IN THE COMMONWEALTH COURT OF PENNSYLVANIA

APPELLATE DOCKET NO. 1857 C.D. 2006

K.W.,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE,

Respondent

Appeal from the Adjudication of the Pennsylvania Department of Public Welfare
Entered June 28, 2006 in No. 21-05-624

BRIEF OF JUVENILE LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Laval S. Miller-Wilson, Esq. (Attorney No. 77585)
Marsha L. Levick, Esq. (Attorney No. 22535)
JUVENILE LAW CENTER
1315 Walnut Street, Suite 400
Philadelphia PA 19107
(215) 625-0551 (office)
(215) 625-2808 (facsimile)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

BOOKS, ARTICLES

H. Gretton *et al*., *Psychopathy and Recidivism in Adolescent Sex Offenders*, 28 CRIMINAL JUSTICE AND BEHAVIOR 427 (2001) 10

K. Hanson *et al*, *Report of Collaborative Data Project on Treatment for Sex Offenders*, 14 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 169 (2002) 11

J. Howell, PREVENTING AND REDUCING JUVENILE DELINQUENCY: A COMPREHENSIVE FRAMEWORK (2003) 7

E. Letournea and M. Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, 17 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 293 (2005) 8, 9, 10, 11

L. Steinberg and E. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009 (2003) 5

F. Zimring, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING, 26-32 (2004) 6, 7, 8, 11

INTEREST OF AMICUS CURIAE

Juvenile Law Center (JLC) is the oldest multi-issue public interest law firm for children in the United States, founded in 1975 to advance the rights and well being of children in jeopardy. JLC pays particular attention to the needs of children who come within the purview of public agencies—for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. JLC works to ensure children are treated fairly by systems that are supposed to help them, and that children receive the treatment and services that these systems are supposed to provide. We believe the juvenile justice and child welfare systems should be used only when necessary, and work to ensure that the children and families served by those systems receive adequate education, and physical and mental health care. JLC submits this *amicus* brief to assert that because of adolescents' unique developmental, special precautions must be taken to ensure that youth—like K.W.—are not unduly punished or stigmatized for their involvement in the juvenile justice system.

STATEMENT OF THE CASE[1]

This is a brief of *amicus curiae* under Pa.R.A.P. 531 in support of Petitioner, K.W. This matter involves an appeal from a final order issued by the Commonwealth of Pennsylvania, Department of Public Welfare (Commonwealth), denying a twelve-year-old boy's challenge to remove his name from the Statewide Central Register (Register) as a "perpetrator" of child abuse. The Child Protective Services Law (CPSL), 23 Pa. C.S. §§ 6301 – 6385, is structured so that a report of child abuse is entered into a Central

1 *Amicus* adopts the statement of the case articulated in the brief of Petitioner K.W. and provides general background about the operation of the relevant provisions of the Child Protective Services Law.

Register either if the report is "founded," meaning there has been "any judicial adjudication based on a finding that a child who is a subject of the report has been abused," or if the report is "indicated," meaning that the "investigation by child protective services determines that substantial evidence of the alleged abuse exits" 23 Pa. C.S. § 6303. The Central Register contains the names of "founded" perpetrators for an indefinite period of time,[2] and is used to screen individuals who need clearances to work in the field of child care.[3] The CPSL enables a perpetrator in an indicated report of child abuse to request expunction and provides a right to appeal a denial of such a request. 23 Pa. C.S. § 6341. There is no corresponding provision within the CPSL for perpetrators named in a founded report of child abuse. In this matter, Indecent Assault, 18 P.S. § 3126, and Indecent Exposure, 18 P.S. § 3127, were the underlying offenses of K.W.'s delinquency adjudication in the Lancaster Court of Common Pleas, Juvenile Division. Both offenses are grounds to deny K.W. employment in the field of child-care services. 23 Pa. C.S. § 6344. K.W. has appealed to this Court pursuant to 42 Pa. C.S. § 723.

---

2 Section 6338(c) of the CPSL provides for permanent retention of the names of perpetrators who are subjects of founded or indicated reports when the individual's Social Security number or date of birth is known to the Commonwealth.

3 23 Pa. C.S. § 6344 provides, in relevant part:

> *Information Relating To Prospective Child-Care Personnel*
> (a*) Applicability*—This section applies to all prospective employees of child-care services, prospective foster parents, prospective adoptive parents, prospective self-employed family day-care providers and other persons seeking to provide child-care services under contract with a child-care facility or program.
> * * *
> (c) *Grounds For Denying Employment*.--
> * * *
> (2) In no case shall an administrator hire an applicant if the applicant's criminal history record information indicates the applicant has been convicted of one or more of the following offenses under Title 18 (relating to crimes and offenses) or an equivalent crime under Federal law or the law of another state:
> * * *
> Section 3126 (relating to Indecent Assault)
> Section 3127 (relating to Indecent Exposure).

Amicus Curiae Juvenile Law Center urges this Court to reverse and remove K.W. from the Statewide Central Register.

