

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Plaintiff-Appellee : Case No. 2018-0183
VS. : On APPEAL from the Hamilton
ROBERT BUTTERY, : County Court of Appeals
Defendant-Appellant : First Appellate District
: C.A. Case No. C-1600609
:

BRIEF OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER, ET AL.,

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Statements of Interest of Amicus Curiae

The **Office of the Ohio Public Defender** (“OPD”) is a state agency, designed to represent criminal defendants, adults, and juveniles, and to coordinate defense efforts throughout Ohio. The OPD, through its Juvenile Department, provides juveniles who have been committed to the Ohio Department of Youth Services their constitutional right to access to the courts. *See John L. v. Adams*, 969 F.2d 228, 1992 U.S. App. LEXIS 16208 (6th Cir.1992). Like this Court, the OPD is interested in the effect of the law that this case will have on parties who are or may someday be involved in similar litigation. Accordingly, the OPD has an enduring interest in protecting the integrity of the justice system, ensuring equal treatment under the law, and safeguarding the rehabilitative purpose of the juvenile court system. To this end, the OPD supports the fair, just, and correct interpretation and application of Ohio’s juvenile rules and laws.

The **Children’s Law Center, Inc.** (“CLC”) is a non-profit organization committed to the protection and enhancement of the legal rights of children. CLC strives to accomplish this mission through various means, including providing legal representation for youth and advocating for systemic and societal change. For nearly 30 years, CLC has worked in many settings, including the fields of special education, custody, and juvenile justice, to ensure that youth are treated humanely, can access services, and are represented by counsel. For the past ten years, CLC has worked on issues facing Ohio youth prosecuted in juvenile and adult court, ensuring that youth receive constitutionally required protections and due process in educational settings,

as well as delinquency and criminal court proceedings, including juvenile sexual offender registration cases.

Statement of the Case and Facts

Amicus curiae adopts the Statement of the Case and Facts presented in Appellant’s Merit Brief.

Argument in Support of Petitioner’s Proposition of Law

Introduction

Ohio has historically shielded children who remain in the juvenile system from adult consequences, so that they can reenter the community and become productive members of society following their juvenile court involvement. *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 63. From the Juvenile Rules—which are designed to keep juvenile dispositions private, to this Court’s jurisprudence, Ohio law recognizes that such anonymity is necessary to protect a child’s welfare. *Id.* at ¶ 66; *see also State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga County Court of Common Pleas, Juvenile Division*, 73 Ohio St.3d 19, 22, 652 N.E.2d 179 (1995).

But, Ohio’s sex offender registration statutes eviscerate these protections for children who are subject to their requirements, exposing them to vigilante justice, hindering their reintegration, and continuing to punish them for the bad acts of their youth long after the rehabilitative reach of the juvenile court has ended. As this Court found:

For a juvenile offender, the stigma of the label of sex offender attaches at the start of his adult life and cannot be shaken. With no other offense is the juvenile’s wrongdoing announced to the world. [* * *] A juvenile—one who remains under the authority of the juvenile court and has thus

been adjudged redeemable—who is subject to sex-offender notification will have his entire life evaluated through the prism of his juvenile adjudication. It will be a constant cloud, a once-every-three-month reminder to himself and the world that he cannot escape the mistakes of his youth.

C.P., at ¶ 44-45.

Prosecuting juvenile offender registrants under R.C. 2950 contradicts the rehabilitative purposes of the juvenile court and violates due process. As the Chief Justice noted in her dissent in *Carnes*:

[P]ermitting [a] juvenile adjudication to follow the juvenile into adulthood does not advance the protective or rehabilitative goals of the juvenile-justice system. Rather than limiting punishment for the youthful indiscretions to the period in which a person was under the jurisdiction of the juvenile-justice system [the statute] allows a child's lapses in judgment to be a permanent stain on his criminal record [* * *] and allows those lapses to be the basis of penalties, including incarceration, when no crime would exist absent the juvenile adjudication.

State v. Carnes, Slip Opinion No. 2018-Ohio-3256, ¶ 33 (O'Connor, dissenting).

Accordingly, and for the reasons outlined in Mr. Buttery's merit brief, amicus curiae urge this Court to adopt Appellant's proposition of law.

