

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : CASE NO. 2015-1847
: :
PLAINTIFF- APPELLANT : :
: :
V. : ON APPEAL FROM THE CUYAHOGA
: COUNTY COURT OF APPEALS
: EIGHTH APPELLATE DISTRICT
DARLELL ORR, : :
: :
DEFENDANT-APPELLEE : C.A. CASE NO. 102460

**BRIEF OF AMICI CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER, ET AL.
IN SUPPORT OF APPELLEE DARLELL ORR**

Charlyn Bohland #0088080
Assistant State Public Defender
The Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
charlyn.bohland@opd.ohio.gov

Counsel for Amici Curiae

Marsha L. Levick PHV #1729-2016
Juvenile Law Center
1315 Walnut Street, Suite 400
Philadelphia, Pennsylvania 19107
(215) 625-0551
(215) 625-2808 – Fax
mlevick@jlc.org

Erika B. Cunliffe #0074480
Assistant Public Defender
Cuyahoga County Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113
(216) 443-7583
ecunliffe@cuyahogacounty.us
(Counsel of Record)

Counsel for Appellee, Darlell Orr

Daniel T. Van #0084614
Assistant County Prosecutor
Cuyahoga County Prosecutor
The Justice Center, 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800
(Counsel of Record)

Counsel for Appellant, State of Ohio

Nadia Natasha Seeratan #1749-2016
National Juvenile Defender Center
1350 Connecticut Avenue, N.W., Suite 304
Washington, D.C. 22209
(202) 452-0010 x 113
(202) 452-1205 – Fax
nseeratan@njdc.info

Carol Hamilton O'Brien #0026965
Douglas N. Dumolt #0080866
Assistant Prosecuting Attorney
Ohio Prosecuting Attorneys Association
140 North Sandusky Street, 3rd Floor
Delaware, Ohio 43015
(740) 833-2690

Table of Contents

Page No.

Table of Authorities.....ii

Statement of Interest of *Amici Curiae*1

Argument.....3

Proposition of Law of *Amici Curiae*:

The adult prosecution of a person who committed a crime as a juvenile but was apprehended after his 21st birthday is irreconcilable with Ohio law’s commitment to protecting young children in the justice system3

A. *Young children are particularly in need of protective services*4

B. *In Ohio, transfer and enhanced punishments are reserved for older youth*5

C. *The requirement to register as an adult sex offender further magnifies the harsh result of adult prosecution*.....8

 1. Uncontroverted research demonstrates that individuals who sexually offend as children are unlikely to recidivate8

 2. Registration causes reputational harm and loss of future employment and other opportunities13

Conclusion.....18

Certificate of Service.....19

Table of Authorities

	Page No.
Cases:	
<i>Board of Regents v. Roth</i> , 408 U.S. 564, 92 S. Ct. 2701, 33L.Ed.2d 548, (1972).....	14
<i>Children’s Home of Marion Cty. v. Fetter</i> , 90 Ohio St. 110, 106 N.E. 761 (1914).....	3
<i>Collins v. Wolfson</i> , 498 F.2d 1100, 1103 (5th Cir. 1974).....	14
<i>Doe v. Dept. of Correctional Safety and Protective Svcs.</i> , 62 A.3d 123, 140-41 (Md. Ct. App. 2013).....	15
<i>Graham v. Florida</i> , 560 U.S. 48, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010).....	8
<i>In re Caldwell</i> , 76 Ohio St.3d 156, 666 N.E.2d 1367 (1996).	3, 4
<i>In re C.P.</i> , 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729.....	14
<i>In re D.B.</i> , 129 Ohio St.3d 104, 2011-Ohio-2671, 950 N.E.2d 528.....	5
<i>In re Gault</i> , 387 U.S. 1, 87 S. Ct. 1428, 18 L.Ed.2d 527 (1967).....	8
<i>In re J.B.</i> , 107 A.3d 1, 16 (Pa. 2014).....	8
<i>In re Kirby</i> , 101 Ohio St.3d 312, 2004-Ohio-970, 804 N.E.2d 476.....	3
<i>In re M.D.</i> , 38 Ohio St.3d 149, 527 N.E.2d 286 (1988).....	4, 5
<i>In re Washington</i> , 75 Ohio St. 3d 390, 662 N.E.2d 346 (1996).....	4
<i>J.D.B. v. North Carolina</i> , 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011).....	4, 5, 8
<i>John L. v. Adams</i> , 969 F.2d 228 (6th Cir.1992).....	1
<i>Miller</i> , ___ U.S. ___, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012).....	8
<i>Roper v. Simmons</i> , 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).....	5, 6, 8
<i>State v. Cook</i> , 83 Ohio St.3d 404, 700 N.E.2d 570, 579 (1998).....	15
<i>State v. Letalien</i> , 985 A.2d 4, 23 n.14 (Me. 2009).....	15
<i>State v. Williams</i> , 88 Ohio St.3d 513, 728 N.E.2d 342 (2000).....	15
<i>State ex rel. Schwartz v. Haines</i> , 172 Ohio St. 572, 179 N.E.2d 46 (1962).....	4

Table of Authorities

Page No.

