

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: SMITH,  
Alleged Delinquent Child

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Case No. 2008-1624  
  
On Appeal from the  
Allen County Court of Appeals  
Third Appellate District  
  
C.A. Case No. 1-07-58

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**MEMORANDUM IN OPPOSITION TO THE STATE'S MOTION  
FOR ALIGNMENT OF BRIEFING SCHEDULE WITH *STATE V. BODYKE***

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SUPREME COURT OF OHIO

## MEMORANDUM IN OPPOSITION

Minor child-Appellant Smith opposes the Ohio Attorney General and the State of Ohio's MOTION FOR ALIGNMENT OF BRIEFING SCHEDULE WITH *STATE V. BODYKE*, which was filed in this Court on April 13, 2009. While judicial economy may be served by this Court hearing the oral arguments in *In re Smith* (pending before this Court as Case No. 2008-1624) and *State v. Bodyke* (pending before this Court as Case No. 2008-2502) on the same day, the same cannot be said for aligning the briefing schedules in these two cases. Contrary to the State's claims, *In re Smith* and *State v. Bodyke* present this Court with legally distinct constitutional challenges to Senate Bill 10, the resolution of which depend on independent reviews of the challenges raised in each appeal. Further, as the State of Ohio's motion amounts to nothing more than a second request for an extension of time in which to file its brief, this Court should deny the State's request, in accordance with S. Ct. Prac. R. XIV, Section 3(B)(2)(a).

*In re Smith* is the first of three cases this Court has accepted that concerns the classification of juveniles under Senate Bill 10. See, also, *In re G.E.S.*, pending before this Court as Case No. 2009-1926, and *In re Gant*, pending before this Court as Case No. 2008-2257. *State v. Bodyke* is the first case accepted by this Court that challenges Senate Bill 10's application to adults.

This Court has long recognized that juveniles and adults are different in the eyes of the law. *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶66; *State v. Agler* (1969), 19 Ohio St.2d 70, 71, 249 N.E.2d 808. And the General Assembly acknowledged these differences when it created separate definitions and registration periods for adults and juveniles classified under Senate Bill 10. The constitutional challenges in *Smith* depend, in part, on whether Senate Bill 10 provides juvenile courts with discretion in determining tier levels for

juveniles who are eligible to be classified as juvenile offender registrants. The arguments in *State v. Bodyke* present no such question to this Court, as there is no ambiguity as to whether courts of common pleas have discretion in determining tier levels for adult offenders. The differences between adult challenges to Senate Bill 10 and juvenile challenges to Senate Bill 10 are further illustrated by the fact that this Court stayed the briefing in *In re G.E.S.* and *In re Gant*, pending the outcome of *In re Smith*; however, it issued no such stay in briefing in *State v. Bodyke*. Because Senate Bill 10 treats juveniles and adults differently, this Court's consideration as to whether the juvenile provisions of Senate Bill 10 are unconstitutional does not depend on a resolution of the challenges asserted by the appellant in *State v. Bodyke*. Aligning the briefing schedules in these two cases would conflate the issues before this Court in an unnecessary manner. For these reasons, this Court should deny the State's motion requesting alignment of the briefing schedules in *In re Smith* and *State v. Bodyke*.

This Court should also deny the State's motion because the appellants in *In re Smith* and *State v. Bodyke* are not similarly situated under the new law. Contrary to the State's assertions, Smith was not "reclassified" by the Ohio Attorney General. Smith received a dual classification hearing under R.C. 2950.032, which provides that, for children classified between July 1, 2007 and December 31, 2007, courts shall do all the following:

- (1) Provide the offender or the delinquent child and the delinquent child's parents with the notices required under section 2950.03 of the Revised Code, as it exists prior to January 1, 2008, regarding the offender's or delinquent child's duties under this chapter as it exists prior to that date;
- (2) Provide the offender or the delinquent child and the delinquent child's parents with a written notice that contains the information specified in divisions (A)(2)(a) and (b) of this section;
- (3) Provide the offender or the delinquent child and the delinquent child's parents a written notice that clearly indicates that the offender or delinquent child is

required to comply with the duties described in the notice provided under division (C)(1) of this section until January 1, 2008, and will be required to comply with the duties described in the notice provided under division (C)(2) of this section on and after that date.