Proposition of Law

Juvenile adjudications cannot satisfy elements of an offense committed as an adult. Fifth, Sixth, and Fourteenth Amendments, United States Constitution; Sections 5 and 16, Article I, Ohio Constitution. *State v. Hand*, Slip Opinion No. 2016-Ohio-5504; *State v. Bode*, 144 Ohio St.3d 155, 2015-Ohio-1519, 41 N.E.3d 1156; *Alleyene v. United States*, 570 U.S. ___, 133 S.Ct. 2151, 186 L.E.2d 314 (2013); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed. 435 (2000).

- I. **The history and purpose of the juvenile court has always been rooted in rehabilitation.**

“Juvenile courts [occupy] a unique place in our legal system. [They are]

“legislative creations, ‘rooted in social welfare philosophy rather than in the *corpus juris*’ [and] were premised on profoundly different assumptions and goals than a criminal court[.]” *In re C.S.*, 115 St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 65-66, quoting *Kent v. United States*, 383 U.S. 541, 554, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966); *In re Agler*, 19 Ohio St.2d 70, 72, 249 N.E.2d 808 (1969). Since its inception, the objective of the juvenile court has been to protect wayward children from evil influences, save them from criminal prosecution, and provide them social and rehabilitative services. *Children’s Home of Marion County v. Fetter*, 90 Ohio St. 110, 127, 106 N.E. 761 (1914).

We as a society believe that our goal should be to rehabilitate, wherever possible, a child who may be young enough that the behavior can be molded and the child directed away from delinquent and criminal acts and toward a productive and responsible future. Therefore, our inquiry must begin with the premise that the goal of the juvenile code is to rehabilitate, not to punish, while protecting society from criminal and delinquent acts during rehabilitation.

In re Caldwell, 76 Ohio St.3d 156, 157, 666 N.E.2d 1367 (1996). Accordingly, 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. *Id.*; *In re Kirby*, 101 Ohio St.3d 312, 2004-Ohio-970, 804 N.E.2d 476, ¶ 21; R.C. 2152.01.

Although the purpose of criminal prosecution and sentencing has been to protect the public from future crime and to punish the offender, the purpose of the juvenile court is decidedly different—namely, the “overriding purposes for juvenile dispositions ‘are to provide for the care, protection, and mental and physical

development of children subject to R.C. Chapter 2152, protect the public interest and safety, hold the offender accountable for the offender's actions, restore, the victim, and rehabilitate the offender." *State v. Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448, ¶ 14.

II. Prosecuting juvenile offender registrants for failing to comply with R.C. 2950 as adults runs afoul of the juvenile court's rehabilitative purpose.

Ohio law strays from these long-held tenets in its sex offender registration statutes. In 2011, this Court held that Ohio's most recent iteration of registration law is punitive in nature, for adults and children. *State v. 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, ¶ 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. The statutes require juvenile offender registrants to personally register with the sheriff of the county in which they live; provide personal information to the sheriff, including picture, name, aliases, social security number, birth date, license plate number, driver's license number, email addresses, and telephone numbers; register in a different county when staying for more than 3 consecutive days, or for 14 days in a 30-day period; and provide notice of relocation to the county sheriff 20 days prior to moving. R.C. 2950.04; 2950.01; 2950.041; and R.C. 2950.111.

Unlike traditional juvenile dispositions, these requirements continue beyond the age jurisdiction of the juvenile court. *In re D.S.*, 146 Ohio St.3d 182, 2016-Ohio-1027, 54 N.E.3d 1184, ¶ 40. Consequently, a juvenile court's classification order is the only juvenile disposition that places an ongoing affirmative duty on a juvenile

offender, for which failure to comply results in a felony offense. *See* R.C. 2950.99(B)(2).¹

This Court has recognized that “registration and notification requirements frustrate two of the fundamental elements of juvenile rehabilitation: confidentiality and the avoidance of stigma.” *C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, at ¶ 67. “Confidentiality promotes rehabilitation by allowing the juvenile to move into adulthood without the baggage of youthful mistakes. Public exposure of those mistakes brands the juvenile as an undesirable wherever he goes.” *Id.* Further, this Court opined:

The publication required by S.B. 10 causes the greatest possible stigmatization:

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 juvenile proceedings are confidential and sealed, sex offender registration and notification laws, by creating a public record, place the sexual offense of a juvenile directly and prominently in the public eye.

