

SC95049

IN THE SUPREME COURT OF MISSOURI

IN THE INTEREST OF S.C.,
Appellant.

v.

JUVENILE OFFICER,
Respondent.

and

MISSOURI ATTORNEY GENERAL
Intervenor

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

REPLY BRIEF OF APPELLANT

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Chrysanthi Leon & David Burton, et. al, <i>Net-widening in Delaware: The overuse of registration and residential treatment for youth who commit sex offenses</i> , 17 Widener L. Rev. 127 (2011).....	22
Fed. Advisory Comm. on Juvenile Justice, <i>Annual Recommendations Report to the President and Congress of the United States</i> 7–8 (2007), www.facjj.org/annual/reports/ccFACJJ%20Report%20508.pdf.....	30
Franklin Zimring, et al., <i>Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?</i> , 6 CRIMINOLOGY & PUB. POL-Y 507 (2007).	27
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Natasha Rose Manuel, <i>Cyber-bullying; It's Recent Emergence and Needed Legislation to Protect Adolescent Victims</i> , 13 Loy. J. Pub. Inst. L. 219 (Fall. 2011)	26
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APPELLANT HAS STANDING

Although this Court denied Intervenor's Motion to Dismiss, which argued Appellant had no standing and his claims are not ripe for review, Intervenor now asks this Court to reconsider these issues. *See* Mo. Sup. Ct. Order issued in SC95049 August 14, 2015. These arguments still have no merit.

"Standing requires that a party have a personal stake arising from a threatened or actual injury." *Schweich v. Nixon*, 408 S.W.3d 769, 774 (Mo. banc 2013). To show a legally protectable interest at stake, requires a showing of a personal interest directly at issue and subject to immediate or prospective consequential relief. *Mo Alliance for Retired Americans v. Dept. of Labor.*, 277 S.W.3d 670, 676 (Mo. banc 2009). Appellant has a personal interest in not being subjected to the automatic lifetime adult registry, which the court ordered him to do, as he is subject to the juvenile court's jurisdiction, laws and procedures. This requirement is an actual and threatened injury as it is the only adult penalty in the entire juvenile code that a juvenile can be subject too while still under juvenile court jurisdiction.

Intervenor argues the juvenile court lacks statutory authority to hear and decide controversies concerning the adult sex offender registration: "[u]ltimately S.C. may be required to register on the adult registry... but that is not a decision for the juvenile court to make." (Intervenor's Brief, at 28) And that 589.400 gives no role to the juvenile court in the adult offender registry but only to the civil division of the circuit court, citing

589.400.7 and .8, R.S.Mo. Subject matter jurisdiction of Missouri circuit courts is governed by Article V, § 14, which provides “[t]he circuit courts shall have original jurisdiction over all cases and matters, civil and criminal.” *K.H. v. State*, 403 S.W.3d 720, 723, (Mo. App., W.D. 2013), citing *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. banc 2009). The juvenile court is a division of the circuit court. *Id.*, at 723, citing *In Re Zartman’s Adoption*, 334 Mo. 237, 65 S.W.2d 951, 954 (1933). Each division possesses all the jurisdiction vested in the circuit court by the Constitution and laws of the state. *Id.*, at 723 (citations omitted)

§ 211.031.1(3), R.S.Mo gives the juvenile court exclusive original jurisdiction over matters involving any child alleged to have violated state laws prior to turning seventeen. If the court finds sufficient evidence to believe the child violated state law and therefore assumes jurisdiction over the child, a disposition hearing is then held. § 211.181.3, R.S.Mo. ¹ Mo. Sup. Ct. Rule 128.03 requires the court to receive evidence, including the social study conducted by the D.J.O. which includes evidence to support their recommendations, and in accordance with the best interest of the child, make findings related to custody and disposition to be imposed on the juvenile. Mo. Sup. Ct. Rule 128.03(b), (c). The court shall order such disposition as is appropriate and *provided by law*. Rule 128.03(d)(3)(emphasis added).

¹ Though Intervenor argues § 211.181 does not specifically list compliance with the sex offender registry as a possible disposition option, it is not uncommon for juvenile courts to do so. See *In the Interest of J.A.H.*, 293 S.W.3d 116, 119 (Mo. App., E.D. 2009)

In this case, a social report was created by the D.J.O. and received into evidence at the disposition hearing. (Ex. 4; Tr. 133) The D.J.O. recommended S.C. be required to register pursuant to § 211.425, R.S.Mo. (Ex. 4, p. 2 , Tr. 137) And § 211.425 and § 589.400.1(6), R.S.Mo., requires 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. § 2241, to register on the adult sex offender registry for life, with no ability to petition for removal. The court ordered S.C. to comply with the law. (L.F. 71)

Intervenor argues that failing to check the box to register as an adult sex offender released S.C.'s duty to register and therefore, did not aggrieve S.C. This argument suggests that S.C. has no duty to register. If this Court agrees, an Order detailing the release of his obligation to register on the adult registry would be necessary to ensure S.C. cannot be charged with failure to register pursuant to § 589.425, R.S.Mo.

