ORIGINAL

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF:

C. P.

CASE NO. 2010-0731

On appeal from the
Athens County Court of Appeals
Fourth Appellate District

Case No. 09CA0041

MERIT BRIEF OFAPPELLEE - STATE OF OHIO

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The State of Ohio accepts appellant's version of the Statement of the Facts and Case as accurate.

LEGAL ARGUMENT

INTRODUCTION

There is nothing in the United States Constitution or the Ohio Constitution specifically establishing juvenile courts. Juvenile courts in the United States are a creation of state legislatures. In Ohio, the first juvenile court began in Cuyahoga County in 1902. Prior to that time there was little distinction between the treatment of juvenile offenders and adult offenders. The Ohio legislature extended the juvenile court system statewide in 1906. The original concept of the juvenile court was that it would have a less formal setting where children's wayward behaviors could be examined and addressed. A new class of legal status, the juvenile, was created. Early juvenile courts dispensed with the use of courtrooms and the adversarial process of the criminal justice system. Instead, the court sought to act in the juvenile's best interest. The proceedings were considered civil and not criminal. The judge, prosecutor, probation officer and the child's parents together often determined what course of action should be taken. "Juvenile Court proceeding was one in which a fatherly judge touched the heart and conscience of the erring youth by talking over his problems, by paternal advice and admonition, and in which, in extreme situations, benevolent and wise institutions of the state provided guidance and help "to save him from a downward career." In re Gault, 387 U.S. 1.at 26. The focus shifted away

from punishment to rehabilitation and treatment. Juvenile delinquents were granted a limited form of legal immunity by the juvenile courts in that they could not receive the same sanctions as adults for the same criminal behavior. Probation became a frequent tool to address delinquent behavior.

However, these lofty concepts have eroded over the years, chiefly as a result of litigation. It is now recognized that "a proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." Gault at 36. Juvenile proceedings to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self incrimination." Id. at syllabus 4. This court recently recognized the change in the juvenile court philosophy in State v. D.H., 120 Ohio St.3d 540. "In *In re C.S.*, this court traced the development of juvenile court from beneficent entities that 'eschewed traditional, objective criminal standards and retributive notions of justice' and focused on the state's role as parens patriae, to the more modern version, which can impose penalties that have serious implications on a child's personal liberty." Id.. at 546. To pretend that the current juvenile court system has not changed over the years and that some forms of punishment do not exist in the current system is a legal fiction. Despite arguments to the contrary, some forms of juvenile dispositions are punishment.

The power and jurisdiction of the juvenile court in Ohio is conferred upon the court by the legislature through Ohio Revised Code Chapters 2151 and 2152. The rehabilitation of delinquent offenders is not the only purpose of Chapter 2152.

R.C. 2152.01 defines the "overriding purposes" of dispositions under Chapter 2152:

2152.01 Purposes; Applicability of Law

(A) The overriding purposes for dispositions under this chapter are to provide for the care, protection, and mental and physical development of children subject to this chapter, protect the public interest and safety, and hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender. These purposes shall be achieved by a system of graduated sanctions and services. (My emphasis)

(B) Dispositions under this chapter shall be reasonably calculated to achieve the overriding purposes set forth in this section, commensurate with and not demeaning to the seriousness of the delinquent child's or the juvenile traffic offender's conduct and its impact on the victim, and consistent with dispositions for similar acts committed by similar delinquent children and juvenile traffic offenders. The court shall not base the disposition on the race, ethnic background, gender, or religion of the delinquent child or juvenile traffic offender.

(C) To the extent they do not conflict with this chapter, the provisions of Chapter2151 of the Revised Code apply to the proceedings under this Chapter.

Appellant challenges the constitutionality of R.C. 2152.86, contending that it violates due process, equal protection and inflicts cruel and unusual punishment. However, R.C. 2152.86, is limited in its application. The statute does not apply to all juvenile sex offenders but only those the legislature determined were the most serious juvenile sex offenders. Contrary to amicus curae's statement of the law in her brief on page 27, the juvenile court has discretion to determine what tier level a juvenile sex offender is assigned except for Serious Youthful Offender's (SYO) who have been adjudicated delinquent for certain sex offenses See .In re T.M., 2009-Ohio-4224 They must be given a Tier III classification and submit to periodic registration. Throughout

their briefs, appellant and amicus curae keep referring to sex offender registration as "adult" sanctions and punishment. The statutes governing the registration requirements include both juvenile sex offenders and adult sex offenders. R.C. 2152.86, R.C. 2950., Chapter 2950.

R.C.2950.02 clearly defines the legislative intent of the sex registration statutes. It says:

Section 2950.02 **Legislative determination and intent to provide information to protect public safety.**

(A) The General Assembly hereby determines and declares that it recognizes and finds all of the following:

(1) If the public is provided adequate notice and information about offenders and **delinquent children who commit sexually oriented offenses or who commit child-victim oriented offenses,** members of the public and communities can develop constructive plans to prepare themselves and their children for the offender's or **delinquent child's** release from imprisonment, a prison term, or other confinement or detention. This allows members of the public and communities to meet with law enforcement agencies to prepare and obtain information about the rights and responsibilities of the public and the communities and to prepare education and counseling to their children.

