

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: D.S.,	:	No. 2008-1624
A Minor Child,	:	
	:	On Appeal from the Allen
	:	County Court of Appeals,
	:	Third Appellate District

MOTION OF AMICI CURIAE, THE JUSTICE FOR CHILDREN PROJECT, THE NATIONAL JUVENILE DEFENDER CENTER, THE CHILDREN'S DEFENSE FUND, THE NATIONAL JUVENILE JUSTICE NETWORK, THE OHIO ASSOCIATION OF CHILD CARING AGENCIES, AND THE JUVENILE JUSTICE COALITION TO REALIGN AS NEUTRAL AMICI AND TO REQUEST TIME TO ARGUE

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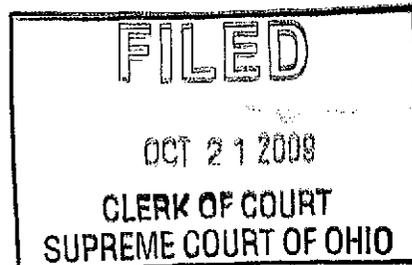
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MOTION TO BE REALIGNED AS NEUTRAL AMICI
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Amici curiae, the Justice for Children Project, the National Juvenile Defender Center, the Children's Defense Fund, the Ohio Association of Child Caring Agencies, the National Juvenile Justice Network, and the Juvenile Justice Coalition, respectfully move this Court for an order realigning Amici as supporting neither party in the above-captioned matter. Amici initially filed a brief in support of appellant. However, to the surprise of the aforementioned Amici, Appellant conceded the constitutionality of S.B. 10 should this Court conclude that juvenile judges have discretion to select the tier classification for juvenile offenders. Amici contend that S.B. 10 remains unconstitutional despite the statutory authorization of discretion and thus notify this Court that our position no longer aligns with that of appellant.

Moreover, it appears that no party will argue that, even with discretion, S.B. 10 is unconstitutional as applied to juveniles because it constitutes punishment for purposes of the Ex Post Facto Clause, amounts to an additional burden and disability for purposes of Ohio's Retroactivity Clause, and constitutes cruel and unusual punishment under the state and federal constitutions. Amici thus respectfully ask this Court to grant Amici time to argue pursuant to Sup. Ct. R. IX, Sec. 6(A). Amici is aligned with neither party; furthermore, the circumstances are extraordinary because the Court will not hear any argument about the constitutional problems raised by S.B. 10 under these circumstances.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

Senate Bill 10, as it applies to juveniles, clearly accords judges discretion in choosing the tier classification; thus, this Court need not reach the important constitutional questions that remain. The definitions of tier levels set forth in R.C. 2950.01(E), (F), and (G) clearly differentiate between juvenile and adult offenders. Under these provisions, an adult will be classified as a Tier I, II, or III sex offender based solely on the underlying offense; the judge has no authority to choose the tier classification. See, e.g., R.C. 2950.01(E)(1) (defining a Tier I sex offender as an individual “who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to” certain specified offenses); R.C. 2950.01(F)(1) (defining a Tier II sex offender as an individual “who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to” certain specified offenses); R.C. 2950.01(G)(1) (defining a Tier III sex offender as an individual “who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to” certain specified offenses). However, a juvenile will not be classified a sex offender unless the juvenile is adjudicated delinquent for one of the

enumerated offenses **and** the juvenile court classifies the minor as a sex offender relative to the offense. See, e.g., R.C. 2950.01(E)(3) (“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 section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier I sex offender”); R.C. 2950.01(F)(3) (“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 section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier II sex offender”); R.C. 2950.01(G)(3) (“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 section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier III sex offender”). Thus, by the plain terms of the statutes, adult tier classification is based on the offense of conviction but juvenile tier classification requires a juvenile court judge to select that classification, regardless of the sexually oriented offense.

Because there is little dispute that juvenile judges have discretion, the undersigned Amici respectfully urge this Court to dispose of this case on statutory, rather than constitutional, grounds. Both Appellant and Amicus Ohio Attorney General correctly contend that discretion exists in the juvenile system – a position held by a substantial number of appellate districts. See *In re Antwon C.*, 2009-Ohio-2567 (1st Dist.); *In re C.A.*, 2009-Ohio-3303 (2d Dist.); *In re J.M.*, 2009-Ohio-4574 (4th Dist.); *In re P.M.*, 2009-Ohio-1624 (8th Dist.); *In re G.E.S.*, 2008-Ohio-4076 (9th Dist.); *In re A.R.*,

