IN THE SUPREME COURT OF OHIO

IN RE: D[redacted] J. S[redacted] Alleged Delinquent Child.	*	CASE NO. [redacted]
	*	
	*	On Appeal from the
	*	Allen County Court of Appeals
	*	Third Appellate District
	*	
	*	Court of Appeals
	*	Case No. [redacted]
	*	

MERIT BRIEF OF *AMICI CURAIE* AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION, INC., JUVENILE LAW CENTER, MONTGOMERY COUNTY PUBLIC DEFENDER, CHILDREN'S LAW CENTER, INC., CENTRAL JUVENILE DEFENDER CENTER, AND OHIO JUSTICE AND POLICY CENTER IN SUPPORT OF APPELLANT, D[redacted] J. S[redacted]

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INTERESTS OF AMICI

Amicus Curiae, the American Civil Liberties Union of Ohio Foundation, Inc. (ACLU of Ohio) is a non-profit, non-partisan membership organization devoted to protecting basic constitutional rights and civil liberties for all Americans. Because of the ACLU of Ohio's commitment to the principles of due process, the rights of juveniles, and the importance of a justice system that offers individualized responses to problems rather than blanket solutions, it offers this brief to assist the Court in resolving this case.

Amicus Curiae, the Juvenile Law Center (JLC) is one the oldest multi-issue public interest law firms for children in the United States. JLC was founded in 1975 to advance the rights and well being of children in jeopardy. JLC advocates in particular on behalf of children involved in the juvenile justice and child welfare systems and, increasingly, children involved in the adult criminal justice system. JLC works to ensure that children are treated fairly, and that they receive the treatment and services that these systems are supposed to provide, including, at a minimum, adequate and appropriate education, and physical and mental health care. In addition to litigation and appellate advocacy, JLC has participated as amicus curiae in state and federal courts throughout the country, as well as the United States Supreme Court, in cases in which important rights and interests of children are at stake. Of particular relevance, JLC was lead counsel for over 50 advocacy groups nationwide who participated as amici in Roper v. Simmons (2005), 543 U.S. 551, in which the Supreme Court ruled that it was unconstitutional to impose an adult punishment, there the death penalty, upon children.

The Montgomery County Public Defender operates to defend citizens who are accused of a criminal offense and who are at risk for going to jail. This includes felonies, misdemeanors, preliminary hearings, extraditions, and juvenile delinquency.

The Children's Law Center, Inc. has as its mission to protect the rights of children in Ohio and Kentucky through legal representation, research and policy development, and training and education of attorneys and others regarding the rights of children. The Center strives to ensure that youth receive the due process protections to which they are entitled, and seeks to enhance the capacity of the public defender programs designed to ensure that the right to counsel is protected and that children receive effective assistance of counsel at all critical stages.

The Central Juvenile Defender Center is one of the nine Regional Centers of the National Juvenile Defender Center. The Center focuses on juvenile law issues in Arkansas, Indiana, Kansas, Kentucky, Missouri, Ohio, and Tennessee. The Center coordinates regional activities, including helping to compile and analyze juvenile indigent defense data, facilitating organizing and networking opportunities for juvenile defenders, offering targeted, state-based training and technical assistance, and providing case support specifically designed for complex or high profile cases. The Central Juvenile Defender Center is based at the Children's Law Center, Inc., in Covington, Kentucky.

The Ohio Justice & Policy Center is a non-profit law office that works for productive, statewide reform of the criminal justice system by promoting rehabilitation of incarcerated people, enabling them to successfully reintegrate into the community, and eliminating racial disparities in the criminal justice system.

STATEMENT OF THE CASE

Amici adopt Appellant's statement of the case.

ARGUMENT

Proposition of Law: Determination of classification, registration, and notification requirements for juvenile sexual and child-victim offenders under Ohio's version of the Adam Walsh Act, is committed to the discretion of the juvenile court and juveniles can only be reclassified under that law by a juvenile court in the exercise of that discretion and after a hearing to determine which classification is appropriate.

I. Classification of juveniles adjudicated delinquent for sex or child-victim offenses is left to the discretion of the juvenile court.

In 2007, the Ohio General Assembly passed and the Governor signed Ohio's version of the Adam Walsh Act. Senate Bill 10, 127th General Assembly, Sections 2, 3, and 4 (2007) ("S.B. 10"). More than a revision of Ohio's then-current sexual offender and child-victim offender classification, registration, and notification system, S.B. 10 is a completely new system, a replacement, rather than a modification of the prior system.