Statutes:

R.C. 2151.011 4

R.C. 2151.23 4

R.C. 2151.357 6

R.C. 2152.01 3, 4

R.C. 2152.02 6

R.C. 2152.10 5, 6

R.C. 2152.11 5, 6

R.C. 2152.12 5, 6

R.C. 2152.14 6

R.C. 2152.16 7

R.C. 2152.17 7

R.C. 2152.18 7

R.C. 2152.19 7

R.C. 2152.83 7

R.C. 2907.02 5

R.C. 2929.14 7

R.C. 2950.01 7

R.C. 2950.02 8

R.C. 2950.04 7

R.C. 2950.07 7

Table of Authorities

	Page No.
Other Authorities:	
<i>A Multi-State Recidivism Study Using Static-99R & Static-2002 Risk Scores & Tier Guidelines from the Adam Walsh Act</i> , National Institute of Just. 24, 32 (2008).....	9, 10
David Van Beinna, <i>Burn thy Neighbor</i> , Time, July 26, 1993.....	7
Donna Vandiver, <i>A Prospective Analysis of Juvenile Male Sex Offenders: Characteristics and Recidivism Rates as Adults</i> . 21 J. Interpersonal Violence, 673-688 (2006).....	10
Elizabeth Letourneau & Michael Miner, <i>Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo</i> , 17 Sexual Abuse: J. Res. & Treatment 293, 313, 331 (2005).....	12
E.M. Driessen, <i>Characteristics of Youth Referred for Sexual Offenses</i>	9
<i>Federal Standards for Community Registration of Juvenile Sex Offenders: An Evaluation of Risk Prediction & Future Implications</i> , 17 J. Psychol. Pub. Pol’y & Law 3, 451, 457-58 (2011).....	11
Franklin Zimring, <i>An American Tragedy: Legal Responses to Adolescent Sexual Offending</i> , The University of Chicago Press (2004).....	13
Franklin Zimring, et al., <i>Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort</i> , 26 Justice Q., 59-76 (2009).....	9
Franklin Zimring, et al., <i>Sexual delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?</i> , 6(3) Criminology & Pub. Pol’y 507 (2007).....	9, 12, 13
Franklin Zimring, <i>The Youth Violence Epidemic: Myth or Reality?</i> , 33 Wake Forest L.Rev. 727, 728 (1998).....	6
Harry J. Holzer et. al., <i>How Willing Are Employers to Hire Ex-Offenders?</i> , Focus vol. 23, no. 2 (2002).....	16
Human Rights Watch, <i>Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US</i> , May 2013.....	10, 16, 17
Jeffrey C. Sandler & Naomi J. Freeman, <i>Female Sex Offender Recidivism</i> , 21 Sexual Abuse 457 (2009).....	11

Table of Authorities

Page No.

Other Authorities:

Jill S. Levenson et al., *Grand Challenges: Social Justice and the Need for Evidence-based Sex Offender Registry Reform*, 18 J. Sociology & Social Welfare (Vol. 2) 3 (June 2016)11, 15

Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 Am. J. Crim. Just. 54 (2009)..... 16

Judith Becker & Scotia Hicks, *Juvenile Sexual Offenders: Characteristics, Interventions, & Policy Issues*, 989 Ann. NY Acad. Sci. 397, 399-400, 406 (2003)..... 11

Kristen M. Zgoba et al., *A Multi-State Recidivism Study Using Static-99R and Static-2002 Risk Scores and Tier Guidelines from the Adam Walsh Act*, National Institute of Justice, at 2-3, 20, 25 (2012)11

Michael 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. Psychol., Pub. Pol’y, & L. 89-114 (2008)9

Michael Caldwell, *Sexual Offense Adjudication and Recidivism Among Juvenile Offenders*, 19 Sexual Abuse: J. Res. and Treatment, 107-113 (2007)9, 12, 13

Michael Caldwell, et al., *Study Characteristics & Recidivism Base Rates in Juvenile Sex Offender Recidivism*, 54 Int’l J. Offender Therapy & Comp. Criminology 197, 198 (2010)9, 10, 11

Michael Caldwell, *What We Do Not Know About Juvenile Sexual Re-offense Risk*, 7 Child Maltreatment 291-302 (2002)..... 11, 13

Michael Hagan, et al., *Eight-year Comparative Analyses of Adolescent Rapists, Adolescent Child Molesters, Other Adolescent Delinquents, and the General Population*, 43(3) Int’l J. Offender Therapy & Comp. Criminology 314 (2011)..... 9

Michael P. Lasher & Robert J. McGrath, *The Impact of Community Notification of Sex Offender Reintegration: A Quantitative Review of the Research Literature*, 56 Int. J. of Offender Therapy & Comp. Crim. 6, 19 (2012)15, 16, 17

Michelle Ford & Jean Linney, *Comparative Analysis of Juvenile Sex Offenders, Violent Nonsexual Offenders, and Status Offenders*, 10 J. Interpersonal Violence 56-70 (1995).....12