[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. The state’s interest in and responsibility for a juvenile’s well-being and rehabilitation is not promoted by a practice that makes a juvenile’s sex offenses public.

¹ R.C. 2950.99(B) appears to present a jurisdictional problem because it requires prosecution of a juvenile offender registrant in common pleas court once the child turns 18, even though the Revised Code classifies such persons as a “child” in regards to enforcing all other juvenile court orders. As such, the statute seems to create dual jurisdiction when it otherwise would not exist.

(Footnotes omitted.) *Id.* at ¶ 68, quoting Phoebe Geer, *Justice Served?*, 27 *Developments in Mental Health Law* 33, 48-49, quoting Robert E. Shepherd, *Advocating for the Juvenile Sex Offender, Part 2*, 21 *Crim.Just.* 52, 53 (2007).

The harms associated with registering juveniles are the reason many jurisdictions have not implemented the Federal Adam Walsh Act (“SORNA”). *See* Elizabeth J. Letorneau et al., *Effects of Juvenile Sex Offender Registration on Adolescent Well-Being: An Empirical Examination*, 24(1) *J.Psychology, Pub.Policy, & Law* 105, 106 (2017). Since SORNA was released, less than 20 states have substantially implemented its requirements, despite the threat of losing federal Byrne Grant funding. *Id.* Legislators in some states have found the “registration and notification of children antithetical to the juvenile justice ideal of rehabilitation.” *Id.* For example, the Deputy Commissioner of the State of New York Division of Criminal Justice Services, wrote that “New York has a longstanding public policy of treating juvenile offenders differently from adult offenders so that juveniles have the best opportunity of rehabilitation and reintegration. The federal requirement that juveniles be placed on the Sex Offender Registry under SORNA is in direct conflict with that public policy.” *Id.*, quoting Sugarman, R.S., Letter submitted on behalf of New York State to Linda Baldwin, Director, USDOJ, Office of the Justice Programs, SMART Office. (2011, August 23).

And although a youth who is on Ohio's juvenile sex offender registry while he is still a "child" as defined by R.C. 2152.02(C) enjoys most of the protections² of the juvenile court system's anonymity, when he turns 18, his failure to comply with those registration requirements places him within the full gaze of the criminal justice system. *See* R.C. 2950.99(B)(2) ("If a person violates a prohibition in [R.C. 2950.04, .041, .05, or .06] that applies to the person as a result of the person being adjudicated a delinquent child and being classified a juvenile offender registrant * * * [i]f the violation occurs while the person is eighteen years of age or older, the person is subject to criminal prosecution based on the violation."). This reveals to the world the very thing that the juvenile system protected prior to his age of majority; and, in so doing, subjects the youth to a myriad of dangers which impede his ability to reintegrate into society.

III. Placing juvenile offenders on sex offender registries causes harm and does not improve public safety.

Children started being included on sex offender registries with the advent of the "super-predator" myth and false beliefs about juvenile offending. *Compare Roper v. Simmons*, 543 U.S. 551, 556, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (recognizing the "particular trend in recent years toward cracking down on juvenile crime") *with* Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality?*, 33 Wake Forest L.Rev. 727, 728 (1998) (analyzing juvenile crime statistics and concluding "there never was a general pattern of increasing adolescent violence in the 1980s and

² Under R.C. 2950.081, the fact of any juvenile's registrant status is a public record, subject to disclosure on a background check.

1990s”). And, in recent years, “the convergence of three trends—the generalized societal alarm over juvenile violent crime, increased punitive responses to juvenile offenders, and the expansion of social control over known sex offenders—has produced a range of policies aimed at juveniles who sexually offend.” A.J. Harris et. al., *Collateral Consequences of Juvenile Sex Offender Registration and Notification: Results from a Survey of Treatment Providers*, *International Journal of Offender Therapy and Comparative Criminology* 62(4): 1-27 (2016), citing Elizabeth .J. Letourneau & M.H. Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*. 17 *Sexual Abuse: A. J. Research & Treatment* 293, 293-312 (2005), and Franklin E. Zimring, *An American Tragedy: Legal Responses to Adolescent Sexual Offending*, Chicago, IL: The University of Chicago Press. (2004). The enactment of the federal Adam Walsh Act brought harsher requirements on juvenile offenders than what was previously required under federal law, so harsh that many states declined to adopt their own version of SORNA. *See* Press Release, Office of Justice Programs, *Jurisdictions Substantially Implement Sex Offender Registration and Notification Act* (Nov. 8, 2013) (available at <http://ojp.gov/newsroom/pressreleases/2013/ojppr110813.pdf>) (accessed Dec. 12, 2018) (finding that, to date, only 17 of the 50 states have enacted their own versions of the federal Adam Walsh Act).

