No. ED102154

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

IN THE INTEREST OF S.C.,

Appellant.

v.

JUVENILE OFFICER,

Respondent.

APPEAL FROM THE TWENTY-SECOND JUDICIAL CIRCUIT COURT
OF ST. LOUIS CITY, STATE OF MISSOURI
JUVENILE DIVISION

BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This action is an appeal from the August 25, 2014 Order and Judgment of Jurisdiction and the September 30, 2014 Order and Judgment of Disposition entered in the 22nd Judicial Circuit Court of the City of Saint Louis, Family Court-Juvenile Division adjudicating S.C. of the delinquent act of attempted rape in the first degree in violation of Section 564.011 and 566.030.1, R.S.Mo. A Notice of Appeal was timely filed on October 21, 2014. This appeal is filed pursuant to Section 211.261, R.S.Mo. The City of Saint Louis lies within the territorial jurisdiction of the Missouri Court of Appeals, Eastern District. Section 477.050, R.S.Mo. Therefore, jurisdiction and venue are appropriate in the Court of Appeals for the Eastern District of Missouri. Mo. Const. Art. 5, Section 3 (as amended).

STATEMENT OF FACTS

As an infant, S.C. was in the custody of the Children's Division due to chronic neglect and lack of supervision. (Competency Hearing Petitioner's Exhibit #1; report of Dr. Patsy Carter (hereinafter "Exhibit 1", p. 2) Not only was he exposed to crack cocaine in utero, at the age of one, he was found to have elevated lead levels in his blood. (Ex. 1, p. 2) Then at ten months of age, he was placed in a foster home. (Ex. 1, p. 2) He was later adopted as an infant by M.C., who was believed to be his biological grandmother, but this was later found not true. (Disposition Hearing Petitioner's Exhibit # 2; report of Dr. Ashley Darling (hereinafter "Exhibit 2"), p. 4) He had some contact with his father, but none in the past ten years since his father is currently in prison. (Ex. 1, p. 2) S.C. only lived with his biological mother for a brief period of time at the age of twelve. (Ex. 1, p. 2) During the adjudication hearing, S.E.C. stated she felt S.C. did not get enough attention from his family. (Tr. 74)

S.C. exhibited behavioral problems from an early age. (Ex. 1, p. 2) By the time he was four years old, he had been suspended from school twice for acting in a threatening manner and "punching holes in the wall." (Ex. 1, p. 2) By the time he was in eighth grade, he had attended five different schools. (Ex. 1, p. 4) Additionally, at age 13, while he was in foster care, he threw "temper tantrums" and acted impulsively. (Ex. 1, p. 2) There were, however, no concerns with S.C. exhibiting sexual behaviors. (Ex. 1, p. 2)

Although S.C.'s educational records revealed as early as 2004 he struggled with developmental delays and concerns in the areas of "fine motor skills, cognition, adaptive

behavior, speech/language, and social/emotional behaviors;" he did not receive special educational services until 2013. (Ex. 1, p. 3) Additionally, assessment reports noted concerns with his inattentiveness, inability to follow directions, displays of impulsivity and hyperactivity, problems with short-term memory, difficulty with transitions, tendency to fight with other children and strong need for a highly structured environment. (Ex. 1, p. 3) Eventually in 2013, based on a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD), Oppositional Defiant Disorder, and Bipolar Disorder, an individualized education plan (IEP) was developed and he was finally eligible for special education services. (Ex. 1, p. 3) But none of the goals on his IEP were met. (Ex. 1, p. 3) Subsequently, a behavioral intervention plan was also developed to address S.C.'s displays of physical aggression. (Ex. 1, p. 3)

In December 2013, S.C. returned to foster care when M.C. refused to pick him up from Cardinal Glennon Children's hospital after he was hospitalized. (L.F. 11–2) The petition alleged he was taken by ambulance to the hospital as he had mental health issues and had not taken his medication. (L.F. 11–2) It was unclear whether his mother refused to give him the medication or whether he refused to take it. (L.F. 11–2) According to hospital personnel, M.C. she did not want to deal with her son and did not care what they did with him. (L.F. 11–2) She later disputed this fact. (Tr. 171)

On January 10, 2014, the Juvenile Officer amended the petition stating S.C. was in need of mental health treatment, which his mother could not access. (L.F. 20) And by stipulation to that amendment, the court adjudicated the petition and ordered S.C. into the

custody of the Children's Division, to be placed with nonrelatives. (L.F. 29–31) The court also ordered M.C. to participate in family counseling with S.C. and for Children's Division to provide family counseling, a psychological evaluation and psychiatric treatment for S.C. (L.F. 32, 35-9)

On March 13, 2014, a new petition was filed alleging S.C., a juvenile aged fourteen years old, attempted to forcibly rape his forty-one year old adoptive sister, S.E.C. pursuant to Sections 564.011 and 566.030, R.S.Mo. (L.F. 40–1) A first amended petition filed later alleged two counts of attempted first degree rape. (L.F. 42–3) S.C. was placed in detention and remained there during the pendency of the petition. (L.F. 2)

On April 22, 2014, a mandatory certification hearing was held pursuant to Section 211.071, R.S.Mo, (L.F. 47–50; Certification Hearing Exhibit 1 (hereinafter "Exhibit 3") Deputy Juvenile Officer (DJO) Webb testified S.C. was fourteen years old and still in the legal custody of Children's Division. (Tr. 12) She explained that he had been in three placements before being placed in detention; a traditional foster home, Annie Malone Children's Home and then Youth in Need. (Tr. 12) A psychological evaluation diagnosed S.C. with bipolar disorder and schizoaffective disorder and was taking Abilify and Guanfacine while in detention. (Tr. 14) She also stated he had an IEP with a diagnosis of mild mental retardation and received special education. (Tr. 15, 17) She believed the Department of Youth Services (D.Y.S.) had suitable programs to treat him in the juvenile system. (L.F. 15, Ex. 3; p. 3) S.C. had no prior adjudications. (Tr. 21) His sister, S.E.C., did not want him to be certified. (Tr. 21) Ms. Kela Burns, Children's

Division casemanager, testified that she agreed S.C. should remain in the juvenile court and not be transferred to adult court for prosecution. (Tr. 18-9) At the conclusion of the hearing, the court denied the Petition to Dismiss and set the matter for juvenile adjudication. (Tr. 16, 21; L.F. 47–50) The court also granted a motion to compel a buccal swab for DNA testing without any objection by defense counsel. (Tr. 22)

On June 2, 2014, defense counsel filed a Motion for a Psychiatric Evaluation pursuant to Sections 211.202, 211.203, and 211.261, R.S.Mo. (L.F. 51) Defense counsel cited a previous evaluation by Dr. Lisa Emmeneger who found S.C. to have a mood disorder and an IQ of 61, thereby placing him in the mental retardation range. (L.F. 51) Defense counsel explained S.C. did not seem to understand discussions about the evidence or proceedings and blankly stared at defense counsel during meetings. (L.F. 51) Counsel asked for an evaluation of S.C.'s competency and whatever else the court deemed necessary. (L.F. 51–2) On June 11, 2014, the court ordered a psychological assessment, a competency evaluation, and an evaluation of his ability to form mental intent at the time of the offense. (L.F. 57) On June 12, 2014, the Attorney for the Juvenile Officer also filed a Motion for Psychiatric Evaluation and Treatment and the court ordered an evaluation of whether S.C. had a mental disease or defect, whether he was competent to proceed, whether he was responsible for his conduct or had diminished capacity, and whether he would be a danger to himself or others. (L.F. 54–7)

A competency hearing was held on August 4, 2014. (Tr. 24) By agreement of the parties, Dr. Patsy Carter's report of S.C.'s evaluation was admitted, and the court took a

recess to read the report. (Tr. 25–6; Ex. 1) Dr. Carter did not testify at the hearing. (Tr. 24) Before leaving the courtroom, S.C.'s mother, M.C., asked the court, "your honor can I ask you a question before you go? I'm kind of confused. Earlier they told me my son was mildly retarded and now they tell me he's competent to stand trial." (Tr. 25) The judge replied that it was up to him to determine whether S.C. was legally competent, and he wanted to read the report and possibly check his own records on how the tests work to determine how much weight to give to the testing. (Tr. 25–6)

