ohio-2623, ¶ 49.

The State agrees and would argue that the age of the offender at the time of the classification under the province of the statute is immaterial. The jurisdiction of the juvenile court was properly obtained at the time of the offense. And, as expressly found in the statute, it retains that jurisdiction. That principle has been endorsed by this Court: where it ruled on an analogous issue of subject matter jurisdiction having already attached in a certain court. *See Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992.

**C. Constitutionality, on due process grounds, of the juvenile sexual offender registry law.**

As with allegations of equal protection violations of the 14<sup>th</sup> Amendment of the United States Constitution, courts have been unwilling to find that R.C. 2152.83 violates concepts of due process founded in the 14<sup>th</sup> Amendment as well. Again, Appellant's argument, specifically the punitive nature of having an adult register for an offense committed when he/she was a juvenile, was found not be a due process violation by a number of appellate courts. *Accord In re R.M.*, 1<sup>st</sup> Dist. Hamilton No. C-120166, 2014-Ohio-1200, ¶ 10-29; *In re Raheem L.*, 1<sup>st</sup> Dist. Hamilton No. C-100608, 2013-Ohio-2423, 993 N.E.2d 455, ¶ 2-12; *In re Messmer*, 3<sup>rd</sup> Dist. Wyandot No. 16-09-17, 2010-Ohio-1088, ¶ 15-19; *In re D.R.*, 5<sup>th</sup> Dist. Knox No. 13CA27, 2014-Ohio-588, ¶ 16-28; *In re J.C.*, 9<sup>th</sup> Dist. Summit No. 24354, 2009-Ohio-1213, ¶ 5; *In re N.Z.*, 11<sup>th</sup> Dist. Lake No. 2012-L-100, 2014-Ohio-157, ¶ 38-45. *See also United States v. Juvenile Male*, 670 F.3d 999, 1011-1014 (9<sup>th</sup> Cir. 2012); *United States v. Shannon*, 511 Fed. Appx. 487, 490-492 (6<sup>th</sup> Cir. 2013).

#### **D. Analysis of the facts here**

Appellant argues that R.C. 2152.83 violates a juvenile's right to due process. But the two types of due process, procedural and substantive, are quite distinct. Appellant, however, does not specify the type of due process that was violated. Ohio courts, however, in viewing this particular issue raised by Appellant have found similar complaints to be alleged violations of substantive, rather than procedural, due process. *See In re I.A.*, 2<sup>nd</sup> Dist. Montgomery No. 25078, 2012-Ohio-4973, ¶ 1-162012; *In re Raheem L.*, 1<sup>st</sup> Dist. Hamilton No. C-100608, 2013-Ohio-2423, 993 N.E.2d 455, ¶ 2-12.

Appellant, further, cites to no case law to suggest that a fundamental right has been infringed by the juvenile court's continuing jurisdiction, and that imposing sexual offender registry upon the Appellant is improper. Nor has any court found there to be such a right. *See In re Raheem L.*, 1<sup>st</sup> Dist. Hamilton No. C-100608, 2013-Ohio-2423, 993 N.E.2d 455, ¶ 2-12; *United States v. Juvenile Male*, 670 F.3d 999, 1012 (9th Cir. 2012).

With no fundamental right implicated, the standard to consider is whether the punishment is rationally related to a legitimate government interest. *In re Raheem L.*, 1<sup>st</sup> Dist. Hamilton No. C-100608, 2013-Ohio-2423, 993 N.E.2d 455, ¶ 2-12. The juvenile court's main purpose, furthermore, is to provide care, protection, development, treatment, and rehabilitation to the youthful offenders in the juvenile 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. And courts have also recognized that the State has "valid interests in enforcing its criminal laws against juveniles and, in at least some cases, in requesting that the juvenile court impose significant penalties in their dispositions." *In re Raheem L.*, 1<sup>st</sup> Dist. Hamilton No. C-100608, 2013-Ohio-2423, 993 N.E.2d 455, 459-60, citing *In re C.S.*, 115 Ohio St.3d 267, 2007-

Ohio-4919, 874 N.E.2d 1177, ¶ 77. For the sexual offender registry in particular, there is “a legitimate nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community.” *United States v. Juvenile Male*, 670 F.3d 999, 1012 (9th Cir. 2012). The Supreme Court of the United States further ruled that courts “must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.” *Flemming v. Nestor*, 363 U.S. 603, 611, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960).