Intervenor argues the juvenile court has no authority to order any juvenile to register on the adult or the juvenile registry. Yet, §§ 211.425.5 and 589.405, R.S.Mo requires the court having jurisdiction over an individual required to register pursuant to § 589.400.1, to inform that person of their duty to register. Intervenor argues because the adult registry is placed in Chapter 589, which is a "crime prevention" chapter, and not under Chapter 211, the juvenile court has no authority over the adult registry. However, this ignores § 211.425, R.S.Mo., which identifies for the juvenile judge which juvenile must register on which registry. And § 211.031.1(3) gives the juvenile court exclusive

jurisdiction over juveniles under seventeen who violate the state laws. If S.C. does not follow the disposition order while under seventeen and is charged with failure to register pursuant to § 589.425, R.S.Mo, the juvenile court would have jurisdiction over that offense. Moreover, § 589.042 gives the court authority to order the probation officer assigned to anyone required to register under 589.400, access to their home personal computer and passwords for the internet. Since S.C. is still subject to juvenile court jurisdiction, only the juvenile court has the authority to order such access while he is still a juvenile. Further, § 589.426.1, R.S.Mo restricts those required to register from participating in Halloween related events and avoid children coming to their home for trick or treating. The failure to follow these mandates is a class A misdemeanor. Again, if this occurred while S.C. was under seventeen, the juvenile court would have jurisdiction pursuant to § 211.031.1(3), R.S.Mo.

Finally, since the juvenile court did not grant Appellant's motion or issue an opinion declaring § 211.425 and 589.400, R.S.Mo unconstitutional, it had no authority to use its discretion to order compliance with the juvenile registry. By ordering him to comply with 211.425, the court fulfilled its duty to inform S.C. that he must register. As such, Appellant has standing to challenge the juvenile court's order requiring him to comply with § 211.425.

This Court granted a Motion to Stay Appellant's obligation to register on the adult registry, yet Intervenor argues S.C.'s claims are not ripe for review because he is not registered and no official has tried to enforce his duty to register. *See* Mo. Sup Ct. Order

issued in SC95049 July 8, 2015. If the State is not seeking to enforce a statute at issue, this Court has allowed pre-enforcement constitutional challenges to law when the facts necessary to adjudicate were fully developed and that laws at issue affect the plaintiff in a manner that gave rise to an immediate and concrete dispute. *Mo. Alliance*, 277 S.W.3d at 677, quoting *Missouri Health Care Association v. Attorney General of the State of Missouri*, 953 S.W.3d 617, 620, 678 (Mo. banc 1997).

Because juveniles required to register on the adult registry are subject to both § § 211.425 or 589.400-425, these “consistent statutes relating to the same subject” should be “construed together and presumed to be intended to be read consistently and harmoniously. *In the Interest of C.A.D.*, 995 S.W.2d 21, 29 (Mo. App., W.D. 1999), citing *State ex rel. Rothermich v. Gallagher*, 816 S.W.2d 194, 200 (Mo. banc 1991). An entire statute should be construed to determine legislative intent and all provisions should be harmonized if reasonably possible. *Id.*, at 29, citing *Campbell v. Labor & Indus. Rel. Com’n*, 907 S.W.2d 246, 249 (Mo. App. 1995). The juvenile code is to be liberally construed,” keeping in mind that Missouri’s child welfare policy is based upon ‘what is in the best interest of the child.’” *Id.*, citing *In re A.G.R.*, 359 S.W.3d 103, 110 (Mo. App., W.D. 2011)

§ 211.425.5, R.S.Mo holds “any juvenile to whom the registration requirement of this section applies shall be informed by the official in charge of the juvenile custody, upon the juvenile’s discharge or release from such custody of the requirement to register pursuant to this section.” This section mandates S.C. be informed of his duty to register

by the juvenile court, who had custody of him while detained. By ordering S.C. to comply with 211.425, the court complied with this section. Now D.Y.S. will have the duty to inform him of his duty once released back into the community.

§ 589.400.2, R.S.Mo requires registration within three days of conviction, release from incarceration or placement on probation with the chief law enforcement officer in the county where they will reside. § 589.405, requires registrants pursuant to § 589.400.1 who are released on probation or from confinement in the county jail to be informed of the duty to register by the court having jurisdiction over the case. If read in harmony, S.C. is to be notified by the juvenile court who had custody over him while detained and then again by the D.Y.S. agent who will supervise him once released back to the custody of his mother.

