Court of Appeals No. 303813; 306407

Case No.: 2010-000169 DL

STATE OF MICHIGAN

IN THE COURT OF APPEALS

In the Matter of: CULLEN ALEXANDER TIEMAN, Minor.

On Appeal from the Ionia County Circuit Court with the Honorable Robert S. Sykes, Jr. presiding.

AMICUS CURIAE JUVENILE LAW CENTER BRIEF IN NO. 306407, IN SUPPORT OF APPELLANT

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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. JLC also works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal, and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

ARGUMENT

Appellant Cullen Tiemann, a minor, was charged with criminal sexual conduct in the third degree and pled no-contest to this strict liability offense on December 30, 2010. Adjudication 35.[1] Because it was a strict liability statutory offense, the court accepted his plea without any findings or inquiry regarding criminal intent or consent; based upon his adjudication, Cullen was required to register as a sex offender under MCLA 28.723, the Michigan Sex Offenders Registration Act ("SORA" or "The Act"). Under this Act, minors may avoid the registration requirement if they can establish consent of the victim in a separate 'consent' hearing. The defendant bears the burden of proving consent, and must do so without the right to confront or cross-examine his accuser. Indeed, under the Act, there is no requirement that the

[1] This is a strict liability offense. MCLA 750.520d(1)(a) provides that a person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person "at least thirteen years of age and under sixteen years of age," regardless of whether or not the sexual conduct was consensual.

victim testify; if she chooses to appear or submit a written statement, her statement need not be sworn. *Amicus Curiae* Juvenile Law Center submits that the initial prosecution of Cullen for criminal sexual conduct, as well as the consent hearing itself, violates Cullen's rights to due process.

I. THE CRIMINAL PROSECUTION OF CULLEN UNDER A STRICT LIABILITY STATUTE VIOLATES FUNDAMENTAL FAIRNESS UNDER THE DUE PROCESS CLAUSES OF THE UNITED STATES AND MICHIGAN CONSTITUTIONS.

Appellant Cullen Tiemann was prosecuted under MCL 750d(1)(a). This criminal sexual conduct statute proscribes sexual penetration with any person "at least thirteen years of age and under sixteen years of age." The statutory provision presumes that individuals under age sixteen cannot, as a matter of law, consent to a sexual act. Thus, the trial court sustained the State's motion to preclude any testimony regarding Hannah's alleged consent to the acts. Mot. In Limine 10:18-21. As a result of this strict liability charge, Cullen pled no contest.

The imposition of strict liability on Cullen Tiemann pursuant to MCL 750.520d(1)(a) violates his right to fundamental fairness under the due process clauses of both the Michigan and U.S. Constitutions. US Const, Am XI; Const 1908, art 1, §17. Strict liability for violations of the criminal law eliminates the traditional burden on the prosecutor to prove *mens rea*. The prosecutor need only prove that the alleged criminal conduct occurred, without regard to whether the individual had any criminal intent. Strict liability has been defined in the criminal law as "impos[ing] criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state." *State ex rel. W.C.P. v State*, 974 P2d 302, 303 (Utah Ct App 1999). While a central premise of our criminal justice system is that criminal responsibility may be imposed only when the defendant committed the act with the requisite

criminal intent, strict liability crimes persist in allowing for a finding of guilt without personal fault.

Amicus submits that the rationale underlying strict liability rape statutes does not apply when the defendant is a child. Strict liability rape statutes eliminate the requirement of *mens rea* in cases where the victim is a child both to protect children because of their unique vulnerability, and to require that adults who engage in sexual acts with children assume the risk of such activities. Catherine L. Carpenter, On Statutory Rape, Strict Liability, and the Public Welfare Offense Model, 53 Am. Univ. L. Rev. 313, 359 (2003); *Commonwealth v. Heck*, 491 A2d 212, 226 (Pa Super 1985); see also *United States v Freed*, 401 US 601, 607-609; 91 S Ct 1112; 28 L Ed 2d 356 (1971) (construing possession of hand grenades as a strict liability offense because possessor should know they are dangerous devices likely to be regulated); see also *People v Cash*, 419 Mich 230, 242-45 (1984) (noting that the Michigan legislature, in adopting new graduated strict liability regime, sought to protect children below a certain age by refusing to recognize mistake of age as a defense). These rationales presume an adult defendant. While due process permits the assumption that an adult actor understands and assumes risk when engaging in certain highly dangerous or risky activities, the same knowledge or understanding cannot be ascribed to a teenager. Indeed, the very premise of strict liability in statutory rape statutes – that children lack the capacity and judgment of adults under similar circumstances and thus cannot "consent" to sexual activity – demonstrates the folly of prosecuting child offenders for violation of these statutes. .