ARGUMENT

The CPSL's provisions preclude perpetrators of child abuse from employment in the field of child care. In this matter, the Commonwealth has applied these provisions to a twelve-year-old—labeling him a perpetrator of child abuse, keeping him on the Statewide Central Registry for his lifetime, and prohibiting him from education opportunities and subsequent career choices—based on the simplistic and irrational premise that his one-time delinquency adjudication makes him a dangerous criminal for life, who forever represents a risk to the safety of vulnerable children. K.W.'s involvement in the juvenile justice system, as opposed to the criminal justice system, exposes the fallacy of that premise.

In reviewing juvenile court proceedings the Superior Court of Pennsylvania has often remarked that adjudicated youth—like K.W.—are not criminals. See In the Interest of G.T., 597 A.2d 638, 641 (Pa.Super.1991) (*en banc*) (recognizing "[d]elinquency proceedings are not criminal in nature but ... intended to address the special problems of children who have engaged in aberrant behavior.").[4] Labeling a twelve-year-old as a perpetrator of child abuse and limiting his employment opportunities—based solely on the misdemeanor offenses underlying his delinquency adjudication—disregards a bedrock principle of juvenile court jurisprudence: that since youths are developmentally different from each other, and from adults, the rehabilitation of juvenile delinquents

4 The United States Supreme Court has also recognized the juvenile court's core principles of individualized rehabilitation and treatment, noting that youth, because they are still malleable and in development, are more amenable to such rehabilitative interventions than adults. McKeiver v. Pennsylvania, 403 U.S. 528, 546 (1971); In re Gault, 387 U.S. 1, 15-16 (1967).

through services designed to treat their individual behavior is the best means of preventing future offending. See In the Interest of J.F., 714 A.2d 467, 473 (Pa. Super 1998) (observing "we must never forget that in creating a separate juvenile system, the [legislature] did not seek to punish an offender but to salvage a boy who may be in danger of becoming one."). The CPSL's exclusive focus on K.W's underlying offenses is directly at odds with the rehabilitative approach of the Juvenile Act and ignores relevant information about K.W's age, the circumstances surrounding the offense, and his accomplishments in court-ordered treatment.

As applied to K.W., the CPSL violates his due process rights under both the United States and Pennsylvania Constitutions by permanently stripping him of his ability to engage in a profession, and education opportunities thereto, without providing any type of hearing or other due process protections. Placing K.W. on the Central Register cannot be justified on the ground that it furthers the goal of reducing the risk that children will be subject to crime. Quite the contrary: K.W. is no more, and probably less, likely to commit sexual offenses than adults. The CPSL is not rationally related to the General Assembly's goal of protecting children, and it is based on an assumption—that the fact of a delinquency adjudication ipso facto renders one permanently unfit to work in the child services industry—that cannot be supported with regard to juveniles. Social science literature and criminal research reveals that juvenile sex offenders like K.W. are less likely to commit a crime in the future than adult sex offenders.

I. PERMANENT REGISTRATION OF CHILDREN WHO ENGAGE IN INAPPROPRIATE SEXUAL BEHAVIORS IGNORES DEVELOPMENTAL RESEARCH DEMONSTRATING DIFFERENCES BETWEEN JUVENILE AND ADULT OFFENDING

A twelve-year-old adjudicated delinquent for a single episode of sexual aggression against another child should be treated differently from an adult offender who assaults a five-year-old. That minors are "different" is a principle that permeates our law. As Justice Frankfurter so aptly articulated, "[C]hildren have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state's duty towards children." May v. Anderson, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring). Accordingly, the United States Supreme Court has consistently considered the developmental and social differences of youth in measuring the scope and breadth of minors' constitutional rights for the last sixty years, as most recently demonstrated in the Court's decision in Roper v. Simmons, 543 U.S. 551 (2005). The Court relied, in part, on social science research on developmental differences of adolescents to hold that imposition of the death penalty on those who committed their offenses when under the age of 18 constitutes cruel and unusual punishment. Specifically, the Court noted that studies confirm that "a lack of maturity and an underdeveloped sense of responsibility are found in youth more than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions" Id. at 569. Additionally, the Court noted that youth have less control over their own environment. Id. at 569 (citing Laurence Steinberg and Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility and the Juvenile Death Penalty,* 58 AM. PSYCHOLOGIST 1009, 1014 (2003).

Classifying K.W. as a perpetrator of child abuse, and banning him from future employment in the field of child care ignores the developmental stages of young sex offenders and relies on assumptions about adult sex offenders, who are viewed by the public with special outrage and fear. Even social scientists consider many adult sex offenders a breed apart from other criminals, with very particular characteristics: pathological sexual orientation, sexual specialization, fixed sexual proclivities, and a high level of sexual dangerousness. Franklin Zimring, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING, 26-32 (2004) [hereinafter AMERICAN TRAVESTY]. Placing K.W. on the Central Register treats all juvenile sex offenders as though they fit this image. These suppositions neither apply to children, generally, nor to K.W., specifically. Adolescents are not merely younger versions of adults. Adolescence is a period of transition, both sexually and behaviorally, and sexual misconduct by juveniles is more varied and more complicated, as well as more temporary, than comparable behavior by adults.

