

IN THE SUPREME COURT OF OHIO

IN RE: A.W., : CASE NO. \_\_\_\_\_  
ADJUDICATED DELINQUENT CHILD :  
: ON APPEAL from the Knox  
: County Court of Appeals  
: Fifth Appellate District  
:  
: C.A. Case No. 15CA3

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MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT A.W.

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Knox County Prosecutor's Office

Charles McConville #0082378  
Prosecuting Attorney

117 East High Street, Suite 234  
Mount Vernon, Ohio 43050  
(740) 393-9720  
(740) 393-7792 – Fax

Counsel for the State of Ohio

The Office of the Ohio Public Defender

Charlyn Bohland #0088080  
Assistant State Public Defender

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

Counsel for A.W.

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**Explanation of why this case is one of public or great general interest  
and involves a substantial constitutional question**

Senate Bill 10 drastically changed the landscape of sex offender registration and notification in Ohio. *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, ¶ 15 (“Following the enactment of S.B. 10, all doubt has been removed: R.C. Chapter 2950 is punitive.”). Based on its determination that Senate Bill 10 is punitive, this Court found multiple portions of Ohio’s registration statutes unconstitutional, including several juvenile provisions. See *In re D.J.S.*, 130 Ohio St.3d 257, 2011-Ohio-5342, 957 N.E.2d 291, ¶ 1; *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, ¶ 1-2; *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, at ¶ 11, 86. And, this this Court is currently considering whether the timing directive in R.C. 2152.83(B) violates double jeopardy under *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684. Case No. 2014-0607, *In re D.S.* Although A.W. was classified under R.C. 2152.83(A), this Court’s decision in *D.S.* will resolve A.W.’s claim, because the timing provisions of each section are the same. Therefore, A.W. requests that this Court accept jurisdiction of his first proposition of law and hold it for the decision in *D.S.*

In *D.S.*, this Court is also reviewing whether the extension of registration beyond the age jurisdiction of the juvenile court violates due process. Because A.W.’s second proposition of law raises this question, this Court should accept jurisdiction and hold A.W.’s second proposition of law for its decision in *D.S.*

This Court has also accepted review of a challenge to the constitutionality of the mandatory classification of 16- and 17-year old, first-time offenders in Case No. 2014-1315, *In re M.R.* (briefing stayed Dec. 3, 2014). This Court has held the equal protection question in *M.R.* for its decision in *D.S.* Because A.W.'s third proposition of law also raises this question, he asks this Court to accept jurisdiction and hold the third proposition of law for the decisions in *D.S.* and *M.R.*

A.W.'s rights to be free from double jeopardy, to due process, and to equal protection were violated when he was classified as a tier I juvenile offender registrant and ordered to comply with registration requirements for 10 years. Because this case involves substantial constitutional questions, which are currently being reviewed by this Court, A.W. asks this Court to grant jurisdiction of this appeal.

#### **Statement of the Case and Facts**

After a trial, the Knox County Juvenile Court found 16-year-old A.W. delinquent of rape, a violation of R.C. 2907.02(A)(1)(c), a first-degree felony if committed by an adult; and, gross sexual imposition, in violation of R.C. 2907.05(A)(5), a fourth-degree felony if committed by an adult. Aug. 24, 2015 *Opinion* at ¶ 5. For disposition, the juvenile court committed A.W. to the Ohio Department of Youth Services (DYS). *Id.* A.W. successfully completed his commitment and was released from DHS in July 2014.