In the years since, researchers have found that children on registries face “incredible barriers to housing, employment, and education.” Ashley R. Brost & Annick-Marie S. Jordan, *Punishment that Does Not Fit the Crime: The*

Unconstitutional Practice of Placing Youth on Sex Offender Registries, 62 S.D.L.Rev. 806, 820 (2017). Placement of child offenders on registries also jeopardizes public safety and successfully reintegration. See Jill S. Levenson et al., *Grand Challenges: Social Justice and the Need for Evidence-Based Sex Offender Registry Reform*, 43(2) J.Sociology & Soc.Welfare 3, 11-14 (2016), available at https://www.researchgate.net/publication/304990286_Grand_Challenges_Social_Justice_and_the_Need_for_Evidence-based_Sex_Offender_Registry_Reform; Richard Tewksbury & Matthew Lees, *Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences*, 26 Sociological Spectrum 309, 319 (2006); Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 Am.J.Criminal Justice 54, 57 (2009).

A 2013 report published by Human Rights Watch found that children on the registry suffer shame, stigmatization, isolation, and psychological harm. Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US*, at 30, 51 (2013), available at https://www.hrw.org/sites/default/files/reports/us0513_ForUpload_1.pdf. Of the 281 juvenile registrants interviewed for the report, 84.5% described having depression, feeling isolated socially, and entertaining suicidal thoughts. *Id.* at 51. Fifty-eight of them (19.6%) attempted suicide. *Id.* In addition, 52% of the youth and family members interviewed reported that they experienced violence or threats of violence from community members. *Id.* at 56. And, nearly all of them reported being denied

access to educational and employment opportunities and being removed from their homes due to the restrictions accompanying their duties to register. *Id.*

A more recent study examined the impact of registration on juvenile offenders and compared their outcomes to those of children who had also committed sexually oriented offenses, but who were not required to register. Letourneau et al., 24 J.Psychology, Pub.Policy & Law at 106. Children who were registered reported worse outcomes on four out of five mental health indicators, including anxiety and depression, and were four times more likely than non-registered children to have attempted suicide. *Id.* at 112. And while registered youth reported having more social support from family than non-registered youth, children on the registry reported more problems engaging with peers. *Id.* at 113. Registered children also reported being exposed to violence at much higher rates than those who were not on the registry, including being nearly twice as likely to report having been sexually assaulted. *Id.* Registered children were also five times as likely to have been approached by an adult for sex than non-registered children. *Id.* Researchers noted that “[t]he primary aim of juvenile registration and notification is to prevent adults from approaching children for sex, yet we find the exact opposite effect.” *Id.* at 114. In other words, registering youth who commit sex offenses increases the likelihood that they will be victimized by others. These results are sobering. And, as outlined below, the ends do not justify the means.

A. Juveniles who commit sexually oriented offenses have extremely low recidivism rates.

The label of “sex offender” carries demonstrably false connotations and causes irreparable harm to the reputations of those so labeled. In 2014, the Pennsylvania Supreme Court recognized that the “common view of registered sexual offenders is that they are particularly dangerous and more likely to reoffend than other criminals,” a fact inconsistent with research. *In re J.B.*, 630 Pa. 408, 107 A.3d 1, 16 (Pa.2014). The presumption that registered sex offenders are dangerous is inherent in Ohio’s law as follows: “Sex offenders and child-victim offenders pose a risk of engaging in further sexually abusive behavior even after being released from imprisonment, a prison term, or other confinement or detention, and protection of members of the public from sex offenders and child-victim offenders is a paramount governmental interest.” R.C. 2950.02(A)(2). But, this presumption and the negative message communicated about registered sex offenders is false. *See* Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 *Hastings L.J.* 1071, 1073 (2012).