(2) 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 government interest.**

(3) The penal, **juvenile**, and mental health components of the justice system of this state are largely hidden from public view, and a lack of information from any component may result in a failure of the system to satisfy this **paramount government interest of public safety** described in division (A)(2) of this section.

(4) Overly restrictive confidentiality and liability laws governing the release of information about sex offenders and child-victim offenders have reduced the willingness to release information that could be appropriately released under the public disclosure laws and have increased risks of public safety.

(5) A person who has been found to be a sex offender or a child-victim offender has a reduced expectation of privacy because of the public's interest in public safetyand in the effective operation of government.

(6) The 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.

(B) The general assembly hereby declares that, in providing in this chapter for registration regarding offenders and **certain delinquent children who have sexually oriented offenses or who have committed child-victim oriented offenses** and for community notification regarding tier III sex offenders/child-victim offenders who are criminal offenders, **public registry-qualified juvenile offender registrants, and certain other juvenile registrants** who are about to be or who have been released from imprisonment, a prison term, or other confinement or detention and who live in or near a particular neighborhood or who otherwise will live in or near a particular neighborhood, it is the general assembly's interest to protect the safety and general welfare of the people of this state. The general assembly further declares that it is the policy of this state to require the exchange in accordance with this chapter of relevant information about sex offenders and child-victim offenders among public agencies and officials and to authorize the release in accordance with this chapter of necessary and relevant information about sex offenders and child-victim offenders to members of the general public **as a means of assuring public protection and that the exchange or release of that information is not punitive.** (My emphasis)

The state legislature has reasonably concluded that the safety interests of the public outweigh the confidentiality interests of serious sex offenders. As amicus curae notes in her brief, mental health professionals and jurists are not able to distinguish which of these offenders will become repeat offenders.

> "Additionally, as the Supreme Court stated: 'It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' Roper, 543 at 573" (page 34 of amicus curae brief)

> "The court continued: 'If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude That States should refrain from asking jurors to issue a far greater condemnation.' Roper 543 at 573" (page 34-35 of amicus curae brief)

"The Court understands that it does not have the expertise, then. to 'distinguish the few incorrigible juvenile offenders from the many that have the capacity to change.' Graham, 130 S.Ct. at 2032." (page 37 of amicus curae brief)

Causes of Juvenile Sex Offenses

In the 2006 report entitled *Report of the Task Force on Children with Sexual Behavioral Problems*, the Association for the Treatment of Sexual Abusers states that the origins of sexual behavior problems in children are not clearly understood. Juvenile sex offenders are often referred to as children with sexual behavior problems. Children who have been abused engage in a higher frequency of sexual behaviors than those who have not been abused.; however, many youth with broadly defined sexual behavior problems have no known history of sexual abuse. Recent decades have seen a significant increase in the number of youth with sexual behavior problems who have been referred to child protective services, juvenile courts and outpatient and inpatient treatment. (Behavioal Health: Developing a Better Understanding, Volume three, Issue 1 by the Ohio Association of County Behavioral Health Authorities, entitled *Juvenile Sex Offenders*)

An article in the same publication states:

We Don't Know What We Don't Know

We don't know what causes individuals to commit sex offenses whether they are adults or juveniles. Sexual abuse is perhaps the most significantly underreported crime. Even when a sex offender is detected or reported, that offense may not be his/hers first one. Thus, arrest data alone yield an underestimate of the true extent of sex offending by juveniles and adults.

Researchers have proposed a number of theories to explain the causes of sex offenses committed by juveniles; however, to date, there is no generally accepted theory regarding juvenile sex offending.

Recidivism among Juvenile Offenders

Estimates are that the recidivism rates among juvenile sex offenders is between 5% to 14 %. (National Center on Sexual Behavior of Youth, July 2003, Number 1) However, there are significant problems in drawing conclusions from these estimates. First, the estimates depend on what data is used: arrest data, incarceration data, or conviction data. None of these are reliable sources because sexual assault is one of the most underreported crimes with an estimated 60% being unreported. Sex offenders often commit many offenses before being apprehended. Males are the least likely to report a sexual assault. Many repeat offenders are not apprehended.

(U.S. Department of Justice,. National Crime Victimization Study 2005)

If a rape is reported, there is a 50.8 % chance of an arrest.
If an arrest is made, there is an 80% chance of prosecution.
If there is a prosecution, there is a 58% chance of a conviction.
If there is a felony conviction, there is a 69% chance the convict will spend time in jail.

So even in the 39% of attacks that are reported to the police, there is only a 16.3 % chance the rapist will end up in prison. Factoring in unreported rapes, about 6% of rapists will ever spend a day in jail

15 of 16 walk free.
(National Center for Policy Analysis, *Crime sand Punishment in America*, 1999)

Additionally, R.C. 2152.86 does not apply to all juvenile sex offenses but only the most serious.

Approximately one-third of sexual offenses against children are committed by teenagers. (Snyder, H.N., Juvenile Offenders and Victims: 1999 National Report, Office of Juvenile Justice and Delinquency Prevention) "There is currently no scientifically validated system or test to determine exactly which adolescent sex offenders pose a high

risk of recidivism."(Smith, W.R. & Monastersky, C. (1986), Assessing juvenile sexual offenders' risk of reoffending, *Criminal Justice and Behavior, 13, 115-140)*

The National Center on Sexual Behavior of Youth recommends that for the adolescent sex offender who commits sexual offenses against young children, additional supervision requirements should be considered.