On January 27, 2015, after a stay pending the resolution of his appeal, the juvenile court held a juvenile sex offender registration and classification hearing pursuant to R.C. 2152.83(A)(1). *Id.* at ¶ 8. At the hearing, A.W. raised Double Jeopardy, Due Process, and Equal Protection objections against the classification. *Id.*

But, because A.W. was 16 years old at the time of the offenses, the Juvenile Code prohibits the juvenile court from exercising discretion in determining whether juvenile sex offender registration and classification was appropriate in A.W.'s case. The juvenile court heard statements from A.W.'s probation officer regarding A.W.'s success in treatment and transition back to the community after DYS, and from A.W.'s service provider at the board of development disabilities regarding A.W.'s increased independence in living on his own and his determination to overcome adversity; and, testimony from another service provider concerning the devastating effects of sex offender classification and registration on employment opportunities. But, because of the mandatory nature of juvenile sex offender registration for 16 and 17 year olds, the juvenile court classified A.W. at "the lowest possible classification," as a tier I juvenile offender registrant with a duty to register annually for a period of 10 years. *Id.* In fact, the juvenile court noted that if it had the "discretion to not classify you, I think I probably would not classify you."

A.W. timely appealed the classification and registration order. The Fifth District Court of Appeals affirmed A.W.'s classification order and overruled his constitutional objections. *Id.* at ¶ 30. Specifically, the Fifth District distinguished *State v. Raber* and held that the classification proceeding is merely "a continuation of the original delinquency case." *Id.* at ¶ 14. Second, the court held that there was no due process violation because the statute permits the juvenile court to eliminate or modify registration after a period of years. *Id.* at ¶ 20. And, finally, the court found that there is a rational reason for drawing a distinction between juvenile offenders based on age; therefore, the

mandatory classification of older juveniles does not violate equal protection. *Id.* at ¶ 27, 29. This timely appeal follows.

## Argument

### Proposition of Law I

**The timing mechanism of R.C. 2152.83(A) is unconstitutional because the imposition of classification at any time other than disposition violates the Double Jeopardy Clauses of the U.S. and Ohio Constitutions, and *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 U.S. 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, 2002-Ohio-4183, 774 N.E.2d 258, ¶ 23-24, citing *Breed v. Jones*, 421 U.S. 519, 526, 95 S.Ct. 1779, 44 L.Ed.2d 346 (1975) (the Double Jeopardy Clause of the Fifth Amendment applies to juvenile delinquency proceedings).

In 2012, the Supreme Court of Ohio considered how the Double Jeopardy Clause in sex offender registration cases is implicated now that sex offender classification is punitive. See *Raber* at ¶ 2; *Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, at ¶ 15 (“Following the enactment of S.B. 10, all doubt has been removed: R.C. Chapter 2950 is punitive.”); *Cases Held for the Decision in In re D.J.S.*, 130 Ohio St.3d 253, 2011-Ohio-5349, 957 N.E.2d 288, at ¶ 1.

In *Raber*, the trial court entered its final judgment on December 1, 2008, sentencing the defendant to 60 days in jail, imposing fines, and ordering community control. *Raber* at ¶ 8. But, on April 13, 2010, more than 14 months later, the trial court conducted an evidentiary hearing and classified the defendant as a tier I sex offender. *Id.* at ¶ 9. This Court held that the Double Jeopardy Clause prevents a trial court from imposing multiple criminal punishments for the same offense in successive proceedings, including sex offender classification and registration. *Id.* at ¶ 2, citing *Hudson* at 99, *Husein* at 338.

This Court is currently reviewing whether the timing mechanism in R.C. 2152.83(B) violates double jeopardy. *See* Case No. 2014-0607, *In re D.S.* Although A.W.'s claim arises under R.C. 2152.83(A), the issue before the Court in this case and in *D.S.* is the same—whether classifying a child at any time other than initial disposition violates double jeopardy. Accordingly, A.W. respectfully requests that this Court accept jurisdiction of this proposition of law, and hold his case for the decision in *D.S.*

### Proposition of Law II

**The imposition of a punitive sanction that extends beyond the age jurisdiction of the juvenile court violates the Due Process Clauses of the U.S. and Ohio Constitutions and constitutes cruel and unusual punishment.**

In Ohio, juvenile courts have exclusive jurisdiction over children who are alleged to be delinquent. R.C. 2151.23(A)(1). That jurisdiction ends at a child's 21st birthday. R.C. 2152.02(C)(6) (providing that "a person who is so adjudicated a delinquent child \* \* \* shall be deemed a 'child' until the person attains twenty-one years of age");

2152.22(A) (providing that 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”).