Children and teenagers who have committed sex offenses rarely reoffend. Research examining the recidivism rates of youth who sexually offend is consistent across studies, time, and populations—sexual recidivism rates among youth are exceptionally low, particularly as they age into young adulthood. Michael F. Caldwell, *Study Characteristics and Recidivism Base Rates in Juvenile Sex Offender Recidivism*, 54 *Int’l J. Offender Therapy & Comparative Criminology* 197, 198 (2010) (citing to recidivism studies dating back to 1994); *see also* Michael F. Caldwell, *Sexual Offense Adjudication and Recidivism Among Juvenile Offenders*, 19 *Sexual Abuse*:

J.Research & Treatment 107, 112 (2007), available at http://www.njjn.org/uploads/digital-library/resource_557.pdf; Michael F. Caldwell et al., *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism*, 14 J.Psychology, Pub.Policy, & Law 89, 91 (2008), available at <http://www.ncjfcj.org/sites/default/files/examinationofthesexoffender.pdf>; Franklin E. Zimring et al., *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort*, 26 Justice Quarterly 58, 58 (2009), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1590&context=facpubs>.

In a 2010 study involving 63 unique datasets of more than 11,000 children, the mean sexual recidivism rate for juvenile offenders, across studies, was 7.08%. *Caldwell* at 197-212. And more recently, a 2016 meta-analysis of 106 studies identified a five-year sexual offense recidivism rate of just 2.75%. Letourneau et al., 24 Psych.Pub.Pol. & L. 105, 115, citing Michael F. Caldwell, *Quantifying the Decline in Juvenile Sexual Recidivism Rates*, 22(4) J.Psychology, Pub.Policy, and Law, 414-426 (2017); Laura Cohen, *Department, Juvenile Justice Cruel and Unusual: The Senseless Stigmatization of Youth Registries*, 33 Crim. Just. 46 (2018). This means that “97% of children adjudicated for a sexual offense do not reoffend sexually within 5 years.” Letourneau at p.115.

This low recidivism rate is consistent with what we know about children—that they tend to offend based on impulsivity and sexual curiosity, among other reasons,

not based on pedophilia. See Michael F. Caldwell, *What We Do Not Know about Juvenile Sexual Re-offense Risk*, 7 *Child Maltreatment* 291, 296 (2002) (“[T]here is a strong trend toward desisting * * * offending as the offender age increases just a few years.”); Judith V. Becker & Scotia J. Hicks, *Juvenile Sexual Offenders: Characteristics, Interventions, and Policy Issues*, 989 *Annals NY Acad.Sci.* 397, 399-400, 406 (2003); Caldwell, *Study Characteristics and Recidivism Base Rates in Juvenile Sex Offender Recidivism*, 54 *Int’l J.Offender Therapy & Comparative Criminology* at 197-198. Additionally, children “are more susceptible to peer influence, have heightened sensitivity to immediate rewards, and possess less self-regulation.” Jeffrey C. Sandler et al., *Juvenile Sexual Crime Reporting Rates Are Not Influenced by Juvenile Sex Offender Registration Policies*, 23(2) *J.Psychology, Pub.Policy, & Law* 131, 137 (2017). With maturation, a better understanding of sexuality, and decreased impulsivity, most of these behaviors stop and only a small fraction of juvenile offenders will maintain sexually-deviant behavior in adulthood. See Caldwell, *Study Characteristics and Recidivism Base Rates in Juvenile Sex Offender Recidivism* at 205. Thus, children who sexually offend also demonstrate the age-crime phenomenon of naturally aging out of criminogenic or antisocial behavior. See also Amy Halbrook, *Juvenile Pariahs*, 65 *Hastings L.J.I.*, 11-12 (December 2013); and Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 *Ann.Rev.Clin.Psychol.* 2009 47-73 (2018) (finding “the vast majority of adolescents who commit antisocial acts desist from such activity as they mature into adulthood and that only a small percentage * * * become chronic offenders”).

Overall, these trends comport with what both this Court and the U.S. Supreme Court have found concerning juvenile offenders, specifically that “juveniles have a ‘lack of maturity and an underdeveloped sense of responsibility.’” *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010), quoting *Roper*, 543 U.S. at 569-570, 125 S.Ct. 1183, 161 L.Ed.2d 1 and *Johnson v. Texas*, 509 U.S. 350, 367, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993); *J.D.B. v. North Carolina*, 564 U.S. 261, 272, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011). The research supporting these cases demonstrates that “transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child’s ‘moral culpability’ and enhanced the prospect that, as the years go by and neurological development occurs, his ‘deficiencies will be reformed.’” *Miller v. Alabama*, 567 U.S. 460, 472, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012). The research on adolescent sexual offending is wholly consistent with the Court’s precedent. Children who commit sex offenses are unlikely to reoffend sexually and have great capacity to mature and change.