Because strict liability crimes, such as the statute at issue here, allow for punishment without a finding of criminal intent, their application must be carefully circumscribed. *See In re D.B.* 2011 WL 2274624 (Ohio Sup Ct) (holding that when a similar strict liability statute is

applied to minors the statute is intended to protect, arbitrary and discriminatory enforcement is encouraged). The historic foundation for strict liability rape statutes does not support the charging and prosecution of Cullen here. Carpenter, *supra* at 333. The statute at issue in this appeal was enacted with precisely the above justifications in mind – to punish the defendant who had assumed the risk of engaging in sexual activity with a young person, and to protect a societal interest – the well-being of our children. *See People v Cash,* 419 Mich at 242. Courts upholding strict liability rape laws have consistently emphasized that the legitimacy of the statutes rests on the fact that they are designed for the vital purpose of protecting vulnerable children, and that the defendant assumes the risk inherent in engaging in any type of sexual activity with a minor. *See, e.g., In re Hildebrant,* 216 Mich App 384, 387, 548 (1996).[2]

The disregard for blameworthiness in strict liability criminal statutes has largely survived legal challenge because of the assumption that the actor can be expected to appreciate and understand that the conduct he is engaging in may be proscribed by statute. Carpenter, *supra* at 333-34; *Owens,* 724 A2d at 53. Thus, the traditional requirement of blameworthiness has been replaced by a different sensibility, one based more on notions that an individual assumes risk for engaging in sexual activity; the individual who engages in sexual conduct with a minor (of a certain age) will be held liable, regardless of whether there was intent to commit the act. These statutes render criminal "a type of conduct that a reasonable person should know is subject to stringent public regulation." Carpenter, *supra* at 330, fn. 90. "Notice" is thus a lynchpin of strict liability statutes; it serves to shift the burden to the more mature adult defendant, who should be

[2] For example, the Maryland Supreme Court held that the state has an overwhelming interest in protecting children from risks, including both physical and emotional trauma, which outweighs any interest an individual may have in engaging in sexual relations with children near the age of consent. *See, e.g., Owens v. State,* 724 A2d 43, 52-53 (Md 1999). *See also United States v Ransom*, 942 F2d 775, 777 (Fed 10, 1991) (the justification for strict liability rape laws is to protect children from sexual abuse, and as such supports placing the risk of mistake as to a child's age on the older more mature person who chooses to engage in sexual activity with one who may be young enough to fall within the statute's purview); Carpenter, *supra* at 333-36.

on heightened awareness that his conduct will be subject to regulation. Without this underlying concept of notice, these statutes make little sense: if the individual charged is not aware of the risks, he or she is unlikely to be deterred by a strict liability statute, and unlikely to be properly identified as one in need of rehabilitation or reformation. Carpenter, *supra* at 336. As a minor, Cullen can hardly be deemed to have been on 'notice;' and thus his prosecution under a strict liability statute was unconstitutional.

II. PLACING THE BURDEN ON CULLEN TO PROVE CONSENT BY A PREPONDERANCE OF THE EVIDENCE, AS WELL AS DENYING HIM THE RIGHT TO CONFRONT AND CROSS EXAMINE HIS ACCUSER AT THE CONSENT HEARING, VIOLATED CULLEN'S DUE PROCESS RIGHTS

Michigan law now requires that any person convicted under § 750.520(d) must register with the state police as a sex offender.[3] MCLA 28.722. There is an exception to this rule where the defendant can show that: 1) the victim consented to the conduct; 2) the victim was at least thirteen years old but less than sixteen years old at the time of the violation; and 3) the individual is not more than four years older than the victim. MCLA 28.723(a). The individual bears the burden of showing that these three conditions exist by a "preponderance of the evidence" at a hearing before a judge. *Id.* After these amendments took effect in July 2011, the trial court below held a two-day fact-finding hearing to determine the issue of consent in the underlying adjudication of Cullen for criminal sexual conduct.