However, a narrow exception exists for youth who are subject to Ohio’s juvenile sex offender registration and notification statutes. Revised Code Section 2151.23(A)(15) authorizes juvenile courts to “make determinations, adjudications, and orders authorized or required under sections 2152.82 to 2152.86 and Chapter 2950 of the Revised Code regarding a \* \* \* [delinquent] child.”<sup>1</sup> In turn, R.C. 2152.83(E) extends the jurisdiction of the juvenile court beyond the age of 21 for juvenile offender registrants. Specifically, R.C. 2152.83(E) provides that “[t]he child’s attainment of eighteen or twenty-one years of age does not affect or terminate the order, and the order remains in effect for the period of time described in this division.” And, R.C. 2152.84 and 2152.85 permit the juvenile court to review, continue, modify, or terminate the registration duties of any juvenile offender registrant indefinitely. But, given both recent and well-established precedent from this Court, this extension is contrary to the purposes of juvenile delinquency dispositions.

This Court has found that R.C. 2950 is punitive. *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, ¶ 1; *Cases held for the decision in In re D.J.S.*, 130 Ohio St.3d 253, 2011-Ohio-5349, 957 N.E.2d

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<sup>1</sup>This Court has determined that R.C. 2152.86 is unconstitutional. *C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, at ¶ 86.

288, ¶ 1-2; and C.P., 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, at ¶ 11, 86. And, 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." *In re Caldwell*, 76 Ohio St.3d 156, 157, 666 N.E.2d 1367 (1996); *In re Kirby*, 101 Ohio St.3d 312, 2004-Ohio-970, 804 N.E.2d 476; R.C. 2152.01. As such, 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.

This Court is currently reviewing whether the extension of juvenile registration beyond the age jurisdiction of the juvenile court is constitutional. *See* Case No. 2014-0607, *In re D.S.* Accordingly, because A.W. presents the same issue here, he requests that this Court accept jurisdiction of this proposition of law, and hold this case for the decision in *D.S.*

### Proposition of Law III

**R.C. 2152.83(A) violates the Equal Protection Clauses of the U.S. and Ohio Constitutions because it requires mandatory registration for 16- and 17-year old first-time offenders.**

The guarantee of equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other

persons or classes in the same place and under like circumstances. Fourteenth Amendment to the U.S. Constitution; *see also Sorrell v. Thevenir*, 69 Ohio St.3d 415, 424, 633 N.E.2d 504 (1994) (finding that the Equal Protection Clause of the Ohio Constitution has been interpreted to be essentially identical in scope to the analogous provision of the U.S. Constitution). The Supreme Court has found that while children's constitutional rights are not "indistinguishable from those of adults," "children generally are protected by the same constitutional guarantees against governmental deprivations as are adults." *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979). In order to be constitutional, a law must be applicable to all persons under like circumstances and not subject individuals to an arbitrary exercise of power. *Conley v. Shearer*, 64 Ohio St.3d 284, 288-289, 595 N.E.2d 862 (1992). In other words, the Equal Protection Clause prevents the state from treating differently or arbitrarily, persons who are in all relevant respects alike. *Park Corp. v. Brook Park*, 102 Ohio St.3d 166, 2004-Ohio-2237, 807 N.E.2d 913, ¶ 18.

**A. Revised Code Section 2152.83 creates classes of similarly situated children who are treated differently based solely upon their ages.**

Revised Code section 2152.83 differentiates between first-time juvenile offenders based solely upon the child's age at the time of the offense. Children who were 13 years old or younger at the time of committing their offense are not subject to sex offender classification or registration. R.C. 2152.83(A)(1)-(B)(1). Children who were 14 or 15 at the time of their offense are subject only to discretionary classification. R.C. 2152.83(B)(1). But, children who were 16 or 17 at the time of their offense are subject to mandatory

classification, and are not entitled to a court's determining whether they should be classified; rather, the court must classify them as juvenile sex offender registrants. R.C. 2152.83(A)(1).