And, because juveniles are especially amenable to treatment, the small percentage of those who do sexually re-offend are “decidedly distinct from the adult sex offender population.” A.J. Harris et. al., *Collateral Consequences of Juvenile Sex Offender Registration and Notification: Results from a Survey of Treatment Providers*, 2: 5 (2014) When the rare repeat sexual offenses do occur, it is nearly always within the first few years following the original adjudication. Caldwell, *Study Characteristics and Recidivism Base Rates in Juvenile Sex Offender Recidivism* at 205. Children who sexually offend seldom repeat their harmful conduct and

appropriate treatment significantly reduces sexual reoffending even further. Illinois Juvenile Justice Commission, *Improving Illinois' Response to Sexual Offenses Committed by Youth: Recommendations for Law, Policy, and Practice*, at 28-36 (2014), available at <https://tinyurl.com/ycnekqvl>. These rates are compared with a 13% recidivism rate for adults who commit sex offenses. Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US*, at 30 (2013), available at https://www.hrw.org/sites/default/files/reports/us0513_ForUpload_1.pdf.

Further, research shows that children who commit sex offenses more closely resemble their non-sex-offending counterparts, in that they share similar family and peer backgrounds, risk factors, and weaker family bonding. A.J. Harris et. al., *Collateral Consequences of Juvenile Sex Offender Registration and Notification: Results from a Survey of Treatment Providers*, 2:5 (2014). The major difference is that children who commit sex offenses are more likely to have suffered sexual abuse, sexual violence, exposure to abuse, neglect, social isolation, low self-esteem, and early exposure to sex or pornography. M.C. Seto & M.L. Lalumiere, *What is So Special About Male Adolescent Sexual Offending? A review and test of explanations through meta-analysis*, 136 Psychol. Bull. 526, 526-575 (2010).

B. Registering juveniles does not increase public safety.

It is important to highlight that the low recidivism rates of children who have committed sex offenses cannot be attributed to the registry itself. “[R]ates of juvenile sexual offenses were declining before implementation of juvenile registration and

notification policies and continued to decline, albeit at a lesser pace, following their implementation.” Letourneau, et al., 24 Psych. Pub. Pol. & L. 105, 115, citing Finkelhor, D. & Jones, L. *Have Sexual Abuse and Physical Abuse Declined Since the 1990s?* Crimes Against Children Research Center, CV267 (Nov. 2012) available at: http://www.unh.edu/ccrc/pdf/CV267_Have%20SA%20%20PA%20Decline_FACT%20SHEET_11-7-12.pdf In fact, “no research has found any evidence of any recidivism reductions” due to classification and registration schemes. Sandler et al., 23(2) J.Psychology, Pub.Policy, & Law at 136-137 (“The current study evaluated the association between four different [registration] policies and juvenile sexual crimes using data from four states. * * * [R]ates of sexual crime reports against minors remained statistically unchanged in the years after enactment of [registration] policies in [the four states].”).

“[E]very published study evaluating the effects of state and federal juvenile registration policies has failed to find any evidence that these policies exert any public safety effects.” Letourneau at 115. The following nine states have had their registration schemes evaluated to discern a linkage between registries and public safety; Idaho, Maryland, New Jersey, Oregon, South Carolina, Texas, Utah, Virginia, and Wisconsin. *Id.* And, none found any public safety benefit. *Id.* Instead, the one consistent finding by researchers who have studied the impact of registering children has found that doing so is harmful.

IV. Applying R.C. 2950.99 to juvenile offenders offends fundamental fairness.

May 15, 2017 marked the 50th anniversary of the U.S. Supreme Court’s

landmark decision guaranteeing basic due process rights to children in juvenile court. *In re Gault*, 387 U.S. 1, 33, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967) (holding that children are entitled to due process and fair treatment). In *Gault*, the Court held that children charged with delinquency have a constitutional right to counsel, confront and cross-examine witnesses at hearings, adequate notice of charges, and safeguards against self-incrimination. *Id.* But, the Court did not grant children *all* the due process rights that are guaranteed adults. *See McKeiver v. Pennsylvania*, 403 U.S. 528, 543, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (finding that delinquency proceedings do not need to be transformed into criminal proceedings). Rather, because delinquency proceedings are still civil in nature the Court found that the applicable due process standard in delinquency proceedings is fundamental fairness. *Id.* at paragraph one of the syllabus. Therefore, the Court concluded that “a jury trial is not constitutionally required” in the adjudicatory phase of a delinquency proceeding. *Id.* at paragraph two of the syllabus.