Listing children as perpetrators of child abuse on a central register seems motivated by one of three (faulty) assumptions: (1) there is an epidemic of juvenile offending, including juvenile sex offending, (2) juvenile sex offenders have more in common with adult sex offenders than with other juvenile delinquents, and (3) juvenile sex offenders are at exceptionally high risk of re-offending. The available data do not support any of these assumptions.

A. Evidence Does Not Support an Epidemic of Juvenile Sexual Offending

The assumption that juvenile sexual offending has attained "epidemic" levels stems from a general and widespread concern that juvenile criminal offending is out of control. This concern about an epidemic of juvenile violence arose toward the end of the 1980s and gained momentum throughout the 1990s. See James C. Howell, PREVENTING AND REDUCING JUVENILE DELINQUENCY: A COMPREHENSIVE FRAMEWORK (2003) (reviewing the history of juvenile justice policies and practices) [hereinafter PREVENTING AND REDUCING JUVENILE DELINQUENCY]. Three sources of data—arrest records, victim reports, and self-reports—provide a markedly different picture of juvenile delinquency over the past two decades. Arrest data, which have been widely reported in the media and are largely responsible for public conceptualizations about crime rates, suggest a sharp increase in violent offending among juveniles, including violent sexual offending, from the late 1980s through 1994, and then an equally sharp decrease from 1994 to 2000. Id. Data from national crime victim surveys indicate a much smaller increase in violent offending between the late 1980s and mid-90s and then a gradual decline through the end of the '90s. AMERICAN TRAVESTY at 46-49. Data from national juvenile self-reports suggest that offending patterns remained relatively stable, with a small increase of 8–10% in the proportion (but not the rate) of adolescents committing serious violent offenses in the late 1980's and early 1990's. See PREVENTING AND REDUCING JUVENILE DELINQUENCY. In his review of the data, Professor Franklin Zimring stated that, between 1974 and 2000, rates of juvenile sexual offending were characterized more by stability than by change. AMERICAN TRAVESTY at 69-73.

Despite evidence of a decline in juvenile violent offending, juvenile justice sanctions developed in the late 1980's and throughout the 1990's remain in place and have, in many cases, intensified during the period of time that juvenile sex offending was declining. These sanctions include longer sentences, extension of sex offender registries and community notification practices to juvenile offenders, and extension of civil commitment procedures to include juveniles. Ironically, while juvenile sex offenders have remained remarkably stable over the past two decades, the number of treatment programs has mushroomed from 20 in 1982 to several hundred today. AMERICAN TRAVESTY at 73-76. As discussed below, the potential for harm against youthful offenders from these practices seems evident, while the potential for improved community safety or reduced sexual recidivism seems remote.

B. Juvenile Sex Offenders Are Like Other Juvenile Offenders And Distinct From Adult Sex Offenders

Evidence suggests that juvenile sex offenders are similar to other juvenile delinquents and are quite distinct from adult sex offenders. To the extent that juvenile sex offenders are unique from other juvenile delinquents and require separate legal or clinical interventions, sex offenders would be expected to have different characteristics than non-sexually delinquent youth.[5] However, the empirical literature supports the view that juvenile sex offenders, as a group, are similar in their characteristics to other juvenile

5 The general delinquency literature has established that youth antisocial behavior is predicted (directly or indirectly) by individual characteristics (e.g., low IQ); peer characteristics (e.g., associating with delinquent peers and not associating with prosocial peers); family characteristics (e.g., low parental monitoring; low parental warmth); and school characteristics (e.g., low school involvement, high drop out and suspension rates. Very different characteristics have been hypothesized as relevant in the development and/or maintenance of juvenile sexual offending including deviant sexual interest or arousal, denial and minimization, low empathy for victims, low social skills, and prior history of sexual victimizations. Elizabeth Letournea and Michael Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, 17 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 293, 297 (2005) [hereinafter *Juvenile Sex Offenders*].

delinquents and do not represent a distinct or unique type of offender. Elizabeth Letournea and Michael Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo,* 17 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 293, 296 (2005) [hereinafter *Juvenile Sex Offenders*]. The most important piece of evidence that supports the similarities of youth in these groups is their recidivism patterns. Both sexually and non-sexually delinquent youth are far more likely to re-offend with nonsexual crimes than with sexual crimes. Id.; See AMERICAN TRAVESTY at 63. This finding is consistent across nearly all examinations of recidivism and seems strongly suggestive that sexual offending is just one type of delinquent behavior and not unique from other delinquent behavior. *Juvenile Sex Offenders* at 297.