Dr. Carter's psychological evaluation was based on information from various available documents including the police report, Dr. Emmenegger's psychological evaluations, juvenile office records, Great Circle's report to the Court, S.C.'s IEP, and an interview with S.C. (Ex. 1, p. 1) Dr. Carter acknowledged there were "significant gaps in the information obtained" and she was unable to obtain additional records due to time constraints of the court. (Ex. 1, p. 5) Based on the limited information available, Dr. Carter diagnosed S.C. with Disruptive Mood Dysregulation Disorder with consistent irritability, low frustration tolerance, and a mild intellectual disability, and noted an IQ score of 61. (Ex. 1, p. 3) His symptoms included severe recurrent temper outbursts out of proportion and intensity to the provocation, low frustration tolerance, and consistent irritability that was "more persistent than episodic." (Ex. 1, p. 6) Dr. Carter hypothesized that the diagnosis was a result of "in utero drug exposure, possible lead exposure or possible early neglect/trauma." (Ex. 1, p. 6) Dr. Carter's evaluation relied on Dr. Emmenegger's assessment which recommended S.C. receive "contact supervision and

oversight as well as a structured environment." (Ex. 1, p. 4) Although treatment was recommended to control his aggressive behaviors, Dr. Carter concluded S.C. did not pose an "imminent risk of harm to himself or others." (Ex. 1, p. 7)

During the ninety-minute interview, Dr. Carter found S.C.'s knowledge and thinking remained "concrete," and moving forward, information should be presented to him in "small easily understood chunks." (Ex. 1, p. 6) Dr. Carter noticed some gaps in S.C.'s knowledge of the court process, so she reviewed the information with him, and tested his knowledge. (Ex. 1, p. 6) She concluded, although his knowledge was concrete, he was able to learn new information. (Ex. 1, p. 6) Retention of information past the ninety-minute interview, however, was not tested. Also, she stated S.C. is "more engaged if he views the information as pertinent to getting his needs met." (Ex. 1, p. 6) Furthermore, she found S.C. understood the charges and proceedings and can assist in his own defense. (Ex. 1, p. 6–7). His knowledge or appreciation of the nature of his actions was not assessed. (Ex. 1, p. 7)

The court after reviewing the report found it was thorough, its conclusions were supported by sufficient methodologies and test results, and its findings were credible, and the court also found Dr. Carter to be highly reliable. (Tr. 26–7) The court concluded it was more likely true than not that S.C was capable of working with his attorney and capable of understanding the potential results of the charges he was facing. (Tr. 27; L.F. 58)

The adjudication hearing was held on August 25, 2014. (Tr. 33) A motion to declare the sexual offender registry unconstitutional as applied to juveniles was filed by defense counsel on August 21, 2014. (L.F. 59-62) Defense counsel asked the court to rule on the motion at the beginning of the adjudication hearing. (Tr. 33) The motion argued the registry is unconstitutional as cruel and unusual punishment under the Eighth Amendment of the U.S. Constitution and Article I, Section 21 of the Missouri Constitution in that the U.S. Supreme Court has declare juveniles are less culpable than adults and therefore having them register for life ignores their great capacity for rehabilitation. (L.F. 59-60) And, the registry violates due process of law under the Fourteenth Amendment of the U.S. Constitution and Article I, Section 10 of the Missouri Constitution because the lifetime registration requirement is imposed without any hearing to determine their future dangerousness and imposes restrictions on other rights by burdening juveniles and their families with registration requirements. (L.F. 60-2) The court took the motion under advisement. (Tr. 33-4)

S.C.'s adoptive sister, S.E.C., was the first witness to testify. (Tr. 42–7) On March 11, 2014, S.C. was dropped off at the house while M.C. went to Aldi's. (Tr. 39-40) S.C. asked to walk the dog and if he could play a game when he returned. (Tr. 41) S.E.C. said yes and S.C. left to walk the dog. (Tr. 40) While she looked for a game, S.C. returned and said he needed to use the bathroom. (Tr. 41–2) Upon returning from the bathroom, he walked up and started to choke S.E.C. (Tr. 41–2) She testified that S.C. is taller and heavier than her. (Tr. 38-9) She struggled for air but was finally able to speak and said,

"you're killing me" and "I'm your sister." (Tr. 43) He responded, "get up bitch" and pulled her to get up. (Tr. 43-4)

They moved around the room and he locked the front door (Tr. 44-5) She ran towards the dining room but he caught up with her and slammed her into the table and wall. (Tr. 45) There was a struggle to get away and she tried to make it to her bedroom to get a gun. (Tr. 45) Before she could, he told her to get on the bed. (Tr. 45) She ran to the kitchen and he cornered her. (Tr. 46) He told her to pull down her pants, but she said no. (Tr. 46) He then bent her over a chair, pulled down his and her pants. (Tr. 46) She said no, not here and requested they go to the living room in the hope someone would see her through the window and help her. (Tr. 46)

When she walked into the living room, he told her to bend over the dining room chair. (Tr. 46) He pulled down her pants and her underwear, put his penis on top of her lower back and in between her upper buttocks, and humped her. (Tr. 46–7) He did not put his penis in her vagina. (Tr. 47) Later, she asked if he was finished and he said "yes," and allowed her to leave to go out on the porch. (Tr. 47) She stated, "[i]t was like he was a different person" and it was as if he "didn't have a soul that day." (Tr. 47, 74)

When it was over, she told him that she had to go see the neighbors since they were expecting her, and if she did not go, they would be suspicious. (Tr. 47–8) He followed her to the neighbor's house, but after she entered their house, she told them to not let him in and to lock the door. (Tr. 48–9) S.E.C. did not know where S.C. went after that. (Tr. 51) She told her neighbors that S.C. had beat and raped her. (Tr.49)

S.E.C.'s neighbor David Carroll testified that when S.E.C. came to his house, she was ruffled up her hair was a mess and he knew something was not right. (Tr. 88–9) S.C. came to the door too but S.E.C. told Mr. Carroll not to let him in. (Tr. 91) S.E.C. said S.C. had choked her , tried to kill her and rape her. (Tr. 92) Nena Carroll, wife to Mr. Carroll, also stated S.E.C. was very upset, nervous, and crying and wanted to call the police. (Tr. 95) The neighbors called the police for her and she stayed at their house until the police arrived. (Tr. 50–1) Her friend drove her to the hospital where she was treated and examined and her clothing was seized for a sexual assault examination. (Tr. 50–1, 71–2, 81–2) She stated she suffered some bruising and scratches from the assault (Tr. 55–6)

Detective Cassity, who arrived at the scene of the assault and interviewed S.E.C., described S.E.C.'s demeanor as visibly upset, distraught, and shaking. (Tr. 76–9) He stated she was complaining of injuries and that she needed medical treatment. (Tr. 79) She went to Barnes and he later collected the sexual assault kit provided by S.E.C. and took it to the crime lab. (Tr. 81-2) He also took S.C. to juvenile detention and later took a buccal swab of S.C. for DNA testing. (Tr. 82–3)

Evidence—including a sexual assault kit, several different types of swabs, pubic hair controls, pubic hair combings, S.E.C.'s clothing and underwear, and fingernail scrapings—from S.C. and S.E.C.—was packaged and sent to the crime lab for examination. (Tr. 104–5) Erick Hall, a biological screener with the St. Louis Police Department crime lab, received these items and conducted several tests to look for DNA.

(Tr. 101-2, 104) First, he used a presumptive test which found a component of seminal fluid on the extra swabs that were marked lower back-buttocks and the underwear, as well as a trace amount of the component of seminal fluid on the vaginal swabs and the rectal swabs. (Tr. 106) He then made slides from those samples and looked at them under a microscope, which confirmed the presence of sperm. (Tr. 106-7) He then sent those samples off for DNA testing. (Tr. 107)

Pamela Larkin, a DNA analyst with the St. Louis Metro Police Department crime lab, conducted PCR analysis of the samples from S.E.C. and S.C. (Tr. 111, 113, 115) Ms. Larkin was able to obtain full DNA profiles from items 3-1-1 the vaginal swab heads, 3-2-1, the rectal swab heads, and 3-3-1 the oral swab heads taken from S.C. (Tr. 115) She was also able to obtain partial profiles from item 3-10-1; a swab and two cuttings of the stained areas on the back of the underwear and 3-11-1; a swab of the scrapings of S.E.C. (Tr. 116) She was able to determine that 3-10-1 was consistent with a mixture of DNA from S.C., the major contributor, and trace amounts from another individual. (Tr. 117)

Before the end of the hearing, defense counsel again asked the court to rule on the motion to declare the sexual offender registry unconstitutional. (Tr. 144) The court advised he was still thinking about it. (Tr. 145)

The court found S.C. guilty of one count of Attempted Rape in the First Degree pursuant to Sections 564.011 and 566.030.1, R.S.Mo. (L.F. 63–6) The other count was dismissed by the court. (Tr. 127) The court took judicial notice of Dr. Emmenger's report and a report that was admitted at an August 4th hearing. (Tr. 13; Ex. #3)