While Michigan courts have held that precluding the issue of consent between two consenting minor children does not violate public policy, the Court of Appeals has never addressed whether precluding the affirmative defense of consent or any other defense is a violation of a defendant's due process rights. *See In re Hildebrant*, 216 Mich App at 389.

[3] The Michigan legislature recently amended the Sex Offender Registration Act (SORA) to comply with the federal Adam Walsh Child Safety and Protection Act. Pub. L. No. 109-248 (requires all states to maintain a sex offender registry meeting certain minimum standards.)

Amicus submits that it is indeed a violation of defendant's due process because it shifted the burden of proof and resulted in an increased punishment after a fact-finding proceeding.

A. Shifting the burden to Cullen at the consent hearing is improper because the hearing is an extension of the adjudicatory hearing.

Imposing the burden on Cullen to prove consent in the 'consent hearing' was a violation of his right to due process of law. Placing the burden of proving the affirmative defense of consent by a preponderance of the evidence is a dramatic departure from what is otherwise required at a criminal trial. Because the consent hearing, pursuant to MCLA 28.723a, was a fact-finding hearing on an issue that was previously precluded from litigation, it should be considered an extension of the adjudicatory hearing. Furthermore, the outcome of the hearing led to the imposition of the registration requirement, which is an additional sanction that was not considered at disposition. That consent plays a significant role in the determination of whether or not registration is required transforms the issue retroactively into an ancillary element of the offense. The consent hearing must be viewed as an extension of the adjudicatory hearing, making the burden shifting to Cullen improper.

Traditionally, the burden to prove the defendant's guilt or involvement in an act rests solely on the prosecution. The Constitution requires that the State must prove beyond a reasonable doubt "every fact necessary to constitute the crime" for which a defendant is charged." *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). The United States Supreme Court has maintained that it is appropriate to place the burden of proof on the State even for issues that are wholly unrelated to the core elements of the crime. *See Colorado v Connelly*, 479 US 157, 168; 107 S Ct 515; 93 L Ed 2d 473 (1986) (holding that State must prove that a defendant has waived his *Miranda* rights); *Lego v Twomey*, 404 US 477; 92 S Ct 619; 30 L

Ed 2d 618 (1972) (holding that the State must prove that a confession was voluntarily rendered); *Nix v Williams*, 467 US 431; 104 S Ct 2501; 81 L Ed 2d 377 (1984) (holding that the State bears the burden of proving inevitable discovery of illegally-seized evidence); *Chapman v California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967) (holding that the State, as the beneficiary of the error, bears the burden of proving beyond a reasonable doubt the harmlessness of constitutional error). Courts require the State to bear the burden in cases involving a waiver of *Miranda* rights, for example, because the government is in a better position than the defendant to bear this burden. The State possesses the knowledge and resources that defendants lack, and can prove this issue without any undue burden on its ability to prosecute offenders. Moreover, where a "defendant produces enough evidence to put an affirmative defense into controversy," Michigan courts require the prosecution to disprove the affirmative defense beyond a reasonable doubt. *People v Thompson*, 117 Mich App 522, 528-29 (1982) (citing *People v Garbutt*, 17 Mich 9 (1868) (insanity); *People v Coughlin*, 65 Mich 704 (1887) (self-defense), and *People v MacPherson*, 323 Mich 438 (1949) (alibi)).[4]

In the instant case, the State charged Cullen with both strict liability statutory rape, MCL 750.520d(1)(b), and forcible rape, MCL 750.520d(1)(a). This precluded him from raising any defenses to the forcible rape charge at his adjudicatory hearing. Generally, defendants must have

[4] A burden shift to the defendant is permitted in limited circumstances. For example, the Michigan legislature passed a statute placing the burden of proving the affirmative defense of insanity on the defense in 1994. MCL 768.21a (3) ("The defendant has the burden of proving the defense of insanity by a preponderance of the evidence."). In capital sentencing hearings, courts have ruled that the defendant bears the burden of proving that the death penalty is inappropriate because the mitigating circumstances outweigh the aggravating circumstances. *Kansas v. Marsh*, 548 U.S. 163, 171; 126 S Ct 2516; 165 L Ed 2d 429 (2006). Similarly, courts have upheld a burden shift to the defendant under the Federal Sentencing Guidelines in cases involving possession and distribution of narcotics. In such cases, the defendant has to prove a lack of intent or capacity to sell drugs. *U.S. v Christian*, 942 F2d 363, 368 (Fed 6, 1991). However, in capital and drug sentencing examples the state had an initial burden to meet beyond simply proving the elements of the crime. In capital cases, the state needs to prove at least one statutory aggravating factor beyond a reasonable doubt. *See Kansas*. Similarly, the state first needs to establish a negotiated amount in drug cases before the burden can be shifted to the defendant. *See U.S. v Christian.* In this case, the State actually has a lesser burden than the examples cited above; in choosing to prosecute Cullen under a strict liability statute, the State bore no burden at all, at any time, in the proceedings.