Although the legislature may set more severe penalties for acts that it believes should have greater consequences, the differences in R.C. 2152.83 are not based on acts of greater consequence, but simply on the child's age at the time of the offense. Under the rational basis test, if the age-based classification is not rationally related to the State's objective in making the classification, it will be found to be unconstitutional. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 315, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

**B. The age-based distinctions in R.C. 2152.83 are not rationally related to the purpose of sex offender registration.**

Although Senate Bill 10 has dramatically changed sex offender registration and notification, the stated purpose of the classification and registration laws after Senate Bill 10 has changed only minimally. Compare former R.C. 2950.02 (Eff. Jan. 1, 2002) with R.C. 2950.02 (Eff. Jan. 1, 2008). Revised Code Section 2950.02(A)(6) provides that "[t]he release of information about sex offenders and child-victim offenders to public agencies and the general public will further the governmental interests of public safety and public scrutiny of the criminal, juvenile, and mental health systems as long as the information released is rationally related to the furtherance of those goals." The legislature may impose special burdens on defined classes in order to achieve permissible ends, but equal protection requires that the distinctions drawn are relevant

to the purpose for which the classification is made. *Rinaldi v. Yeager*, 384 U.S. 305, 309, 86 S.Ct. 1497, 16 L.Ed.2d 577 (1966) (there must be some rationality in the nature of the classes singled out).

First, treating children differently from adults makes sense. The U.S. Supreme Court has recognized that even children who are prosecuted as adults for very serious crimes are "categorically less culpable than the average criminal." *Roper v. Simmons*, 543 U.S. 551, 567, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). The Court held that "juvenile offenders cannot with reliability be classified among the worst offenders." *Roper* at syllabus. These findings apply generally to all adolescents under the age of 18. But, the distinctions between ages in R.C. 2152.83 are not supported by empirical evidence, which recognizes the differences between adults and children, not between older children and younger children.

Second, classifying and ordering that older children register as juvenile sex offenders does not improve community safety. "[T]he accurate identification of high risk youth has been elusive." Elizabeth J. Letourneau & Michael F. Caldwell, *Expensive, Harmful Policies that Don't Work or How Juvenile Sexual Offending is Addressed in the U.S.*, 8 Int'l J.Behav. Consultation & Therapy 23, 25, available at <http://psycnet.apa.org/journals/bct/8/3-4/23.pdf&productCode=pa> (accessed Sept. 30, 2015). This is because "the vast majority of youth adjudicated for a sexual offense will not sexually reoffend, even across decades-long follow-up." *Id.* In fact, "four

research studies evaluating the effects of registration and notification on recidivism fail to find any evidence that these policies reduce juvenile recidivism." *Id.* at 26.

And finally, juvenile sex offender registration and classification significantly harms the children that the juvenile system is tasked to rehabilitate. A national report released in 2013, captures the enormous impact that registration has on a child on the sex offender registry, including economic consequences; decreased education, housing, and employment opportunities; stunted emotional growth; and being labeled by the public and ostracized from peers. Human Rights Watch, *Raised on the Registry*, <http://www.hrw.org/node/115179> (accessed Sept. 30, 2015), pp.4-6.

**C. Under strict scrutiny review, R.C. 2152.83(A), which mandates that the juvenile court must issue classification and registration orders for some, but not all children, based solely on a child's age, violates equal protection.**

The Supreme Court's decisions in *Roper*, *Graham*, and *Miller* support the conclusion that children have a substantive due process right to have their youth and its attendant characteristics to be taken into account as a mitigating factor at every stage of the proceedings. See, e.g., Martin Guggenheim, *Graham v. Florida and a Juvenile's right to Age-Appropriate Sentencing*, 47 Harv.C.R.-C.L.L.Rev. 457, 492 (2012). Although recognizing a new substantive due process right is generally disfavored, the Supreme Court has done so, recognizing that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry." *Lawrence v. Texas*, 539 U.S. 558, 572, 123 S.Ct 2472, 156 L.Ed.2d 508 (2003).