The disposition hearing took place on September 30, 2014. (Tr. 131) DJO Webb testified regarding the social investigation she conducted and the accompanying recommendation. (Tr. 131–9) She recommended a commitment to D.Y.S. because it had long-term, structured residential treatment programs. (Disposition Hearing Exhibit 1 (hereinafter "Exhibit 4"; p. 1; Tr. 137) She further recommended S.C. should (1) receive individual/family counseling, medical treatment, and HIV testing, (2) participate in sexual offender treatment program, and (3) register with the sex offender registry pursuant to Section 211.425, R.S.Mo., (Ex. 4, p. 1–2)

A psychosexual evaluation was conducted on September 10, 2014 by Dr. Darling while S.C. was in detention. (Ex. 2) S.C. met daily with a court psychologist while in detention to work on controlling his anger. (Ex. 2, p. 5) An assessment of his intellectual abilities showed he performed below average on (1) a test of visual perception and organization, visual memory, and recognition of essential details, (2) verbal tasks, and (3) a measure of working memory. (Ex. 2, p. 7) His ability to pay attention was found to be severely impaired. (Ex. 2, p. 7) The personality measures showed S.C. mistrusted others and feared they will dominate or brutalize him, and therefore, he did not "allow himself to be vulnerable to others because he [anticipated] being hurt." (Ex. 2, p. 8) Consequently, his desire to be close to others was negatively affected by "his brash exterior and socially blunt public posture." (Ex. 2, p. 8) Dr. Darling also noticed S.C. responds in an "impulsive and careless manner" and seeks "momentary gratification." (Ex. 2, p. 8) The evaluation found S.C. had limited frustration tolerance and "may

respond with overt cruelty or withdrawal into sulky, grumpy moods." (Ex. 2, p. 8) According to the assessment, along with his pessimistic outlook, he also "commonly broods over incidents from the past, and his "positive moods are likely short-lived." (Ex. 2, p. 8)

The report also included a risk assessment using the Juvenile Sex Offender Assessment Protocol-II. (Ex. 2, p. 9) Based on S.C.'s responses, the assessment revealed he did "not exhibit serious risk factors associated with sexual behavior and sexual preoccupation." (Ex. 2, p. 9) More importantly, since S.E.C. was an adult woman, S.C.'s risk of reoffending was lower. (Ex. 2, p. 9) S.C.'s ability to adjust to the community and his ability to manage his sexual impulses and anger were not assessed. (Ex. 2, p. 10) S.C. denied the current rape charge and demonstrated insufficient empathy, and did not express an internal motivation to change. (Ex. 2, p. 9) Contrary to Dr. Carter's diagnosis, Dr. Darling diagnosed S.C. with "Other specified Bipolar and Related Disorder" of moderate severity and a severe case of ADHD. (Ex. 2, p. 10) The recommendations included providing S.C. with (1) consistent and intense supervision, (2) treatment in a sex offender treatment program, (3) therapist-led sessions to teach coping strategies, (4) supportive therapy, and (5) psychiatric services. (Ex. 2, p. 11)

M.C. testified at the disposition hearing and asked that S.C. not be taken away from her and that she would get help for him. (Tr. 176) At the conclusion of the hearing, the judge awarded S.C.'s care, custody, and control to D.Y.S. and ordered him to register

as a sexual offender pursuant to Section 211.425, effectively denying the motion filed by defense counsel to declare the registry unconstitutional. (Tr. 181, L.F. 67–72)

POINTS RELIED ON

POINT I

THE TRIAL COURT ERRED IN ORDERING S.C., A JUVENILE, TO REGISTER AS A SEXUAL OFFENDER PURSUANT TO SECTIONS 211.425 and 589.400.1(6), R.S.MO., BECAUSE LIFETIME REGISTRATION OF JUVENILES IS FUNDAMENTALLY UNFAIR AND VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION, IN THAT IT IMPOSES AN ADULT PENALTY FOR A JUVENILE ADJUDICATION, CONFLICTS WITH THE PURPOSE OF THE JUVENILE CODE, AND REMOVES THE DISCRETION OF THE JUVENILE JUDGE DURING DISPOSITION.

In re J.B., 107 A.3d 1 (Pa. 2014)

In re C.P., 967 N.E.2d 729 (Oh. 2012)

Miller v. Alabama, 132 S.Ct. 2455 (2012)

J.D.H. v. Juvenile Court of St. Louis County, 508 S.W.2d 497 (Mo. 1974)

Section 211.271, R.S.Mo. (2014)

POINT II

THE TRIAL COURT ERRED IN ORDERING S.C., A JUVENILE, TO REGISTER AS A SEXUAL OFFENDER PURSUANT TO SECTIONS 211.425 and 589.400.1(6), R.S.MO., BECAUSE LIFETIME REGISTRATION OF JUVENILES ADJUDICATED OF SEXUAL DELINQUENT ACTS IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 21 OF THE MISSOURI CONSTITUTION, IN THAT A NATIONAL CONSENSUS HAS DEVELOPED AGAINST REQUIRING AUTOMATIC LIFETIME REGISTRATION FOR JUVENILES AND SUCH PENALTY IS DISPROPORTIONATE TO THE CULPABILITY OF THE JUVENILE AND IS INEFFECTIVE TO ACHIEVE THE REHABILITATIVE GOALS OF THE JUVENILE CODE.

Miller v. Alabama, 132 S.Ct. 2455 (2012)

Graham v. Florida, 560 U.S. 48 (2010)

In re C.P., 967 N.E.2d 729 (Oh. 2012)

R.W. v. Sanders, 168 S.W.3d 65 (Mo. banc 2005)

ARGUMENT I

THE TRIAL COURT ERRED IN ORDERING S.C., A JUVENILE, TO REGISTER AS A SEXUAL OFFENDER PURSUANT TO SECTIONS 211.425 and 589.400.1(6), R.S.MO., BECAUSE LIFETIME REGISTRATION OF JUVENILES IS FUNDAMENTALLY UNFAIR AND VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE MISSOURI CONSTITUTION, IN THAT IT IMPOSES AN ADULT PENALTY FOR A JUVENILE ADJUDICATION, CONFLICTS WITH THE PURPOSE OF THE JUVENILE CODE, AND REMOVES THE DISCRETION OF THE JUVENILE JUDGE DURING DISPOSITION.

S.C. is a fourteen-year-old boy diagnosed with Bipolar/Schizophrenic Affective Disorder, Mild Mental Retardation, and Attention Deficit Hyperactivity Disorder. (Ex. 1, p. 3). Although subject to a statutory mandatory certification hearing, the Juvenile Officer and Children's Division case manager requested that S.C. not be certified to stand trial as an adult because they believed there were programs and services within the juvenile system that could benefit and rehabilitate him. (Tr. 12-21; Ex. 3) The juvenile judge agreed and ordered that S.C. remain in the juvenile court for hearing. (L.F. 47-50, Tr. 21) S.C. was thereafter adjudicated for Attempted Rape in the First Degree of his forty-one-year-old adopted sister. (Tr. 29, 127).

A psychosexual evaluation conducted by Dr. Darling found S.C. to be "impulsive," "careless," and prone to "momentary gratification," yet concluded he "does not exhibit serious risk factors associated with sexual behavior and sexual preoccupation" and that he demonstrated "no evidence of abnormal sexual drive or preoccupation." (Ex. 2, p. 8-9). She noted concerns about intervention outcomes but crafted particularized recommendations to assist with rehabilitation. (Ex. 2, p. 10-11) Dr. Darling found S.C.'s sister's age was "related to a lower risk of reoffending." (Ex. 2, p. 7).

Notwithstanding this individualized evaluation of S.C.'s low risk of sexual reoffending and a motion by defense counsel to declare the sex offender registry unconstitutional, the court followed the statute and ordered S.C. to register as a sex offender pursuant to Section 211.425., R.S.Mo. (L.F. 67-72, 74). Such decision ignores that 211.425 and corresponding Section 589.400.1(6), R.S.Mo are fundamentally unfair as it inflicts an adult punishment on a juvenile still subject to juvenile court jurisdiction. Moreover, it eliminates the juvenile judge's central role in disposition; to consider the individual characteristics of the juvenile when imposing treatment options and court conditions to further rehabilitation while protecting the community.

1. Standard of Review

Construction of a statute is a question of law, which this Court reviews *de novo*. *Doe v. Phillips*. 194 S.W.3d 833, 841 (Mo. banc 2006). A "statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision." *Id.*, at 841, quoting *Doe v. Roman Catholic Diocese of Jefferson City,* 862

S.W.2d 338, 340 (Mo. banc 1993). Further, "[n]either the language of the statute nor judicial interpretation thereof can abrogate a constitutional right." *Id.*, quoting *State v. Bolin,* 643 S.W.2d 806, 810 (Mo. banc 1983).