Psychiatrists and other experts also agree that sexually inappropriate behavior by children does not indicate a permanent problem. Patterns of sexual behavior by youth differ significantly from those of adult sex offenders. Deviant sexual arousal is a clear motivator for adult sex offenders and, according to researchers, when measured by penile plethysmography,[6] is the single best predictor of adult sexual recidivism. *Juvenile Sex Offenders* at 298. It is therefore not surprising that deviant sexual arousal has also been hypothesized as a causal factor in juvenile sex offending and a risk factor for juvenile sexual recidivism (e.g., juvenile sex offender risk assessment measures include estimates of deviant arousal). Id. However, research evidence fails to support the usefulness of deviant sexual arousal as either a predictor of recidivism or a reliable differentiating factor between sexually and non-sexually delinquent youth. Deviant sexual arousal, as measured by penile plethysmography, was not found to be related to sexual recidivism in

6 Penile plethysmography is a test that measures physical sexual arousal, assuming that there exists a relationship between specific stimuli, penile response, and specific overt sexual acts.

juvenile sex offenders in the single published study examining this relationship. Heather Gretton *et al*., *Psychopathy and Recidivism in Adolescent Sex Offenders*, 28 CRIMINAL JUSTICE AND BEHAVIOR 427-449 (2001). In this regard, juvenile sex offenders do not appear to resemble adult sex offenders.[7]

Beyond the individual characteristics of sexual arousal, there are other ways in which juvenile sex offenders differ from adult offenders and ways in which juvenile sex offender appear similar to other delinquent youth. For example, as with the families of other delinquents, the families of juvenile sex offenders were often characterized by less positive communication, less warmth, and more parental violence than were families of non-delinquent youth *Juvenile Sex Offenders* at 299 citing M. Ford & J. Linney, *Comparative Analysis of Juvenile Sex Offenders, Violent Nonsexual Offenders, and Status Offenders*, 10 JOURNAL OF INTERPERSONAL VIOLENCE 56-70 (1995). Thus, family relationships of juvenile sex offenders appear to be challenged, but may not present greater treatment challenges than do the families of other delinquents. Several uncontrolled studies evaluated by Elizabeth Letourneau in *Juvenile Sex Offenders* indicate that adolescent sexual offenders tend to have academic deficits, and these problems occur at rates similar to the rates of other delinquent youth. Id. at 299. Like family problems, academic problems appear to function as nonspecific delinquency risk factors. Thus, with some exceptions (e.g., deficient relations with same-age peers), the available research suggests that juvenile sex offenders have much in common with other delinquents. Id. One researcher has suggested that the initial peak in ages of sex

7 See also AMERICAN TRAVESTY at 139-40 (explaining that the overwhelming majority of sexually abusive children are not diagnosable sex deviants at any point before they age out of the juvenile system. Zimring similarly noted that it was unlikely juvenile offenders could be diagnosed with any confidence for pedophilia).

offenders (which occurs at age 13) may be due to "generally antisocial, aggressive youth becoming sexually active." Id. citing Karl Hanson *et al, Report of Collaborative Data Project on Treatment for Sex Offenders,* 14 SEXUAL ABUSE: A JOURNAL OF RESEARCH AND TREATMENT 169-194 (2002). The belief that "sex offenders are a very unique type of criminal" is not supported when applied to juvenile offenders.

C. Juvenile Sex Offenders Exhibit Extremely Low Risk of Recidivism

Researchers also agree that sexual recidivism rates of juvenile sex offenders are low—both statistically and as compared with nonsexual recidivism rates. Children who engage in sexually inappropriate behavior are not chronic sexual predators. Over ninety percent of arrests of children for sex offenses represent a one-time event that will never recur. AMERICAN TRAVESTY at 66. Of the twenty-five studies that reported sexual recidivism rates for juvenile sex offenders (wherein recidivism was defined as either new arrests or new convictions), the mean rate of recidivism was 9%. *Juvenile Sex Offenders* at 300; AMERICAN TRAVESTY at 66; See Michael Caldwell, *What We Do Not Know About Juvenile Sexual Re-Offense Risk,* 7 CHILD MALTREATMENT 291-302 (2002). These same youth were more than six times as likely to be rearrested for nonsexual crimes. *Juvenile Sex* Offenders at 300. By comparison, a review of 61 studies of adult sex offenders reported a mean sexual recidivism rate of 13.4% (49% higher than for juveniles) and a mean general recidivism rate of 36.3%. Id. Thus, juveniles appear to be less likely to reoffend sexually and more likely to reoffend with nonsexual offenses than are adults (see also Zimring, 2004, for a recent review of sex crime rates and comparison of adult and juvenile rates).

This is not to say that high-risk juvenile sex offenders do not exist. For example, in a small sample of 14 youth subjected to the highest level of community notification in Washington State, most (79%) were rearrested within 4.5 years for a new offense of any kind and 43% were rearrested for new sex crimes. *Juvenile Sex Offenders* at 300. Nevertheless, it appears that the majority of juvenile sex offenders do not continue as career sex offenders.

Mistaken beliefs about the high risk of sexual recidivism have likely contributed to the shifting of funds from community-based treatment programs to more restrictive and expensive residential treatment programs that have yet to be subjected to randomized clinical trials and the application of adult legal consequences such as registration and community notification to juvenile sex offenders.

