ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: ADRIAN R., Alleged Delinquent Child	:	Case No. 2009-0189
	:	On Appeal from the Licking County Court of Appeals Fifth Appellate District
	:	C.A. Case No. 08-CA-17

MEMORANDUM IN RESPONSE TO APPELLEE'S MOTION TO DISMISS APPELLANT'S APPEAL AS BEING IMPROVIDENTLY GRANTED

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MEMORANDUM IN RESPONSE

The State of Ohio's Motion to Dismiss should be denied, as the State's motion demonstrates its misapprehension of Adrian's arguments. In its motion, the State makes several inaccurate assertions concerning the nature of Adrian's claims, and misstates current appellate case law on issues pertinent to this appeal. All of the State's arguments lack merit. Appellant responds to the State's claims in the order addressed in its motion.

A. The Case Adrian Presents in His Merit Brief is the Same Case Presented in His Memorandum in Support of Jurisdiction.

The State claims that there is no discussion in Adrian's merit brief as to the "retroactive application" of Senate Bill 10 ("S.B. 10"), and that as such, the case he presents therein is not the same case presented in his memorandum in support of jurisdiction ("MISJ"). (Motion, at pp. 1-2). The State is mistaken; and its grounds for dismissal are unfounded.

In making its claim, the State relies on this Court's decision in *Williamson v. Rubich* (1960), 171 Ohio St. 253, 259, 168 N.E.2d 876, in which this Court dismissed a case for being improvidently granted when the appellant raised a due process violation in his motion to certify a conflict, but argued res judicata in his merit brief. *Williamson*, at 257. In *Williamson*, this Court compared the assigned errors, legal analysis, and questions of law in each pleading and determined that the appellant made two distinctly different arguments. Id. This Court found that the assignments of error varied greatly, the questions of law were significantly different, and the legal arguments in the merit brief did not "even incidentally" refer to the claims raised in the motion to certify a conflict. Id. at 256. Such is not the case here.

In his MISJ, Adrian presented the following claims to this Court:

> Minor child-Appellant [Adrian]'s constitutional rights were violated when he was classified a Tier III juvenile sex offender registrant under Ohio's newly enacted Senate Bill 10 ("S.B. 10"). His right to due process was violated when he was classified based solely on his offense, and not according to the facts of his case and his future risk to the community. Further, his right to be protected from ex post facto and retroactive laws was violated as S.B. 10 is significantly different from the law in effect at the time of his offense and admission. Moreover, the application of S.B. 10 to [Adrian] violated the United States Constitution's prohibition against cruel and unusual punishments.

(MISJ, at p.1). Based on those claims, Adrian raised three Propositions of Law for this Court's consideration. (MISJ, at p. i). This Court accepted jurisdiction on all three propositions, however it stayed briefing on Propositions II and III, and ordered those issues held for its decision in *In re Smith*, pending as Case No. 2008-1624.[1] The Court ordered immediate briefing on Proposition of Law I and scheduled oral argument in Adrian's case and *In re Smith* for the same day. Therefore, the primary focus of Adrian's merit brief is his claim that the retroactive application of S.B. 10 to him violates his due process rights.

In his MISJ, Adrian outlined the timeline for his offense and classification. (MISJ, at p. 2). Specifically, Adrian stated that:

> On February 8, 2006, then fifteen-year-old [Adrian] admitted to and was found delinquent of two counts of rape, violations of R.C. 2907.02, felonies of the first degree if committed by an adult. [Adrian] was committed to the Ohio Department of Youth Services ("DYS") for a minimum term of one year on each count, maximum to the age of twenty-one, with each commitment set to run concurrently with one another.

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[1] Adrian's Proposition of Law II asserts that the retroactive application of Senate Bill 10 to youth whose offense predates its enactment violates the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution. Adrian's Proposition of Law III asserts that the offense based application of Senate Bill 10 to Adrian violates the United States Constitution's prohibition against cruel and unusual punishments.

> While [Adrian] was serving his commitment in DYS, the Ohio General Assembly passed S.B. 10, which drastically changed the law affecting juveniles like [Adrian], who have been adjudicated delinquent of a sexually oriented offense.

