

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

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**MOTION FOR RECONSIDERATION OF APPELLANT D.S.**

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IN THE SUPREME COURT OF OHIO

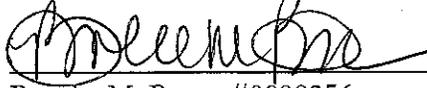
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**MOTION FOR RECONSIDERATION OF APPELLANT, D.S.**

Pursuant to S.Ct.Prac.R. 18.02(B)(1), D.S. respectfully requests that this Court reconsider its March 16, 2016 decision in this case. Specifically, D.S. asks this Court to find that the extension of a juvenile court's classification order beyond the age jurisdiction of the juvenile court violates a child's right to due process. D.S. presents the following memorandum in support of his request that this Court reconsider its determination on his third proposition of law.

Respectfully submitted,

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## Memorandum in Support of Reconsideration

### 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.**

#### *Introduction*

Operating directly contrary to the rehabilitative goals of the juvenile justice system, sex offender registration and notification laws can publicly and permanently mark juvenile sex offenders as deviant criminals who should be feared and shunned. While many proceedings are confidential and sealed, sex offender registration and notification laws, by creating public record, place the sexual offense of a juvenile directly and prominently in the public eye.<sup>1</sup> [F]ew labels are as damaging in today's society as 'convicted sex offender.' Sex offenders are, as one scholar put it, 'the lepers of the criminal justice system,' with juveniles listed in the sex offender registry sharing this characterization.

*In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 67, quoting Phoebe Geer, *Justice Served?*, 27 *Developments in Mental Health Law* 33, 47 (2008) and Robert E. Shepherd, *Advocating for the Juvenile Sex Offender*, Part 2, 21 *Crim.Just.* 52, 53 (2007).

It is well established that 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 1174, ¶ 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 a result of the juvenile court's distinct rehabilitative function, "[f]rom the inception of the juvenile court system, wide differences have been tolerated – indeed insisted upon – between the procedural rights accorded to adults and those of juveniles." *In re Gault*, 387 U.S. 1, 14, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). For example, juveniles are "not

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<sup>1</sup> Under R.C. 2950.081(A), "Any statements, information, photographs, fingerprints, or materials that are required to be provided, and that are provided, by an offender or delinquent child pursuant to section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code and that are in the possession of a county sheriff are public records open to public inspection under section 149.43 of the Revised Code[.]"

entitled to bail, to indictment by grand jury, to a public trial or to a trial by jury.” *Id.*; see also *McKeiver v. Pennsylvania*, 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) paragraph two of the syllabus (finding that granting juveniles jury trial rights “might remake the proceeding into a fully adversary process and effectively end the idealistic prospect of an intimate, informal protective proceeding.”).

The tradeoff for the relaxed procedural protections of the juvenile court is that the consequences imposed for a delinquent act terminate on a child’s 21st birthday. R.C. 2152.22(A). As this Court has found, for delinquent children, “it is the law’s policy to ‘hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.’” *State ex rel. Plain Dealer Publish. Co. v. Geauga County Court of Common Pleas*, 90 Ohio St.3d 79, 83, 734 N.E.2d 1214 (2000), quoting *Gault* at 24. But, “in some extraordinary cases,” adult treatment and punishment may be necessary, and “the safety of the community [may require] that [a] child be placed under legal restraint, including, if necessary, for a period extending beyond the child’s majority.” See *State v. Hanning*, 89 Ohio St.3d 86, 89, 93, 728 N.E.2d 1059 (2000). When those extraordinary cases arise—in fact, even where adult treatment is only a *potential* consequence, Ohio provides children with procedural protections to ensure that such sanctions are not imposed without strict adherence to the fundamental fairness that due process requires. See R.C. 2152.12(B),(C); 2152.13, 2152.14; *State v. D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209. But, there are distinct differences between the classification statutes at issue in this case and the statutory protections in Ohio’s serious youthful offender statutes. Compare R.C. 2152.82-2152.85 with R.C. 2152.13-2152.14. Those differences warrant reconsideration of this case.

I. **This Court's decision affirms the only statutory scheme in Ohio law that allows juveniles to be punished as adults without affording them jury trial rights and affirms the only juvenile disposition where failure to comply results in a felony conviction.**

A. *Ohio's practice of affording juveniles facing the potential of adult punishment is violated in Ohio's juvenile offender registration statutes.*

Under the federal constitution, “[t]rial by jury in the juvenile court’s adjudicative stage is not a constitutional requirement.” *McKeiver* at 545. And, this Court has likewise determined that “indictment or trial by jury are not requisite in delinquency proceedings, either as matters of constitutional guarantees or sound public policy.” *In re Agler*, 19 Ohio St.2d 70, 77-78, 249 N.E.2d 808 (1969). But, there are two instances in which juvenile offenders have a right to a jury in Ohio: when they are subject to a serious youthful offender dispositional sentence or transferred to criminal court for prosecution. R.C. 2152.12-2152.14.