This Court, in *In re C.P.*, found that R.C. 2152.86 was unconstitutional because it automatically imposed lifelong registration and notification requirements on a certain class of juvenile sex offenders called public-registry-qualified juvenile-offender registrants, and “eliminated the discretion of the juvenile judge, this essential element of the juvenile process, at the most consequential part of the dispositional process.” *In re C.P.*, 131 Ohio St.3d 513, 533, 2012–Ohio–1446, 967 N.E.2d 729. And R.C. 2152.86 was problematic because it required the automatic imposition of a lifetime punishment—with no chance of reconsideration for 25 years—without benefit of a juvenile judge weighing its appropriateness.

This, however, is precisely why application of R.C.2152.83 here was appropriate and did not violate Appellant’s right to due process. Indeed, this Court contrasted the procedure used for public-registry-qualified juvenile-offender registrants with that used for traditional juvenile-offender registrants and found the result in this type of case to be appropriate. *See In re C.P.*, 131 Ohio St.3d 513, 518-519, 2012–Ohio–1446, 967 N.E.2d 729; *In re I.A.*, 140 Ohio St.3d 203, 203-208, 2014-Ohio-3155, 16 N.E.3d 653.

The decision to classify Appellant as a juvenile offender registrant was not automatic; rather, it was at the sound discretion of the Juvenile Court. The Juvenile Court held a hearing on

the matter, heard witnesses, and reviewed evidence of the case before making its determination. The determination was supported in the Juvenile Court's Judgment Entry, which fully explicated the reasons and facts that the Court considered when it made its determination. (Judgment Entry Nov. 19, 2013, p. 5-10.). The Court clearly used its discretion in making its determination that Appellant was classified as a Tier I offender—when his offense would have entitled him to a higher Tier II classification, as was requested by the State of Ohio. *Id.* at 10. Further, upon future disposition of this case, a hearing will be conducted at which Appellant's classification will be subject to possible modification or termination, so it is still within the Juvenile Court's discretion to declassify Appellant at a later date. *Id.* at 12.

The Juvenile Court's determination to classify Appellant as a juvenile offender registrant, with the possibility that this determination will necessitate his compliance beyond his 21<sup>st</sup> birthday, therefore, does not violate the due process clause of the 14<sup>th</sup> Amendment of the United States Constitution. And, as a result of the statutorily-provided-for continuing jurisdiction of the juvenile court to review SORNA classifications of former juvenile sexual offenders, the continued ability of the Juvenile Court to review Appellant's classification is proper. *See* R.C. 2152.83. This Court, therefore, should reject Appellant's proposition of law and deny jurisdiction.

CONCLUSION

This case presents no circumstances justifying the modification of or departure from this Court's prior precedents. There is no substantial constitutional question or matter of general or great public interest, and this Court should decline to exercise its discretionary jurisdiction to review this case. In the alternative, if the Court grants review, the State asks that this case be scheduled for argument on the same day as *In re D.S.*, Case No. 2014-0607, so that the common issue can be considered together—as well as treat the consequence of waiving any argument as to due process rights at the juvenile court level.

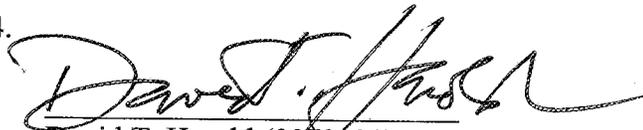
Respectfully submitted,



David T. Harold (0072338)  
Assistant Prosecuting Attorney  
Wood County Prosecutor's Office  
One Courthouse Square, Annex  
Bowling Green, Ohio 43402

CERTIFICATION

The undersigned counsel certifies that a true and accurate copy of this appellate brief was served via regular U.S. Mail to counsel for Defendant-Appellant M.W., Attorney Brooke M. Burns, Office of the Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, on this 7<sup>th</sup> day of November, 2014.



David T. Harold (0072338)  
Assistant Prosecuting Attorney