(MISJ, at p. 2). Adrian's merit brief contains the same timeline, with the additional fact that his offense occurred in 2005. (Merit Brief, at p. 1). Thus, the fact that S.B. 10 was applied to Adrian, even though his offense predated the law's enactment, is plainly stated in both Adrian's MISJ and his merit brief.

In his MISJ, Adrian detailed the process by which registration-eligible youth were found to be juvenile offender registrants under pre-S.B. 10 law. (MISJ, at p. 3). Then he argued that:

> The procedures set forth in *former R.C. 2152.83* provided juvenile sex offenders with due process protections that ensured their classification would be determined on a case-by-case basis. However, the Licking County Juvenile Court applied S.B. 10 to [Adrian] *without the protection of the procedure previously required by the law before S.B. 10's enactment*. The juvenile court in the present case did not consider [Adrian's] dangerousness or likelihood to re-offend, rather the court simply noted the offense committed and assigned [Adrian] to Tier III, based on its understanding the law. R.C. 215283(B)(2)(b), 2152.02(Y), and 2950.01(E),(F), and (G). *This completely eradicated the previous mechanism of providing [Adrian] with the due process protection that he clearly had in the law prior to S.B. 10's enactment*. Further, the new registration requirements, which are indiscriminately applicable to juveniles, have imposed criminal punishments on members of society who have historically been shielded from criminal prosecution.

(MISJ, at p. 4). (Emphasis added).

Similarly, in his merit brief, Adrian supplied this Court with a detailed history of juvenile sex offender registration and notification ("JSORN") in Ohio and the evolution of Ohio's sex offender registration and notification laws for juveniles and adults alike. (Merit Brief, at pp. 2-7, 12-13). And just as he did in his MISJ, Adrian gave the Court an

explanation of how he has been disadvantaged by the application of a law that was enacted after his offense was committed:

> At the time of his offense, the only way Adrian could have been classified as a sexual predator was if the juvenile court made certain factual findings, on the record, determining that he was likely to reoffend in the future. Former R.C. 2950.09(B)(2). And he could not have been classified as a habitual offender because he had not previously committed a sexually oriented offense. Former R.C. 2950.01(B). In fact, given his success in sex offender treatment at the Ohio Department of Youth Services, the record in this case would have supported a finding that if Adrian were to be classified at all, he would have been classified as a sexually oriented offender, with a duty to comply with registration requirements annually for ten years. However, because the Licking County Juvenile Court believed it had no discretion in determining Adrian's tier level, he is now registering as a Tier III juvenile offender registrant, every 90 days in the counties where he lives, works, and goes to school. And because reclassification or declassification is not guaranteed, Adrian may be registering as a Tier III juvenile offender registrant for the rest of his life—not because he was found to be a dangerous member of society, who was likely to commit future sexually oriented offenses—but because the juvenile court classified him as though he were an adult offender.

(Merit Brief, at pp. 20-21).

Therefore, and contrary to the State's arguments, Adrian's MISJ and merit brief present the same argument. Both documents contain a comparison of Ohio's JSORN classification schemes pre and post-S.B. 10. Each also contains a specific argument regarding the way in which Adrian was disadvantaged by being classified under a registration scheme that was not in effect at the time of his offense. And there is a discussion in both pleadings as to how the retroactive application of S.B. 10 gives rise to Adrian's Due Process Clause challenges.

B. Adrian's Constitutional Challenge to Senate Bill 10 Originated from His Offense-Based Classification.

In its Motion, the State repeatedly alleges that Adrian's constitutional challenge is based on an "assumption" that S.B. 10 is applied to children in the same offense-based

manner as it is applied to adults. (Motion, at p. 2). Specifically, the State declares that "while acknowledging the lack of a consensus from the lower courts, the Appellant nonetheless assumes for the sake of its argument before this Court that the offense-based classification below is the law in Ohio." (Motion, at p. 4). In so asserting, the State misapprehends Adrian's argument.