1. **No baby sitting** under any circumstances.
2. **No access to young people or potential victims** without direct supervision by a responsible adult who is aware of the problem.
3. No authority or supervisory role over young children (e.g. **in school, church or job activities)**
4. No possession or use of sexually explicit, "x-rated," or pornographic materials.
5. These rules do not preclude most ordinary daily activities , such as going to school, church, stores, or restaurants with family, or involvement with age-appropriate and appropriately supervised peer activities.

(NCSBY, July, 2003, No. 1) (My emphasis)

Therefore, the public should have the information on known sex offenders so parents do not unknowingly submit their children to unnecessary risks.

"[T]he classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts. *** Without the legislature's creation of sex offender classifications, no such classification would be warranted. Therefore, *** we cannot find that sex offender classification is anything other than a creation of the legislature, and therefore, the power to classify is properly expanded or limited by the legislature." In re Smith, 2008-Ohio-3234 at paragraph 39.

Statutes enacted in Ohio "are presumed to be constitutional." State v. Ferguson, 120 Ohio St.3d 7, 2008-Ohio-4824 at paragraph 12. This presumption remains until one challenging a statute's constitutionality shows, "beyond reasonable doubt, that the statute

is unconstitutional." Roosevelt Properties Co. v. Kinney (1984), 12 Ohio St.3d 7, 13. Neither appellant nor amicus curae has shown beyond a reasonable doubt that R.C. 2152.86 is unconstitutional.

APPELLANT'S PROPOSITION OF LAW I:

> **The classification of a registration-eligible youth as a public registry-qualified juvenile offender registrant violates the juvenile's right to due process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Ohio Constitution.**

As stated before, R.C. 2152.86 application is limited in scope. The statute does not apply to all juvenile sex offenders but only those the legislature determined were the most serious juvenile sex offenders and only after certain findings are made. In the case of C. P., he is a repeat juvenile sex offender. He was found delinquent in the state of Utah for a sexual assault on a small child. He received eighteen months of sex offender treatment. (July 29, 2009, T. p. 21) The treatment did not work. He did it again. This time, at age 15, he sexually assaulted a six year old boy. These were not childish pranks but rape and kidnapping.

In his brief, Appellant asserts that "he was denied due process because R.C. 2152.86 required the court to give him a lifetime, offense based, and public Tier III classification, immediately following his SYO designation." (Appellant's brief at page 18) Appellant argues that since under R.C. 2152.86 the juvenile court does not have the discretion to determine what, if any, classification should be applied to PRQJOR's, the statute is unconstitutional. Appellant also claims that because PRQJOR's are not afforded

an opportunity to present evidence to show they should not be subject to a lifetime of public registration, the statute violates due process. (Appellant brief at page 19 - This is a new procedural due process claim that appellant did not make to the Fourth District Court of Appeals. "C.P. does not appear to contend that the procedures used to impose his classification were inadequate." In re C.P., 2010-Ohio-14 at paragraph 8) Appellant also claims that R.C. 2152.86 violates constitutional due process because it placed C.P. on eSORN and, therefore, "ignores the history and purpose of the juvenile justice system." (Appellant's brief at page 20)

As stated earlier, statutes enacted in Ohio "are presumed to be constitutional." State v. Ferguson, 120 Ohio St.3d 7, 2008-Ohio-4824 at paragraph 12. This presumption remains until one challenging a statute's constitutionality shows, "beyond reasonable doubt, that the statute is unconstitutional." Roosevelt Properties Co. v. Kinney (1984), 12 Ohio St.3d 7, 13. Pursuant to its police powers, the General Assembly has the authority to enact laws defining criminal conduct and to prescribe its punishment. This authority is not unfettered and that almost every exercise of the police power will necessarily interfere with the enjoyment of liberty or the acquisition or possession of property, or involve an injury to a person. See Benjamin v. Columbus (1957), 167 Ohio St. 103, 110. Nevertheless, laws passed by virtue of the police power will be upheld if they bear a real and substantial relation to the object sought to be obtained., namely, the health, safety, morals or general welfare of the public, and are not arbitrary, discriminatory, capricious or unreasonable. Cincinnati v. Correll (1943), 141 Ohio St. 535, 539. The federal test is similar. To determine whether such statutes are constitutional under federal scrutiny, the

court must decide if there is a rational relationship between the statute and its purpose. Fabrey v. McDonald Village Police Dept. (1994), 70 Ohio St.3d 351, 354.

The right to procedural due process is found in the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution. To trigger protections under these clauses, a sexual offender must show that he was deprived of a protected liberty or property interest as a result of the registration requirement. See Steele v. Hamilton Cty. Community Mental Health Bd. (2000), 90 Ohio St.3d 176, 181. The basic requirements under this clause are notice and an opportunity to be heard. State v. Hochhausler (1996), 76 Ohio St.3d 455, 459.

PROCEDURAL DUE PROCESS

There is no ambiguity in the wording of R.C. 2152.86, it make the classification of Tier III mandatory. If a juvenile court imposes upon a juvenile a serious youthful offender dispositional order for committing certain sex offenses, he must be classified a Tier III sex offender.