If any one of the three assumptions were true—if there was an epidemic of violent juvenile offending; if juvenile sex offenders were distinct from their non-sexually offending delinquent peers; or, if most (or even many) juvenile sex offenders were at high risk of sexual recidivism, permanent registration might be appropriate. However, evidence does not support any of these beliefs. The classification of K.W. as a perpetrator and the restrictive employment provisions of the CPSL ignore the developmental differences between adult and juvenile sex offenders, the similarities between juvenile sex offenders and other juvenile delinquents, and the rehabilitative mission of the Commonwealth's juvenile justice system.

II. BRANDING A TWELVE-YEAR-OLD AS A CHILD ABUSER ON THE BASIS OF HIS DELINQUENCY ADJUDICATION IS DIRECTLY AT ODDS WITH THE SPIRIT OF THE JUVENILE ACT

Targeting K.W. because of his past involvement with the juvenile court is inconsistent with the confidential, rehabilitative approach of juvenile proceedings.[8] Several provisions of the Juvenile Act, 42 Pa. C.S. § 6301 *et seq.*, reflect commonly held assumptions that upon discharge from court involvement, adjudicated youth have fully paid their debt and are free to return to their community without additional terms and conditions.[9] The provision of the CPSL prohibiting employment is directly at odds with Section 6354(a) of the Juvenile Act, which specifically prohibits the use of delinquency adjudications or disposition records. The Juvenile Act states the effect of a delinquency adjudication must "not impose any civil disability ordinarily resulting from a conviction or operate to disqualify the child in any civil service application or appointment." 42 Pa. C.S. § 6354(a).

Identifying K.W's as a perpetrator in the Central Register is an additional condition outside the boundaries of the Juvenile Act that will continue to brand and stigmatize him even when his delinquency petition has been discharged and the juvenile court no longer has jurisdiction. Stigmatizing K.W. in this way hinders the juvenile court's efforts to rehabilitate juveniles and convert them into law-abiding and productive

---

[8] "Unlike criminal or civil cases, juvenile proceedings have traditionally been closed to the public in most jurisdictions." In re M.B., 819 A.2d 59, 61 (Pa. Super 2003); See 42 Pa. Cons. Stat. § 6336(e) (closing juvenile court proceedings to the public, except for certain delinquency proceedings).

[9] 42 Pa. Cons. Stat. § 6307 (limiting access to juvenile court files and records); 42 Pa. Cons. Stat. § 6308 (requiring that law enforcement records concerning children not be disclosed to the public); 42 Pa. Cons. Stat. § 6336(e) (closing juvenile court proceedings to the public, except for certain delinquency proceedings); 42 Pa. Cons. § 6341(b.1)(4) (expressly prohibiting the use of delinquency adjudications or disposition records for admissions or disciplinary decisions by schools).

citizens.[10] "Publicity [of juvenile court involvement], with its attendant stigma, generally impedes integration of a youth into the community. In re M.B., 819 A.2d 59, 64 (Pa. Super 2003).

III. THE RESTRICTIVE EMPLOYMENT PROVISIONS OF THE CPSL VIOLATE K.W'S DUE PROCESS RIGHTS

In his brief, Petitioner K.W. argues the CPSL fails to provide any due process guarantees. As a matter of law, the CPSL violates both state and federal due process requirements for at least two additional reasons. First, a delinquency adjudication under the Juvenile Act is not the proper forum to determine a juvenile's fitness for future employment. Second, due process prohibits official actors from characterizing an individual in a manner that is capable of being proved false and that results in a burden on his rights (the "stigma plus" doctrine). Third, due process prohibits the creation of an irrebutable presumption. Finally, under the Pennsylvania Constitution, a citizen's interest in reputation is afforded even higher protection than under the United States Constitution.

A. A Delinquency Adjudication Is Not The Proper Forum To Determine A Juvenile's Fitness For Employment

In this matter the Commonwealth relied exclusively on K.W.'s delinquency adjudication to place him on the Central Register as a founded perpetrator of child abuse. The CPSL's reliance on the delinquency adjudication is constitutionally infirm. The Pennsylvania Supreme Court has expressly held, "'the essential elements of due process are notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause.'" Dep't. of

[10] Delinquency adjudications are not criminal in nature. In re C.M.T., 861 A.2d 348, 352 (Pa. Super. 2004); In the Interest of Tassening H., 422 A.2d 530, 535 (Pa. Super. 1980) (explaining the purpose of juvenile proceedings is to facilitate "treatment, reformation and rehabilitation," not to punish).

Transp. v. Clayton, 684 A.2d 1060, 1064 (Pa. 1996) (emphasis added), citing Soja v. Pa. State Police, 455 A.2d 613, 615 (Pa. 1982); See also Bell v. Burson, 402 U.S. 535 (1971). Due process requires not just any hearing, but rather an "appropriate" hearing. Fiore v. Pa. Bd. of Fin. & Revenue, 633 A.2d 1111, 1114 (Pa. 1993).11 With respect to the nature of procedural due process required, the Supreme Court in Bell stated:

> "The hearing required by the Due Process Clause must be "meaningful" and "appropriate to the nature of the case." It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision ... involved ... does not meet this standard.