In 2009, registration and notification requirements for juveniles in Missouri changed to comply with the Sex Offender Registration and Notification Act, or "SORNA". 42 U.S.C. § 16911 (2012). The federal law requires juveniles over fourteen years of age who are adjudicated for a sex offense equal to or more severe than aggravated sexual abuse under 18 U.S.C. Section 2241 to register for life, with the ability to petition for removal after twenty-five years, as "Tier III" sex offenders. *Id.* In contrast, Sections 211.425 and 589.400.1(6), R.S.Mo., require juveniles fourteen years or older at the time of the offense, and adjudicated of a sex offense equal to or more severe than aggravated sexual abuse under 18 U.S.C. Section 2241, to register on the adult sex offender registry for life, with no ability to petition for removal. The laws also require registration for juveniles certified as adults and convicted of sexual offenses equal to or more severe than aggravated sexual abuse under 18 U.S.C. Section 2241. Section 589.400.1(5), R.S.Mo. It is fundamentally unfair to make certain juveniles adjudicated of certain sexual offenses under juvenile court jurisdiction receive a civil penalty subjected only on those convicted of adult sex crimes. Moreover, the law treats juveniles certified to stand trial as adults the same as juveniles found by a juvenile judge to be amendable to treatment therefore subject to the care and protections of juvenile court jurisdiction. Because this violates

S.C.'s right to the protections of the juvenile court jurisdiction, it violates his rights to due process of the law.

2. Lifetime registration and notification conflicts with the purpose of Missouri's juvenile justice system to rehabilitate rather than punish.

The purpose of Missouri's juvenile code is to facilitate the care, protection and discipline of children who come within the jurisdiction of the juvenile court. Section 211.011, R.S.Mo. Chapter 211, R.S.Mo. must "be liberally construed" so "each child coming within the jurisdiction of the juvenile court shall receive such care, guidance and control as will conduce to the child's welfare and the best interests of the state." *Id.* The child welfare policy of Missouri is what is in the best interests of the child. *Id.*

The Missouri Supreme Court has declared the emphasis of the juvenile code is on continuing care, protection and rehabilitation of the juvenile." *J.D.H. v. Juvenile Court of St. Louis County*, 508 S.W.2d 497, 500 (Mo. 1974). Indeed, the "'rhetoric of rehabilitation'" constitutes "'the sole justification for the independent existence of the juvenile justice system apart from the criminal justice system.'" *Id.,* at 500, quoting Comment, *Juvenile Court Waiver: The Questionable Validity of Existing Statutory Standards*, 16 St.L.U.L.J. 604 (1972), citing R. Habiger, *Prosecution of Children in Missouri*, 30 J.Mo.B. 11, n. 7 (1974)). The United States Supreme Court has recognized that states can constitutionally treat juveniles "differently from adults…to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal

attention.'" *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) quoting *McKeiver v. Pennsylvania*, 403 U.S. 528, 550 (1971).

Moreover, juvenile delinquency cases are civil and not criminal cases. *In the Interest of A.G.R.*, 359 S.W.3d 103, 108 (Mo. App., W.D. 2013, citing *In the Interest of D.L.,* 999 S.W.2d 291, 293 (Mo.App. E.D.1999). Missouri has codified this purpose in Section 211.271.2, R.S.Mo. which states "[n]o child shall be charged with a crime or convicted unless the case is transferred to a court of general jurisdiction as provided in this chapter." Further: "[n]o adjudication by the juvenile court upon the status of a child shall be deemed a conviction *nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction* nor shall the child be found guilty or be deemed a criminal by reason of the adjudication." Section 211.271. 1., R.S.Mo. (emphasis added) Procedurally, delinquency cases are filed as petitions and not as informations or indictments. *See* Mo. Sup. Ct. Rule 23.01 and 113.01.

Although juvenile delinquency cases are civil, it is well established that most constitutional protections afforded to adults charged with criminal cases apply when juveniles face delinquency petitions. See *In re Gault,* 387 U.S. 1, 30–31, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). Specifically, due process and fair treatment are required in juvenile court adjudications of delinquency by the Fourteenth Amendment's Due Process Clause. *T.S.G. v. Juvenile Officer*, 322 S.W.3d 145, 149 (Mo. App. W.D. 2010), citing *In re Gault,* 387 U.S. at 30–31. The standard for due process in juvenile proceedings is fundamental fairness. *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971).

This long standing history of not imposing criminal penalties on juveniles and having a separate court system to treat and rehabilitate is further supported by new understandings of juvenile brain development. The United States Supreme Court has held that juveniles are less culpable than adults for offenses they commit because developmentally they are more impulsive, vulnerable to outside pressures, and have transitory character traits. *Roper v. Simmons*, 543 U.S. 551, 569-70 (2005)(finding the imposition of the death penalty on juveniles to be cruel and unusual punishment) In *Graham v. Florida*, the Court held juveniles sentenced to life without parole for non-homicde offenses is cruel and unusual punishment. 560 U.S. 48, 68, 130 S.Ct. 2011, 2027 (2010) Relying on amicus briefs from the American Medical Association and the American Psychological Association, the Court found "…developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. … parts of the brain involved in behavior control continue to mature through late adolescence." 560 U.S. at 68. The Court further concluded "[j]uveniles are more capable of change than are adults, and their actions are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Id.*, at 68, quoting *Roper,* 543 U.S., at 570, 125 S.Ct. 1183. Finally the Court reasoned "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.*

In *Miller v. Alabama*, the Court extended *Graham* to find juveniles automatically sentenced to life without parole for homicides constitutes cruel and unusual punishment.

132 S.Ct. 2455, 2469 (2012). The Court reasoned, "[b]y making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment." 132 S.Ct. at 2469. The Court justified different sentencing schemes for juveniles: "[w]e have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children." *Id.*, at 2470. As these cases came after the 2009 amendment to Missouri's juvenile registration requirements, it is important to evaluate their constitutionality under the U.S. Supreme Court's findings that adolescent development should be considered when assessing punishment and culpability.

3. The purpose of the sexual offender registry is to protect against recidivism.

The Missouri Supreme Court, in reviewing the adult sexual offender registry, found the purpose of Missouri's law is to "protect children from violence at the hands of sex offenders," *J.S. v. Beaird,* 28 S.W.3d 875, 876 (Mo. banc 2000), and to respond to the known danger of recidivism among sex offenders. *Doe v. Phillips,* 194 S.W.3d 833, 839 (Mo.banc 2006), citing *Connecticut Dept. of Pub. Safety v. Doe,* 538 U.S. 1, 4, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003); *Smith v. Doe,* 538 U.S. 84, 103, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003). The registry, as applied to adults, has been upheld as having a legitimate state interest and not violative of substantive due process principles. *Phillips*, 194 S.W.3d at 845, citing *Smith,* 538 U.S. at 99, 101, 123 S.Ct. 1140. However, Missouri has not looked at how these laws impact juveniles, in light of *Graham* and *Miller*, and

whether these state interests have a rational relationship to recidivism and the need to protect.

a. Because juvenile sexual offenders are not likely to reoffend, Sections 211.425 and 589.400.1(6), R.S.Mo are not rationally related to the intended purpose of the registry laws.

A 2006 study by University of California law professor Franklin Zimring of over 6,000 juveniles found that "juvenile sex offending did not predict adult sex offending" because "juvenile sex offenders were not statistically more likely than juvenile non-sex offenders to commit an adult sex offense." Amy E. Halbrook, *Juvenile Pariahs*, 65 Hastings L.J. 1, 14 (2013). A follow up study by Zimring in 2007 used a larger sample that separated male and female offenders up to age 21 and concluded, "neither having committed a sex offense as a juvenile nor the frequency of juvenile sex offending significantly increased the likelihood that a person would commit a sex offense as an adult." *Id.* Additionally, a 2007 study by psychologist Dr. Michael Caldwell of over 2,000 juvenile offenders found that recidivism of youths "previously adjudicated for sex offenses was 6.8%," while the percentage of sex offenses by previous non-sex offenders was a comparable 5.7%. *See id.* at 15. Furthermore, a 2008 study by psychologist Dr. Elizabeth Letourneau compared sex-offense recidivism of registered and unregistered youth and found a "sexual offense reconviction rate of less than one percent--too low to support a comparison between the groups." *Id.* Finally, a 2009 follow up study by Letourneau of juvenile males adjudicated for sex crimes found a sex-offense reconviction rate of less than three percent, a result supported by additional studies. *Id.* These results

are consistent with *Graham*'s findings there are "fundamental differences between juvenile and adult minds. … Juveniles are more capable of change than are adults." *Graham*, 560 U.S. at 68.