> "(B)(1) If an order is issued under (A)(1), (2), or (3) of this section the classification of tier III sex offender/child-victim offender automatically applies to the delinquent child based on the sexually oriented offense the child committed." R.C. 2152.86 (B)

Appellant asserts that since the classification under R.C. 2152.86 is offense based and, therefore, mandatory, the juvenile court is deprived of its discretion. Juveniles are not given the opportunity present evidence that they should not be subject to the life time registration requirements, therefore, the statute is a violation of procedural due process. The fact that the state legislature decided that a sex offender classification should be

offense based and not based on a court's determination of likelihood of reoffending, does not violate due process. The Supreme Court of the United States has found that although SORNA provided no mechanism to challenge a registration or sex offender designation, it held that when the registry requirement is based on a previous conviction (as opposed to the fact of current dangerousness), due process does not require that the sex offender be afforded a hearing. See Connecticut Dept. of Public Safety v. Doe, 538 U.S. 1 The Supreme Court of the United States said that:

> "due process does not require the opportunity to prove a fact that is not material to the State's statutorily scheme, mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty interest. Paul v. Davis, 424 U.S. 693. But even assuming *arguendo* that respondent has been deprived of a liberty interest, due process does not entitle him to a hearing establishing a fact - that he is not currently dangerous - that is not a material under the statute. Cf., e.g., Wisconsin v. Constantineau, 400 U.S. 433. As the DPS Website explains, the law's requirements turn on an offender's conviction alone - a fact that the convicted offender has already had a procedurally safeguarded opportunity to contest. Unless respondent can show that the substantive rule of law is defective (by conflicting with the Constitution), any hearing on current dangerousness is a bootless exercise." Id. at syllabus.

Since under R.C. 2152.86, all SYO's who have been found delinquent of certain sex offences must be assigned a Tier III sex offender classification and are subject to lifetime registration, it does not violate procedural due process. See United States v. Hernandez, 615 F.Supp.2d 601, 620. These juvenile sex offenders are afforded procedural rights when contesting the underlying charges against them. Appellant admits in his brief on page 18, "Like this Court found in D.H., C.P. was afforded certain due process rights related to his initial designation as an SYO, including the right to grand jury determination of probable cause and trial by jury in the juvenile court."

SUBSTANTIVE DUE PROCESS

Appellant and amicus curae contend that R.C. 2152.86 violate substantive due process for a number of reasons. Namely, because it is fundamentally unfair, it violates traditional juvenile justice principles, it is bad public policy, it imposes "adult punishment" on juvenile offenders, and that there is no rational relationship between the statute and its purpose.

The notion behind substantive due process is that certain unenumerated liberties must be protected by the courts. The substantive component of the Due Process Clause protects fundamental rights that are so "implicit in the concept of ordered liberty" that "neither liberty nor justice would exist if they were sacrificed." See Palko v. Connecticut,' 302 U.S. 319, 325, 326. While the United States Supreme Court has recognized fundamental rights in regard to some special liberty and privacy interests, it has not created a broad category where any alleged infringement on privacy and liberty will be subject to substantive due process protection. See Paul v Davis 424 U.S. 693, 713. Circuit courts that have considered substantive due process arguments regarding sex offender registries have upheld such registrations and publication requirements finding no fundamental right implicated and no constitutional infirmities. See Doe v. Tandeske, 361 F.3d 594, 597; Doe v. Moore, 410 F.3d 1337, 1344-46; Gunderson v. Hvass, 339 F. 3d 639, 643; Paul P. v. Verniero, 170 F.3d at 404, 405. See also United States v. Madera, 474 F.Supp.2d 1257 , 1264-1265. (The Act [SORNA] does not violate substantive due process because it does not infringe upon any fundamental right.)

When a statute does not implicate fundamental rights, it must then be determined

whether it is "rationally related to legitimate government interests." Washington v. Gluckenberg, 521 U.S. 702, 728. Appellant, on page 25 of his brief, concedes that the rational basis test is the appropriate test. The rational basis standard is "'highly deferential' and we hold legislative acts unconstitutional under a rational basis standard in only the most exceptional circumstances." Doe v. Moore, *supra* (quoting Williams v. Pryor, 240 F.3d 944, 948) SORNA meets the rational basis test because it is the interest of government to protect the public from sex offenders, and knowing where offenders live enables the public to assess the risk and take protective measures as appropriate. Doe v. Moore at 1345.See also United States v. Hernandez, 615 F.Supp. 2d 601 (E.D. Mich. 2009) 621-622."

As stated in R.C. 2950.01, the intent of the legislature is to provide information to the public so it may take steps to protect itself. The registration of serious sex offenders is rationally related to this purpose. Additionally, as the Fourth District Court of Appeals noted in addressing appellant's argument that because R.C. 2152.86 conflicts with the principles of juvenile law, it violates due process. "The mere fact that community notification provisions might conflict with the principles of juvenile law does not establish a violation of due process. To establish such a violation, C.P. would need to demonstrate that he had a fundamental right not to be treated like an adult in this proceeding. At best, C.P. has demonstrated that the juvenile code has some provisions that are in tension with the juvenile code's stated purpose." In re C.P., 2010-Ohio-14 Appellant has not established beyond a reasonable doubt that R.C. 2152.86 violates either procedural or substantive due process.

APPELLANT'S PROPOSITION OF LAW II

The classification of a registration-eligible youth as a public registry-qualified juvenile offender registrant violates the juvenile's right to equal protection as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2 of the Ohio Constitution.