As such, this case is ripe for review because this Court stayed the requirement to register until it can decide the constitutionality of the requirement. And, reading Chapter 211 and 589 consistently and harmoniously, he is not required to register until he is released from D.Y.S and back into the community.

ARGUMENT I

THE TRIAL COURT ERRED IN ORDERING S.C., A JUVENILE, TO REGISTER AS A SEXUAL OFFENDER PURSUANT TO §§ 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, § 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.

Juveniles required to register pursuant to §§ 211.425.1 and 589.400.1(6) are subject to the most severe form of registration and notification in the nation. It is a true lifetime registration and notification requirement that is identical to the adult registration requirement for those identified as Tier III offenders in Missouri. There is no opportunity to petition for review or reduction of this punishment. The cases Intervenor relies are from states whose registration statutes allow a juvenile to petition for relief or reduction from registration and/or notification after proof of rehabilitation. Moreover, most of those cases were decided before the United States Supreme Court ruled that “kids are different” and therefore laws related to juveniles measured against their lesser culpability and greater ability to reform. By eliminating the juvenile judge’s flexibility and

discretion in disposition, §§ 211.425.1 and 589.400.1, R.S.Mo., ignore that this is the only law that eliminates the juvenile judge's ability to assess amenability to rehabilitation. Such effect creates an irrebuttable presumption that kids will reoffend, which is not supported by data, and therefore the public must be protected from them. As such, the stated purpose of the law, to protect the community from the known recidivism of sex offenders, is not rationally related to juveniles. Further, research shows registration and notification laws interfere with juveniles' rehabilitation and make them more potentially dangerous. As such §§ 211.425 and 589.400.1 must be found fundamentally unfair and in violation of the right to due process of law.

This Court must analyze §§ 211.425 and 589.400.1(6) through the juvenile lens and not apply the adult standard used in prior cases. As Missouri is a conviction based registration state vs. a risk assessment registration state, adult standards assume due process was afforded at all stages of their trial to ensure effective representation and a valid conviction. Relying on *Doe v. Phillips*, 194 S.W.3d 833 (Mo. 2006), Intervenor applies the adult standard to analyze lifetime registrations on juveniles, which is not applicable, because no analysis that juveniles are less culpable and more rehabilitative was explored. The laws must be viewed through the juvenile lens and Intervenor completely ignored that scrutiny.

Intervenor relies on *Doe v. Tandeske*, 361 F.3d 594 (9th Cir. 2004) and *United States v. Juvenile Male*, 670 F.3d 999 (9th Cir. 2012), to argue additional procedural due process protections are not needed for conviction based registration requirements because

due process was offered prior to the conviction. However, Missouri courts cannot use those same standards on Missouri juveniles as recent studies show the assumption that youth receive due process prior to adjudication is false.

In 2013, the National Juvenile Defender Center (“NJDC”) released its assessment of Missouri’s juvenile system. *See Missouri: Justice Rationed: An Assessment of Access to Counsel and Quality of Representation in Juvenile Delinquency Court* (Spring 2013): <http://njdc.info/wp-content/uploads/2013/11/Missouri-Assessment.pdf>. NJDC determined youth were regularly “discouraged from and systematically denied counsel throughout the state.” *Id.*, at 35, 38. Judges admitted many youth who waive their right to counsel without understanding their rights or to avoid expense to parents. *Id.*, at. 39-40. An investigator witnessed “subtle pressure put on the children” by inferring parents would have to pay for private counsel, and the youth would meanwhile remain in detention. *Id.*, at. 40. See also *In the Interest of M.M.*, 320 S.W.3d 191, 196-7 (Mo. E.D. 2010)(waiver of counsel not knowingly and intelligent when mother asked for more time to obtain counsel and DJO recommended child go into detention if continuance granted). The role of the DJO across the state also impeded access to counsel with most DJOs not understanding the role or importance of counsel for kids. *Id.*, at. 39. As such, many youth plead guilty without an attorney. *Id.*, at 47.

Reporters found when youth had attorneys, there was covert and overt pressure to minimize zealous advocacy by defenders, but rather work as a team to obtain services for their clients. *Id.*, at 37. Few motions or appeals were filed. *Id.*, at. 46, 49. Disturbingly,

investigators most common observation was that youth in juvenile court need only be “guilty enough” to prove they need some services. *Id.*

More recently, on July 31, 2015, the United States Department of Justice (“DOJ”) issued a report of its investigation into due process violations reported in St. Louis County Juvenile Court. *See Investigation of the St. Louis County Family Court, St. Louis Missouri*: <http://www.justice.gov/opa/file/641971/download>. The report found significant violations of due process and ineffective assistance of counsel. *Id.*, at 2-3, 13-34. Only one Public Defender was assigned to juvenile court, and in 2014, that attorney opened 394 juvenile cases, closed 277 delinquency cases and four status offense cases, with only three cases going to a contested adjudication. *Id.*, at 18. The review of transcripts showed few defense objections, no defense witnesses were called and no appeals were filed. *Id.*, at 16-7. The DOJ was also concerned with the organizational structure of the juvenile court and the ethical duties of legal officers, to advocate zealously for their clients – the DJOs, was unlike traditional prosecutors whose role is to pursue justice. *Id.*, at 32.