Adrian's claims are not based on an *assumption* of how S.B. 10 applies to children. Instead, his claims arise out of the *fact* of his own offense-based classification. (Merit Brief, at p. 1). At Adrian's January 14, 2008 classification hearing, the juvenile court, defense counsel, and the State were all under the belief that classification as a Tier III juvenile offender registrant was automatic in Adrian's case:

> The Court: And it appears – although I'm going to ask everyone their opinion – it appears that the Court has no alternative but to classify him a Tier [III]3.
>
> Defense: I think that we'd have no arguments with regard to the Tier, Your Honor, I think that it's a Tier [III] offense, because the tiers are defined strictly by the nature, in many cases of the offense – the underlying offense. And my understanding is that rape –
>
> The Court: Yes.
>
> Defense: -- is a -- is a Tier [III] offense.
>
> The Court: Yes.
>
> Defense: We don't – we don't dispute the tier, Your Honor. We understand that portion of the law.

(T.pp. 4-5). The State also informed the juvenile court, "Your Honor, * * * the State's understanding is that – that this would be a Tier [III] offense." (T.p. 8). Adrian was subjected to an offense-based classification. Thus, his brief has been written from the perspective of how he was actually classified, not as to what he supposes the law is.

Moreover, the State's assertion that Adrian is only objecting to an alleged error in the implementation of S.B. 10 and not the statute itself is inaccurate. Adrian is not arguing that the juvenile court erred in applying S.B. 10. Adrian's argument is clearly that his offense-based classification is unconstitutional. (Merit Brief, at pp. 8-22). However, he has presented this court with a potential remedy for the problem of S.B. 10's unconstitutionality. (Merit Brief, at p. 7). He has argued that SB 10, as applied to Adrian, is unconstitutional, *unless* the juvenile court's interpretation of the law was inaccurate. The State misunderstands the nature of Adrian's claims and submits an erroneous interpretation of Adrian's argument to this Court.

C. Whether Senate Bill 10 Vests Juvenile Courts with Discretion in Determining Tier Levels for Juvenile Offender Registrants has been Presented to this Court as a Potential Remedy to the Problem Presented by an Offense-Based Application of Senate Bill 10 to Juveniles.

The State submits that the "first real fight" regarding the constitutionality of S.B. 10 as applied to juveniles is whether the law vests juvenile courts with discretion to determine tier levels for juveniles subject to classification as juvenile offender registrants. (Motion, at p. 1). And the State claims that "to properly argue and brief the Proposition of Law, one must determine first whether or not juvenile sex offender tier assignments are mandatorily offense-based, or are totally discretionary." (Motion, at p.2). (Emphasis added). Thus, the State asserts that the issue of whether S.B. 10 is constitutional is not ripe for this Court's consideration, as the issue of tier discretion needs to be appealed and argued in a separate proposition. While Adrian agrees that the issue of whether juvenile courts retain discretion to determine tier level is important and could potentially resolve the question presented in this case, the State is wrong as to whether this Court can answer

the question presented without having the issue of tier discretion argued in a separate proposition.

To clarify the issue in this appeal, Adrian has argued that his retroactive, offense-based classification under S.B. 10 is unconstitutional. (Merit Brief, at pp. 8-22). He was classified based solely on his offense, without the protections that JSORN statutes provided at the time of his offense. (Merit Brief, at pp. 20-21). It is his position that this Court must answer whether the assignment of youth to tier levels in the same offense-based manner as adults violates the juveniles' right to due process in cases where the youth's offense was committed prior to S.B. 10's enactment and where the youth did not have the same protections as a similarly situated adult defendant had. (Merit Brief, at pp. 8-22). This Court can simply answer the question concerning Adrian's offense-based classification without making any determination as to whether juvenile courts have discretion in determining tier levels under S.B. 10.

However, given the confusion among Ohio courts and the divergent line of case law emerging on the issue of tier discretion—and specifically how tier discretion relates to the law's constitutionality—Appellant has urged that "perhaps before the constitutional question can be answered, this Court must give guidance as to whether juveniles are to be classified in the same way as adults." (Merit Brief, at p. 7). Appellant acknowledges that the reasoning employed by the Ninth District in *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076, presents this Court with a potential remedy to the problem of S.B. 10's unconstitutionality. (Merit Brief, at p. 7). This is of particular importance given the fact that many appellate districts have determined that the reason S.B. 10 is constitutional is because discretion exists and classifications are still determined on a case-by-case basis.