Specifically, R.C. 2152.13 provides that a child “for whom a serious youthful offender dispositional sentence is sought \* \* \* has the right to a grand jury determination of probable cause that the child committed the act charged and that the child is eligible by age for a serious youthful dispositional sentence”[;] further, “once a child is indicted or charged by information \* \* \* the child is entitled to an open and speedy trial by jury in the juvenile court[.]” In *D.H.*, this Court determined that “the jury plays an important role in the adjudicative portion of Ohio’s serious youthful offender disposition statutory scheme. Only the jury’s factual determination makes the juvenile defendant eligible for a disposition that might include a stayed adult sentence.” *D.H.* at ¶ 58. And, R.C. 2152.23(H) provides that following transfer of a child’s case to criminal court, the criminal court “has jurisdiction subsequent to the transfer to hear and determine the case in the same manner as if the case originally had been commenced in that court[.]” Accordingly a child’s transfer to criminal court includes the right to jury trial. Sixth Amendment to the U.S. Constitution; Ohio Constitution, Article I, Section 5.

Although this Court's reliance on *D.H.* may make sense in light of the fact that juvenile court judges retain discretion in determining a juvenile offender's tier classification, discretion is not the only relevant consideration here. As such, this Court's analysis is incomplete when considering that juvenile sex offender registration is now the only adult punishment a juvenile offender in Ohio can be subject to without being afforded the right to a jury trial. And, this is significant, given the penalty a juvenile offender faces for failure to comply with the registration requirements.

B. *Juvenile offender registrants who fail to comply with their registration requirements are charged with a strict liability felony offense.*

A registrant's failure to comply with the registration requirements of R.C. 2950.04, 2950.041, 2950.05, 2950.06 is a strict liability offense. R.C. 2950.99(A)(1)(a); *State v. Finn*, 2d Dist. Montgomery No. 22914, 2009-Ohio-4949, ¶ 29-30 ("Sexual offender registration laws are 'mala prohibita,' acts made unlawful for the good of the public welfare to register is a strict liability offense.") *State v. Cook*, 83 Ohio St.3d 404, 420, 700 N.E.2d 570 (1998). Specifically, R.C. 2950.99(A) provides that whoever violates a prohibition outlined in those sections "shall be punished as follows \* \* \*." R.C. 2950.99(A)(1)(a). For juvenile offenders, violating registration requirements while under 18 subjects the child to prosecution in juvenile court. R.C. 2950.99(B)(1). But, if the juvenile registrant fails to comply with registration requirements after turning 18, "the person is subject to criminal prosecution." R.C. 2950.99(B)(2). The felony level is dictated by the felony level associated with the corresponding level of the offense requiring registration. R.C. 2950.99(A)(1)(a),(b).

All other juvenile court dispositions terminate on a child's 21st birthday; and, none of them carry consequences that follow the juvenile offender beyond the jurisdiction of the juvenile court. R.C. 2152.22(A). And, this makes sense, given the rehabilitative reach of the juvenile court and the overall purpose of juvenile court dispositions. R.C. 2152.01(A),(B). But, allowing a juvenile offender to receive an adult penalty—specifically one that can result in a strict liability offense if violated,

without full due process rights is a drastic departure from Ohio's treatment of juveniles who remain in the juvenile system.

**II. This Court's decision in D.S.'s third proposition of law conflicts with its decision on D.S.'s second proposition of law.**

In its decision, this Court overruled D.S.'s second proposition of law based on the fact that juveniles have a different expectation of finality than their adult counterparts. *Op.* at ¶ 23. Specifically, this Court found that General Assembly crafted Ohio's juvenile registration statutes to permit a bifurcated disposition/classification process, which does not exist for adults. *Id.* at ¶ 23-24, citing *State v. Raber*, 134 Ohio St.3d 350, 2012-Ohio-5636, 982 N.E.2d 684, ¶ 23-27. In addition, this Court found that the timing of juvenile classifications "may assist in the child's rehabilitation" and that notice that the classification hearing will occur after commitment to DYS "may provide motivation to successfully complete treatment." *Id.* at ¶ 26, citing *In re I.A.*, 140 Ohio St.3d 203, 2014-Ohio-3155, 16 N.E.3d 653, ¶ 16. Thus, and as this Court concluded, "deferred classification of the juvenile offender is consistent with the juvenile court's exercise of its discretion in its rehabilitative role and with the statutory scheme." *Id.*; *see also* R.C. 2152.01(A), (B).