Appellant argues that R.C. 2152.86 violates equal protection because the statute makes multiple age based distinctions without having any rational basis. He argues that similarly situated juveniles are treated in vastly different ways. He then goes on to demonstrate that the statute is applied to juveniles who are not similarly situated.. There are age differences, sex offense differences, and number of offenses differences with corresponding levels of dispositions. He argues that if C.P. were differently situated, that is younger, he would not have been treated the same.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that: "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." Section 1,, Fourteenth Amendment to the United States Constitution. The Ohio Constitution provides that "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit." Section 2, Article I of the Ohio Constitution. "The limits placed upon governmental action by the Equal Protection Clauses of the Ohio and the United States Constitutions are nearly identical." Sorrell v. Thevenir, 69 Ohio St.3d 415, 424.

In order to determine the constitutionality of a statute under the equal protection clause, the court must first decide whether a fundamental right or suspect class is involved. Conley v. Shearer, 64 Ohio St.3d 284, 289. "Suspect classes have been

traditionally defined as race, sex. religion and national origin, Adamsky v. Buckeye Local School Dist., 73 Ohio St.3d 360, 362, with age being excluded. Cleveland v. Trzebuckowski, 85 Ohio St.3d 524. A statutory classification which involves neither a suspect class nor a fundamental right does not violate the Equal Protection Clause of the Ohio or the United States Constitution if it bears a rational relationship to a legitimate government interest." McCrone v. Bank One Corp., 107 Ohio St.3d 272. Appellant admit on page 25 of his brief that the correct standard of review of classifications based on age is the rational basis test.

Under rational basis review, the judgment of the General Assembly is granted substantial deference. State v. Williams, 88 Ohio St.3d 513, 531. Furthermore, rational basis review only requires a reasonable justification for the classification, even if the classifications are imprecise. Groch v. Gen. Motors Corp., 117 Ohio st.3d 192. The reviewing court does "not inquire whether this statute is wise or desirable * * *, * * * Misguided laws may nevertheless be constitutional." Morris v. Savoy, (1991), 61 Ohio St.3d 684, 692 quoting James v. Strange (1972), 407 U.S. 128, 133.

The juvenile statutes that address juvenile sex offenders makes distinctions dased on age of the offender, the nature of the offence and whether the offender is a repeat offender. In other words, it treats juveniles who are not similarly situated differently. Juveniles who are fourteen or fifteen years of age at the time of their offense are subject to discretionary classification. See In re T.M., 2009-Ohio-4224; R.C. 2152.83 (B)(1) However, if the juvenile has a prior adjudication for a sexually oriented offense (as appellant had) or was sixteen or seventeen years old at the time of the offense then that

juvenile is subject to mandatory sex offender classification and registration. R.C. 2152.82 (A); R.C. 2152.83 (A)(1).

Unlike juveniles fourteen and older, a juvenile who is younger than fourteen at the time of the offense is not subject to classification and registration at all. R.C. 2152.82 (A)(1); R.C. 2152.83 (A)(1) and (B)(1). Additionally, a juvenile fourteen years of age or older at the time of the offense and is designated a serious youthful offender is automatically subject to the public registry as long as his offense falls within certain listed sex offenses. R.C. 2182.86 (A)(1) Juveniles of the same age who are not designated serious youthful offenders are not subject to the registry requirements. R.C. 2152.82; R.C. 2152.83; R.C. 2152.86. Finally, juveniles under fourteen at the time of their offense and are designated as serious youthful offenders are not subject to any notification, registration or the public registry. R.C. 2152.86.

A public registry-qualified juvenile offender registrant (PRQJOR) is a juvenile who is fourteen, fifteen, sixteen or seventeen years of age, has been adjudicated delinquent of one of several specific sexually oriented offenses, and was found to be a serious youthful offender (SYO) in relation to that offense. For these juvenile sex offenders, their classification as a tier III registrant, community notification, and their inclusion on the Ohio Attorney General's electronic sex offender registration and notification data base is mandatory. R.C. 2152.86. Only after the juvenile court makes several discretionary findings must a juvenile be classified a PRQJOR. A plethora of rights are afforded those facing a serious youthful offender designation including presentation to the grand jury and a trial by jury. The court has discretion in applying the

traditional juvenile disposition in order to attempt to rehabilitate the offenders.

In the case of C.P., he was designated a PRQJOR because he was fifteen years old at the time of his latest offense, had been adjudicated delinquent for a previous offense and was found to be a serious youthful offender.

It is reasonable that by enacting statutes that take into consideration age differences, recidivist offenders, and seriousness of the offense committed, the legislature was endeavoring to further its interest in protecting the public. The registration and notification requirements are required of a small group who present the most danger to the public. Only after the juvenile court make several discretionary findings must a juvenile be classified a PRQJOR. A plethora of rights are afforded those facing a serious youthful offender designation including presentation to the grand jury and a trial by jury. The court has discretion in applying the traditional juvenile disposition in order to attempt to rehabilitate the offenders.