Table of Authorities

	Page No.
Other Authorities:	
Michelle Natividad Rodriguez and Maurice Emsellem, <i>65 Million "Need Not Apply": The Case for Reforming Criminal Background Checks for Employment</i> , The Nat'l Employment Law Center at 1 (March 2011)	16
Molly J. Walker Wilson, <i>The Expansion of Criminal Registries and the Illusion of Control</i> , 73 La. L. Rev. 509, 519 (2013)	11
R. Karl Hanson et al., <i>High Risk Offenders May Not Be High Risk Forever</i> , 29 J. Of Interpersonal Violence 2792, 2796 (2014)	11, 12
R. Karl Hanson and Monique T. Bussiere, <i>Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies</i> , 66 J. of Consulting & Clin. Psych. 348-62 (1998)	10
Richard Tewksbury & Matthew Lees, <i>Perceptions of Sex Offender Registration</i> , 26 Soc. Spectrum 309, 319 (2006)	15
<i>The Impact of Specialized Sex Offender Legislation on Community Reentry</i> , 20 Sex Abuse 188, 194 (2008)	16
U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, <i>Jurisdictional Boundaries</i>	4
Wayne A. Logan, <i>Knowledge as Power: Criminal Registration and Community Notification Laws in America</i> 138, 138 (Stanford Univ. Press 2009)	15
24 C.F.R. 960.204	17, 18
42 U.S.C. § 13663	17, 18

Statement of Interest of *Amici Curiae*

The **Office of the Ohio Public Defender** is a state agency, designed to represent adult and juvenile defendants, and to coordinate defense efforts throughout Ohio. The Ohio Public Defender, through its Juvenile Department, provides juveniles who have been committed to the Ohio Department of Youth Services, their constitutional right of access to the courts. *See generally John L. v. Adams*, 969 F.2d 228 (6th Cir.1992). Like this Court, the Ohio Public Defender is interested in the effect of the law that the instant case will have on those parties who are, or may someday be involved in, similar litigation. Accordingly, the Ohio Public Defender 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 Ohio Public Defender supports the fair, just, and correct interpretation and application of Ohio's juvenile rules and laws.

Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the U.S. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Recognizing the critical developmental differences between youth and adults, Juvenile Law Center works to ensure that the child welfare, juvenile justice, and other public systems provide vulnerable children with the protection and services they need to become healthy and productive adults. Juvenile Law Center advocates for the protection of children's due process rights at all stages of juvenile court proceedings, from arrest through disposition and from post-disposition through appeal. Juvenile Law Center works to align juvenile justice policy and practice, including state laws on transfer with modern understandings of adolescent development and time-honored constitutional

principles of fundamental fairness. Accordingly, Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the U.S. Supreme Court, in cases addressing the rights and interests of children.

The **National Juvenile Defender Center** was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice. The National Juvenile Defender Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. The National Juvenile Defender Center also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

Statement of the Case and Facts

Amici curiae adopts the Statement of the Case and Facts set forth in the Appellee's Merit Brief.

Argument

Proposition of Law of *Amici Curiae*: The adult prosecution of a person who committed a crime as a juvenile but was apprehended after his 21st birthday is irreconcilable with Ohio law's commitment to protecting young children in the justice system.

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 Cty. v. Fetter*, 90 Ohio St. 110, 127, 106 N.E. 761 (1914). And, this Court explained Ohio's juvenile court's rehabilitative purpose as follows:

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 in the juvenile justice system. *Id.*; *In re Kirby*, 101 Ohio St.3d 312, 2004-Ohio-970, 804 N.E.2d 476; *see also* R.C. 2152.01(A)-(B).

A. Young children are particularly in need of protective services.

Juvenile courts have exclusive jurisdiction over children who are alleged to be delinquent. R.C. 2151.23(A)(1); *see also State ex rel. Schwartz v. Haines*, 172 Ohio St. 572, 573, 179 N.E.2d 46 (1962). Like most states, Ohio does not specify a lower age limit for the juvenile court's jurisdiction. *See* U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention, *Jurisdictional Boundaries*, http://www.ojjdp.gov/ojstatbb/structure_process/qa04102.asp?qaDate=2012 (accessed July 13, 2016). That means very young children can be adjudicated delinquent of felony-level offenses. *See* R.C. 2151.011(B)(6); 2152.01(A); *In re Washington*, 75 Ohio St. 3d 390, 394, 662 N.E.2d 346 (1996) (holding that an eight-year-old child can be adjudicated delinquent of rape).

Even though young children can be adjudicated delinquent, the juvenile court's focus remains the rehabilitation and treatment of the child; therefore, affirming the juvenile court's central purpose. *See Caldwell* at 157; *see also In re M.D.*, 38 Ohio St.3d 149, 153, 527 N.E.2d 286 (1988) (explaining the local intake policy as "[i]n situations where there is an allegation of sexual conduct involving no force and both the alleged offender and the victim are under 13 years of age, charges are not to be taken under the above statute[;and a]s an alternative, the intake mediator may consider unruly charges on one or both children"). Although the demarcation line for juvenile court has generally been set as under the age of 18, courts have noted the particular vulnerabilities of young children in the juvenile justice system. In 2011, the U.S. Supreme Court held that a child's age informs the *Miranda* custody analysis because "children are 'most susceptible'" to outside influences and pressures. *J.D.B. v. North Carolina*, 564 U.S. 261, 265, 275, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011) (recognizing that a 13-year-old can be in custody when interrogated in school). The Court

explained that a child's age "generates commonsense conclusions about behavior and perception" that "are self-evident to anyone who was a child once himself, including any police officer or judge." *Id.* at 272. "They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult." *Id.* at 280.