Moreover, juveniles in Missouri do not have the same post-conviction remedies that adults have. Although juveniles who remain under juvenile court jurisdiction are entitled to an appeal; § 211.261, R.S.Mo., because they are not “convicted” of crimes, the same post-conviction remedies available to adults do not apply to them. *See Mo. Sup. Ct. Rule 24.035 and 29.15* As such, to assume juveniles in Missouri subject to mandatory

adult registration had proper due process protections at adjudications, or post adjudication, is highly suspect.

Intervenor makes the general argument that §§ 211.425.1 and 589.400.1(6) are “virtually identical” to 42 U.S.C. § 16911(8). Although the age of the juvenile and the crimes that require adult registration are the same, the length of time a juvenile must register in Missouri versus the federal registry are significantly different. Pursuant to 42 U.S.C. § 16915(b)(1) and (2)(B), a juvenile may have the lifetime duty to register reduced after a “clean record” of twenty-five years, which is proven by not reoffending, successfully completing supervised release or probation or parole, and successfully completing a certified sex offender treatment program. This exception only applies to juveniles adjudicated delinquent, not to similarly situated adults. Missouri juveniles required to register on the adult registry have no ability to seek a reduction after a period of a clean record.

The cases Intervenor relies are from jurisdictions that allow some form of review or ability to seek reduction after a certain period of time and thus, are not relevant to Missouri’s laws. See *United States v. Juvenile Male*, 670 F.3d 999, 1010 (SORNA allows petition for relief after twenty five years and proof of rehabilitation); *Doe v. Michigan Dep’t of State Police*, 490 F.3d 491 (6th Cir. 2007) (allows juveniles the opportunity to seek removal after ten years on the registry); *State v. Eighth Jud. Dist. Ct. & Logan D.*, 306 P.3d 369, 374 (Nev. 2013)(allow petition for removal after twenty five

years); *Helman v. State*, 784 A.2d 1058 (Del. 2001)(allowed to petition for reduction after twenty five years).

Intervenor also argues that because receipt of federal funding is contingent on Missouri's substantial compliance with SORNA, Missouri's 2008 amendment is constitutional. However, many states are not in substantial compliance with SORNA, specifically citing resistance to the juvenile adjudication requirement. See *In the Interest of C.P.*, 967 N.E.2d 729, 738-9 (Ohio 2012). In light of that, the United States Attorney General issued supplemental guidelines in 2011, announcing "no remaining requirement under SORNA that jurisdictions engage in any form of public disclosure or notification regarding juvenile delinquent sex offenders." *Id.*, at 739.

The Missouri legislature attempted in 2013 to act upon this new guideline and eliminate public notification of juveniles' adjudicated of sexual offenses and grant the ability to petition for removal from the adult registry pursuant to § 589.400.1(6) after five years from adjudication or release from custody for the offense if the juvenile had not reoffended, had not been charged with failure to register and had successfully completed supervised release or probation. Senate Committee Substitute for HB301; <http://house.mo.gov/billtracking/bills131/billpdf/truly/HB0301T.PDF>. However, the Governor vetoed the bill. As such, Missouri youth are treated exactly the same as adults, with no exceptions or ability to petition for a reduction after proving rehabilitation.

Intervenor cites *Smith v. Doe*, 538 U.S. 1 (2003), to argue a juvenile's right to an individualized assessment or review of the risk for recidivism prior to being placed on the

adult registry has already been decided. *Smith* as well as *Doe v. Phillips*, 194 S.W.3d 833, (Mo. 2006) dealt with adults placed on the registry and came before *Graham v. Florida*, 560 U.S. 48 (2010) and *Miller v. Alabama*, 132 S.Ct. 2455 (2012) which found “juveniles are more capable of change than adults” and “continue to mature through late adolescence.” 560 U.S. at 68; quoting *Roper v. Simmons* 543 U.S. 551, 570 (2005). *Miller* emphasized, “[o]ur history is replete with laws and judicial recognition’ that children cannot be viewed simply as miniature adults.” 132 S.Ct. at 2470, citing *J. D. B. v. North Carolina*, 564 U. S. ___, 131 S.Ct. 2394, 2404 (2011) and quoting *Eddings v. Oklahoma*, 455 U. S. 104, 115-116, 102 S.Ct. 869 (1982). Intervenor also cites to *United States v. Juvenile Male*, 670 F.3d 999, 1013-4 (9th Cir. 2012), which was decided in January of 2012, before *Miller* (decided June of 2012). The youth in that case also had the benefit of a review after twenty five years to petition for reduction of the registration requirement, which treated juveniles different than their adult counterparts. *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005), was also decided before *Graham* and *Miller*.