Bell, 402 U.S. at 541-542 (citations omitted).

This fundamental principal of due process is plainly violated by relying upon the delinquency hearing which addresses a completely different set of issues. The issue in delinquency adjudicatory hearings is the youth's responsibility for the crime(s) he or she is alleged to have committed and, if adjudicated delinquent, the appropriate disposition.

---

11 In Fiore, the Pennsylvania Supreme Court examined the orderliness and appropriateness of a Commonwealth Court hearing and found that appellant's procedural due process rights were infringed because the issues litigated in that forum differed from the issues litigated before the Commonwealth's administrative agencies. In Fiore's Commonwealth Court hearing there was too little "procedural flexibility," leaving him ill prepared to address new legal theories advanced by the Commonwealth. Id. at 1113. The Fiore Court recognized that "[a]lthough this case does not deal with lack of actual notice or the total absence of a hearing, we note that due process requires an appropriate hearing." Id. at 1114 (emphasis in original).

Similarly in Soja v. Pa. State Police, 455 A.2d 613 (Pa. 1982), the Supreme Court critiqued and demanded the redesign of discipline procedures against state police officers which allowed investigation and reports to be forwarded to the State Police Commissioner. A plurality of the Court was troubled by the separate adjudicatory forums and the denial of the subject's right of review and confrontation. "The essential elements of due process are 'notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause.'" Soja, 455 A.2d at 615 (emphasis added) (citations omitted).

In both Fiore and Soja, the Court articulates a requirement that should govern the result here: procedural due process calls for an individual determination about the merits of employment. The matters addressed at a juvenile delinquency adjudicatory hearing – whether the accused youth committed all the elements of the act beyond a reasonable doubt – is a wholly separate inquiry from whether that adjudicated youth, will be fit to work with children when he reaches the age of majority. In none of the cases cited above did the Court suggest that the Commonwealth could avoid the Due Process Clause by doing what the CPSL does – prohibiting a class of children from employment on a categorical basis and denying members of that class any chance to dispute the determination. Youth like K.W. are entitled to the full panoply of relevant protections which due process guarantees.

No aspect of an adjudicatory hearing considers or addresses the youth's fitness for future employment.

This Court recognized the limited scope of delinquency proceedings and expressly reversed the lower court's finding that the plaintiffs' received procedural due process protections at their delinquency adjudication. D.C. v. School District of Philadelphia, 879 A.2d 408, 415-20 (Pa. Cmwth. 2005). In that case, this Court declared a portion of the School Code unconstitutional because delinquent students, who were returning to their resident school district from residential placement, did not have a hearing before placement in an alternative school. The Court did not agree with the lower court that due process afforded in the juvenile adjudication addressed plaintiffs' interests.

> In delinquency proceedings, the juvenile court lacks jurisdiction over the decision on a student's school placement upon return. The initial decision on a returning student's fitness for the regular classroom is designed to be made at the transition center, and that decision turns on factors that could not be known at the time of the juvenile adjudication. Simply stated, the juvenile proceeding is not adapted to consideration of the matter at issue in this case.

Id. at 418.

The same conclusion applies in this instance. A determination of K.W.'s responsibility for a delinquent act, even on proof beyond a reasonable doubt, has no bearing whatsoever on whether he will put other children at risk when he reaches the age of majority. To extract such a determination from the finding of delinquency violates due process. K.W. had no notice that his chances for future employment were at issue. The role of juvenile court judges is tailored to their expertise and is strictly confined. See In re R.A., 761 A.2d 1220 (Pa. Super. 2000) (limiting the authority of the juvenile court to

issue orders beyond its statutory authority). The Juvenile Act directs that, at adjudication, the judge focus upon whether the alleged delinquent act occurred, and, depending upon the gradation of the offense, whether the child is in need of treatment or rehabilitation. 42 Pa. Cons. Stat. § 6341. The adjudication hearing will always occur years before K.W. reaches the age of majority. Even if the adjudicatory hearing did provide an opportunity for speculation about future employment, and education opportunities related thereto, K.W. would be unable to address the matter since treatment and rehabilitation, the cornerstones of juvenile justice, would not yet have occurred.

B. The Due Process Clause Is Implicated When, as Here, State Action Results in Stigma

The CPSL violates the Due Process Clause of the United States and Pennsylvania Constitutions because it imposes a stigma that changes K.W.'s legal status as compared to all other youth in the Commonwealth: he cannot be employed in certain professions. The CPSL labels these youth dangerous, and unfit for certain employment, whether or not they are. Under the stigma plus doctrine, the CPSL must be struck.