Finally, a 2009 report by the Supreme Court of Missouri Office of State Courts Administrator found that, out of 15,910 Missouri juvenile offenders tracked during 2007, those offenders whose "initial law offense referral" had been a sex offense had the lowest recidivism rate. Rick McElfresh, Jiahui Yan, & Anne Janku, *MO Juvenile Recidivism: 2009 Statewide Juvenile Court Report*, Your Missouri Courts 1, 5 (Sept. 2009), https://www.courts.mo.gov/file.jsp?id=34387. This data from Missouri supports the data from other registration systems showing that juvenile sex offenders are statistically unlikely to recidivate and are not any more likely to reoffend than non-sex offenders.

Despite the low risk of re-offense by juvenile sex offenders and their greater potential for rehabilitation, research has shown that sex-offender registration counter-productively interferes with such rehabilitation by imposing a stigma and blocking societal reintegration. Many "mental health professionals argue that public registration will greatly hinder intervention efforts" and could even cause "an increased likelihood of sexual and general recidivism by creating barriers to the successful reintegration of youth offenders." Ashley B. Batastini et al., *Federal Standards For Community Registration of Juvenile Sex Offenders: An Evaluation Of Risk Prediction And Future Implications*, 17 Psychol. Pub. Pol'y & L. 451, 454 (2011) (citing E. J. Letourneau & K. S. Armstrong, *Recidivism Rates for Registered and Nonregistered Juvenile Sexual Offenders*, Sexual

Abuse: A Journal of Research and Treatment 20, 393-408 (2008)). Enforcing a statute that increases the likelihood of recidivism cannot be consistent with the "care, protection and rehabilitation" that is central to the Missouri juvenile justice system. *See J.D.H. v. Juvenile Court of St. Louis County*, 508 S.W.2d 497, 500 (Mo. 1974).

Because there is no rational relation between the intended purpose of sexual offender registry laws; to protect children from recidivism, and the very low re-offense rate of juvenile sexual offenders, Sections 211.425 and 589.400.1(6) are fundamentally unfair and in violation of due process of law.

4. Requiring S.C. to register as a sex offender for life with no individualized assessment or review is fundamentally unfair because the automatic requirement does not consider the unique rehabilitative potential of juveniles.

The lessened culpability and transitory character of juveniles entitle them to individualized review of the risk of recidivism before any adult registration requirement is imposed. In *In Re J.B.*, the Pennsylvania Supreme Court held that the Pennsylvania version of SORNA's lifetime registration requirements for certain sex offenders violated due process as applied to juveniles. 107 A.3d 1, 35 (Pa. 2014). The Court, relying on U. S. Supreme Court precedent, concluded that "statutes that infringed upon protected interests or denied benefits by utilizing presumptions that the existence of one fact was statutorily conclusive of the truth of another fact" violated due process "absent a meaningful opportunity to contest the validity of the second fact." *Id.* at 25 (citing *Vlandis v. Kline*, 412 U.S. 441 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Bell v.*

Burson, 402 U.S. 535 (1971)). Under this "irrebuttable presumption doctrine," the Pennsylvania Supreme Court reasoned that SORNA infringed on juveniles' right of reputation under the Pennsylvania Constitution by presuming that all juveniles who had committed certain offenses were likely to recidivate. *Id.* at 34-35.

The lack of universality of a presumption and the existence of a reasonable alternative means of determining the presumption's validity weigh against that presumption's constitutionality. In *J.B.*, the Court relied on *Miller's* recognition of the "fundamental differences between juveniles and adults," as well as data showing that juvenile sex offense recidivism is low because "impulsivity and sexual curiosity" diminish with greater maturity. *Id.* at 31-32 (citing *Miller*, 132 S. Ct. at 2464-65; Halbrook, *supra* at 11-12). The Court reasoned that low actual recidivism of juvenile sex offenders showed that the presumption of recidivism risk was not universally true. *Id.* at 33-34. It also pointed out that "individualized risk assessment" was a reasonable alternative means of determining the likelihood of recidivism. *Id.* at 34. The same logic applies to juveniles beyond Pennsylvania.

Given the caring and rehabilitative purposes and traditions of the juvenile court system in Missouri and elsewhere, juveniles have a protected due process interest in state care that is conducive to rehabilitation and considerate of their age-related characteristics and vulnerabilities. Under the irrebuttable presumption doctrine, the presumption involved must infringe on a protected interest before it violates due process. *J.B.*, 107 A.3d at 21 (citing *Dean v. McWherter*, 70 F.3d 43 (6th Cir. 1995). In *J.B.*, the court relied

on the Pennsylvania Constitution's "right to reputation" to fulfill this requirement. *Id.* at 28.

Given that S.C. was not certified to stand trial as an adult, he was found to be amenable to treatment. (Tr. 8-21; L.F. 47-50) Therefore, S.C. has a protected interest in the juvenile court system which is focused on "continuing care, protection, and rehabilitation," *J.D.H.*, 508 S.W.2d at 500, consistent with the U.S. Supreme Court's recognition that due process in juvenile court can "account for children's vulnerability." *Bellotti*, 443 U.S. at 635. As such, this court should find that the juvenile court system's emphasis on rehabilitation and the United States Supreme Court's recognition of juveniles' lesser culpability combine to give juvenile's adjudicated in juvenile court a protected interest in state care that takes account of age-related characteristics and facilitates rehabilitation. Moreover, Missouri recognizes that juveniles not certified to stand trial as adults and subject to the juvenile court jurisdiction shall not have convictions and shall not be subject to the civil disabilities associated with convictions. See Section 211.271.1 and .2, R.S.Mo. Because S.C. was not certified, to impose the civil disability of a conviction violates his protected interest in the rights of the juvenile code.

By imposing a presumption of likely recidivism on certain juvenile sex offenders, which is not supported by research or data, and providing no opportunity to meaningfully contest the validity of that presumption, thereby inconsistent with the goal of rehabilitation and ignoring age-related characteristics, Sections 211.425 and

589.400.1(5), R.S.Mo violate due process under the irrebuttable presumption doctrine. S.C., a mere fourteen-year-old boy, will have to register as a sex offender for the rest of his natural life, with no individualized review of that requirement and no chance for him to demonstrate rehabilitation and rebut the presumption that he is likely to recidivate. Missouri's automatic lifetime registration for juvenile offenders provides no chance for review even though SORNA provides review after twenty-five years. This lifetime imposition disregards the unlikelihood of juvenile sex-offender recidivism and the demonstrated psychological and social harm that lifetime registration wreaks on juvenile offenders. *See* McElFresh, Yan, & Janku, *supra* at 5; Batastini, *supra* at 454 (citing E. J. Letourneau & K. S. Armstrong, *Recidivism Rates for Registered and Nonregistered Juvenile Sexual Offenders*, Sexual Abuse: A Journal of Research and Treatment 20, 393-408 (2008)). Therefore, Sections 211.425 and 589.400.1(6), R.S.Mo infringe on S.C. and all juvenile offenders' protected interest in juvenile court jurisdiction that promotes rehabilitation and considers their age-related characteristics, thus violating due process of law.

Sections 211.425 and 589.400.1(5), R.S.Mo. also violate due process of law because the automatic lifetime registration without individualized consideration of a juveniles' lessened culpability eliminates the discretion of the juvenile judge during disposition. In *C.P.*, the Ohio Supreme Court "held that SORNA's registration requirements violated due process because they lacked fundamental fairness by automatically imposing registration requirements on juveniles without procedural safeguards generally provided

in the juvenile system for consideration of a juvenile's lessened culpability and greater potential for rehabilitation." *In Re C.P.*, 967 N.E.2d 729, 746-50 (Ohio 2012). The court explained that "fundamental fairness is not a one-way street" that only enables states to relax due process requirements for juveniles. 967 N.E.2d at 750. Rather, fundamental fairness can demand "*additional* procedural safeguards for juveniles in order to meet the juvenile system's goals of rehabilitation and reintegration into society." *Id.* (emphasis added).

In *C.P.*, the juvenile judge determined the child should remain under juvenile court jurisdiction after weighing factors and determining the child was amenable to rehabilitative purpose of the juvenile system. *Id.* Further that juveniles are more amenable to reform than adult offenders. *Id.* And as such, the role of the judge in disposition is to use discretion in implementing individualized corrective treatment, is essential in the juvenile system. *Id.*, at 748. The court emphasized that "automatic imposition" of lifetime sex offender registration for certain juvenile offenders amounted to "the imposition of an adult penalty for juvenile acts without input from a juvenile judge." *Id.* According to the court, when "dealing with juveniles who remain in the juvenile system through the decision of a juvenile judge," the "protections and rehabilitative aims of the juvenile process must remain paramount." *Id.*, at 750. As such, automatic lifetime sex offender registration of juveniles did not "meet the due process requirement of fundamental fairness." *Id.*

Finally, several states give courts discretion to weigh fact-specific circumstances to determine whether registration will be required of an adjudicated juvenile. *See* A.R.S. 13-3821(D); IC 11-8-8-5(c); M.G.L. 6 § 178E(e); N.C.G.S. § 14-208.26(a); 10A Okl.St. § 2-8-104A-B; RI ST § 11-37.1-4(j); VA Code § 9.1-902G; RCW 9A.44.143. The age and offense alone do not automatically trigger registration requirement and courts are allowed to determine if circumstances specific to the young person and the case make registration necessary in the public interest. http://www.ncsl.org/research/civil-and-criminal-justice/juvenile-sex-offender-registration-and-sorna.aspx.