But, if the rehabilitative role of the juvenile court system and the unique ability of the juvenile court to maintain continuing jurisdiction over a child's case is what keeps Ohio's juvenile sex offender scheme from violating double jeopardy protections, those same differences must be what results in the juvenile offender's registration duties terminating when all other juvenile court dispositions cease. Ohio cannot have it both ways: it cannot deny children double jeopardy protections because of the unique role of the juvenile court structure, but then permit a child to carry a punishment beyond the jurisdiction of the juvenile court without giving him full due process protections before that extension occurs.

**III. Because juvenile courts have unfettered discretion in assigning a juvenile offender's tier level, the extension of juvenile registration beyond the age jurisdiction of the juvenile court results in juveniles being subject to harsher punishments as adults than offenders who committed their offenses after they turned 18.**

Recently, the Seventh District Court of Appeals affirmed a juvenile court's imposition of a tier III classification on a first-time juvenile offender who had been adjudicated delinquent of gross sexual imposition, in violation of R.C. 2907.05(A)(4). *In re G.H.*, 7th Dist. Mahoning No. 14MA7, 2016-Ohio-770, ¶ 5-10. The court's tier III classification was based on the structure of the juvenile registration statutes, which permit juvenile courts to classify children as tier I, II, or III juvenile offender registrants in connection with "any sexually oriented offense." R.C. 2950.01(E)(3)-(4), 2950.01(F)(3)-(4), 2950.01(G)(3)-(4); 2152.191; 2152.82; 2152.83.

But, for offenders who commit a sexually oriented offense after turning 18, the Revised Code assigns tier classification automatically. Specifically, for an adult registrant, tier registration is automatic, and based on the offense of conviction. R.C. 2905.01(E)-(G). Or, an adult offender with a prior tier I classification may be classified as a tier II following a second conviction for a sexually oriented offense, and an adult offender with a prior tier II classification may be classified as a tier III. R.C. 2950.01(F)(1)(i); 2950.01(G)(1)(i). Thus, under this classification scheme, a first-time adult offender who violates R.C. 2907.05(A)(4) would not be eligible for a tier III classification; but, a juvenile would. *G.H.* at ¶ 5-10.

While the discretion afforded juvenile judges in the tier selection process makes sense, given the unique function of the juvenile court system and its focus on rehabilitation, this Court's holding in this case means that juvenile offenders who carry their registration duties beyond the age

jurisdiction of the juvenile court will be subject to a more stringent punishment than that of those who committed their offenses after they turned 18. *G.H.* at ¶ 6.<sup>2</sup>

**IV. The procedural differences between R.C. 2152.14 and 2152.83-2152.85 require a different outcome in this case than the decision issued by this Court in *D.H.***

In *D.H.*, this Court affirmed the constitutionality of Ohio's serious youthful offender statutes by emphasizing the *potential* nature of the adult sentence and highlighting the procedural protections imbedded in the serious youthful offender invocation process. *D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, 901 N.E.2d 209, at ¶ 30-38. But, the differences between Ohio's serious youthful offender statutes and Ohio's juvenile registration statutes beg for a different outcome here.

*A. The invocation of a serious youthful offender's adult sentence is not guaranteed; but a juvenile sex offender registrant's duty to register into adulthood is presumed.*

In *D.H.*, this Court found that the adult sentence that is attached to a serious youthful offender disposition "is only a potential sentence – it is stayed pursuant to R.C. 2152.13(D)(2)(a)(iii) 'pending the successful completion of the traditional juvenile dispositions imposed.'" *D.H.* at ¶ 30. As such, "how the juvenile responds to that disposition will determine whether the stay is lifted on the adult sentence." *Id.* In contrast, the extension of a juvenile offender's duty to register beyond the age of majority is not stayed, and then imposed only if the child fails to successfully complete the remaining portions of his juvenile disposition. R.C. 2152.83(E). Instead, concerning any order issued under R.C. 2152.83(A) or (B), "[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." *Id.* Thus, there is a presumption that the child will be subject to punishment as an adult. This is distinctly different from the "carrot and stick" function of Ohio's serious youthful disposition, which this Court found "encourages a juvenile's cooperation in his own rehabilitation because the registration statutes do not encourage a child to comply with treatment to avoid adult

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<sup>2</sup> The youth in *G.H.* will register for life as a tier III juvenile sex offender; but, an adult convicted of the same offense, with no prior classification, will only register for 25 years.

punishment. *D.H.* at ¶ 18. In fact, the registration statutes do not guarantee a child any way to avoid the adult punishment. Instead, the statutes notify the child that adult punishment is the presumption, removal is not guaranteed, and the duty to register may last 10 years, 20 years, or until the juvenile offender's death. R.C. 2152.83(D), 2152.84(D), 2152.85(F), 2950.07.