Appellant, in this proposition of law, argues that younger juveniles and older juveniles should be treated the same or it violates equal protection. More serious offenders should be treated the same as less serious offenders. Those who commit multiple offenses should be treated the same as those who committed a single offense. There is no authority to support these notions. The Equal protection Clause prevents states from treating people differently under its laws on an arbitrary basis. Harper v. State Bd. Of Elections (1966), 383 U.S. 663, 681. "Whether any such differing treatment is to be deemed arbitrary or not depends on whether or not it reflects an appropriate differentiating classification among those affected; the clause has never been thought to

require equal treatment of all people despite differing circumstances." Id. Under the Equal Protection Clause, a legislative distinction need only be created in such a manner as to bear a rational relationship to a legitimate state interest. Clements v. Fashing (1982), 457 U.S. 957, 963. These distinctions are invalidated only where "they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." Id.

A major purpose of classifications and notification statutes is to protect the public from sex offenders. The entire justice system, criminal and juvenile, is based on the idea that sanctions should be geared to the seriousness of the offense and the culpability of the offender. Ironically, appellant writes on page 32 of his brief, "And ,as it is generally agreed, punishment should be directly related to the personal culpability of a criminal defendant".

The purpose of juvenile dispositions is stated in R. C. 2152.01(A) which says:

> (A) The overriding purposes for dispositions under this chapter are to provide for the care, protection, and mental and physical development of children subject to this chapter, **protect the public interest and safety**, hold the offender accountable to the offender's actions, restore the victim, and rehabilitate the offender. These purposes shall be achieved by a **system of graduated sanctions and services.** (My emphasis)

The purpose of R. C. Chapter 2950 is stated in R. C. 2950.02(B) which states:

> (B) The general assembly hereby declares that, in providing in this chapter for registration regarding offenders and **certain delinquent children who have sexually oriented offenses** or child-victim oriented offenses and for community notification regarding tier III sex offender/child-victim offenders who are criminal offenders, public registry-qualified juvenile offender registrants, and certain other juvenile offenders registrants who are about to be or have been released from imprisonment, a prison term. Or other

> confinement or detention and who will live in or near a particular neighborhood or who otherwise will live in or near a particular neighborhood, It is the general assembly's intent to protect the safety and general welfare of the people of this state. The general assemble further declares that it is the policy of this state to require the exchange in accordance with this chapter of relevant information about sex offenders among public agencies and officials and to authorize the release in accordance with this chapter of necessary and relevant information about sex offenders and child-victim offenders to members of the general public as a means of assuring public protection and that the exchange or release of that information **is not punitive**. (My emphasis)

The law requires the court to make certain finding in classifying a child as a "serious youthful offender". And if the offense involves certain serious sex offences, the court must then classify the offender as a tier III registrant. This classification is reserved for those few, such as the appellant, who present the most danger to the public. Therefore, there is a rational basis for this law. Appellant was fifteen years old at the time of his latest offense. He has committed multiple offenses against small children. There was a rational basis for classifying him as a serious youthful offender and a mandatory Tier III registrant. It is not a violation of equal protection to treat serious offenders differently than less serious offenders. It is also a rational conclusion that older juveniles are more culpable than younger juveniles. One of the stated "overriding purposes" for juvenile dispositions as stated in R.C. 2152.01 is "to hold the offender accountable for the offender's actions" through a system of graduated sanctions and services."

As the Fourth District Court of Appeals noted, "However, in examining these provisions, we find that the general assembly has enacted provisions that are more likely to impose registration and public registry requirements on offenders who are older or who have previously been adjudicated delinquent for committing sexually oriented offenses.

The purpose of the notification and public registry provisions is to protect the public. See State v.Cook, 83 Ohio St.3d 404, 413, 1998-Ohio-291. " In re C.P., 2010-Ohio-14.

The Court went on to say, "C.P. contends that 'these classifications are based on age and, in only some cases, prior offense. Under the rational basis review, these classifications cannot survive * * * There is simply no evidence at all that a sixteen-year-old offender (mandatory) is more likely to re-offend than a fifteen-year-old offender (discretionary).' C.P.'s brief at 17-18. However, as we noted above, validly enacted statutes are presumed to be constitutional. The State need not introduce evidence justifying a statute. We do not review a statute under the rational basis test to determine whether the legislature's decisions were wise or supported by evidence, but only to determine if the enacted statute is rationally related to a legitimate government aim. Here, the legitimate government aim is the protection of the public. The General Assembly concluded that juveniles who were older when they committed their offenses or who had previously been adjudicated delinquent for committing a sexually oriented offense are more likely to reoffend. And we find these conclusions are rationally related to the legislative goal of protecting the public." Id.. "The state does not bear the burden of proving that some rational basis justifies the challenged legislation; rather, the challenger must negative every conceivable basis before an equap protection challenge will be upheld. See Heller, 509 U.S. at 320." State v. Williams, 88 Ohio St.3d 513, 531.

Because the general assembly has a rational basis for implementing R.C. 2151.86, appellant's equal protection rights were not violated nor has he established that R.C. 2152.86 is unconstitutional beyond a reasonable doubt.

APPELLANT'S PROPOSITION OF LAW III

The classification of a registration-eligible youth as a public registry-qualified juvenile offender registrant violates the prohibition against cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Ohio Constitution.