Missouri's 211.425 and 589.400.1(6), R.S.Mo. automatically impose lifetime registration and notification requirements on S.C. with no individualized opportunity to contest the requirement or review over time. These impositions run afoul of both the Missouri juvenile justice system's focus on "care, protection, and rehabilitation" and the U. S. Supreme Court's emphasis on "individualized sentencing" based on the age-related characteristics of juveniles. *See J.D.H.*, 508 S.W.2d at 500; *Miller*, 132 S.Ct. at 2475. Moreover, "the best interest of the child" is not considered in the statute. Section 211.011, R.S.Mo. Therefore, Sections 211.425 and 589.400.1(5), R.S.Mo are fundamentally unfair and violate due process of law.

For the above reasons, this court should find Sections 211.425, 589.400.1(6) violate the due process clause of the Fourteenth Amendment of the United States Constitution and Article 1, Section 10 of the Missouri Constitution and are thus unconstitutional and therefore remand this cause to the St. Louis City Juvenile Court with instructions to

amend the Order of Disposition entered September 30, 2014, by removing the registration requirement under Section 211.425 and thereafter, have S.C.'s name removed from the sexual offender registry.

ARGUMENT II

THE TRIAL COURT ERRED IN ORDERING S.C., A JUVENILE, TO REGISTER AS A SEXUAL OFFENDER PURSUANT TO SECTIONS 211.425 and 589.400.1(6), R.S.MO., BECAUSE LIFETIME REGISTRATION OF JUVENILES ADJUDICATED OF SEXUAL DELINQUENT ACTS IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 21 OF THE MISSOURI CONSTITUTION, IN THAT A NATIONAL CONSENSUS HAS DEVELOPED AGAINST REQUIRING AUTOMATIC LIFETIME REGISTRATION FOR JUVENILES AND IS DISPROPORTIONATE TO THE CULPABILITY OF THE JUVENILE AND IS INEFFECTIVE TO ACHIEVE THE REHABILITATIVE GOALS OF THE JUVENILE CODE.

The Eighth Amendment prohibits punishments that are "cruel and unusual." U.S. Const. amend. XIII. Punishment for a crime is to be proportionate to the offense. *Graham v. Florida*, 560 U.S. 40, 58 (2010). Courts are to consider the gravity of the offense and the severity of the sentence. *Id.* What is cruel and unusual is dependent upon what society views as being such. *Id.* To determine what society currently views as cruel and unusual, courts will consider: 1) "objective indicia of society's standards, as expressed in legislative enactments and state practice," 2) the culpability of the offender in light of their crime and the characteristics of the offender along with the severity of the

punishment, and 3) the effectiveness of the sentence in achieving penological goals. 560 U.S. at 60, 67-72.

1. Standard of Review

Statutory interpretation is an issue of law that is reviewed *de novo,* giving no deference to the trial court's determination. *State v. Andrews,* 329 S.W.3d 369, 371 (Mo. banc 2010), citing *State v. Rousan,* 961 S.W.2d 831, 845 (Mo. banc 1998). "A statute is presumed to be constitutional and will not be invalidated unless it clearly and undoubtedly violates some constitutional provision and palpably affronts a fundamental law embodied in the constitution." *Andrews*, 329 S.W.3d at 371, quoting *Bd. of Educ. of City of St. Louis v. State,* 47 S.W.3d 366, 368–69 (Mo. banc 2001) (internal citations omitted).

2. Lifetime registration for juveniles qualifies as punishment because its effect of seriously hampering juveniles' rehabilitation and reintegration is excessive in relation to its non-punitive purpose.

S.C. was adjudicated of attempted rape in the first degree in violation of Section 566.030, R.S.Mo. (L.F. 29, Tr. 127) Sections 211.425 and 589.400.1(6), R.S.Mo requires juveniles adjudicated for committing or attempting to commit sex offenses equal to or more severe than aggravated sexual abuse under 18 U.S.C. Section 2241 to register for life on the sex offender registry, with no option to review over time. The federal SORNA law, 42 U.S.C. 16911, allows for a review after twenty-five years. Section

589.402.2, R.S.Mo requires the offender's name, photo, address, where they work and where the go to school be placed on a website available to the public for notification that he is a registered sex offender. If he fails to register, he is subject to criminal prosecution, and in S.C.'s case, of a class C felony with a punishment of up to seven years in prison. Section 589.425.1, R.S.Mo. He must notify the sheriff of a change of address or school within three business days and must update in person, semiannually, all his information, along with have a current photograph taken. Section 589.414.1, .4, and .5, R.S.Mo. Placing this dispositional order on S.C., a fourteen year old juvenile, constitutes cruel and unusual punishment.

In *R.W. v. Sanders*, the Missouri Supreme Court analyzed whether 589.400 et. seq was punitive as applied to adults. 168 S.W.3d 65, 69 (Mo. banc 2005). Because the legislative intent was not clear from the statute, the court analyzed whether it was punitive in effect under standards set by the United States Supreme Court. 168 S.W.3d at 69, citing *Smith v. Doe* 538 U.S. 84, 97, 123 S.Ct. 1140 (2003). The Court relied on factors from *Smith v. Doe* to assess whether the sanction imposed: 1) has historically been regarded as a punishment; 2). its operation will promote the traditional aims of punishment—retribution and deterrence; 3). whether it imposes an affirmative disability or restraint; 4). it has a rational connection to a non-traditional purpose; 5). or appears excessive in relation to the alternative purpose assigned. *Id.,* at 69 citing *Smith*, 538 U.S. at 97. Although the Court found the adult registry was not punitive, an analysis of

lifetime sex-offender registration for juveniles proves it is effectively punishment despite the claimed civil regulatory purpose.

a. Traditional norms of punishment

In *R.W.*, the Court looked to whether the registrant was subject to intentional public shaming or humiliation or physical restraint and found that it was not. *Id.* However, because of the immaturity and vulnerability of juveniles, lifetime sex-offender registration for juveniles is more analogous to the historical punishments of public shaming or banishment. In *In re C.P.*, the Ohio Supreme Court examined Ohio's requirements of automatic juvenile lifetime sex-offender registration and notification with no review for 25 years. 967 N.E.2d 729, 733-35 (Ohio 2012). Holding those requirements unconstitutional under the Eighth and Fourteenth Amendments, the court referred to the registration requirements as "forcing a juvenile to wear a statutorily imposed scarlet letter as he embarks on his adult life." *Id.* at 743. Like the requirements under the Ohio law in *C.P.*, the registration and notification requirements under the Missouri statutes "are different from such a penalty for adults" because "the stigma of the label of sex offender" is there from the very beginning of a juvenile's young adult life. *Id.* at 741. The registration and notification requirements deprive still-developing juveniles of any "chance to develop a good character in the community" even before their "potential…has a chance to show itself." *Id.* Therefore, when registration and notification requirements are automatically applied to juveniles for life before any opportunity to establish themselves as adults, the length and severity of public humiliation of juveniles

is more like public branding or shaming than "dissemination of information" about mature adults. Moreover, because the requirement is to register for life, it imposes a significantly longer obligation than would be placed upon an adult, thus again, weighing in favor or punishment versus information. *See Miller*, 132 S.Ct. at 2466.

In Missouri, the purpose of juvenile court is to keep all records, including the name, address and photographs, confidential. *See* Section 211.321. 2., R.S.Mo (in all delinquency proceedings, the records of the juvenile court shall be kept confidential and may be open to inspection without court order; Section 211.321.2(1)(b)(the juvenile officer can make public information concerning the offense, the substance of the petition, the status of proceedings in the juvenile court and any other information which *does not specifically identify the child or the child's family.*); and Section 211.321.3 (peace officers' records of children shall be kept separate from the records of persons seventeen years of age or over and shall not be open to inspection or their contents disclosed, except by order of the court.) This conforms with the penological goals of rehabilitation and giving kids a chance to move past their delinquent acts once treated.