That same year, this Court recognized that charging and adjudicating a 12-year-old child with an offense that was designed to protect him does not make sense. *In re D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671, 950 N.E.2d 528, ¶ 18 ("[R.C. 2907.02(A)(1)(b)] furthers the state's interest in protecting young children."). This Court held that R.C. 2907.02(A)(1)(b) violates due process and equal protection, and "is unconstitutional as applied to a child under the age of 13 who engages in sexual conduct with another child under 13." *Id.* at ¶ 32-33.

This holding was consistent with its earlier decision in 1988, where this Court reversed a 12-year-old child's rape adjudication holding that an adjudication stemming from "playing doctor" with other young children violated the child's due process rights. *M.D.* at 150. This Court explained that "[t]he best interests of the child and the welfare and protection of the community are paramount considerations in every juvenile proceeding in this state." *Id.* at 153. The best interests of the child could have been served by diverting the case from the juvenile court system. *Id.* at 154. These cases highlight the special care provided for and treatment of young children in the juvenile justice system.

B. In Ohio, transfer and enhanced punishments are reserved for older youth.

Ohio law provides for transfer of jurisdiction for older children who commit certain offenses. R.C. 2152.10-2152.12. Despite a trend in charging children as adults and imposing increased punishments, young children are treated differently in Ohio. *See 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”); Franklin Zimring, *The Youth Violence Epidemic: Myth or Reality?*, 33 Wake Forest L.Rev. 727, 728 (1998) (analyzing juvenile crime statistics and concluding that “there never was a general pattern of increasing adolescent violence in the 1980s and 1990s”).

In Ohio, 13-year-old children are not subject to transfer to criminal court for any offense. R.C. 2152.10(A)(1)(b); 2152.10(B); 2152.12(A)(1)(a)(i)-(ii); 2152.12(B)(1). Children under 14 years of age are not subject to mandatory serious youthful offender (SYO) blended sentences. R.C. 2152.11. And, in its discretion, if a juvenile court determines that a 10-, 11-, 12-, or 13-year-old child should be subject to an SYO blended sentence, the adult portion of the sentence may not be invoked until the child turns 14 years old. R.C. 2152.14. Each of these examples confirms that Ohio treats young children, particularly 13-year-old children, differently.

Prosecuting Mr. Orr for an offense that he was alleged to have committed when he was 13 years old, does nothing to further the rehabilitative purpose of the juvenile court system, and it does not comport with Ohio’s benevolent treatment of young children. See R.C. 2152.02(C)(3). The State asserts that this case is really limited to procedure and merely changes the jurisdiction. (See Merit Brief of Appellant at 10-11). But, in Mr. Orr’s case, it is much more than just a change of venue. As a 13-year-old child, Mr. Orr would be subject to a rape adjudication, which does not carry the same collateral consequences or civil disabilities as an adult conviction of rape. See R.C. 2151.357(H). Additionally, a 13-year-old child would be subject to a range of dispositional options, including a commitment to DYS with juvenile-specific treatment and educational opportunities, and a perhaps a

discretionary SYO blended sentence, limited to the child's 21st birthday. *See* R.C. 2152.16-2152.19. However, an adult is subject to a lengthy prison term a post-release control term, and registration as a sex offender without the benefit of rehabilitation and treatment. *See* R.C. 2929.14.

C. The requirement to register as an adult sex offender further magnifies the harsh result of adult prosecution.

In Ohio, a 13-year-old child is not subject to juvenile sex offender registration. R.C. 2152.83(A)(1)(b); 2152.83(B)(1)(b). Mr. Orr's *ex post facto* argument is further substantiated in that the belated prosecution of Mr. Orr would result in an increased punishment, i.e., registration as a sex offender, a punishment that would not have been applicable to him if prosecuted at the time of his offense. (*See* Brief of Appellee at 6-14).

Under Ohio law, an adult convicted of the rape of a 14-year-old must be registered as a tier III sex offender/child victim offender. R.C. 2950.01(G)(1); 2950.04(A); 2950.07(B). The registration lasts the duration of the person's life and requires an in-person registration with the county sheriff's office every 90 days. *Id.* Tier III sex offender registrants are also subject to community notification, which means the county sheriff will provide notice to a neighborhood within 1250 feet of the sex offender's residential address. The county sheriff will also provide notice to schools, registered day-care providers, and law enforcement agencies within the 1250-foot radius.