Intervenor argues the legislature may limit the applicability of the juvenile statutory process “when it sees fit.” Intervenor’s Brief., at 39. Of course, it may not do so when it is unconstitutional. Intervenor cites § 211.071, R.S.Mo., an example how the legislature has limited the juvenile code. However, the certification statute grants the juvenile judge full discretion to analyze precisely what §§ 211.425 and 589.400.1 do not; whether the juvenile can benefit from treatment in the juvenile court and therefore should remain under the juvenile court’s jurisdiction to receive such treatment. See §

211.071.6(9), R..S.Mo. Because the juvenile adult registration statutes are automatic with no discretion for the court to utilize, comparing 211.071 is like comparing apples to oranges.

Intervenor argues the risk to the general public and to children in particular posed by S.C.; fourteen and adjudicated of an attempted rape of an adult family member, creates a sufficient basis regardless of the victim's characteristics or his characteristics. And yet, this ignores studies that juveniles are less culpable and pose a minimal risk to reoffend when compared to adult sex offenders. A meta-analysis study conducted by Andrew Harris and R. Karl Hanson, which included over 29,000 adult sex offenders, found that within four to six years of release, 14 percent of all adult sex offenders will be arrested or convicted for a new sex crime. See *Public Safety and Emergency Preparedness Canada, "Sex Offender Recidivism: A Simple Question,"* http://ww2.psepc-sppcc.gc.ca/publications/corrections/pdf/200403-2_e.pdf (accessed August 24, 2007), pp. 3-6. Over a 15-year period, recidivism rates for all adult sex offenders averaged 24 percent. *Id.* When compared to statistics that juveniles sexually reoffending ranges from 3% to 6.8% and Missouri's juvenile sex offenders are the lowest recidivists in the state. See Appellant's Brief pp. 29-32; 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, (2104)

Research also suggests registration and notification statutes pose an increased risk to the public because the effects interfere with rehabilitation. In 2012, Illinois created a

statutory Commission to study and make recommendations on effective treatment and supervision of youth adjudicated delinquent of sex offense. *See* 20 ILCS 505/17a-5. The Illinois Juvenile Justice Commission released the findings of a comprehensive study in March 2014. ijjc.illinois.gov/youthsexualoffenses. The report found; “[b]ecause there is no persuasive evidence that subjecting youth to registries improves public safety or reduces risks of future offending, Illinois should repeal the registry, restrictions, and notification requirements applied to youth adjudicated delinquent for sexual offenses.” *Id.*, at Exec. Sum., p. 10; Full Report p. 59-60. It has also been found that registration can cause underreporting and under-prosecution to avoid registration, thus decreasing the opportunity for the child to get appropriate treatment and potentially increasing their risk to reoffend. Parker, at 195. Notification can also increase risk of recidivism by introducing stressors, ostracism and the inability to reintegrate into their community which contributes to reoffending. *Id.*, at 195.

Intervenor relies on *Logan D.*, which reasoned children fourteen and older know what they are doing is wrong and therefore pose a greater risk to the public than a younger child. 306 P.3d at 376. This presumption has been in Nevada’s legislative history since 1911. *Id.* The Nevada court used those long terms beliefs, ignoring *Roper*, *Graham* and *Miller* precedent and documented neurological evidence that fourteen year olds brains are different and therefore less culpable than adults. The Supreme Court in *Miller*, which dealt with the sentences of two fourteen year olds, noted that using the adult constitutional analysis as applied to children does not make it legal. 132 S.Ct. at

2468. (“We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children. ...”)

Intervenor also relies on *Helman v. State*, 784 A.2d 1058 (Del. 2001), decided well before *Roper*, *Graham* and *Miller*, stating the purpose of the resignation and notification statutes is to protect the public from the danger and propensity for recidivism of convicted sex offenders without examining recidivism rates for juveniles. *Id.*, at 1075. Experts have criticized Delaware’s conviction based system as “ignor[ing] a considerable amount of research that provides the basis for individualized risk prediction, and puts Delaware out of step with the evidence-based practice used” in other states.” Chrysanthi Leon & David Burton, et. al, *Net-widening in Delaware: The overuse of registration and residential treatment for youth who commit sex offenses*, 17 Widener L. Rev. 127, 132-3 (2011).