the opportunity to raise defenses in support of their innocence. *See* US Const Am VI; Mich Const Art I, § 13; *People v Hayes*, 421 Mich 271, 278 (1984) ("[A] criminal defendant has a state and federal constitutional right to present a defense.") (citing *Washington v. Texas*, 388 U.S. 14, 19 (1967)). An affirmative defense is one that is "pled to avoid responsibility for criminal acts or, to use the terminology of proponents of the rule, to avoid the consequences of acts otherwise criminal." *In re Certified Question*, 425 Mich 457, 464 (1986) (quoting *People v Walker*, 142 Mich App 523, 525 (1985)). However, the prosecution is required to disprove an affirmative defense only when the defendant actually raises the defense and introduces evidence of the affirmative defense. *In re Certified Question*, 425 Mich. at 465-66. At Cullen's adjudicatory hearing, he was foreclosed from raising any affirmative defenses and therefore the State bore no burden to disprove them.

Indeed, the State is at times required to prove lack of consent or non-consent. The prosecution in a forcible rape case does not have to prove non-consent as a separate element of the crime since evidence of force or coercion "necessarily tends to establish that the act was nonconsensual." *People v Jansson*, 116 Mich App 674, 682-83 (1982). However, where a defendant produces enough evidence to put an affirmative defense into controversy, the prosecution bears the burden of disproving the affirmative defense beyond a reasonable doubt." *Thompson*, 117 Mich App at 528. In reversing and remanding a trial court's decision to exclude an affirmative defense of consent, this court held that if the evidence introduced at trial warrants instructions on consent as a defense to kidnapping or criminal sexual conduct, then "the instructions should indicate that the burden is on the prosecution to disprove consent beyond a reasonable doubt." *Thompson*, 117 Mich App at 528-29.

The same principle applies to the burden of proof in Cullen's consent hearing. The burden should not shift to Cullen under the strict liability statute, especially where, had he been prosecuted for forcible rape alone, he would have had the right to assert consent as an affirmative defense and the burden would have been on the State to disprove consent. Moreover, as a juvenile defendant, Cullen was particularly hampered by this burden shift. In accordance with the prescribed rules for the hearing, discussed in greater detail below, he was denied the right to confront and cross-examine his accuser, and his accuser not only had the option of foregoing appearing or testifying at all, she was also permitted to submit unsworn testimony. Like a boxer stepping into the ring blindfolded and with his hands tied behind his back, Cullen was ill-equipped to surmount the obstacles placed in front of him.

Additionally, although the consent hearing was not explicitly classified as either part of the adjudicatory or disposition stage of the delinquency proceeding, it is most closely analogous to an adjudicatory hearing.[5] The role of the judge in the initial adjudication and in the consent hearing is identical. In both proceedings, the judge engages in fact-finding, determining first the juvenile defendant's culpability and secondly whether the sexual act was consensual. In a disposition hearing, however, the judge acts in a different capacity, determining the appropriate sanction and program for rehabilitation. This is especially clear in Cullen's case as Judge Sykes presided over all of Cullen's hearings – the adjudicatory hearing, the consent hearing, and the disposition hearing.