S.B. 10 establishes a comprehensive scheme for classification of sexual offenders and child-victim offenders. Where prior law had classified those offenders based on judicial determinations of the likelihood they would reoffend,[1] S.B. 10 generally abandons that approach. Rather, under S.B. 10, offenders are classified as Tier I, Tier II, or Tier III based on the offense of conviction. Those who had been found guilty of or delinquent due to sexually oriented or child-victim offenses before S.B. 10's effective date received notice from the Ohio Attorney General of their new classifications based exclusively on their offense of conviction.

R.C. 2950.031(A)(1) requires the Attorney General to reclassify sexual offenders, including juvenile sexual offenders, into Tier I, Tier II, or Tier III based on their offense of conviction. However, R.C. 2950.01 provides that juvenile offenders are not to be classified on that basis. Rather, their classification is to be determined by the juvenile courts. As the Ninth

[1] Former R.C. 2950.09(B)(3) set forth a non-exclusive list of factors courts were required to consider in determining an offender's classification.

District Court of Appeals explained, "[T]he legislature intended to give juvenile courts the discretion to determine which Tier level to assign to a delinquent child, regardless of the sexually oriented offense that the child committed. [S.B. 10] does not forbid a juvenile court from taking into consideration multiple factors, including a reduced likelihood of recidivism, when classifying a delinquent child." *In re G.E.S.*, Summit App. No. 24079, 2008-Ohio-4076, ¶ 37; accord, *In re A.R.*, Warren App. No. CA2008-03-036, 2008-Ohio-6536, ¶¶ 36-37.

That classification of juvenile sexual offenders is not just a mechanical act under S.B. 10, is evident from the language of the statute. Sections 2950.01(E) through (G) of the Revised Code define Tier I, Tier II, and Tier III sexual offenders and identify which offenders are to be classified into which tiers. In essentially identical language, each of those sections provides, in subsection 1 (concerning sexual offenders) and in subsection 2 (concerning child-victim offenders) that its tier consists of those who have been found guilty, by plea or at trial, of certain specified offenses. Under those subections, classification is essentially ministerial.

But each section also has a subsection 3, concerning those adjudicated delinquent. Those sections are different, because each requires a determination by a juvenile court of the proper tier. For instance, R.C. 2950.01(E) (1) provides:

> (E) "Tier I sex offender/child-victim offender" means any of the following:
>
> (1) A sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any of the following sexually oriented offenses:
>
> (a) A violation of section 2907.06, 2907.07, 2907.08, or 2907.32 of the Revised Code;
>
> (b) A violation of section 2907.04 of the Revised Code when the offender is less than four years older than the other person with whom the offender engaged in sexual conduct, the other person did not consent to the sexual conduct, and the offender previously has not been convicted of or pleaded

> guilty to a violation of section 2907.02, 2907.03, or 2907.04 of the Revised Code or a violation of former section 2907.12 of the Revised Code;
>
> (c) A violation of division (A)(1), (2), (3), or (5) of section 2907.05 of the Revised Code;
>
> (d) A violation of division (A)(3) of section 2907.323 of the Revised Code;
>
> (e) A violation of division (A)(3) of section 2903.211, of division (B) of section 2905.03, or of division (B) of section 2905.05 of the Revised Code;
>
> (f) A violation of any former law of this state, any existing or former municipal ordinance or law of another state or the United States, any existing or former law applicable in a military court or in an Indian tribal court, or any existing or former law of any nation other than the United States, that is or was substantially equivalent to any offense listed in division (E)(1)(a), (b), (c), (d), or (e) of this section;
>
> (g) Any attempt to commit, conspiracy to commit, or complicity in committing any offense listed in division (E)(1)(a), (b), (c), (d), (e), or (f) of this section.

By contrast, R.C. 2950.01(E)(3) provides:

> (3) 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 section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier I sex offender/child-victim offender relative to the offense.

The reference to those sections of R.C. Chapter 2152 is clear. And while those sections discuss the classification of juvenile offenders by the court into Tier I, Tier II, and Tier III, they do not circumscribe the discretion of the juvenile court in determining the relevant classification. Thus, R.C. 2152.831 discusses classification determination. R.C. 2152.831(B) says the determination is to be "made under division A of this section." Division A says, in its entirety:

> If, on or after January 1, 2008, a juvenile court adjudicates a child a delinquent child and classifies the child a juvenile offender registrant

> pursuant to section 2152.82 or 2152.83 of the Revised Code, before issuing the order that classifies the child a juvenile offender registrant the court shall conduct a hearing to determine whether to classify the child a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/ child-victim offender.