Delaware also has a history of unsealing and releasing juvenile records since 1987. *Id.*, at 1079. Missouri’s confidentiality of juvenile records did not have public exceptions until 2004. § 211.321.1, R.S.Mo. And only allows access to public hearings if the youth is charged with a certifiable offense. § 211.171.6, R.S.Mo. However, the court can limit access to that hearing if it is determined it would not be in the child’s best interest for the public to attend or would interfere with the juvenile’s right to a fair trial. *State ex rel. Garvey v. Post Dispatch*, 179 S.W.3d 899 (Mo. 2000).

This Court should focus on the analysis of *In re C.P.*, as the Court focuses on the purpose of juvenile court and the role of the juvenile judge when evaluating the

fundamental fairness standard of due process. 967 N.E. 2d at 747-9. The Court found because the statute “requires the automatic imposition of a lifetime punishment—with no chance of reconsideration for 25 years—without benefit of a juvenile judge weighing its appropriateness. An automatic long-term punishment is contrary to the juvenile system's core emphasis on individual, corrective treatment and rehabilitation.” *Id.*, at 748. The Court reasoned as “[p]unishment is not the goal of the juvenile system,” the registration statute “requires the imposition of an adult penalty for juvenile acts without input from a juvenile judge.” *Id.*, at 748-9. Because the juvenile judge’s decision to not transfer C.P. to adult court; “a decision made through the balancing of the factors ... —that the juvenile at issue is amenable to the rehabilitative purpose of the juvenile system”, then the protections of juvenile court and rehabilitative aims that kids are different must remain central. *Id.* However, the registration statute excludes the judges ability to exercise its most important role in rehabilitation, and “[f]undamental fairness requires that the judge decide the appropriateness of any such penalty.” *Id.*

This same reasoning is relevant and applicable to Missouri and to S.C.’s case. The juvenile judge weighed all the factors in § 211.071 and determined that S.C. should remain in the juvenile court system for rehabilitation. (Tr. 8-21; L.F. 47-50) The court heard evidence of his low risk to reoffend and S.C.’s treatment needs and committed him to the custody of D.Y.S. (Ex. 2; Ex. 4; Tr. 131-150, 179; L.F. 68) That commitment can only last until S.C. is eighteen. The court knew those limits and determined in his judgment that would fulfil his needs for rehabilitation. Neither state allows for

discretionary risk assessment by a juvenile judge prior to registration. Thus making §§ 211.425 and 589.400.1's conviction based requirements fundamentally unfair.

As Missouri's placement of certain juvenile adjudications on the adult sex offender registry is automatic based on adjudication, with no opportunity for the juvenile judge to assess risk, in direct contrast to the juvenile code and no consideration of Supreme Court precedent that laws affecting kids should be evaluated based on their lesser culpability and greater chance of rehabilitation, this Court must determine that §§ 211.425.1 and 589.400.1(6), R.S.Mo. are fundamentally unfair and violate the due process clause of the Fourteenth Amendment of the United States Constitution and Article I, Sec. 10 of the Missouri Constitution. As such, this case should be remanded to the St. Louis City Juvenile Court with instructions to inform S.C. of his duty to register on the Juvenile Sex Offender registry pursuant to § 211.425, R.S.Mo.

ARGUMENT II

THE TRIAL COURT ERRED IN ORDERING S.C., A JUVENILE, TO REGISTER AS A SEXUAL OFFENDER PURSUANT TO §§ 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, § 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.

As stated in Argument I, §§ 211.425.1 and 589.400.1(6) are true automatic juvenile lifetime registration and notification requirements that provide no opportunity for removal or reduction of time based on rehabilitation. It is more restrictive than SORNA and the other states Intervenor cites. This is especially significant when analyzing the statutes under the Eighth Amendment prohibition on cruel and unusual punishment. The statutes treat juveniles under the jurisdiction of the juvenile court exactly the same as adults convicted of crimes, with no consideration for their lesser culpability and no opportunity to show their rehabilitation.