The plain language of SORA likewise supports our contention that the consent hearing is effectively an extension of the delinquency adjudication. The SORA provides that the court must conduct the consent hearing "*before* sentencing or disposition to determine whether the

[5] Juvenile proceedings are bifurcated into a fact-finding phase, the adjudication, followed by the disposition, in which the court determines how best to provide for the treatment, rehabilitation or supervision to the child. MCLA 712A.17-18(H). This mirrors the two-part trial and sentencing phases in the adult criminal process.

individual is required to register under the act." MCLA 28.723a (emphasis added). Because Cullen's adjudicatory and disposition hearings took place prior to the SORA amendments' effective date, his hearing occurred after his disposition. However, the process established by SORA suggests that the legislature considered the consent hearing to be distinct from disposition, both chronologically and in purpose. The consent hearing is intended to serve as a fact-finding proceeding on an issue which informs the disposition, but is not part of it. Moreover, the requirement to register under SORA is predicated on the conviction of the juvenile, which necessarily means that the factfinder has found all essential elements of the offense to be true beyond a reasonable doubt. *See Fullmer v Mich. Dept. of State Police*, 360 F3d 579, 582 (Fed 6, 2004). Under SORA, the requirement of registration was predicated on a finding of *non-consent*, which was initially excluded as an essential element of the offense.

However, at the consent hearing, the question of consent became a critical factor in determining whether or not Cullen should be required to register as a sex offender. For purposes of registration in compliance with SORA, the Michigan legislature retroactively made consent an element of the offense. Accordingly, the burden should have been on the State to prove there was no consent in order to impose the harsh requirement of sex offender registration. Shifting the burden to Cullen to prove his innocence is a violation of his due process rights.[6]

This is consistent with the conduct of adjudicatory hearings generally, where the burden of proof rests with the prosecution because it is both substantively and procedurally

[6] The Michigan sexual conduct statutes do not exclude an alleged victim's consent to the instant crime charged as an affirmative defense to criminal sexual conduct. *See* MCL 750.520(a)-(e), (i)-(j)). Further, Michigan courts recognize that the legislation "impliedly comprehends that a willing, non-coerced act of sexual intimacy" is not criminal sexual conduct if it does not violate the other statutory provisions for age and capacity, and that consent is an affirmative defense. *People v Khan*, 80 Mich App 605, 619 n. 4 (1978). *See also People v Waltonen*, 272 Mich App 678, 688-89 (2006) ("In the context of the CSC statutes, consent can be utilized as a defense to negate the elements of force or coercion.") (citing *People v Stull*, 127 Mich App 14, 19–21 (1983)).

advantageous to the defendant. *See In re Winship*, 397 U.S. at 364 ("Where one party has at stake an interest of transcending value-as a criminal defendant his liberty-this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt.") (quoting *Speiser v Randall*, 357 US 513, 525-26; 78 S Ct 1332; 2 L Ed 2d 1460 (1958)). Substantively, the burden of proof in a criminal trial is advantageous to the defendant because of what must be proven. In any criminal trial, the prosecution bears the burden of proving all elements of the crime beyond a reasonable doubt. *In re Winship*, 397 US at 364. Although the State need not disprove all affirmative defenses beyond a reasonable doubt (*Patterson v New York*, 432 US 197, 210; 97 S Ct 2319; 53 L Ed 2d 281(1977)), it is required to disprove an affirmative defense that negates a required element of a crime. *Gall v Parker*, 231 F3d 265, 287 (Fed 6, 2000), cert. denied *Parker v Gall*, 450 US 989; 101 S Ct 1529; 67 L Ed 2d 824 (1981), overruled on other grounds by *Bowling v Parker*, 344 F3d 487, 501 n. 3 (Fed 6, 2003). In Michigan, courts specifically recognize that the burden of proving all elements of a crime beyond a reasonable doubt includes disproving any affirmative defenses. *Thompson*, 117 Mich App at 528-29.

B. Cullen was denied the right to confront and cross-examine his accuser at the consent hearing, in violation of his due process rights.

The statute governing the consent hearing denies Cullen the opportunity to confront and cross examine his accuser, in violation of his rights under the Sixth and Fourteenth Amendments "to be confronted with the witnesses against him." US Const Am VI.[7] In *Crawford v Washington*, the Supreme Court held that the Confrontation Clause of the Sixth Amendment applies to any "testimonial statements" offered against a defendant. 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). During Cullen's consent hearing, the victim was permitted to submit an unsworn

[7] For the reasons set forth above, Cullen's consent hearing was an extension of his delinquency adjudication; the Confrontation Clause applies to this hearing.

statement to the court. Her statement led to the determination that the sexual conduct was not consensual, requiring that Cullen register as a sex offender under the Act. She was not present for cross-examination, denying Cullen the opportunity to "ensure the reliability of the evidence against [him] by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v Craig*, 497 US 836, 845; 110 S Ct 3157; 111 L Ed 2d 666 (1990). This inability to test the reliability of her testimony made it nearly impossible for Cullen to meet his burden of proving consent. Since the sole issue at this hearing is the victim's consent, stripping the defendant of any opportunity to test the victim's credibility renders the hearing little more than a kangaroo court. Indeed, this crippling of the defendant contravenes the very principles which undergird the Sixth Amendment: the elimination of prejudice against the defendant; the preclusion of statements which cannot be corroborated; and the presumption of innocence.