There is simply nothing in the language of that section to cabin the discretion of the juvenile court in its determination of which tier should be designated for the child.

That is as it should be, the juvenile court system and our treatment of juvenile offenders are, and historically have been, different from the adult system and the treatment of adult offenders.

II. Since Its Inception, the Juvenile Court Has Exercised Broad Discretion To Promote the Rehabilitation of Child Offenders.

A. The founders of the juvenile court granted the court broad discretion to promote the rehabilitation of child offenders.

At the turn of the twentieth century, a coalition of progressive reformers in Cook County, Illinois established what is widely believed to be the country's first juvenile court. By 1925, all but two states had followed suit. See Coupet, What to Do with the Sheep in Wolf's Clothing: The Role of Rhetoric and Reality About Youth Offenders in the Constructive Dismantling of the Juvenile Justice System (2000), 148 UPALR 1303, 1312. The rationale of the Cook County reformers for a separate judicial system for children was based on the belief that children are different from adults. They believed that children, as compared to adults, are both less culpable for their crimes and more capable of reform. This belief motivated the Cook County reformers to create the first juvenile court, and continues to justify the differential treatment of juvenile offenders today. See e.g., *Roper v. Simmons* (2005), 543 U.S. 551 (declaring the juvenile death penalty unconstitutional in part because child offenders are less culpable and more amenable to reform than adult criminals).

Based on the belief that children are less culpable and more capable of reform, the reformers viewed the goal of rehabilitation—rather than punishment—as the proper aim of the juvenile court. The creation of a separate juvenile court was intended to promote the reformers' rehabilitative goal in two ways: by diverting child offenders from the criminal justice system and by intervening in the lives of child offenders to address the alleged causes of their delinquency. *See* Zimring, American Juvenile Justice (2005) 34.

Diversion from the criminal justice system, in and of itself, was believed to promote the rehabilitation of juvenile offenders by providing them with "room to reform." See *Id.* at 35-38, 62-64. By diverting children from the criminal justice system, the juvenile court spared children from some of the features of the criminal justice system that would have disrupted or hampered their development. For example, in the criminal justice system, impressionable children were incarcerated with adult criminals who schooled them on how to engage in more sophisticated criminal activities. See *Id.* at 36. As a further example, the proceedings and records of the criminal court were open to the public. The public stigma that children experienced as a result of the open proceedings and records in the criminal court made it difficult for them to reintegrate into their communities after completing their sentences. By separating children from adults, and increasing the confidentiality of juvenile proceedings and juvenile records, the juvenile court protected children from features of the criminal justice system that would have diminished their capacity to reform. See Tanenhaus, The Evolution of Juvenile Courts, in Rosenheim, Zimring, Tanenhaus, & Dohrn, Eds., A Century of Juvenile Justice (2002) 42, 61, 64, 69.

In addition to sparing children the harmful consequences of involvement in the criminal justice system, the juvenile court was designed to intervene in the lives of children to address their rehabilitative needs. To enable the juvenile court to serve this function, the reformers

granted the juvenile court broad discretion to prescribe varying "treatments" tailored to the needs of each child. See *Id.* at 42; Steinberg & Schwartz, Developmental Psychology Goes to Court, in Grisso & Schwartz, Eds., Youth on Trial (2000) 9, 12. In its interventionist capacity, the juvenile court was intended to play the role of a concerned parent whose primary concern was the welfare of the child who appeared before the court, rather than the delinquent act committed by the child. See Coupet, *supra,* at 1312. It was assumed that if the judge would attend to the negative influences in the child's environment, the child would no longer be inclined to engage in criminal activity.

Judge Julian Mack, one of Illinois's first juvenile court judges, aptly summarized the diversionary and interventionist roles of the juvenile court judge in his era:

> Why is it not just and proper to treat these juvenile offenders, as we deal with the neglected children, as a wise and merciful father handles his own child whose errors are not discovered by the authorities? Why is it not the duty of the state, instead of asking merely whether a boy or a girl has committed a specific offense, to find out what he is, physically, mentally, morally, and then if it learns that he is treading the path that leads to criminality, to take him in charge, not so much to punish as to reform, not to degrade but to uplift, not to crush but to develop, not to make him a criminal but a worthy citizen."

Mack, The Juvenile Court (1909), 23 Harv. L. Rev. 104, 107.

B. While the juvenile court's discretion has declined in recent years, the court nevertheless continues to exercise significant discretion.