There is little dispute about what the term "sex offender" means, that it carries demonstrably false connotations, or that it causes irreparable harm to the reputations of those so labeled. David Van Beinna, *Burn thy Neighbor*, Time, July 26, 1993 ("Sex offenders are the 'irredeemable monsters' in modern society."). Indeed, the Pennsylvania Supreme

Court has recognized that the “common view of registered sexual offenders is that they are particularly dangerous and more likely to reoffend than other criminals,” *In re J.B.*, 107 A.3d 1, 16 (Pa. 2014), a fact inconsistent with research. The presumption that registered sex offenders are dangerous is inherent in Ohio’s law because the “manifest purpose” of the Act is to protect children from harm by requiring past offenders to register with the state and the underlying premise of the Act is that registered sex offenders are at high risk of reoffending. “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). However, the negative message communicated about registered sex offenders is false because research confirms that most individuals who act out sexually as youth are unlikely to recidivate.

1. *Uncontroverted research demonstrates that individuals who sexually offend as children are unlikely to recidivate.*

The U.S. Supreme Court has issued several decisions in the last ten years that are rooted in the science of adolescent development and diminished capacity. *See Miller*, ___ U.S. ___, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012); *J.D.B. v. North Carolina*, 564 U.S. 261, 131 S. Ct. 2394, 180 L.Ed.2d 310 (2011); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L.Ed.2d 825 (2010); *Roper v. Simons*, 543 U.S. 551, 125 S. Ct. 1183, 161 L.Ed.2d 1 (2005); *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L.Ed.2d 527 (1967). The research on adolescent sex offending fully comports with the high Court’s precedent. Children who commit sex offenses are unlikely to reoffend and have a greater capacity to mature and change.

Indeed, research examining the recidivism rates of youth who sexually offend are remarkably consistent across studies, across time, and across populations: sexual recidivism rates among youth are exceptionally low. Michael Caldwell, et al., *Study Characteristics & Recidivism Base Rates in Juvenile Sex Offender Recidivism*, 54 *Int'l J. Offender Therapy & Comp. Criminology* 197, 198 (2010) [hereinafter Caldwell, *Recidivism Study 2010*] (citing to recidivism studies dating back to 1994. See also Michael Caldwell, *Sexual Offense Adjudication and Recidivism Among Juvenile Offenders*, 19 *Sexual Abuse: J. Res. and Treatment*, 107-113 (2007), available at http://www.njjn.org/uploads/digital-library/resource_557.pdf; Michael 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. Psychol., Pub. Pol'y, & L.* 89-114 (2008) available at <http://www.ncjfcj.org/sites/default/files/examinationofthesexoffender.pdf>; E.M. Driessen, *Characteristics of Youth Referred for Sexual Offenses*. Unpublished doctoral dissertation, University of Wisconsin-Milwaukee (2002); Michael Hagan, et al., *Eight-year Comparative Analyses of Adolescent Rapists, Adolescent Child Molesters, Other Adolescent Delinquents, and the General Population*, 43(3) *Int'l J. Offender Therapy & Comp. Criminology* 314 (2011); Franklin Zimring, et al., *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort*, 26 *Justice Q.*, 59-76 (2009), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1590&context=facpubs>; Franklin Zimring, et al., *Sexual delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?*, 6(3) *Criminology & Pub. Pol'y* 507 (2007) [hereinafter Zimring, *Early Sex Offending and Later Sex Offending*]. As a group, juvenile sex offenders pose a relatively low risk of re-offending sexually, particularly as they age into young adulthood. *A Multi-State Recidivism Study Using Static-99R & Static-2002 Risk Scores &*

Tier Guidelines from the Adam Walsh Act, National Institute of Just. 24, 32 (2008), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/240099.pdf>.

A meta-study of over 63 studies and over 11,200 children “found an average sexual recidivism rate of 7.09% over an average 5-year follow-up.” Caldwell, *Recidivism Study 2010* at 197-98. When rare sexual recidivism events do occur, it is nearly always within the first few years following the original adjudication. *Id.* at 205. Even youth initially evaluated as ‘high risk’ are unlikely to reoffend, particularly if they remain free of offending within the relatively brief period of time following initial adjudication. Donna Vandiver, *A Prospective Analysis of Juvenile Male Sex Offenders: Characteristics and Recidivism Rates as Adults*. 21 *J. Interpersonal Violence*, 673-688 (2006). The data in Illinois is consistent with the national findings. The Illinois Juvenile Justice Commission Report found that children who sexually offend seldom repeat their harmful conduct (93% sexual nonrecidivism in studies of 11,219 youth) and that appropriate treatment significantly reduces sexual reoffending even further. IJJC Report at 10, 23, 28-36. These rates are compared with a 13% recidivism rate for adults who commit sexual offenses. Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US*, May 2013, at 30 [hereinafter *Raised on the Registry*] (citing R. Karl Hanson and Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 *J. of Consulting & Clin. Psych.* 348-62 (1998)).