In appellant's third proposition of law, he makes the argument that assigning to juveniles mandatory tier III classifications with notification and requirements similar to adult sex offenders constitutes cruel and unusual punishment, maintaining that the courts in Ohio have long recognized the fundamental differences between juvenile and adult offenders and have traditionally treated them differently. However, the cruel and unusual punishment claim is only cognizable in the criminal or punitive context. Powell v. Texas (1968), 392 U.S. 514, 532. Lost in appellant's arguments is the fact that juvenile offenders are treated differently and more leniently than adult offenders. They do not receive prison term but, when found delinquent, receive traditional juvenile dispositions which are less severe than adult offenders.

The argument seems to be that adult and juvenile offenders must be treated differently in all respects and all juveniles, regardless of their circumstances, must be treated the same. Despite the abundance of case law to the contrary, Appellant also argues that the sex classifications are punitive and not remedial. On page s 12-13 of his brief, he writes:

> "The criminal aspects of juvenile delinquency have been highlighted with the advent of Senate Bill 10, which has drastically changed the penalties associated with delinquency adjudications for sexually oriented juvenile offenders in Ohio. S. B. 10 imposes on defendants and juvenile offenders burdens that have

historically been regarded as punishment and operate as affirmative disabilities and restraints."

Although amicus curae on page 42 of her brief has determined that all of these courts and this Court are "misguided" in believing that the requirements of PRQJOR registration are not punishment, every Ohio appellate district has held that R.C. Chapter 2950, as modified by Senate Bill 10, remains remedial in nature and is not punitive. See Sewell v. State, 1st Dist., 2009-Ohio-872; State v. King, 2nd Dist., 2008-Ohio-2594; In re Gant, 3rd Dist., 2008-Ohio-5198; State v. Graves, 4th Dist., 2008-Ohio-5763; In re Kristopher W., 5th Dist., 2008-Ohio-6075; Montgomery v. Leffler, 6th Dist., 2008-Ohio-6397; State v. Byers, 7th Dist., 2008-Ohio-5051; Gildersleeve v. State, 8th Dist., 2009-Ohio-2031; In re G.E.S., 9th Dist., 2008-Ohio-4076; State v.Gilfillan, 10th Dist., 2009-Ohio-1104; State v. Swank, 11th Dist., 2008-Ohio-6059; State v. Williams, 12th Dist., 2008-Ohio-6195. In addition, federal court that have addressed the issue have also reached the same result. See United States v. Markel (W.D. Ark, 2007), 2007 U.S. Dist. LEXIS 27102 and United States v. Templeton (W.D. Okla. 2007), 2007 U.S. Dist. LEXIS 8930.

This Court in State v. Ferguson, 120 Ohio St. 3d 7, concluded that added registration burdens on sex offenders were not intended to be punishment. " Similarly, we believe that the General Assembly's findings also support the conclusion that the more burdensome registration requirements and the collection and dissemination of additional information about the offender as part of the statute's community notification provisions were not born out of a desire to punish. Rather, we determine that the legislative history

supports a finding that it is a remedial, regulatory scheme designed to protect the public rather than to punish the offender - a result reached by many other courts. See, e.g. Arizona Dept. of Public Safety v. Maricopa Cty. Superior Ct. (1997), 190 Ariz. 490, 495, 949 P.2d 983 (describing a legislative history that "evinces a regulatory objective to forestall future incidents of sexual abuse by notifying those who may well encounter a potential recidivist, not to punish a past offense.")" Id. at 15. This Court also noted that the United States Supreme Court and state appellate courts have upheld permanent, lifetime classifications. "Central to these holdings is the understanding that the legislatures enacting such statutes found recidivism rates among sex offenders to be alarming and that an offender's recidivism may occur years after his release from confinement rather than soon after his initial reentry to society." Id. *at 14.*

This Court determined in State v. Wilson, 113 Ohio St.3d 382, that sex offender classification proceeding were civil in nature. "Because sex-offender-classification proceeding under R.C. 2950 are civil in nature, a trial court's determination in a sex-offender-classification hearing must be review under a civil manifest-weight-of-the evidence standard and may not be disturbed when the trial judge's findings are supported by some competent, credible evidence." Id. at 390.

There is no material difference in the nature of the dissemination of information between Ohio's notification scheme and Alaska's scheme. .In re C.P., 2010-Ohio-14 at paragraph 12. The United States Supreme Court examined Alaska's registration statutes and concluded that " Our system does not treat dissemination of truthful information in the furtherance of a legitimate government objective as punishment." Smith v. Doe,

(2003), 538 U.S. 84 at 98. The Court also considered whether the regulatory scheme has traditionally been regarded as a punishment. The Court noted that sex offender registration statutes are of recent origin, which suggests they did "not involve a traditional means of punishment." Id. at 97.

Appellant claims that disseminating sex offender information resembles public shaming.

> "This dissemination of information resembles shaming punishment, which are intended to inflict public disgrace." Appellant's brief at page 13.

The United States Supreme Court thinks otherwise::

> "Respondents contend that Alaska's compulsory registration and notification resemble these historical punishments, for they publicize the crime, associate it with his name, and, with the most serious offenders, do so for life.
>
> Any initial resemblance to early punishments is, however, misleading. Punishments such as whipping, pillory, and branding inflicted physical pain and staged a direct confrontation between the offender and the public. Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community. See Earle, supra at 20, 35-36, 51-52; Massaro, supra, at 1912-1924; Semmes, supra, 39-40; Blomberg & Lucken, supra, at 30-31. By contrast, the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of accurate information in furtherance of a legitimate governmental objective as punishment." Smith v. Doe. at 98.