In its early years, the juvenile court operated without the procedural safeguards of criminal proceedings. See Bonnie & Grisso, Adjudicative Competence and Youthful Offenders, in Grisso & Schwartz, Eds., Youth on Trial (2000) 73, 82-83. The reformers who created the juvenile court viewed such safeguards as unnecessary constraints on the court's power to explore each child's needs and prescribe appropriate treatments. Since a delinquency disposition did not, in the reformers' idealized view, have the punitive purpose and consequences associated with a

criminal conviction, the reformers did not believe that children who appeared before the juvenile court needed procedural protections. See Id.

This view proved to be shortsighted. With few constraints on the discretion of the juvenile court, the proceedings and outcomes in juvenile court were significantly influenced by the personalities and generosity of particular judges. See Coupet, *supra,* at1313. Some judges abused their discretion and imposed sentences on juvenile defendants that were far more punitive than the sentences imposed on adults for similar crimes in criminal court.

Such abuse of discretion was evident in *In Re Gault* (1967), 387 U.S. 1, a landmark Supreme Court case that dramatically changed the nature of juvenile court proceedings. *Gault* concerned a 15-year-old boy who was sentenced to six years at a State Industrial School after he was adjudicated delinquent for allegedly making prank phone calls. Gault was not represented by an attorney and was not allowed to question his accuser in court. The Supreme Court viewed Gault's plight as representative of that of countless other children who appeared before the juvenile court without due process protections. In *Gault*, the Supreme Court established that children in juvenile court are entitled to many of the same due process protections afforded to adults in criminal court, including the right to counsel and the right to confront witnesses.

Gault introduced a period in which children were increasingly afforded constitutional protections similar to those of adults. The decision, as Larry Steinberg and Robert Schwartz explain, marked the beginning of the "adultification" of the juvenile court. Steinberg & Schwartz, *supra,* at 13.

In the mid-1990s, the juvenile court again underwent another period of "adultification" of a very different sort. *Id.* at 13-14. In response to a significant increase in violent juvenile crime in the early 90s, almost every state changed its juvenile laws. States reacted in different ways,

including increasing the severity of juvenile court dispositions for particular violent offenses, and transferring specific categories of violent juvenile offenders to the jurisdiction of the criminal court. *Id.*

Yet for the vast majority of children who appear before the juvenile court, the juvenile system remains essentially the same. *See Id.* While constrained by due process requirements, juvenile courts continue to exercise broad discretion in cases under their jurisdiction.

For example, the juvenile court has broad discretion to divert children from the juvenile justice system. When a child is referred to the juvenile court, an intake officer—typically a probation officer—can exercise significant discretion in deciding whether the child's case should be dropped or referred to a different system, such as the mental health system. The intake officer can choose to make this decision on the basis of a variety of factors, including the child's age, offense, attitude, and prior history. See Schwartz, Juvenile Justice and Positive Youth Development, in Youth Development: Issues, Challenges and Directions (Public/Private Ventures, 2000) 233, 245.

After the intake officer decides that a case should proceed to a hearing, the juvenile court judge has the authority to decide whether the child should remain in the juvenile justice system. State statutes and rules provide juvenile court judges with the discretion to apply a wide range of alternatives to each child who appears before the court, such as dismissal, continuance without a finding of delinquency, restitution, probation with or without conditions or supervision, out-of-home placement, and institutional confinement. See Feld, Cases and Materials on Juvenile Justice Administration (2 Ed. 2004) 829; see, e.g., R.C. 2152.19; Cal. Welf. & Inst. Code 727, 730, 731.

After determining the child's disposition, the juvenile court continues to retain significant discretion in the child's case. Juvenile court dispositions, unlike criminal court sentences, are for indeterminate periods of time. In most states, the juvenile court or reviewing authorities examine each case every six to nine months, and decide whether the child's disposition should be modified. See Schwartz, Juvenile Justice and Positive Youth Development, *supra*, 233, 248.

III. Recent scientific developments underscore the need for broad juvenile court discretion.

Recent studies of adolescent behavior and brain development support the belief that child offenders are indeed less culpable and more capable of reform than their adult counterparts. For over a century, the belief that child offenders are less culpable and more capable of reform has justified the juvenile court's discretion both to spare children the types of punishments that adult criminals receive for similar crimes, and to order individualized dispositions for children to promote their rehabilitation. The new studies of adolescent behavior and brain development thus underscore the importance of juvenile court discretion.