The recidivism rate is lower for children than for adults because children are different.¹ Multiple studies have confirmed that children sexually offend for different

¹ Importantly, the rates of adult reoffending are also far lower than public perceptions about adult ex offender recidivism. The public estimates that sex offenders re-offend

reasons than adults. It is rare for juvenile sexual offenders' motivations to be as sexual or predatory in nature as that of adults. Children tend to offend based on impulsivity and sexual curiosity, among other reasons. Michael Caldwell, *What We Do Not Know About Juvenile Sexual Re-offense Risk*, 7 *Child Maltreatment* 291-302 (2002); Judith Becker & Scotia Hicks, *Juvenile Sexual Offenders: Characteristics, Interventions, & Policy Issues*, 989 *Ann. NY Acad. Sci.* 397, 399-400, 406 (2003); Caldwell, *Recidivism Study 2010* at 197-98. 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. Caldwell, *Recidivism Study 2010* at 205.

Additionally, sexual recidivism cannot be predicted by offense. The extant research has not identified any stable, offense-based risk factors that reliably predict sexual recidivism in adolescents. Ashley Batastini et al. *Federal Standards for Community Registration of Juvenile Sex Offenders: An Evaluation of Risk Prediction & Future Implications*, 17 *J. Psychol. Pub. Pol'y & Law* 3, 451, 457-58 (2011) (describing the heterogeneous behaviors of child sex offenders). In a study that compared the sexual recidivism rates of children assigned to

sexually at higher than 50% or even 75%. Molly J. Walker Wilson, *The Expansion of Criminal Registries and the Illusion of Control*, 73 *La. L. Rev.* 509, 519 (2013). A study of nearly 8000 sex offenders found an 11.9% recidivism rate across all offenders over an 8 year period. R. Karl Hanson et al., *High Risk Offenders May Not Be High Risk Forever*, 29 *J. Of Interpersonal Violence* 2792, 2796 (2014); see also Jill S. Levenson et al., *Grand Challenges: Social Justice and the Need for Evidence-based Sex Offender Registry Reform*, 18 *J. Sociology & Social Welfare* (Vol. 2) 3 (June 2016) ("sex offense recidivism rates [] averaging from 5% to 15% depending on the study."). See also Kristen M. Zgoba et al., *A Multi-State Recidivism Study Using Static-99R and Static-2002 Risk Scores and Tier Guidelines from the Adam Walsh Act*, National Institute of Justice, at 2-3, 20, 25 (2012) (10.3% over ten years). For female offenders, the rates of re-arrest are only 1% to 3% over five years. Jeffrey C. Sandler & Naomi J. Freeman, *Female Sex Offender Recidivism*, 21 *Sexual Abuse* 457 (2009).

three groups according to the severity of their offense, there was no significant difference in the recidivism rates of juvenile offenders in the three groups. Zimring, *Early Sex Offending and Later Sex Offending* at 507-34; See also Michael Caldwell, *Sexual Offense Adjudication and Recidivism Among Juvenile Offenders*, 19 *Sexual Abuse: J. Res. and Treatment*, 107-113 (2007), available at http://www.njjn.org/uploads/digital-library/resource_557.pdf (reporting no significant difference in the rate of adult sexual offense charges between 249 juvenile sex offenders and 1,780 non-sex-offending delinquents over a 5-year follow-up). Research has also shown that if a registrant does not reoffend sexually within 15 years of their release, they almost never do thereafter. Hanson, *High Risk Offenders*, *supra* note 1, at 2802-06 (less than 4%). This includes even high-risk offenders. *Id.* After 15 years of offense-free supervision, recidivism rates correspond to the risk that an offender with no history of sexual crimes will commit a sex crime in the future (1% to 3%). *Id.*

Moreover, both sexually and non-sexually delinquent youth are far more likely to re-offend with nonsexual crimes than with sexual crimes. See also Elizabeth Letourneau & Michael Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, 17 *Sexual Abuse: J. Res. & Treatment* 293, 313, 331 (2005) [hereinafter Letourneau, *Against the Status Quo*]. The belief that “sex offenders are a very unique type of criminal” is not supported with respect to juvenile offenders. *Id.* at 296 and 299 (citing Michelle Ford & Jean Linney, *Comparative Analysis of Juvenile Sex Offenders, Violent Nonsexual Offenders, and Status Offenders*, 10 *J. Interpersonal Violence* 56-70 (1995)).

Research studies demonstrate that juvenile sexual offenders are no different from non-sexual juvenile offenders; sexual offenses among juveniles are a result of delinquency in general not specifically sexual in origin. Letourneau, *Against the Status Quo*, at 296. Many

demographic studies find no differences in personality and psychosocial circumstances between juvenile sex offenders and non-sex offenders. Furthermore, youth patterns of re-offending are similar with non-sexual offenses predominating. *Id.* at 297 (citing Michael Caldwell, *What We Do Not Know About Juvenile Sexual Re-offense Risk*, 7 *Child Maltreatment* 291-302 (2002); Franklin Zimring, *An American Tragedy: Legal Responses to Adolescent Sexual Offending*, The University of Chicago Press (2004)). Research studies have found no statistically significant difference between the sexual recidivism rates of children who committed sexual offenses and children who committed nonsexual violent offenses. See Zimring, *Early Sex Offending and Late Sex Offending* at 534; Caldwell, *Recidivism Study of 2007* (finding “the risk of sexual recidivism was statistically equal for youth treated in a residential facility for either sexual or nonsexual delinquent offenses”).