As Justice Scalia noted in *Crawford*, "where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 US at 68-69. Yet the consent hearing under SORA permits victims to present untested versions of the facts,[8] while Cullen's version of the facts remains fully open to challenge by the prosecutor. The statute does not even require sworn testimony from the victim. This flaw in the Act is compounded in 'Romeo and Juliet' cases – arguably the scenario here – where the victim may be pressured by family members to deny any consensual sexual activity. At the consent hearing below, Hannah was surrounded by family members when she was asked to discuss the nature of her sexual contact with Cullen. It is likely that her family's presence placed pressure on her to recount a version of events that put her

[8] MCL 28.123(a)(5) "The victim of the offense has the following rights in a hearing under this section. A) to submit a written statement to the court, B) to attend the hearing and to make a written or oral statement to the court, C) to refuse to attend the hearing or D) to attend the hearing but refuse to testify or make a statement at the hearing".

conduct and reputation in the most favorable light. Conducted in accordance with these rules, the consent hearing is fatally unbalanced, and severely limits the capacity of the court make an informed ruling on a matter with such severe, long-term consequences for a juvenile defendant as sex offender registration.

Moreover, while the State's interest in protecting a vulnerable witness is not unimportant, the State has other means to ensure protection of the victim that do not violate a defendant's Due Process rights. For example, while there is a preference for face to face testimony, the court may make other arrangements for an "important public policy and only where the reliability of testimony is otherwise assured." *Maryland v. Craig*, 497 US at 850. Furthermore, the victim is already provided protections within the statutory scheme. The SORA explicitly states that the Rape Shield Law applies to the fact finding consent hearing. MCL 28.723(a)(3)(establishes that the rules of evidence do not apply with the exception of MCL 750.520j [9] The Rape Shield Law provides explicit and constitutionally permissible limitations on the confrontation or proffering of evidence of a victim's sexual conduct history or reputation with a few narrow exceptions. *See People v Arenda*, 416 Mich 1 (1982) (upholding constitutionality of Rape Shield Law).

The reliability of the testimony presented at the consent hearing takes on a heightened importance when the underlying charge was prosecuted as a strict liability crime. No testimony was proffered as to the circumstances of the sexual contact. The State was neither required to prove multiple elements of a criminal act nor required to prove criminal intent or non-consent. The consent hearing was the first and only opportunity for Cullen to challenge Hannah's

[9] (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
(a) Evidence of the victim's past sexual conduct with the actor.
(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

subjective version of the event.

Finally, even if the court declines to view this fact finding hearing as an extension of the adjudication hearing, Cullen's inability to confront and cross-examine the witness against him still violates due process. The Supreme Court has acknowledged that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v Kelly*, 397 US 254; 269; 90 S Ct 1011; 25 L.Ed.2d 287 (1970). Whether or not Cullen would be required to register as a sex offender turned exclusively on whether or not the court found consent. Given the heavy burden imposed by sex offender registration, discussed in more detail below, the consent hearing involved an "important decision" with far reaching, long term consequences, and thus necessitated that Cullen have the opportunity to confront his accusers. *Id.*

III. CULLEN FACES HARSH LONGTERM COLLATERAL CONSEQUENCES AS A RESULT OF THE CONSENT HEARING FINDINGS.

The requirement that Cullen register as a sex offender under SORA contravenes two of the primary justifications for relaxing traditional due process requirements in strict liability criminal prosecutions -- limited penalties and minimal stigma following conviction under such statutes. While Amicus submits that the registration requirement imposed on Cullen is punishment, regardless of how it is characterized, it places an onerous burden on Cullen that can hardly be considered either limited or minimal.