Yet, Sections 211.425 and 589.400.1(6) remove that confidentiality and allow all identifying information placed on the notification website for the general public to see. See 589.402.3(1), (2), (3), (5), R.S.Mo. Moreover, the area where he goes to school or works will be published. 589.402.3(4), R.S.Mo. This dissemination of traditionally confidential information is now released to the public against the traditional goals of

juvenile court jurisdiction. This weighs in favor of finding the statutes punitive and not just informative.

a. Traditional Aims of Punishment

Registration of juvenile sex offenders for life promotes the traditional aims of punishment because, as applied to juveniles, the length of the registration requirements relates only to the severity of the offense, not to any risks posed. As discussed in Argument I, studies show a juvenile who commits a sexual offense is not likely to reoffend. See Arg. I, pp. 31-32, citing Halbrook, at 13-15. In contrast, in *Smith*, the Supreme Court held Alaska's registry requirements related to adults were not retributive because they were "reasonably related to the danger of recidivism." 538 U.S. at 102. However, because *juvenile* sex offending has no bearing on the danger of recidivism, the rationale from *Smith* does not apply, and the juvenile registry requirements based on the severity of the offense can only be seen as retributive. Also, in *R.W.*, the Court found the registration requirements were not retributive because all offenders were subject to lifetime registration and a retributive scheme would impose progressively longer periods based upon the severity of the underlying sex offense. However, Section 589.400.1(6), R.S.Mo makes a progressively longer period, lifetime registration, for older juveniles adjudicated of more severe offenses versus Section 211.425.1, R.S.Mo, which imposes on all other juveniles adjudicated of less "aggravating" felonies to register only until the age of twenty-one. Section 211.425.6, R.S.Mo. Further, as explained in *Miller* and *Graham*, these punishments are imposed for a significantly longer time on juveniles than

on adults. See *Miller*, 132 S.Ct. at 2466 and *Graham*, 560 at 68. Because juveniles are not likely to reoffend and the statute progressively treats certain juveniles more harshly than others, this factor weighs in favor of finding the statutes punitive.

b. Affirmative Disability or Restraint

Lifetime sex-offender registration for juveniles imposes an affirmative disability or restraint for juveniles by imposing adult legal responsibilities upon children not legally able to perform on their own. Neither fourteen nor fifteen year olds can drive themselves to the sheriffs office to register and have no control over when they move to a new home or town. Sections 302.060.1(2), 475.025, R.S.Mo. They are reliant upon parents or guardians or other adults to take them or assist them with locating the office to register. There is a cost to register, and juveniles have only limited options for employment if their parents will not pay for such fees. Sections 589.400.4-.5, 294.024-294.040, R.S.Mo. They have to provide a non-driver's identification, which requires an in-person meeting at the Department of Revenue plus payment of costs, and proof of residency. Section 589.410.2, R.S.Mo If they fail to register, they can be charged with a crime. Section 589.425, R.S.Mo.

Moreover, registration creates a level of stigma that severely impairs reintegration into society and causes serious psychological harm. Social science data shows that juvenile sex-offender registrants experience "difficulty obtaining employment and housing, increased social harassment and rejection, and disruption to support systems." Shannon C. Parker, *Branded for Life: The Unconstitutionality of Mandatory and Lifetime*

Juvenile Sex Offender Registration and Notification, 21 Va. J. Soc. Pol'y & L. 167, 190-91 (2014). Although in *Smith,* the Court rejected arguments that registration and notification would create employment and housing difficulties as "conjecture" *see* 538 U.S. at 100, the disability in employment and housing for registered juveniles has been confirmed by actual data. A report on juvenile sex-offender registration by Human Rights Watch found that, of 296 examined juvenile-offender registrants, more than 44 percent reported "at least one period of homelessness as a result of the restrictions that come with being registered." Nicole Pittman & Alison Parker, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US*, Human Rights Watch 65 (2013). Furthermore, offenders interviewed for the report related that "their registration status for offenses committed as children decades ago continues to limit their job opportunities," and difficulty with employment is "the most commonly reported consequence of registration for adult sex offenders." *Id.* at 73. Furthermore, adolescent brain research shows that labeling juveniles as "sex offenders" will probably "permanently undermine" their "self-worth and create lasting mental health problems such as depression and substance abuse." Nastassia Walsh & Tracy Velazquez, *Registering Harm: The Adam Walsh Act and Juvenile Sex Offender Registration*, The Champion, Dec. 2009, at 23 (citing Franklin E. Zimring et al., *Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?*, 6 Criminology & Pub. Pol'y 507-534 (2007)). Both the concrete difficulties with employment and housing and the psychological harm caused by lifetime sex-

offender registration of juveniles impose an affirmative disability or restraint. Therefore, this factor weighs in favor of finding the statute punitive.

c. Rational Connection to Non-Punitive Purpose

Requiring juvenile offenders to register as sex offenders for life is not rationally related to a non-punitive purpose because juvenile sex offenses have no statistical relevance to the likelihood of continued sexual offending in adulthood. Studies show that sexual offenses committed while a juvenile do not predict sexual re-offending into adulthood. As argued in Argument I, pp. 29-30, studies conducted over the years show no statistically significant rate of re-offense for juvenile sexual offenders. Halbrook, at 14-15. Furthermore, data specific to Missouri supports the aforementioned conclusions;, those offenders whose "initial law offense referral" had been a sex offense had the lowest recidivism rate. McElfresh, at 5 (Sept. 2009), https://www.courts.mo.gov/file.jsp?id=34387. This data indicates juvenile sex offenders are not likely to recidivate.

In finding that the registry of adults in *Smith* was rationally connected to the regulation's non-punitive purpose, the Supreme Court emphasized Alaska's conclusion "that a conviction for a sex offense provides evidence of substantial risk of recidivism." 538 U.S. at 103. Here, however, in light of the evidence showing that conviction of a *juvenile* for a sex offense is statistically irrelevant to risk of recidivism, requiring juveniles to register as sex offenders for life is not rationally connected to protecting the

public against recidivism. Therefore, this factor weighs in favor of finding the statute punitive.

d. Excessive in Relation to Non-Punitive Purpose

Lifetime registration and notification for juveniles heavily burdens juvenile offenders' ability to function in society. As statistics do not support the claimed need for protection from re-offense, such registry requirements are excessive in relation to their non-punitive purpose. Requiring juveniles to register as sex offenders for life inhibits "their ability to participate in normal youth activities, such as finding a job." Parker, at 196. Furthermore, registration may actually "increase the risk of recidivism by introducing stressors into the juvenile's life and ostracizing him from support networks." *Id.* at 195. Increasing the risk of recidivism would directly contradict the statutes stated purpose; to respond to the known danger of recidivism among sex offenders. *Phillips,* 194 S.W.3d at 839, citing *Smith,* 538 U.S. at 103.

S.C. is a fourteen year old boy who suffers from Mild Mental Retardation (an IQ of 61), Attention Deficit Hyperactivity Disorder and Bipolar/Schizophrenic Affective Disorder. (L.F. 14, 17; Ex. 1, p. 3) Moreover, before he was adjudicated of a sexual offense, he was under the jurisdiction of the juvenile court for neglect as his mother was not able to access mental health services to treat his needs and needed Children's Division to take legal and physical custody to ensure appropriate treatment. (L.F. 11-12) The burdens hereinafter imposed on S.C. to register and comply with notification requirements ignore his disabilities and his youth. He is currently committed to DYS.

(L.F. 67-72, Tr. 181) Before that commitment, he was living in Children's Division custody in a residential placement. (L.F. 29-31, Tr. 14-17) His mother is elderly and was overwhelmed by his needs. (Tr. 175-76; Ex. 1, p. 2) The Division can only retain youth until eighteen years old, unless it petitions the court for continued jurisdiction up to age twenty-one. Section 219.021.1, R.S.Mo. It is DYS's responsibility to help him register while in their custody. Section 211.425.2, R.S.Mo. But, thereafter, he will have to get assistance from family or do it on his own. Such burdens make it very difficult for him to comply with registration requirements. Because his unique situation cannot be considered by the juvenile judge when creating the disposition order, the automatic imposition of the registry and notification statutes is excessive. Further, while in DYS, the court ordered S.C. was to receive sexual offender treatment. As he ages, maturity will increase, impulsivity should decrease and medication supports can assist with managing his disabilities. To never be able to reassess his need for registration and notification impairs rehabilitation and reintegration and is fundamentally unfair.

Therefore, because lifetime juvenile sex offender registration burdens juveniles' ability to reintegrate into society and does not advance the goal of protecting the public, its effects are excessive in relation to its non-punitive purpose making this factor in favor of finding the statute punitive.

All five factors support the conclusion that lifetime sex-offender registration and notification requirements are punitive as applied to juveniles. This brief will next address whether that punishment as applied to juveniles is cruel and unusual.

3. The objective indicia of society's standards as expressed in legislative enactments and practice shows a trend towards finding lifetime registration and notification cruel and unusual punishment.