When analyzing whether mandatory lifetime registration and notification required of juveniles who remain under the juvenile court jurisdiction is cruel and unusual punishment, this Court must apply Eighth Amendment precedent from *Roper*, *Graham* and *Miller* that: 1). juveniles are less culpable than adults who commit the same crimes; 2). juveniles are constitutionally different for purposes of sentencing and criminal procedure laws must account for those differences; and 3). their age and surrounding circumstances must be considered, regardless of the offense and potential punishment, to ensure a sentence is not disproportionate,

First, using the *Smith* five factors, but applying them through juvenile principles, §§ 211.425 and 589.400.1(6) are clearly punitive. The public Internet registry is the equivalent of public shaming and like traditional punishment because the *Roper/Graham/Miller* factors: that juveniles are immature and highly influenced by peers and environment, make the effects more harmful to kids. In a 2006 study, 98% of adolescents had regular access to the internet and on-line material. Natasha Rose Manuel, *Cyber-bullying; It's Recent Emergence and Needed Legislation to Protect Adolescent Victims*, 13 Loy. J. Pub. Inst. L. 219, 222 (Fall. 2011) (citations omitted) The prevalence of cyber-bullying has grown since then due to Internet accessibility by adolescents, along with anonymity and lack of face-to face contact which encourages repeatedly intense harassment of victims. *Id.*, at 222. Many adolescents victims struggle with mental health issues and some resort to violence against themselves or others. *Id.*, at 225-7. Public Internet registration of juveniles is a virtual scarlet letter. See *C.P.*, 967 N.E.2d at 743.

Juveniles who are not certified and remain under juvenile court jurisdiction are deemed more amenable to treatment and thus need the rehabilitative focus of juvenile jurisdiction for all disposition orders. Registration has the opposite effect. Studies show public registration of youth can interfere with rehabilitation thus creating a more retributive effect. See Argument I, at 20, citing Parker at 191-2 and Walsh, at 21. Thus juvenile mandatory lifetime registration promotes penological outcomes such as retribution and deterrence.

When viewing registration as applied to juveniles, the affirmative disability or restraint is clear. The burden is significantly higher on youth as his ability to meet the standards conflict with legal and practical barriers due to age: cannot drive until sixteen, cannot obtain personal records without a parent or guardian, no control over housing until, etc. While many barriers that adults face (employment, housing, social ostracism) apply to juveniles, youth feel the impact more strongly as science proves “[r]esearch on adolescent brain development indicates that youth are particularly vulnerable to the stigma and isolation that registration and notification create. To be labeled and therefore self-identified as a ‘sex offender’ as a child will likely permanently undermine a person's self-worth and create lasting mental health problems such as depression and substance abuse.” Walsh, at 23, citing Franklin 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). Thus, the disabilities are more intense, more impactful and therefore, more punitive than to adults. Intervenor relies on

Logan D, whose registration statutes prohibits the general public from using the information on the notification website from injuring, harassing or committing a crime against the person named in the registry. 306 P.3d at 375. It does not appear Missouri has similar protections for registrants. And with social media and access to the internet among youth, it is highly probable that such information could be used to harass the juvenile registrant. See Parker, at 191-2 citing Natassia Walsh & Tracy Velazquez, *Registering Harm: The Adam Walsh Act of Juvenile Sex Offender Registration*, THE CHAMPION, Dec. 2009 at 21 (citing Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. Contemp. Crim. Just. 67-81 (2005) (“One study found that “47 percent of [registered sex offenders] surveyed had been harassed in person and 28 percent had received threatening phone calls as a result of being on the sex offender registry; 16 percent had been assaulted.”))

Finally, §§ 211.425 and 589.400.1, R.S.Mo are clearly excessive in relation to a non-punitive purpose as there is no opportunity for relief after a period of time or proof of rehabilitation and no statistical support that juvenile sex offenders are likely to reoffend. The majority of states have limited the public notification of the registration concerning juveniles. Nicole Pittman, *A Snapshot of Juvenile Sex Offender Registration and Notification Laws: A Survey of the United States*; http://www.njjn.org/uploads/digital-library/SNAPSHOT_web10-28.pdf. Twenty-two states allow for a juvenile to petition from removal from the registration and notification. *Id.*, at 35. Twenty five states make registration and publication subject to judicial discretion. *Id.*, at 39. Many states do not

have registration or community notification for juveniles. *Id.*, at 32. As Missouri's scheme has no ability for the juvenile to ever show rehabilitation, treats juveniles exactly the same as adults, and the majority of states allow some opportunity to be removed from the registry, it is clearly excessive.

Furthermore, there is no statistical data that the general public needs to be protected from juvenile sex offenders. In *Logan D.*, cited by Intervenor, the court was presented with statistics that had juveniles and adults reoffending at similar rates. 306 P.3d at 386-7. But such data is not accurate and not based on meta-data analysis and longitudinal studies. *See* Argument I, at 20; Appellant's Brief at 31-33.