See *In re G.E.S.*, at ¶37; *In re A.R.*., 12th Dist. No. CA2008-03-035, 2008-Ohio-6566, ¶36; *In re P.M.*, 8th Dist. No. 91922, 2009-Ohio-1624, ¶5; *In re C.A.*, 2nd Dist. No. 23022, 2009-Ohio-3303, ¶37-38; *In re Antwon C.*, 1st Dist. No. C-080847, 2009-Ohio-2567; and *In re J.M.*, 4th Dist. No. 08CA782, 2009-Ohio-4574, ¶71.

The State fails to acknowledge that the issue of tier discretion was not presented as an independent argument in *In re G.E.S.* Id. at ¶3, 48, 49, 55. In fact, it was not raised as an issue at all. Id. Instead, when faced with the question of whether S.B. 10 as applied to juveniles was constitutional, the Ninth District opted to scrutinize the language of the statute and find the law constitutional because it vests juvenile courts with discretion in determining classification levels for juvenile offender registrants. Id. In so holding, the Ninth District effectively avoided answering the question of whether an offense-based classification scheme for juveniles was constitutional, even though that was the issue raised before it. Id.

This Court has no obligation to answer the issue of discretion before it examines the constitutionality of S.B. 10 as applied to children. This Court can decide the issue of constitutionality based solely on whether the offense-based application of S.B. 10 to Adrian was unconstitutional. In fact, this is precisely what Adrian has asked this Court to do. (Merit Brief, at pp. 13-22). However, should this Court choose to address the issue of tier discretion it would be well within the purview of the question presented, as six appellate districts have determined that the issue of tier discretion is directly related to the constitutionality of S.B. 10. (Merit Brief, at p. 8).

D. The Current Precedent From the Second and Fourth District Courts of Appeals is Clear: Juvenile Courts Retain Discretion in Determining Tier Level for Juvenile Offender Registrants Under Senate Bill 10.

Contrary to the State's claims that the current precedent in four appellate districts is that juvenile courts lack discretion in determining tier levels for juvenile offender registrants, only two appellate courts have made and affirmed such a determination. See *In re Smith*, 3rd Dist. No. 1-07-58, 2008-Ohio-3234 and *In re Adrian R.* 5th Dist. No. 08-CA-17, 2008-Ohio-6581. See, also, *In re Gant*, 3rd Dist. No. 1-08-11, 2008-Ohio-5198 and *In re P.M.*, 5th Dist. No. 2008CA00152, 2009-Ohio-1761.

In it's Motion to Dismiss, the State makes the following claims:

> Several lower courts have concluded that juvenile sex offender tier classification falls within the discretion of the juvenile court. The five lower courts reaching this conclusion include the First, Second, Eighth, Ninth, and Twelfth Districts, finding that the particular tier assignment is discretionary. There are also four lower courts reaching the opposite interpretation and finding that juvenile sex offender tier classification is automatic, based on the underlying offense. These include the Second, Third, Fourth, and Fifth Districts.

(Motion, at p. 3). Later, the State notes that:

> The Second District is listed on both sides, as it examined the issue in two cases, and came up with two different results, with two of the three appellate judges being different on this second case. It does not appear that the Second District has addressed this matter en banc to resolve the differences, as required by *McFadden v. Cleveland State University* (2008), 120 Ohio St.3d 54, 896 N.E.2d 672, 2008-Ohio-4914.

(Motion, at p. 3 fn. 2). The State cites to *In re S.R.B.*, 2nd Dist. No. 08-CA-8, 2008-Ohio-6340 and *In re T.M.*, 4th Dist. No. 08CA863, 2009-Ohio-4224, in support of its assertion that the Second and Fourth District Courts of Appeals have found that juvenile courts lack discretion in determining tier level. (Motion, at p. 3). However, the Second District overruled its holding in *In re S.R.B.*, (*In re C.A.*, 2nd Dist. No. 23022, 2009-Ohio-3303,

¶70-74) and the Fourth District has actually held that juvenile courts retain discretion in determining tier level under S.B. 10's juvenile provisions. *In re J.M.*, 4th Dist. No. 08CA782, 2009-Ohio-4574, ¶68-74. Thus, the State misconstrues the holdings it cites from the Fourth and Second District Courts of Appeals. (Motion, at p. 3).