2008-Ohio-6566 (12th Dist.). The Fifth District Court of Appeals appears to have taken an inconsistent approach to the question. Compare *In re Adrian R.*, 2008-Ohio-3234, ¶ 18 (5th Dist.) (“While initially there appeared to be some confusion over the mandatory or discretionary nature of the classification, both parties clarified that the classification was in fact discretionary and the court recognized that understanding.”) with *In re P.M.*, 2009-Ohio-1761, ¶ 14 (5th Dist.) (classification no longer based on individualized determination but on type of crime committed). Only one appellate district, the Third District, has held consistently that juvenile court judges lack discretion: in the case at bar and in *In re Gant*, 2008-Ohio-5198 (3d Dist.). Thus, a finding in the case at bar that juvenile judges have discretion to select a tier classification based on the offender and his offense would not necessitate resolution of the constitutional claims but merely a remand to the lower court to apply the law accordingly. In this event, the Supreme Court need not address the constitutional challenges because a decision interpreting the statute necessarily ends the inquiry. “[N]o constitutional question is ripe for judicial review ‘where the case can be disposed of upon other tenable grounds.’” *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, ¶9, quoting *Van Fossen v. Babcock Wilcox Co.* (1988), 36 Ohio St.3d 100, 105, 522 N.E.2d 489, *Ireland v. Palestine, Braffetsville, New Paris, & New Westville Turnpike Co.* (1869), 19 Ohio St. 369, 373.

In the event, however, that this Court finds that juvenile judges do have discretion to select tier classification, and the Court chooses to address the constitutional questions, then it would be appropriate to hear argument from the neutral Amici on behalf of Ohio’s children. Only the undersigned Amici present the argument that, regardless of the presence of discretion, S.B. 10 is unconstitutional as applied to

juveniles because it violates the federal Ex Post Facto Clause, Ohio's Retroactivity Clause, and the prohibition against cruel and unusual punishment. Curiously, Appellant has taken the position that in the event that juvenile judges have discretion to select the tier classification for juvenile offenders, then S.B. 10 is constitutional. The Attorney General has joined with Appellant in stating that because juvenile judges have discretion to select the tier level for juvenile sex offenders, the law is constitutional and does not violate the prohibition against cruel and unusual punishment or the Ex Post Facto and Retroactivity Clauses. On both legal and socio-scientific grounds, Amici respectfully challenge this conclusion and seek to address issues that would not otherwise be addressed in argument.

First, as indicated in Amici's Reply Brief, the presence of discretion does not eliminate constitutional infirmities. The United States Supreme Court has made it clear that "the presence of discretion does not displace the protections of the *Ex Post Facto* Clause." *Garner v. Jones* (2000), 529 U.S. 244, 253, 120 S.Ct. 1362, 146 L.Ed.2d 236. See also *Johnson v. Comm'r of Correction* (Conn. 2002), 786 A.2d 1091, 1100 ("primary focus of an ex post facto claim is the probability of increased punishment"). Under the state constitution, "[r]etroactive laws are therefore a larger category than ex post facto laws, and comprise statutes imposing 'disabilities' as well as those imposing 'punishments.'" *State ex rel. Corrigan v. Barnes* (1982), 3 Ohio App.3d 40, 44, 443 N.E.2d 1034. Moreover, "the proscription against retroactivity applies to laws affecting substantive rights but not to the procedural or remedial aspects of such laws." *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 137, 522 N.E.2d 477, 480. Discretion, which allows a court potentially to choose a lower tier classification, may

reduce the duration of the burdens and disabilities but cannot eliminate them; furthermore, the length of the disability does not change the fact that the disabilities themselves are substantive as opposed to remedial. The question, then, is not whether judges may choose to impose a tier classification but whether the law is punitive in its effect or constitutes an additional burden or disability that violates the federal and state constitutional provisions.

Second, the reality that children are different, as established by the scientific research on juvenile brain development, drastically and irrevocably shifts the balance that this Court stated should be drawn between privacy expectations of the offender and the government's interest in protecting the public, *State v. Cook*, 83 Ohio St.3d 404, 413, 1998-Ohio-2914. Because the brains of juveniles are not fully developed, it is not just the nature of the disability that changes the outcome of an analysis under *Cook*; it is also the nature of the offender. Recent medical, social, and scientific studies have led scientists to conclude that there are no concrete definitions for what constitutes sexual misconduct in juveniles. Thus juveniles differ from adults both in terms of their motivations for engaging in sexual activity and the persistence of that behavior over time.

Traditional concepts of offending and deterrence also do not apply to juveniles in this context. Because the human brain continues to develop and mature well into adulthood, judgment and understanding of consequences are last to develop. As a result, the constant maturation of the brain not only permits a juvenile to grow out of behavior, it also results in greater responsiveness to and a higher degree of success in treatment that are reflected in the consistently low rates of recidivism for these juvenile

offenders. The collateral consequences that result from juvenile offending have traditionally been limited because of earlier and intuitive understandings that children are different. These factors are critical to determining whether a penalty violates the Ex Post Facto Clause and constitutes cruel and unusual punishment.