Intervenor argues *C.P.* is not persuasive because the Ohio court relied on an earlier holding in *State v. Williams*, 952 N.E.2d 1108, 1113 (Ohio 2011), which held the adult registry was punishment as applied to adults. Intervenor argues the court thus used the same analysis in finding the statutes cruel and unusual punishment for juveniles. However, Ohio analyzed the prospective placement of certain juveniles on the registry under the "kids are different" reasoning. Relying on the Attorney General's Supplemental Guidelines releasing states from public notification of juveniles due to twenty three states objecting to the juvenile requirement, the Court saw this as a major shift in policy, reflective of a national consensus against the assumption that a national consensus favored publication of juvenile sex offenders' personal information. 967 N.E.2d at 39. The Court also relied on *Graham*, finding its laws must be analyzed pursuant to those factors. *Id.*, at 740-4.

Using the same analysis, a recent Kansas Supreme Court case found mandatory juvenile lifetime post release supervision was cruel and usual punishment. *State v. Dull*, 351 P.3d 641 (Kan. 2015); Pet. Cert. to U.S. Supreme Ct. filed September 4, 2015. Although a petition for certiorari is pending, the reasoning of its decision is persuasive. Relying on *Graham* to examine conditions imposed on sexual offenses, the court noted “none of what [*Graham*] said about child – about their distractive [and transitory] mental traits and environmental vulnerabilities is – is crime specific.” *Id.*, at 659. And “an offender’s age ... is relevant to the Eighth Amendment” and to “criminal procedure laws that fail to take defendant’s youthfulness into account at all would be flawed.” *Id.*, citing *Miller*, 132 S.Ct at 2465-6. The court also relied on several recent longitudinal studies that prove juvenile sex offenders present low recidivism risks. *Id.* (citations omitted)

The Court explored how other states used this low recidivism data, and noted *In Re A.J.M.*, 847 N.W.2d 601, 605 (Iowa 2014) Iowa allows the juvenile court to waive the adult public registration requirement for juveniles: “when it ‘finds that the person should not be required to register.’” *Id.*, citing Iowa Code § 692A.103(3). The court found the purpose of the waiver of registration was based on data that juvenile offenders who receive treatment have low recidivism and that research confirmed juvenile sex offenders generally “are less likely to re-offend than adults, especially when they receive appropriate treatment.” *Id.*, quoting Fed. Advisory Comm. on Juvenile Justice, *Annual Recommendations Report to the President and Congress of the United States* 7–8 (2007), available at [www.facjj.org/annual/reports/ccFACJJ% 20Report% 20508.pdf](http://www.facjj.org/annual/reports/ccFACJJ%20Report%20508.pdf).

The Court further noted “that juveniles constrained by the requirements of

registration suffer a variety of adverse consequences. ... may be unable to live at home or ... struggle to find suitable housing. .. [as well as] experience difficulty in pursuing educational and employment opportunities.” *Id.*, at 660. And although the Kansas Court found the lifetime post release supervision for adults was constitutional, the same factors that result in a diminished culpability for juveniles, *i.e.*, recklessness, immaturity, irresponsibility, impetuousness, and ill-considered decision making, along with their lower risks of recidivism, diminish the penological goals of lifetime supervision for juvenile sex offenders. *Id.*

Finally Intervenor relies on *United States v. Under Seal*, 709 F.3d 257 (4th Cir. 2013), which is not persuasive as it is based on SORNA, which gives juveniles the opportunity to seek review after twenty five years on the registry and showing rehabilitation. However, since Missouri has mandatory lifetime registration with no possibility of being released or proving rehabilitation, that case is not persuasive. Finally, Missouri is one of a hand full of sates that has a true lifetime registration requirement for juveniles. *See* N.M. Stat. § 29-11a-4; S.C. Code Ann. § 23-3-460; and VA. Code Ann. § 9.1-908; Mont. Code. Ann § 46-23-506. Thus showing a national consensus against such statutes.

Because §§ 211.425 and 589.400.1(6), R.S.Mo are punitive and the length of registration is against the national consensus, provides no opportunity to show rehabilitation and does not consider the lesser culpability of the offender, the statutes constitute cruel and unusual punishment in violation of the Eighth Amendment to the

United States Constitution and Article I, § 21 of the Missouri Constitution. Wherefore, Appellant prays the Court remand this cause to the St. Louis City Juvenile Court for the juvenile court to remove the requirement of S.C. to register as an adult offender.

CONCLUSION

For the foregoing reasons, Appellant requests this Court find §§ 211.425.1 and 589.400.1(6), R.S.Mo., violates due process and constitutes cruel and unusual punishment as applied to juveniles 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 an adult sexual offender pursuant to § 211.425, R.S.Mo.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically via Missouri CaseNet e-filing system on this 14th day of September, 2015, to:

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CERTIFICATE OF COMPLIANCE

The undersigned do hereby certify:

That the foregoing brief complies with the limitations contained in the Supreme Court Rule 84.06(b) and the brief contains 7449 words and 645 lines of text as performed by 2010 Microsoft Word software.

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