This Court has determined "the sting of public censure does not convert a remedial statute into a punitive one." State v. Cook (1998), 83 Ohio St.3d 404, 423. "And although the scorn of the public may be the result of a sex offender's conviction and his ensuing registration and inclusion in the public database, we do not believe that

scorn is akin to colonials clearly punitive responses to similar offenses, which ranged from public shaming to branding and exile." State v. Ferguson, 120 Ohio St.3d 7, 16. "Whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the 'sting of punishment," " Montana Dept. of Revenue v. Kurth Ranch, 511 U.S. 767, 777. A statutory scheme that serves a regulatory purpose "is not punishment even though it may bear harshly upon one affected." Flemming v. Nestor (1950), 363 U.S. 603, 614.

Appellant also claims that the "automatic placement of an offender into a tier without determining whether he or she is likely to reoffend is also a form of retribution." (Appellant's brief on page 14.)

The United States Supreme Court again thinks otherwise:

> "To hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation. Hudson, 522 U.S. at 105; see also Ursery, 518 U.S. at 292; 89 Firearms, 465 U.S. at 364.
> The Court of Appeals was incorrect to conclude that the Act's registration obligations were retributive because 'the length of the reporting requirement appears to be measured by the extent of the wrongdoing, not by the extent of the risk posed.' 259 F.3d 990. The Act, it is true, differentiates between individuals convicted of aggravated or multiple offenses and those convicted of a single nonaggravated offense. Alaska Stat. Section 12.63.020(a)(1) (2000). The broad categories, however, and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective.
> The Act's rational connection to a nonpunitive purpose is a '[m]ost significant' factor in our determination that the statute's effects are not punitive." State v. Doe at 102.

The Supreme Court of the United States has already stated , "The state's determination to legislate with respect to convicted sex offenders as a class, rather than

require individual determination of their dangerousness, does not make the statute a punishment." Smith v. Doe (2003), 538 U.S. 84, 104. This is true whether the offender is a juvenile or an adult.

The added requirements of Senate Bill 10 over earlier versions does not turn a civil remedial registration system into a criminal sentence. The purpose of the bill is to provide information to the public and law enforcement so the public can take steps to protect itself. Under R.C. 2152.86, a juvenile sex offender must register must register with the sheriff office every three months. He or she must fill out a form and possibly have a picture taken. Most of the information will be the same.

Assuming arguendo that mandatory sex offender registration is punishment, it is not "cruel and unusual punishment." "The prohibition against cruel and unusual punishment is applicable only if the government imposition is in the nature of punishment, and if the punishment is 'grossly disproportionate to the severity of the crime.'" Ingraham v Wright (1977), 430 U.S. 651, 667.

This Court has held that in order for a sentence to constitute cruel and unusual punishment, the punishment must be "so disproportionate * * * as to shock the moral sense of the community." State v. Chaffin (1972), 30 Ohio St.2d 13, 17.Registering with the county sheriff every three months hardly constitutes cruel and unusual punishment. Any speculation about being ostracized from the community is just that, speculation.

Appellant and amicus curae speculate about the possible effect on a juvenile sex offender who is required to comply with R.C. 2152.86. However, dubious generalizations, speculations and hyperbole are not facts. Amicus curae admits that there

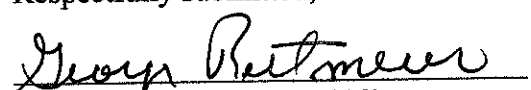
have been few studies done. "Despite their existence for over a decade, little work has been done to examine the effectiveness of registration and notification laws on sex offense rate." (Amicus curae brief at page 23) There are no reports that sex offender registration has resulted in mass ostracism and public shaming. There is no reliable evidence to support amicus curae's claim that "Without question, the detailed reporting requirements, limitations on movement, and the potential for disseminating private information makes it nearly impossible for a juvenile offender to be rehabilitated and reintegrated into society." (Amicus curae brief on page34) There is no reliable evidence to support that "The requirements may also prevent sex offenders from seeking treatment because their fear of public humiliation will force them to 'go underground and hide their tendencies from others, including their therapists." (Amicus curae's brief on page 41) There is no reliable evidence to support that "Public registration may actually increase recidivism". (Appellant's brief at page 30)

Since the requirements of R.C. 2152.86 are civil and not criminal, they do not violate the Eighth Amendment's restriction on cruel and unusual punishment. Even if considered punishment, they do not rise to the level of being cruel and unusual. Appellant and amicus curae have not shown beyond a reasonable doubt that the statute is unconstitutional.

CONCLUSION

Since the classification of registration-eligible youth as a registry qualified juvenile offender registrant does not violate the juvenile's right to due process, right to equal protection or the prohibition against cruel and unusual punishment as guaranteed by the United States constitution and the Ohio Constitution,, appellant's propositions of law should be overruled.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served upon:

Brooke M. Burns, Attorney for C.P., Office of the Ohio Public Defender, 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215;
Jeffrey M. Gamso, ACLU of Ohio Foundation, Inc., 1119 Adams Street, second floor, Toledo, Ohio 43604;
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:by regular U.S. mail on the 1th day of November, 2010.

George Reitmeier

George Reitmeier (0065820)
Athens County Assistant Prosecutor_

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