1. *In re S.R.B.*, 2nd Dist. No. 08-CA-8, 2008-Ohio-6340 and *In re C.A.*, 2nd Dist. No. 23022, 2009-Ohio-3303.

In *In re S.R.B.*, the Second District Court of Appeals considered a juvenile court's failure to make appropriate findings under R.C. 2950.11(F)(2), when it classified a sixteen-year-old youth as a Tier III juvenile offender registrant under S.B. 10 and ordered that the youth be subject to community notification. *In re S.R.B.*, at ¶1-4. Though the specific issue before the Second District concerned whether the juvenile court abused its discretion in imposing community notification, the appellate court noted that:

> In this case, the offense that S.R.B. admitted to required, by definition, that the court classify him as a Juvenile Offender Registrant/Tier III sex offender. See R.C. 2152.83(A)(1), R.C. 2950.01(A)(1), (G)(1)(a), (M). This classification is non-discretionary, and is based upon the conviction for Rape, R.C. 2907.029(A)(1)(b) after January 1, 2002, while the offender was sixteen years old.

Id. at ¶7. The Second District ultimately found that, given the mandatory nature of the youth's classification as a Tier III "sexual predator" the juvenile court did not abuse its discretion when it ordered community notification. Id. at ¶16. The Second District issued its opinion in *In re S.R.B.* on December 5, 2008.

On July 2, 2009, the Second District overruled *In re S.R.B.* *In re C.A.*, at ¶70-74. In *In re C.A.*, the appellant assigned error to the juvenile court's finding that he was a mandatory Tier III juvenile offender registrant. Id. at ¶34. He specifically argued that

the court had discretion in determining whether a Tier I, II, or III classification level was required. Id.

Contrary to what it noted *In re S.R.B.*, the Second District held that registration under S.B. 10 is a two-step process, the first of which involves the court determining if a discretionary registrant should have to register as a juvenile offender registrant at all, and the second of which involves determining to what tier to classify the youth. Id. at ¶38. Utilizing the same statutory construction analysis employed by the Ninth District Court of Appeals in *In re G.E.S.*, the Second District determined that:

> Unlike the classifications for adults, the tiers for juvenile sex offenders are not mandated by the offense of which the offender had been convicted. Rather, R.C. 2950.01 defines a juvenile sex offender for each tier as "[a] sex offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any sexually oriented offense and who a juvenile court, pursuant to [R.C.] 2152.82 * * *, classifies a tier [I, II, or III] sex offender/child-victim offender relative to the offense." (Emphasis added.) R.C. 2950.01(E)(3), (F)(3), (G)(3).

Id. at ¶60.

The Second District then clarified and overruled its previous holding in *In re S.R.B.* Id. at ¶70-74. Specifically, the court found:

> * * * *S.R.B.* is not binding precedent. The assignments of error in *S.R.B.* concerned whether the juvenile court appropriately required community notification as part of his Tier III classification, not whether the juvenile court employed the wrong analysis in determining whether he should be classified as a Tier III sex offender. In addition, unlike C.A., S.R.B. was 16 years old and was classified under R.C. 2152.83(A)(1).
>
> However, to the extent that we held that S.R.B.'s Tier III classification was mandatory, we believe that statement was not correct; we did not consider the differences in the tier definitions for adults and juveniles, and we supported our comment that S.R.B.'s classification as a Tier III sex offender was "non-discretionary" based upon his "conviction" for rape by citing R.C. 2950.01(G)(1), which sets forth the offenses that require Tier III classification for adults. In short, any expression in S.R.B. that a juvenile's classification was mandated solely by the offense of which the

> child was adjudicated was not supported with the relevant statutory provisions, and, to the extent that it is not dicta, that conclusion is hereby overruled.