B. *Ohio's serious youthful offender statutes place mandatory duties on the juvenile court before an adult sentence can be invoked and requires that the court's determination is supported by clear and convincing evidence; but, the juvenile court has no such requirements before a juvenile offender registrant's duty to register as an adult attaches.*

As this Court found in *D.H.*, a juvenile subject to a serious youthful offender disposition "would have to engage in separate conduct detrimental to his own rehabilitation in the juvenile system to be committed to an adult facility" [.] and, he could not receive the adult punishment based solely on "the acts that led to his serious youthful offender status." *D.H.* at ¶ 38. But, this is not true for juveniles on the sex offender registry. R.C. 2152.83(D). For juveniles subject to sex offender registration, there is no statutory requirement that the child commit a triggering bad act before facing the potential of registering as an adult. *Id.*; R.C. 2152.84(D), 2152.85(F).

Moreover, if a child subject to a serious youthful offender disposition commits a subsequent bad act, "the court may not invoke the adult sentence without another hearing, and the juvenile has the right to counsel and to present evidence on his behalf. In fact, the right to counsel cannot be waived." *D.H.* at ¶ 37, citing R.C. 2152.14(D). Further, R.C. 2152.14 requires that the court find, "by clear and convincing evidence" that the child is "unlikely to be rehabilitated during the remaining period of juvenile jurisdiction" before the court may invoke the adult portion of the child's sentence. *D.H.* at ¶ 31; R.C. 2152.14(E)(1)(c). Clear and convincing evidence is that which is sufficient to establish a firm belief or conviction as to the facts sought to be established. *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. Thus, when applied in the context of serious youthful offender invocation, the juvenile's adult sentence cannot be imposed without the court's determination that successful rehabilitation in the juvenile system was not

possible; and, the finding must be supported by this midlevel standard of proof. But, no such requirements exist for juveniles subject to juvenile sex offender registration. R.C. 2152.84-2152.85.

When a juvenile court reviews a juvenile offender's classification upon completion of the child's disposition, the court is required to consider the factors in R.C. 2152.83 and, within the court's discretion, determine whether to continue, modify, or terminate the child's registration duties. R.C. 2152.84(A)(2). But the court is not required to consider whether the juvenile system alone is insufficient to rehabilitate the child. R.C. 2152.84(A)(2). The same calculus is also lacking from the hearing the juvenile court conducts upon a juvenile offender's petition for declassification under R.C. 2152.85(B)(2). And, neither statute requires the court to support its finding with a clear and convincing standard. R.C. 2152.84(A)(2); 2152.85(B)(2). Thus, it is left to the sole discretion of the juvenile court as to whether to relieve a juvenile offender of his registration requirement.

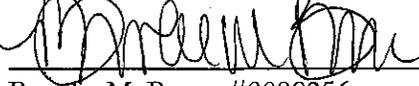
### **Conclusion**

This Court's decision in D.S.'s third proposition of law is a sharp departure from the fundamental fairness this Court recognized in *D.H.* It isolates a class of juvenile offenders—those who commit sexually oriented offenses—and places them in the “worst of both worlds,” by affirming their subjection to adult punishment without the protections afforded to other juvenile offenders who are punished as adults for offenses they committed as a child. *Kent* at 556. Unlike serious youthful offenders, who must “engage in separate conduct detrimental to his own rehabilitation in the juvenile system” and have a court determine “by clear and convincing evidence” that he is “unlikely to be rehabilitated during the remaining period of juvenile jurisdiction” before his adult punishment can be invoked, a juvenile sex offender must not commit any triggering event before their adult punishment attaches. *Compare* R.C. 2152.84(F) *with D.H.* at ¶ 31, 38. Instead, as he ages, he must continue returning to court, with the burden of demonstrating that he is no longer a risk to the community. *See* R.C. 2152.84-2152.85. And, even then, removal from the registry is not

guaranteed. *Id.* In fact, the court need not justify its continuation of a juvenile's duty to register by the same midlevel standard of proof required in serious youthful offender invocation proceedings. *Compare* R.C. 2152.84 and 2152.85 *with* R.C. 2152.14(E). In no other circumstances does the Revised Code place such a heavy burden on a juvenile offender whose case is retained in the juvenile system. For these reasons, D.S. respectfully requests that this Court reconsider its decision in this case.

Respectfully submitted,

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#### Certificate of Service

I hereby certify that a copy of the foregoing MOTION FOR RECONSIDERATION OF APPELLANT D.S. was forwarded by regular U.S. Mail to the office of Eric Murphy, State Solicitor, Attorney General of Ohio, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, this 28th day of March, 2016.



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