The analysis begins with objective indicia of national consensus. "[T]he 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.' " *Graham* at 62, quoting *Atkins v. Virginia,* 536 U.S. 304, 312, 122 S.Ct. 2242 (2002)(quoting *Penry v. Lynaugh,* 492 U.S. 302, 331, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989))

There is an emerging national consensus against imposing lifetime sex offender registration and notification requirements on juvenile offenders. According to a 2009 survey on SORNA by the National Consortium for Justice Information and Statistics, 23 states cited the registration requirements for juveniles adjudicated in juvenile court as an obstacle to their implementation of SORNA. *C.P.*, 967 N.E.2d at 738 (citing National Consortium for Justice Information and Statistics, *Survey on State Compliance with the Sex Offender Registration and Notification Act (SORNA)* (2009) 2). Additionally, in 2008, "the Council of State Governments promulgated a resolution against the application of SORNA to juveniles." *Id.* In response to these states concerns, the United States Attorney General issued guidelines in 2011 allowing "'that jurisdictions need not publicly disclose information concerning persons required to register on the basis of juvenile delinquency adjudications.'" *Id.* at 739 (quoting 76 Fed. Reg. at 1632). The expression of concern by many states, and the attorney general's resulting guidelines,

show an emerging consensus against requiring juveniles adjudicated in juvenile court to comply with SORNA's registration and notification requirements.

The slow and still-incomplete level of state compliance with SORNA with respect to juvenile registration further supports an emerging national consensus against SORNA's juvenile registration requirements. Though Missouri is now SORNA-compliant, it is one of only fourteen states to reach compliance by July 2011 even after two extensions to the original 2009 deadline. Carole J. Peterson & Susan M. Chandler, *Sex Offender Registration and the Convention on the Rights of the Child: Legal and Policy Implications of Registering Juvenile Sex Offenders*, 3 Wm. & Mary Pol'y Rev. 1, 11 (2011). The thirty-six states remaining non-compliant did so despite facing losses of federal law enforcement related funding. *See id.* at 12. According to a report by the Council of State Governments, "the most commonly cited barrier to compliance" with SORNA "was the act's juvenile registration and reporting requirements, cited as a reason by 23 states." *Sex Offender Management Policy in the States: SORNA and Sex Offender Policy in the States*, The Council of State Governments 4 (2010), *available at* http://www.csg.org/policy/documents/SORNABriefFINAL.pdf. Instead of full SORNA compliance, ten states have pursued a middle-ground policy of giving "courts discretion to weigh fact-specific circumstances to determine whether registration will be required of an adjudicated juvenile." *Juvenile Sex Offender Registration and SORNA*, National Conference of State Legislatures (2011), http://www.ncsl.org/research/civil-and-criminal-

justice/juvenile-sex-offender-registration-and-sorna.aspx. A total of ten states does not require any adjudicated juveniles to register as sex offenders. *Id.*

4. 211.425.1 and 589.400.1(5) do not consider the lesser culpability of juveniles based on their developing character compared to the severity of punishment lifetime registration imposes.

The United States Supreme Court has recognized that juveniles are constitutionally different from adults and thus certain punishments are unconstitutional as applied to juveniles. In *Roper v. Simmons*, the Court held that applying the death penalty to juveniles under eighteen at the time of their crimes violated the Eighth Amendment's prohibition on cruel and unusual punishment. 543 U.S. 551, 578 (2005). The Court concluded juveniles are different from adults because: (1) they are less mature, less responsible and more impulsive and reckless; (2) they are more "susceptible to negative influences and outside pressures" and less in control of their environments; and (3) their evolving personality and character makes their actions less depraved. 543 U.S. at 569-70. As such, juvenile offenders are less blameworthy, more deserving of forgiveness, and more capable of reform than adult offenders, rendering "suspect any conclusion that a juvenile falls among the worst offenders." *Id.,* at 570.

In *Graham v. Florida*, the Court further held it was cruel and unusual to sentence juveniles to life without the possibility of parole for non-homicide offenses. 560 U.S. 48, 68, 82 (2010). The Court stated that "a juvenile offender who did not kill or intend to kill has a twice diminished moral culpability" and emphasized that such juveniles must have

a "realistic opportunity to obtain release based on demonstrated maturity and rehabilitation" before the end of their lives. 560 U.S. at 69, 82.

Finally, in *Miller v. Alabama*, the Court held the Eighth and Fourteenth Amendments forbid an automatic life without parole sentence for juveniles convicted of homicide. 132 S. Ct. 2455, 2475 (2012). The Court emphasized the importance of individualized consideration during juvenile sentencing of age-related characteristics, the child's environment, the circumstances of the offense, and the possibility of rehabilitation. 132 S.Ct. at 2466. The Court noted "[s]uch mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. … And still worse, each juvenile (including these two 14–year–olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve." *Id.*, at 2468. So these individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult." And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

These factors along with studies that show juveniles are not likely to reoffend sexually prove Sections 211.425.1 and 589.440.1(5), R.S.Mo are cruel and unusual as they do not allow for individualized consideration of the lessened culpability of such

juvenile offenders based on their age-related characteristics or for a review upon reaching a certain age to show there are not dangerous.

5. Requiring juveniles to register as sex offenders for life is not effective in implementing the penalogical goal of Missouri's juvenile code, which is to rehabilitate and reintegrate.

As there is no statistical evidence that juvenile sex offenders are more likely to commit additional sexual offenses as adults, lifetime sex-offender registration has no relationship to the goal of protecting society from reoffenders and yet imposes severe hardship on juvenile offenders by impairing their ability to rehabilitate and function as productive members of society. A report by Human Rights Watch stated that 84.5 percent of the 281 registered youth sex offenders and family members of the offenders interviewed by the organization reported "negative psychological impacts" related to their status as registrants, including feelings of isolation and depression, difficulties engaging in relationships, and contemplation of suicide. Nicole Pittman & Alison Parker, Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the U.S.* 51 (2013). Additionally, studies support that public knowledge of juveniles' registrant status can lead to isolation from support systems such as "schools, neighborhoods, and workplaces," and this ostracizing and stigmatization can extend to the juvenile's whole family. Shannon C. Parker, *Branded for Life: The Unconstitutionality of Mandatory and Lifetime Juvenile Sex Offender Registration and Notification*, 21 Va. J. Soc. Pol'y & L. 167, 192 (2014). Therefore, lifetime sex-offender

registration has serious negative consequences for juveniles and contradicts the purpose of rehabilitation, especially notable in light of the lack of connection between juvenile sex offenses and likelihood of reoffending.

Because requiring S.C. to register as a sex offender for life would sabotage his ability to rejoin society without individualized consideration of his youth and circumstances, Sections 211.425 and 589.400 constitute cruel and unusual punishment. These age-related characteristics "render suspect any conclusion that a juvenile falls among the worst offenders." *Roper*, 543 U.S. at 570. Furthermore, the Court has emphasized the importance of "individualized sentencing" and consideration of "mitigating circumstances" in ensuring that punishments of juveniles meet the "principle of proportionality" guaranteed by the Eighth Amendment. *Miller*, 132 S. Ct. at 2475. Thus, the Missouri statutes violate the United States Supreme Court's standards for proportionality in punishment of juvenile offenders by failing to take account of juvenile offenders' lessened culpability and greater capacity for rehabilitation.

For the above reasons, this court should find Sections 211.425 and 589.400.1(6), R.S.Mo impose cruel and unusual punishment on adjudicated juveniles in violation of the Eighth Amendment to the United States Constitution and Article 1, Section 21 of the Missouri Constitution. Therefore, we ask that this Court remand this cause to the St. Louis City Juvenile Court and order that the dispositional order imposed on September 30, 2014 be amended to eliminate the requirement that S.C. register as an adult sexual offender under Section 211.425.

CONCLUSION

For the foregoing reasons, Appellant requests this Court find Sections 211.425.1 and 589.400.1(6), R.S.Mo., unconstitutional as applied to juveniles who are fourteen years old and older and adjudicated of offenses that are equal to or more severe than aggravated sexual abuse under 18 U.S.C. Section 2241 and remand this matter to the St. Louis City Circuit Court, juvenile division with instructions to amend the Order and Judgment of Disposition, by removing the requirement that S.C. register as a sexual offender pursuant to Section 211.425, R.S.Mo.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned do hereby certify:

1. That the foregoing brief complies with the limitations contained in the Supreme Court Rule 84.06(b) and Local Rule 360, and the brief contains 12,459 words and 1,090 lines of text, not including the table of contents or authorities as performed by 2010 Microsoft Word software; and
2. That a true and correct copy of the foregoing brief were filed electronically and as such will be electronically served on this 21st day of April, 2015, to the individuals listed below:

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Respectfully Submitted,

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