Moreover, the fact that a judge has the discretion to impose a cruel or unusual punishment does not satisfy the constitutional bars against such action. Implicit in the Supreme Court's holding in *Roper v. Simmons* (2005), 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1, is the principle that certain sentences can be unconstitutionally severe even when imposed on only the most heinous offenders. Giving the court discretion to impose a sentence does not end the inquiry into whether the penalty is disproportionate to the moral culpability of the offender. *Gregg v. Georgia* (1976), 428 U.S. 153, 182, 96 S.Ct. 2909, 49 L.Ed.2d 859. The Supreme Court in *Roper* made it clear that juvenile offenders are different: because they lack maturity, are more susceptible to outside influence, and lack fixed personalities, they are less morally culpable. Consequently, according judges the discretion to impose a tier classification does not resolve the questions about whether such classifications constitute cruel and unusual punishment.

Third, in a case of first impression decided after briefing this case, the Ninth Circuit Court of Appeals held in *United States v. Juvenile Male* (9th Cir. Sept. 10, 2009), 2009 WL 2883017, that restrictions imposed under the federal Adam Walsh Act are punitive and therefore violative of the Ex Post Facto Clause of the United States Constitution. Noting that evidence a statute is punitive rather than civil is considered in relation to the statute on its face (rather than as it applies to any particular individual), the Ninth Circuit concluded that the statute's juvenile registration provisions had a

punitive effect. Applying the factors articulated by the United States Supreme Court in *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644, relied on by this Court in *Cook*, the Ninth Circuit found that the juvenile registration provisions impose “a disability that is neither ‘minor’ nor ‘indirect,’ but rather severely damaging to former juvenile offenders’ economic, social, psychological, and physical well-being.” *Id.* at *7. Because the law also permitted public disclosure, evidenced a punitive intent, and appeared excessive in relation to its purportedly non-punitive purpose, the Court found the Adam Walsh Act violated the Ex Post Facto Clause. “In light of these two different systems of justice — one public and punitive, the other largely confidential and rehabilitative — the impact of sex offender registration and reporting upon former juvenile offenders and upon convicted adults differs in ways that we cannot ignore.” *Id.* at *7.

As with the federal Adam Walsh Act, S.B. 10 carries direct and severe disabilities for juvenile offenders that impact their economic, social, psychological, and physical well-beings. Juvenile Tier III offenders are required to report every 90 days until death and face felony prosecution for registration violations. They must update detailed personal information and are subject to the dissemination of that information both by operation of law and through practice. The most serious sex offenders (public registry qualified juvenile offender registrants) will have names, photographs and personal information posted on the web and disseminated through mailings to the community. R.C. 2950.04, R.C. 2950.11(F)(1). Judges may impose victim and community notification requirements on Tier III juvenile offender registrants. R.C. 2152.82(B)(4), R.C. 2950.11(F)(1)(c). Information about other juvenile offenders will be provided to

numerous law enforcement agencies. Juvenile offenders must report to the county sheriff in the counties in which they reside and in which they are domiciled for three or more days. R.C. 2950.04(A)(3). Finally, the process of verifying information necessarily involves contact with neighbors, landlords, school officials, and possibly employers. The reality is that verification requires an exchange of information that directly harms and prevents rehabilitation of juvenile offenders.

Fourth, recognizing that S.B. 10 expressly provides discretion to juvenile judges to select the tier level does not end the inquiry as to discretion. Neither party has indicated what would happen if a juvenile judge, in exercising discretion, imposes a higher tier classification than could be imposed on an adult offender. Amici respectfully contend that increasing the tier classification beyond that which adult offenders can receive violates the equal protection clauses under the state and federal constitutions. "In our examination of the sex offender registry scheme and its disparate treatment of juvenile offenders, we cannot conceive of any state of facts to suggest a rational basis for the harsher treatment of juveniles." *In the Interest of Z.B.* (S.D. 2008), 757 N.W.2d 595, 600 (Supreme Court of South Dakota holding unanimously that federal equal protection violated by state statute which permitted adult registrants to be removed from registry under certain circumstances but not juvenile registrants). Imposing higher tier levels results in the disproportionately harsh treatment of juveniles who demonstrably are less culpable, pose less risk to the community, and are more responsive to treatment. A general holding by this Court as to the existence of discretion leaves unanswered a critical issue that could ultimately and improperly subject juvenile

offenders to even longer periods of disability than adult offenders who have committed more serious offenses.

Because the position of the Appellant is irreconcilable with the position taken by the Amici, the Amici hereby request that they be realigned as neutral amici. Moreover, because critical issues will not otherwise be presented to the Court, should the Court choose to rule on the important constitutional matters involved, the Amici respectfully request time to address the socio-scientific issues and argue the constitutional questions on behalf of Ohio's children.

Respectfully submitted,



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