In *Roper v. Simmons* (2005), 543 U.S. 551, the Supreme Court highlighted recent research on adolescent behavior that supports the view that child offenders are less culpable and more capable of reform than adults who commit similar crimes. The *Simmons* Court declared the juvenile death penalty unconstitutional in part because child offenders, as compared to adult criminals, are less culpable and more capable of reform. In arguing that adolescent offenders are less culpable, the Court cited research demonstrating that adolescents are generally more "impetuous" than adults and thus "overrepresented statistically in virtually every category of reckless behavior." *Simmons*, 543 U.S. at 569, citing Arnett, Reckless Behavior in Adolescence: A Developmental Perspective (1992), 12 Developmental Rev. 339. To further support their position that adolescent offenders are less culpable, the Court cited research demonstrating that

"juveniles are more vulnerable or susceptible to negative influences and outside pressures." *Id.* at 569-570 citing Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty (2003), 58 Am. Psychologist 1009, 1014. Finally, in arguing that adolescents are more capable of reform than adults, the court cited research demonstrating that "'[o]nly a relatively small portion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.'" Id. at 570 (quoting Steinberg & Scott, *supra* at 1014).

In addition to the research on adolescent behavior cited in *Simmons*, recent developments in neurobiology provide further support for the view that child offenders are less culpable and more capable of reform than adult criminals. In recent years, advances in the field of neurobiology, including improvements in the safety of Magnetic Resonance Imaging (MRI) brain scans, have enabled scientists to demonstrate that the frontal lobe—the area of the brain associated with reasoning, planning, judgment, and impulse control—begins to develop rapidly during the teen years and continues to develop into the early 20s. Fagan, Adolescents, Maturity, and the Law: Why Science and Development Matter in Juvenile Justice, The American Prospect (Aug. 14, 2005), A5, A6-A7; Toga, Thompson & Sowell, Mapping Brain Maturation (2006), 29 Trends in Neuroscience 148-59. Since the area of the brain associated with reasoning, planning, judgment, and impulse control is not fully developed in children, child offenders have a diminished capacity to make mature decisions, and are thus less blameworthy than their adult counterparts for choosing to commit crimes. In the same vein, child offenders are also more capable of reform than their adult counterparts because the part of the brain associated with mature decision making is still developing in children.

The view that children are less culpable and more capable of reform than adults serves as the basic rationale for the juvenile court's broad discretion. Thus, the recent scientific developments that support this view strengthen the argument for broad juvenile court discretion.

IV. Insofar as S.B. 10 might deprive juvenile courts of discretion in determining in which Tier a juvenile offender should be classified, it would interfere with the court's ability to perform its core function.

The core function of the juvenile court is to promote the rehabilitation of child offenders. The juvenile court, as discussed above, performs this function in two ways: by protecting children from the consequences of a criminal conviction that would inhibit their development, and by proactively intervening in their lives to promote their development. See Zimring, American Juvenile Justice (2005) 34.

One of the premises underlying the belief that children should be spared from features of the criminal justice system that would inhibit their development is that child offenders, if given the "room to reform," can outgrow their criminal behavior. This premise is supported by recent research, which has shown that "only a relatively small portion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood." Steinberg & Scott, *supra* at 1014. The situation is no different for child sex offenders. Several studies have shown low rates of recidivism among juvenile sex offenders. See Garfinkle, Coming of Age in America: The Misapplication of Sex Offender Registration and Community-Notification Laws to Juveniles, 91 Cal. L. Rev. 163, 193-194 (2003).

Traditionally, one of the main ways in which the juvenile court has provided children with "room to reform" is by keeping court records and proceedings confidential in order to limit the public stigma experienced by child offenders. The rationale for this practice is that it is necessary to enable children to rehabilitate and reintegrate into society as law abiding citizens.

See Tanenhaus, The Evolution of Juvenile Courts, *supra*, 42, 61. In other words, it is necessary to provide them with "room to reform. "

Insofar as S.B. 10 may deprive juvenile courts of discretion in determining the appropriate classification for juvenile offenders, it limits the court's ability to provide children with "room to reform." If the court cannot choose the child's classification level, which determines the number of years and frequency with which the child must register, then S.B. 10 weakens the capacity of the juvenile court to limit the public stigma experienced by child offenders. S.B. 10 would, thereby, interfere with the juvenile court's core function of supporting the rehabilitation and eventual reintegration of child offenders into society.

CONCLUSION

A careful reading of the provisions of S.B. 10 relating to the classification of juveniles found delinquent for sex or child-victim offenses reveals that juvenile courts retain broad discretion to determine their appropriate tier classifications. That reading comports with the history and purposes of juvenile courts and of the juvenile justice system.

Because S.B. 10 requires that classification of juveniles be determined by the juvenile court, reclassification by the Attorney General is a nullity.

Respectfully Submitted,

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