The connection between state action that stigmatizes an individual and the Due Process Clause of the Fourteenth Amendment to the United States Constitution has been elaborated in numerous cases. Paul v. Davis, 424 U.S. 693 (1976); see also, Wisconsin v. Constantineau, 400 U.S. 433 (1971). In Paul, then-Justice Rehnquist, writing for the majority, held that stigma, or defamation, by state actors violates the Due Process Clause when, "as a result of the state action complained of, a right or status previously recognized by state law was distinctly altered or extinguished." 424 U.S. at 711. In Paul, the Supreme Court held that in order to state a claim under 42 U.S.C. § 1983 for a violation of the Due Process Clause, a plaintiff who complains of governmental

defamation must show (1) the utterance of a statement about him or her that is sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false and (2) some material and state-imposed burden or alteration of his or her status or of a right in addition to the stigmatizing statement. Paul, 424 U.S. at 701-702, 710-711. This requirement is known as the "stigma plus" test. Many federal and Pennsylvania courts have found due process violations when persons did not have the opportunity to rebut a legal characterization that stigmatized them and deprived them of a cognizable liberty or property interest.

The CPSL likewise imposes an unlawful stigma on K.W. that cannot withstand scrutiny under the "stigma-plus" test of Paul v. Davis. It brands youth who have been adjudicated delinquent as dangerous and unfit for employment– irrespective of whether they are. Importantly, under Paul, litigants need only allege, not prove, that the reputation-tarnishing statement is false, and capable of being proven false, in order to establish a violation of due process. Here, where youth adjudicated for certain offenses are subject to the provisions of the CPSL, and where the majority of youth are at low risk of re-offending, the risk of error is manifest, not speculative.

C. The Due Process Clause Prohibits the Creation of an Irrebutable Presumption

The employment-prohibiting provisions of the CPSL also violate due process rights by impermissibly creating an irrebutable presumption of unfitness for employment as a result of a single delinquency adjudication.

The Pennsylvania Supreme Court has recognized that a citizen's right to pursue a lawful occupation is a "substantial property" subject to the full protective mechanisms of procedural due process. See Lyness v. Com., State Bd. Of Medicine., 605 A.2d 1204,

1207 (Pa. 1992). "While procedural due process is a flexible notion which calls for such protections as demanded by the individual situation, the essential requisites are notice and meaningful opportunity to be heard." Pa. Dep't. of Transp. v. Clayton, 684 A.2d 1060, 1064 (1996). In determining whether a particular procedure satisfies the mandates of due process, a court must consider the following three factors:

> (1) the private interest that will be affected by the official action; (2) the likelihood of an erroneous deprivation of such an interest as a consequence of the procedure used and the probable value, if any of additional procedural safeguards; and (3) a balancing of the state interest served by the use of a summary proceeding against the burden that would be imposed by an additional, substitute or more rigorous procedure.

Petron v. Dep't. of Educ., 726 A.2d 1091, 1094 (Pa. Cmwth. 1999).

In the present case, the CPSL unilaterally and irrebuttably deprives K.W. of an essential private interest: the constitutional right to pursue a chose, lawful occupation. Despite this constitutional deprivation, the CPSL provides absolutely no procedures by which an individual may seek a pre- or post-deprivation hearing before an impartial tribunal (or any other body) to present evidence establishing that he or she is not a threat to children and is otherwise competent to perform his job. The CPSL, quite simply, is barren of any due-process protections any kind. Instead, it creates an absolute presumption that all individuals adjudicated delinquent of one of the enumerated offenses are unfit for employment, based upon this irrebutable presumption.

The Pennsylvania Supreme Court has held that an irrebutable presumption violates due process "where the presumption is deemed not universally true and a reasonable alternative means of ascertaining the presumed facts [is] available." Pa. Dep't of Transp. v. Clayton, 684 A.2d at 1063. In Clayton, for instance, the Pennsylvania

Supreme Court reviewed the constitutionality of a state regulation mandating the revocation of an individual's driving license for one year upon the occurrence of a single epileptic seizure, without giving the licensee the opportunity to present medical evidence to establish his or her competency to drive. Id. at 1060. Relying on a long line of United States Supreme Court decisions that found that irrebutable statutory presumptions violate due process, the Pennsylvania Supreme Court ruled that the Pennsylvania regulation was unconstitutional, holding that although the Commonwealth has an important interest in ensuring the safety of its highways, "it is not an interest which outweighs a person's interest in retaining his or her license so as to justify the recall of that license without first affording the licensee the process to which he is due." Id. at 1065.

Similarly in Petron, this Court struck down application of a statutory provision that authorized the immediate suspension of the professional teaching license of an educator who was charged with a crime involving moral turpitude. 726 A.2d at 1094. The plaintiff in that case had been arrested on charges of simple assault and endangering the welfare of a child after he allegedly grabbed an 11-year-old student by the neck, banged him into a locker, and threw him into a chair. Id. at 1091 n.2. The Department of Education, relying upon Section 5(a)(11) of the Teacher Certification Law, 24 P.S. § 2070.5(a)(11), sought the immediate suspension of plaintiff's teaching license. At hearings before the Commonwealth's Professional Standards and Practices Commission, the plaintiff argued, *inter alia*, that Section 5(a)(11) violated the Pennsylvania Constitutions by creating an irrebutable presumption that he was unfit to teach without affording him a pre- or post-deprivation hearing in which he could attempt to establish fitness despite the pending charges. Id. at 1091-92. The Commission rejected plaintiff's

arguments and granted the Department's motion to suspend plaintiff's professional teaching certification.