This Court has previously ruled that the sex offender registration requirement is not punishment. *People v Pennington*, 240 Mich App 188, 192-197 (2000) (noting that the registration requirement is "directed at protecting the public and [has] no punitive purpose"); *see also In re T.D.*, 2011 Mich App LEXIS 954, *10-13 (2011). The legislation itself states that the

purpose of the registration requirement is to "assist law enforcement officers and the people of this state in preventing and protecting against the commission of future criminal sexual acts." MCL 28.721(a). It is not contested that the SORA has a "regulatory purpose," and that the state has a legitimate interest in promoting public safety. *Lanni v Engler*, 994 F Supp 849, 853-54 (ED Mich 1998). This is especially so in the adult context. However, the Michigan Court of Appeals has previously expressed concern over "the draconian nature of this act." *In re Hardwick*, 2004 WL 316459 (Mich App 2004). In considering whether a similar registration statute in Ohio comported with due process when applied to juveniles, the Court of Appeals of Ohio noted that "what may not be 'punishment' in the adult justice system, is most certainly punitive to juveniles." *In re W.Z.*, 2011 WL 2566303, No. S-09-036 at *10 (2011). The court concluded that "the doctrine of fundamental fairness" required that the statute contain adequate procedures to protect juveniles from the "oppression, harassment, or egregious deprivation" which the court recognized resulted from the registration and community notification requirements. *Id*.

Over four decades ago the United States Supreme Court recognized in *In re Gault* that the technical classification of juvenile proceedings as civil in nature could not mask the severe infringement on a child's liberty occasioned by these proceedings, necessitating the extension of significant due process protections to juvenile delinquency adjudications. 387 US 1, 13; 87 S Ct 1428; 18 L Ed 2d 527 (1967). As in *Gault*, the substance and the effect of Cullen's consent hearing, including the ultimate requirement that he register as a sex offender, mandates a level of procedural protection not provided by the SORA.

A. The consequences of Cullen's registration are long lasting and severe because he can never have his juvenile record expunged.

Although Cullen's information will be entered into a non-public registry, unlike the defendant in *W.Z.*, this does not eliminate the harmful consequences that he will suffer as a result of being required to register as a sex offender for 25 years. MCL 28.725(6). Non-public registration does not guarantee that there will be no breach of Cullen's privacy. Although only law enforcement officials have 'access' to Cullen's information, it is possible in today's tech-savvy culture that his information will be leaked, and that the stigma of being branded a registered sex offender will follow Cullen far into adulthood. Additionally, the SORA's registration requirement, quite apart from the additional community notification requirements that apply only to serious offenders, runs afoul of the core purpose of the juvenile justice system, which is the rehabilitation of juvenile offenders. As the *W.Z.* court noted, rehabilitation of juvenile offenders can be "hampered if not obliterated" by the knowledge that the registration requirement, for however long it is imposed, cannot be avoided. *Id*. at 62. *See also* Letter from Nancy Gannon Hornberger, Executive Director, Coalition for Juvenile Justice to Laura L. Rogers, Department of Justice (January 31, 2007), noting that subjecting juveniles to sex offender registration "interferes with and threatens child-focused treatment modalities and may significantly decrease the effectiveness of the treatment." *Available at* http://www.juvjustice.org/media/fckeditor/SORNA%20Comments.pdf.

Moreover, Cullen's juvenile court record will be accessible as he is ineligible for record expungement under Michigan law, which provides generally that children who have been adjudicated delinquent and who have completed their dispositions may have their records sealed and eventually expunged. MCL 712A.18e. Michigan's expungement policy is consistent with policies nationwide, adopted in recognition of the transient nature of childhood. Because children

generally grow out of delinquency even without court interventions, there is widespread agreement that they should be able to enter adulthood without their childhood mistakes following them. However, Cullen is ineligible for record expungement due to the nature of the crime with which he was charged. MCL 712A.18e.

Additionally, the collateral consequences of having a sex offender adjudication on his record for the rest of his life will likely interfere with Cullen's ability to become a productive member of society. It will likely limit his options for employment, education, college and financial aid, and housing, among others. *See* Robert Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings: Part II*, 15 Crim. Just. 41 (2000), *available at* http://www.abanet.org; Kristin Henning, *Eroding Confidentiality in Delinquency Proceedings: Should Schools and Public Housing Authorities Be Notified?* 79 N.Y.U. L. Rev. 520, 570 (2004); Michael Pinard, *The Logistical and Ethical Dilemmas of Informing Juveniles about the Collateral Consequences of Adjudication*, 6 Nev. L.J. 1111, 1114 (2006). According to Human Rights Watch, "private employers are reluctant to hire sex offenders even if their offense has no bearing on the nature of the job." Human Rights Watch, *supra* at 81. A felony juvenile adjudication for a sex offense may also disqualify Cullen from military service. *See* Shepherd, *supra* at 42. Thus, adjudications for sexual offenses often "equate directly with job loss and [loss of] employment opportunities, and a general inability to provide for a future family through gainful employment and parental involvement (volunteering, coaching, and chaperoning) in the lives of future children." Meredith Cohen, *No Child Left Behind Bars: The Need to Combat Cruel and Unusual Punishment of State Statutory Rape Laws*, 16 J.L. & Pol'y 717, 740-41 (2008).