Under strict scrutiny review, Ohio's mandatory sex offender classification and registration statute for 16 and 17 year olds would unquestionably violate equal

protection. Providing the juvenile court with discretion to determine if 16- or 17-year-old children should be subject to classification and registration orders—that which is currently afforded to children under R.C. 2152.83(B)—would make R.C. 2152.83(A) constitutional.

Given the collateral consequences of registration and the fact that it does not achieve the goal of “improving community safety” and appears to “[have] no deterrent effect,” juvenile sexual offending treatment experts recommend that, at the very least, “registration for adolescents should be based on a competent individualized risk assessment.” Letourneau & Caldwell, 8 Int’l J. Behav. Consultation & Therapy at 27, 28. And, “if adolescents are to be registered at all, it should be for a short term, no longer than age 18.” *Id.* at 28.

But, R.C. 2152.83(A), Ohio’s mandatory juvenile sex offender registration and classification statute, does not provide the juvenile court with discretion to determine if classification is appropriate for a 16- or 17-year-old child. Because the statute prohibits the juvenile court from making an individualized determination, it creates an irrebuttable presumption that older children must be more dangerous than younger children and that the community must be informed about older children’s acts. This is a particularly egregious presumption in light of the foregoing research.

In this case, the juvenile court had no discretion in determining whether juvenile sex offender registration and classification was appropriate. And, although the juvenile court heard about A.W.’s success in treatment, positive transition back to the community after his DYS commitment, increased independence in living on his own,

and determination to overcome adversity, the juvenile court was required to issue a classification order, based solely on the fact that A.W. was 16 at the time of his offense. R.C. 2152.83(A)(1). In fact, the juvenile court noted that if it had the "discretion to not classify you, I think I probably would not classify you."

There is no evidence to support the need for disparate treatment under R.C. 2152.83. And, the General Assembly gives no rationale for treating older children who have committed a sex offense differently from younger children who have committed the same sex offense. Therefore, R.C. 2152.83, which allows for similarly situated children to receive disparate treatment without any rational basis whatsoever cannot withstand constitutional scrutiny.

This Court is currently reviewing whether the mandatory classification of 16- and 17-year-old, first-time offenders is constitutional. *See* Case No. 2014-1315, *In re M.R.* (briefing stayed Dec. 3, 2014). Accordingly, A.W. respectfully requests that this Court accept jurisdiction of A.W.'s third proposition of law and hold it for its decision in that case.

### **Conclusion**

Because this Court is already reviewing A.W.'s first two propositions of law in *In re D.S.*, he respectfully requests that this Court accept his case and hold the first two propositions for decision in Case No. 2014-0607, *In re D.S.* And, this Court held an identical proposition of law regarding equal protection in Case No. 2014-1315, *In re M.R.* (briefing stayed Dec. 3, 2014) for the decision in *D.S.* A.W. respectfully requests

this Court accept his case and hold the third proportion of law for decisions in *D.S.* and *M.R.*

Respectfully submitted,

The Office of the Ohio Public Defender

/s/: Charlyn Bohland

Charlyn Bohland #0088080

Assistant State Public Defender

250 East Broad Street, Suite 1400

Columbus, Ohio 43215

(614) 466-5394

(614) 644-0708 – Fax

charlyn.bohland@opd.ohio.gov

Counsel for A.W.

#### Certificate of Service

The undersigned counsel certifies that a copy of the foregoing **Memorandum in Support of Jurisdiction of A.W.** was served by ordinary U.S. Mail this 7th day of October, 2015 to Charles McConville, Knox County Prosecutor, 117 East High Street, Suite 234, Mount Vernon, Ohio 43050.

/s/: Charlyn Bohland

Charlyn Bohland #0088080

Assistant State Public Defender

Counsel for A.W.

#451000

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