This research is consistent with Mr. Orr’s criminal history. Although he is currently incarcerated for a non-sexual criminal offense, he has not had any subsequent sexual offense adjudications or convictions and has not been linked by DNA to any other sex crimes. Mr. Orr is not a risk to the community and therefore should not be mandated to register as an adult sex offender. All of the information in his case demonstrates that he is not a risk. He has no sex offender history – this was his first and only offense. The factors undeniably point to a finding that Mr. Orr is not a risk to the community – and therefore, the message about his dangerousness communicated by registration is provably false.

2. *Registration causes reputational harm and loss of future employment and other opportunities.*

Registration and notification can communicate false messages about individuals that harm their reputations. This harm to reputation has serious practical consequences: the

common “sex offender” myths and assumptions may directly affect a person’s employment, education and housing, and may permanently mar his emotional well-being.

This Court has described the enduring effect of registration on a child’s reputation:

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. Before a juvenile can even begin his adult life, before he has a chance to live on his own, the world will know of his offense. He 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. 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. A youth released at 18 would have to wait until age 43 at the earliest to gain a fresh start. While not a harsh penalty to a career criminal used to serving time in a penitentiary, a lifetime or even 25-year requirement of community notification means everything to a juvenile. It will define his adult life before it has a chance to truly begin.

In re C.P., 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, 741-42. The government’s communications or “labeling of an individual with a badge of disgrace constitutes” harm to a person’s reputation and is a deprivation of liberty. *Collins v. Wolfson*, 498 F.2d 1100, 1103 (5th Cir. 1974) citing *Board of Regents v. Roth*, 408 U.S. 564, 577-578, 92 S. Ct. 2701, 33L.Ed.2d 548, (1972). The 5th Circuit in *Collins* explains that “charging an individual with dishonesty or immorality . . . or publicly branding him in essence as anti-socially enslaved to spirits . . . so infringes liberty interests of the individual as to require significant procedural protections.” 498 F.2d at 1103 (internal citations omitted).

This Court has previously reasoned that “an allegation that government dissemination of information or government defamation has caused damage to reputation,

even with all the attendant emotional anguish and social stigma, does not in itself state a cause of action for violation of a constitutional right. * * * ' Further, 'the harsh consequences [of] classification and community notification * * * come not as a direct result of the sexual offender law, but instead as a direct societal consequence of [the offender's] past actions.' "

State v. Williams, 88 Ohio St.3d 513, 728 N.E.2d 342, 357 (2000) citing *State v. Cook*, 83 Ohio St.3d 404, 700 N.E.2d 570, 579 (1998).

Although Mr. Orr's conviction as an adult will be a matter of public record, labeling him as a sex offender completely transforms the perception of his record. "To conclude that registries only contain 'accurate information' is to thus misstate the government's action; a wholly stigmatizing and unwelcome public status is being communicated, not mere neutral government-held information." *State v. Letalien*, 985 A.2d 4, 23 n.14 (Me. 2009) (quoting Wayne A. Logan, *Knowledge as Power: Criminal Registration and Community Notification Laws in America* 138, 138 (Stanford Univ. Press 2009); *Doe v. Dept. of Correctional Safety and Protective Svcs.*, 62 A.3d 123, 140-41 (Md. Ct. App. 2013) ("dissemination of information about registrants... is the equivalent of shaming them"). Registration brands a person as dangerous – a likely inaccurate scarlet letter that the individual has no mechanism to dispute.

Although Mr. Orr is incarcerated and some of the barriers to employment, housing, and education caused by registration are currently inapplicable, we nonetheless present them to emphasize the way in which registration of any individual can further jeopardize public safety and successful reintegration. See Levenson, *Grand Challenges*, *supra* note 1, at 11-14; Richard Tewksbury & Matthew Lees, *Perceptions of Sex Offender Registration*, 26 Soc. Spectrum 309, 319 (2006); Michael P. Lasher & Robert J. McGrath, *The Impact of Community Notification of Sex Offender Reintegration: A Quantitative Review of the Research Literature*, 56

Int. J. of Offender Therapy & Comp. Crim. 6, 19 (2012) (“almost a third (30%) [of registrants] reported job loss,” and 20% housing loss due to community notification); *The Impact of Specialized Sex Offender Legislation on Community Reentry*, 20 Sex Abuse 188, 194 (2008) (finding similar numbers in New Jersey); Farkas, *supra* at 90; see also Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of Registered Sex Offenders*, 34 Am. J. Crim. Just. 54 (2009).