Without the ability to expunge the adjudication for criminal sexual conduct from his record, Cullen may have to disclose his delinquency adjudication for criminal sexual conduct to

potential employers. Additionally, his juvenile record may come up in background checks completed by a state agency or the Federal Bureau of Investigation (FBI) for the purposes of employment, licensing, or child placement. *See, e.g.*, Ohio Justice and Policy Center, *Criminal Records & Expungement: A Guide for Hamilton County Service Providers* 7 (Sept. 2009), *available at*: http://www.reentrycoalition.ohio.gov/docs/Expung+CrimRec%20Guide-sept09.pdf. (explaining juvenile justice records are generally not public information, but offenses that cannot be expunged *will* be accessible in background checks for jobs in hospitals, schools, daycares, security, and others).

B. The labeling of a child as a sex offender through sex offender registration laws causes lasting stigma and concrete harm.

In addition to the adverse consequences for Cullen's future education, employment, and livelihood, Cullen most certainly faces harsh consequences to his personhood. It is a matter of common understanding that the labels of "rapist" or "sex offender" are among the most heinous and despised in contemporary society. *Neal v Shimoda*, 131 F3d 818, 829 n.12 (Fed 9, 1997) ("We can hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling . . . as a sex offender". . . "). Research shows that calling a child a "sex offender" or "rapist" can have severely damaging psychological and practical consequences. *See* Judith V. Becker, *What We Know About the Characteristics and Treatment of Adolescents Who Have Committed Sexual Offenses*, 3 Child Maltreatment 317, 317 (1998); Mark Chaffin & Barbara Bonner, *"Don't Shoot: We're Your Children:" Have We Gone Too Far in Our Response to Adolescent Sexual Abusers and Children with Sexual Behavior Problems?*, 3 Child Maltreatment 314, 314-16 (1998). This long-term sex offender labeling is likely to interrupt the natural process of developing a positive, healthy self-identity and undermine the juvenile justice system's goals

of rehabilitation. *See* Elizabeth J. Letourneau, & Michael H. Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, 17 Sexual Abuse: A J. of Res. & Treatment 293, 303-07 (2005); Maggie Jones, *How Can You Distinguish a Budding Pedophile From a Kid with Real Boundary Problems?*, N.Y. Times, July 22, 2007. As Human Rights Watch observed in their recent report, labeling children as sex offenders has little apparent benefit, but it "will, however, cause great harm to those who, while they are young, must endure the stigma of being identified as and labeled a sex offender, and who as adults will continue to bear that stigma, sometimes for the rest of their lives." Human Rights Watch, *No Easy Answers: Sex Offender Laws in the U.S.*, 9 (2007).

Such labeling can also cause other kinds of concrete harm to children, including social isolation and ostracism by peers. For example, one expert in sex offender treatment concluded that "labeling young children as *child rapists* . . . has the potential to . . . isolate them further from peers, adults, and potential sources of social and psychological support." Becker, *supra*, at 317. In addition, children adjudicated as sex offenders are often unable to develop and maintain friendships, are kicked out of extracurricular activities, or even physically threatened by classmates after their peers learn of their record. *See* Jones, *supra*, at 3. As a result of the community's awareness of the nature of the crime with which Cullen has been charged, Cullen has already suffered ostracism and ridicule by his peers and other members of the community. He has indirectly been told to limit his scholastic extracurricular involvement and has been called a "rapist" by adults in the community.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that the Court of Appeals reverse the underlying adjudication and registration requirement under SORA. Further, we request that the court hold that the rules governing the consent hearing under MCLA 28.723(a) violate the Michigan and United States Constitutions.

Respectfully submitted,

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