This is the exact reasoning this Court followed in *Hand*, finding that “[t]he determination that a jury trial is not constitutionally necessary in juvenile-court proceedings is predicated on the juvenile system's purpose to ‘combine flexible decision-making with individualized intervention to treat and rehabilitate offenders rather than to punish offenses.’” *Hand*, 149 Ohio St.3d 94, 2016-Ohio-5504, 73 N.E.3d 448, at ¶ 35, quoting *In re Anderson*, 92 Ohio St.3d 63, 65, 748 N.E.2d 67; Ralph A. Rossum, *Holding Juveniles Accountable: Reforming America’s “Juvenile Injustice System,”* 22 Pepperdine L.Rev. 907, 912 (1995). Further, this Court determined that

equating juvenile adjudications to criminal convictions undermined the civil nature of juvenile proceedings:

In order to continue holding that a jury trial is not required for juveniles, we must maintain the civil nature of juvenile adjudications. It is contradictory and fundamentally unfair to allow juvenile adjudications that result from these less formal proceedings to be characterized as criminal convictions that may later enhance adult punishment.

Hand at ¶ 35.

The reasoning in *Hand* holds true here too, where the existence of a juvenile disposition is the sole predicate upon which a failure to register is based. Rather than being an “element” of the offense, as this Court found to be distinguishable in *Carnes*, the juvenile offender registrant’s enduring obligation to comply with the registration order places an affirmative duty on the juvenile offender and his failure to comply *is* the felony. R.C. 2950.09(A)(1)(a)(i).

In one sense, the failure to comply with the registration order operates like a probation violation, requiring a triggering event before imposition of the second punishment; but, unlike the probation violation, the consequences are much more dire. Prosecuting juvenile offender registrants as adults for failing to comply with R.C. 2950 violates fundamental fairness by allowing “allows the long arm of the law to reach back well after the juvenile court’s jurisdiction ends to seize a youthful adjudication and use it as the basis for a criminal penalty in adulthood,” and does so without considering the differences between adult and juvenile sexual offending or comporting with the rehabilitative goals of the juvenile-justice system. *Carnes*, Slip Opinion No. 2018-Ohio-3256, at ¶ 23 (O’Connor, dissenting).

Conclusion

“Ohio has developed a system for juveniles that assumes that children are not as culpable for their acts as adults[, * * * and that] their bad acts are less likely to reveal an unredeemable corruptness[.]” *C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, at ¶ 39-40. And yet, Ohio holds those same children responsible into adulthood, for complying with a juvenile disposition, even though juvenile offenders are not “afforded the full panoply of constitutional rights available to an adult in the criminal-justice system.” *Carnes* at ¶ 35 (O’Connor, dissenting). Prosecuting juvenile offenders for failing to comply with the juvenile court’s registration order allows their “juvenile adjudication to burden them into adulthood.” *Id.* Such prosecution ensures that the juvenile sex offender “will never have a chance to establish a good character in the community. He will be hampered in his education, in his relationships, and in his work life. His potential will be squelched before it has a chance to show itself.” *C.P.* at ¶ 44-45.

There is no distinction between the using a juvenile adjudication as a sentencing enhancement and using a juvenile offender registrant’s duty to register as the predicate requirement on which a failure to register is based. Accordingly, and for the reasons set forth in Appellant’s merit brief, this Court should extend *Hand* to failure to register cases where the registration order was issued by a juvenile court.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing **BRIEF OF AMICI CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER, ET. AL.** was sent by regular U.S. mail, postage prepaid, on December 14, 2018, to the following parties: Julie Kahrs Nessler, Assistant Public Defender, 125 East Court Street, 9th Floor, Cincinnati, Ohio 45202; and Paula E. Adams, Assistant Prosecuting Attorney, 230 East Ninth Street, Suite 4000, Cincinnati, Ohio 45202.

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