Id. at ¶73-74. Thus, the State's assertion that the Second District has contradicted itself and currently holds two conflicting opinions as valid precedent is disingenuous. Instead, an accurate statement of the law is that the Second District announced what was intended to be dicta in *In re S.R.B.*, which it then expressly overruled in *In re C.A.* Id. at ¶73-74. Thus, the current precedent in the Second District is that juvenile courts retain discretion in determining tier levels for juvenile offender registrants under S.B. 10. Id. at ¶60.

2. *In re T.M.*, 4th Dist. No. 08CA863, 2009-Ohio-4224 and *In re J.M.*, 4th Dist. No. 08CA782, 2009-Ohio-4574.

The State is also misstating the law when it cites the Fourth District Court of Appeals' decision in *In re T.M.* for the proposition that tier levels for juveniles are offense-based under S.B. 10. (Motion, at p. 3). The Fourth District has actually made the opposite finding. *In re J.M.*, at ¶71.

In *In re T.M.*, the Fourth District held that the juvenile court erred when it found that the appellant's classification as a Tier III juvenile offender registrant was mandatory. Id. at ¶1. However the term "mandatory" in *In re T.M.*, did not concern the youth's tier level. Rather, it referred to his status as a juvenile offender registrant and whether the juvenile court was required to make him a registrant, or whether it had discretion in finding that he did not have to register at all under R.C. 2152.83(B). Id. at ¶14-15. The Fourth District did not actually address the issue of tier discretion until it announced its decision in *In re J.M.* on August 14, 2009. *In re J.M.*, at ¶71-72.

In *In re J.M.*, the Fourth District considered the issue of whether juvenile courts have discretion in determining tier level through an ineffective-assistance-of-counsel

claim. Id. at ¶68-74. In analyzing whether trial counsel rendered ineffective assistance at a juvenile's classification hearing, the court noted that "if a juvenile court decides to issue an order classifying the juvenile as a juvenile offender registrant, then the court must determine which tier the juvenile should be classified under." Id. at ¶71. The Fourth District found that the majority of the districts in Ohio have determined that S.B. 10 vests juvenile courts with discretion in determining tier level, and that as such, it would join the Ninth, Twelfth, Eighth, First, and Second Districts in finding that "a trial court has the discretion in classifying a juvenile offender registrant to a particular tier." Id. at ¶71.

Upon review of the holdings announced by the Second District in *In re C.A.*, and by the Fourth District in *In re J.M.*, it is clear that the only two appellate courts in the state to find that juveniles are subject to offense-based classification under S.B. 10 are the Third and the Fifth Districts. And each of those decisions is currently pending review before this Court. See *In re Smith*, pending before this Court as Case No. 2008-1624, *In re Adrian R.*, pending before this Court as Case No. 2009-0189, and *In re Gant*, pending before this Court as Case No. 2008-2257.

CONCLUSION

For all the foregoing reasons, Appellant respectfully requests that this Court deny the State's Motion to Dismiss as Appeal Improvidently Granted.

Respectfully submitted,

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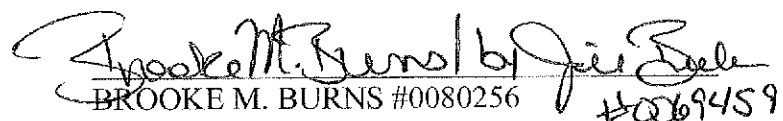

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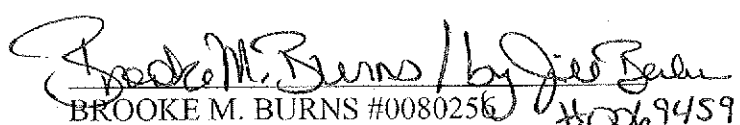
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded by regular U.S. Mail this 18th day of September, 2009 has been sent by regular U.S. mail, postage prepaid, to the office of Alice R. Bond, Assistant Licking County Prosecuting Attorney, Licking County Prosecutor's Office, Licking County Admin. Bldg., 20 South Second Street, 4th Floor, Newark, Ohio 43055.



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