The most commonly reported consequence of sex offender registration is the inability to find employment. *Raised on the Registry* at 50. Nearly 90% of employers conduct background checks. Michelle Natividad Rodriguez and Maurice Emsellem, *65 Million “Need Not Apply”: The Case for Reforming Criminal Background Checks for Employment*, The Nat’l Employment Law Center at 1 (March 2011). These checks reveal registration information. In recent studies, over 40% of employers reported that they would “definitely” or “probably” not hire an applicant with a criminal record for a job not requiring a college degree, Harry J. Holzer et. al., *How Willing Are Employers to Hire Ex-Offenders?*, Focus vol. 23, no. 2 (2002) available online at <http://www.irp.wisc.edu/publications/focus/pdfs/foc232h.pdf>, and researchers have found that employers are more than 50% less likely to make a callback or job offer to applicants with a criminal record; this effect is stronger for minority applicants than white applicants. Rodriguez, *65 Million “Need Not Apply”* at 1. For individuals with the added classification of “sex offender”, these negative consequences are likely amplified. In addition, sex offenders are categorically barred from working in certain professions:

Certain institutions, including public schools, child care centers, and nursing homes, are legally required to investigate and obtain criminal histories of all applicants for professional or certified licensed positions. State laws prohibit individuals on the sex offender registry from applying for licenses and certifications which require a criminal background check,

thus precluding registrants from becoming nurses, doctors, lawyers, and emergency medical technicians such as paramedics. Some states implement blanket laws to prevent registered sex offenders from obtaining certain types of employment or volunteer positions. In addition to the obvious prohibitions, such as on working at a school or day care center, some states have sought to limit employment in other areas, such as operating an ice cream truck or a school bus; working at a carnival, circus, street fair, amusement park, or long-term care facility; or serving as an athletic coach, manager, or trainer.

Raised on the Registry at 50.

False assumptions about sex offender recidivism also harm a person's ability to obtain stable housing and schooling. Significantly, Tier III registrants are categorically ineligible for public housing, often destabilizing a registrant's entire family. 42 U.S.C. § 13663(a); 24 C.F.R. 960.204. As to basic safety, "16% [of registrants] reported that a family member or cohabitant was harassed, assaulted, or had 'property damaged' and 44% reported being threatened or harassed by neighbors." Lasher & McGrath, *Impact of Notification, supra*, at 19. Nearly half of registered children indicated they had experienced at least one period of homelessness as a result of the restrictions caused by registration. See *Raised on the Registry* at 65. Landlords may refuse to rent to a registered individual after that landlord has been contacted by the sheriff to verify an address.

Registration leads to depression, hopelessness, and fear for one's safety. *Raised on the Registry* at 51. In extreme cases, sex offender registration has led individuals to suicide. *Id.* Many registrants experience vigilante activities such as property damage, harassment, and even physical assault. *Id.* at 56-57.

Conclusion

Prosecuting adults for crimes committed as young children does nothing to further the juvenile court's fundamental purpose, and does not coincide with Ohio's treatment of

young children. For the foregoing reasons, *Amici Curiae* respectfully requests that this Court grant Mr. Orr the relief requested.

Respectfully submitted,

/s/: Charlyn Bohland

Charlyn Bohland #0088080
Assistant State Public Defender
The Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
charlyn.bohland@opd.ohio.gov

Counsel for *Amici Curiae*

/s/: Nadia Natsha Seeratan

Nadia Natasha Seeratan #1749-2016
National Juvenile Defender Center
1350 Connecticut Avenue, N.W., Suite 304
Washington, D.C. 22209
(202) 452-0010 x 113
(202) 452-1205 – Fax
nseeratan@njdc.info

/s/: Marsha L. Levick

Marsha L. Levick PHV #1729-2016
Juvenile Law Center
1315 Walnut Street, Suite 400
Philadelphia, Pennsylvania 19107
(215) 625-0551
(215) 625-2808 – Fax
mlevick@jlc.org

Certificate of Service

I hereby certify that a copy of the above and foregoing has been filed with the Clerk of Court on the 20th day of July, 2016, and served upon the following parties Ericka B. Cunliffe, Assistant Cuyahoga County Public Defender, 310 Lakeside Avenue, Suite 200 Cleveland, Ohio 44113, Daniel T. Van, Assistant County Prosecutor 1200 Ontario Street, Cleveland, Ohio 44113, Carol Hamilton O'Brien and Douglas N. Dumolt ,Assistant Prosecuting Attorneys, Ohio Prosecuting Attorneys Association 140 North Sandusky Street 3rd Floor Delaware, Ohio 43015.

Respectfully submitted,

/s/: Charlyn Bohland

Charlyn Bohland #0088080
Assistant State Public Defender
The Office of the Ohio Public Defender
250 East Broad Street, Suite 1400
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
charlyn.bohland@opd.ohio.gov

Counsel for Amici Curiae

/s/: Nadia Natsha Seeratan

Nadia Natasha Seeratan #1749-2016
National Juvenile Defender Center
1350 Connecticut Avenue, N.W., Suite 304
Washington, D.C. 22209
(202) 452-0010 x 113
(202) 452-1205 – Fax
nseeratan@njdc.info

/s/: Marsha L. Levick

Marsha L. Levick PHV #1729-2016
Juvenile Law Center
1315 Walnut Street, Suite 400
Philadelphia, Pennsylvania 19107
(215) 625-0551
(215) 625-2808 – Fax
mlevick@jlc.org