R.C. 2950.032(C)(1), (2), (3). Conversely, the defendant in *State v. Bodyke* was originally classified as a sexually oriented offender in 1999, with a duty to comply with the registration requirements in former R.C. 2950 annually for ten years. (See *Bodyke Memorandum in Support of Jurisdiction*; p. 4). Thus, Mr. Bodyke had been registering under the old provisions of Ohio's sex offender registration and notification law for nearly ten years before the Ohio Attorney General reclassified him by letter in November 2007. (See *Bodyke Memorandum in Support of Jurisdiction*; p. 4). Mr. Bodyke argues that his reclassification violates Ohio's Separation of Powers doctrine, Ohio's and the United State's prohibitions against Double Jeopardy, and Cruel and Unusual Punishments, and Ohio's and the United State's guarantees of Due Process, not simply because his offense was committed prior to Senate Bill 10's enactment, but also because Senate Bill 10 substantially altered his registration requirements, which were in effect prior to Senate Bill 10's effective date. Further, Mr. Bodyke argues that the retroactive application of Senate Bill 10 to him violates his right to contract, as his classification status was a result of his guilty plea. (See *Bodyke Memorandum in Support of Jurisdiction*; p.4). As such, Mr. Bodyke's substantive legal challenges are characteristically different from the challenges raised in this appeal. These differences place Mr. Bodyke and minor child-Appellant Smith in the unique position of challenging the same law, but in two substantively different ways. The resolution of whether the reclassification of an adult sex offender registrant under Senate Bill 10 is constitutional will not answer the question of whether the offense-based initial classification of a juvenile under Senate Bill 10 is constitutionally sound.

Finally, the State's joint motion with the Ohio Attorney General amounts to an additional request for an extension of time in which to file Appellee's brief in this case. The Supreme Court Practice Rules provide for a general prohibition against extensions of time, but make exceptions for one twenty-day extension when the parties so stipulate. Specifically, S. Ct. Prac. R. XIV, Section 3(B)(1) provides, in pertinent part, that "[t]he Clerk shall refuse to file a stipulation to an agreed extension of time that is not tendered timely in accordance with this rule, or if a request for extension of time has already been granted under Section 3(B)(2)(b) of this rule to the party filing the stipulation." (Emphasis added). This Court accepted jurisdiction of *In re Smith* on December 3, 2008. The record was filed on January 2, 2009. Following an agreed stipulation for a twenty-day extension of time, Appellant Smith filed his brief on March 3, 2009. On March 19, 2009, the parties in this present action stipulated to one twenty-day extension of time for the State to write and file its merit brief, which is currently due to be filed on or before April 22, 2009. The State's current motion amounts to a further extension of time in which to align the briefing schedules with a separate case that concerns distinct constitutional challenges. The State's request is not authorized by this Court's Rules of Practice.

**CONCLUSION**

For the above-stated reasons, Appellant Smith respectfully requests that this Court deny the State's motion for alignment, and order that the State of Ohio and any Amicus Curiae file their briefs in accordance with the briefing schedule already established in *In re Smith*.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing MEMORANDUM IN OPPOSITION TO THE STATE'S MOTION FOR ALIGNMENT OF BRIEFING SCHEDULE WITH STATE V. BODYKE has been sent by regular U.S. mail, postage prepaid, this 17<sup>th</sup> day of April, 2009 to the office of Christina L. Steffan, Assistant Allen County Prosecutor, 204 N. Main St., Suite 302, Court of Appeals Building, Lima, Ohio 45801.

  
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