On appeal the Commonwealth Court agreed that the statute was unconstitutional as applied, finding that the statute's irrebutable presumption of professional unfitness violated plaintiff's right to due process protections. Id. at 1094. While expressly recognizing "the importance of the state's interest in preserving the integrity of its teaching staff and profession," the Court nonetheless held that "we cannot ignore the rights of individual teachers, particularly where a prompt, post-deprivation hearing would satisfy the requirements of due process while addressing the concerns of the state." Id. Therefore, the Court concluded that because the Plaintiff was not afforded minimal due process protections, Section 5(a)(11) of the Teacher Certification Law, "as applied to [plaintiff], violate[d] the constitutional mandates of due process." Id.

As in Clayton and Petron, the anti-employment provisions of the CPSL irrebuttably presume that a child adjudicated delinquent for any of the enumerated offenses is unfit to hold any employment position in the fields covered by the CPSL. The CPSL also provides no procedure by which an affected individual may obtain a pre- or post-deprivation hearing before an impartial tribunal to present evidence that could establish that the statutory presumption should not apply in light of his or her specific situation.

The Pennsylvania Supreme Court has held that an irrebutable presumption is constitutionally infirm "where [it] is deemed not universally true and a reasonable alternative means of ascertaining the presumed facts [is] available." Clayton, 684 A.2d at 1063. The presumption that virtually every former juvenile delinquent is unfit to perform

is clearly not one of universal truth. It is therefore irrational to assume that K.W.'s adjudication will render him unfit to perform his job. Moreover, "a reasonable alternative means of ascertaining the presumed facts" is available. The CPSL could certainly have included provisions for a pre- or post-deprivation hearing before an impartial tribunal by which an aggrieved individual could present evidence that he or she is competent and fit to perform a particular position at a facility. Such a hearing could be similar to those routinely conducted in the occupational licensing field when a worker's fitness is questioned. Instead, the CPSL is entirely bereft of any protection for K.W.'s due process rights.

D. The CPSL Irrevocably Harms K.W.'s Reputation And Violates The Due Process Clause Of The Pennsylvania Constitution

The Pennsylvania Constitution affords reputation protection:

> [I]n Pennsylvania, reputation is an interest that is recognized and protected by our highest state law: our Constitution. Sections 1 and 11 of Article I make explicit reference to "reputation," providing the basis for this Court to regard it as a fundamental interest which cannot be abridged without compliance with constitutional standards of due process and equal protection.

R. v. Pa. Dep't. of Pub. Welfare, 636 A.2d 142, 149 (Pa. 1994) (emphasis added).

The Commonwealth's actions injure K.W.'s reputation and violate the Pennsylvania Constitution. First, the Commonwealth has targeted K.W. for an offense committed sometime in the past, irrespective of how long ago the delinquent offense was committed. It targeted K.W. as "bad" without regard to how well he actually did in treatment or whether he had in fact been "rehabilitated." Second, no matter what the treatment program concludes regarding K.W's rehabilitation, his employment prospects are limited. This practice is at odds with this Court's ruling in Warren Cty. Human

Servs. v. State Civil Serv. Comm'n, 844 A.2d 70 (Pa. Commw. 2004). In Warren County, this Court struck down a provision of the Child Protective Services Law that prohibited the hiring of applicants previously convicted of certain enumerated crimes; however, the law did not ban existing employees from continuing to work in the child care field, despite having similar convictions. This Court found that if convicted criminals who already had been working at covered facilities were capable of rehabilitating themselves so as to qualify them to continue working, "there should be no reason why other convicted criminals were not, and are not, also capable of doing the same." Id. at 74. In finding the employment restriction unconstitutional, this Court wrote:

> Such a ban "runs afoul of the deeply ingrained public policy of this State to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders .... To forever foreclose a permissible means of gainful employment because of an improvident act in the distant past completely loses sight of any concept of forgiveness for prior errant behavior and adds yet another stumbling block along the difficult road of rehabilitation."

Id. at 74 (citations omitted). The Warren County Court's holding that due process requires the removal of employment barriers for ex offenders released from a system that emphasizes punishment has great significance for a juvenile disposition specifically aimed at rehabilitating a juvenile offender. Additional restrictions on K.W's reintegration, based on a single delinquency adjudication, undermines, rather than furthers, his rehabilitation, and imposes an "unwarranted stigmatization." It is the "absolute" exclusion of K.W. from future employment, with no opportunity for individual determinations of fitness that runs afoul of the due process concerns at issue in Warren County. Likewise, there is no real and substantial relationship between the

possible goals of the statute and the General Assembly's denial of procedural due process protections to a small group of juvenile sexual offenders.

CONCLUSION

For the foregoing reason, *Amicus Curiae* Juvenile Law Center request that the founded report be expunged.

Respectfully submitted,

_____

Laval S. Miller-Wilson, Esq.
Marsha L. Levick, Esq.
JUVENILE LAW CENTER

Attorneys for *Amicus Curiae*

December 21, 2006