IN THE SUPREME COURT OF OHIO

In the Matter of D.S., Appellant	Case No.: 2016-0907 On Appeal From the Franklin County Court of Appeals, Tenth Appellate District Court of Appeals Case No. 15AP-487

BRIEF OF APPELLANT D.S.

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STATEMENT OF THE FACTS

On November 25, 2013, Appellant D.S. was charged in Franklin County Juvenile Court with three delinquency counts of gross sexual imposition, violations of R.C. 2907.05(A)(4). The complaint alleges that these acts occurred on October 16, 2013 and further states that D.S. was twelve and the alleged victim was nine years old at the time of the offenses.

The complaint filed in the juvenile court alleged that on or about October 16, 2013, D.S. had sexual contact with D.M., a child under the age of thirteen. D.S., born on July 25, 2001, was twelve years and three months old at the time of the alleged offenses; D.M., born December 16, 2003, was nine years old, two months away from his tenth birthday. While not stated in the complaint itself, the record indicates that the children lived in the same household. In a motion filed in the Juvenile Court, defense counsel noted that D.S. and D.M. lived in the same house, along with the father of D.S. and the mother of D.M.

The complaint alleged three counts of gross sexual imposition. The first count alleged that D.S. touched D.M.'s penis; the second count alleged that he engaged in anal intercourse with D.M.,; and the third count alleged that he engaged in oral intercourse with D.M. There was no allegation of use of force by D.S. or physical resistance by D.M.

On June 14, 2014, trial counsel for D.S. moved the court to dismiss the charges based upon the ruling of this Court in *In re D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671, 950 N.E.2d 528, which held that R.C. 2907.02(A)(1)(b) (Ohio's statutory rape provision) is unconstitutional as applied to a child under the age of 13 who engages in sexual

conduct with another child under 13. The motion further asserted that the court should dismiss the complaint to avoid formal court action pursuant to Juv.R. 9(A).

The motion came on for hearing before a magistrate of the Juvenile Court on November 5, 2014. On November 7, 2014, the magistrate issued a decision denying the motion.

On November 18, 2014, trial counsel timely filed an objection to the magistrate's decision. The Juvenile Court conducted a hearing on the objection on February 4, 2014, the Honorable Terri B. Jamison presiding. By Decision and Entry filed April 13, 2015, the trial court sustained the objection. The Juvenile Court explained the basis for this ruling:

> The Court has reviewed the cases dealing with this issue from other jurisdictions and notes that in most of those cases the disparity in the ages of the alleged perpetrator and the alleged victim was substantial. It was clear at first blush which participant had the capacity to develop the *mens rea* for the gross sexual imposition and which did not.
>
> In the case at bar it is more difficult to distinguish between the parties and not as easy to determine who should be charged given the closeness of their ages. In the instant case the victim was almost ten and the alleged delinquent was just past twelve. Further, at least two of the charges in this case could have been charged as rape under 2907.02 (A)(l)(b). If that had occurred, the Court would have dismissed the charges based on *In re D.B.* and provided alternative means for treatment and/or rehabilitation of both children.
>
> The Court is not willing to make the GSI statute unconstitutional in all cases involving children under the age of thirteen but the Court will find it to be unconstitutional as applied in this case. These children are quite close in age, it is arbitrary to decide who should be charged and who should not, given there is no threat of force or violence.
>
> The Court further finds this case should be DISMISSED under Rule 9 as there are alternative methods available to provide for the treatment needs of both children and to protect the community as a whole without the use of formal Court action. If the parents are not able to provide the treatment necessary, a dependency action may be filed on behalf of the child needing

> the services. The Court does not find it is in the best interest of either child, given the facts of this case, to continue with the prosecution of this matter.

The State appealed this decision, and asserted two assignments of error:

> 1. The Juvenile Court Erred in Finding R.C. 2907.05(A)(4) Unconstitutional as Applied to this Case.
>
> 2. The Juvenile Court Abused Its Discretion in Dismissing the Complaint Under Juv.R. 9.

On May 3, 2014, a divided panel of the Court of Appeals released its decision. The Honorable Lisa Sadler wrote the lead opinion, which sustained the two assignments of error. The Honorable Betsy Luper Shuster wrote a concurring opinion in which she agreed with Judge Sadler's ruling on the Second Assignment of Error, but disagreed, in part, with the lead opinion on the First Assignment of Error:

> while only appellee was charged, he did not meet his burden to prove that the statute is unconstitutional as applied. Specifically, appellee did not provide evidence that both children had the requisite *mens rea* to make the enforcement arbitrary and discriminatory. If appellee's argument is that neither child had the requisite *mens rea*, then the defense is to an element of the crime and not an as-applied constitutional challenge.

In re D.S., 10th Dist. Franklin App. No. 15AP-487, 2016-Ohio-2810, ¶34.

The Honorable William Klatt dissented on the Second Assignment of Error, and would find that the juvenile court did not abuse its discretion in dismissing the complaint pursuant to Juv.R. 9(A):

> As noted in the majority decision, in deciding whether the court properly exercised its discretion in dismissing the case under Juv.R. 9, we must liberally interpret and construct the rule so as to "provide for the care, protection, and mental and physical development of children subject to the jurisdiction of the juvenile court, and to protect the welfare of the community; and * * * to protect the public interest by treating children as persons in need of supervision, care and rehabilitation." Juv.R. 1(B)(3) and (4). See also *In re M.D.*, 38 Ohio St.3d 149, 153, 527 N.E.2d 286 (1988) ("The best interests of the child and the welfare and protection of

> the community are paramount considerations in every juvenile proceeding in this state.").
>
> Although the evidentiary record in this case is relatively thin, I believe there is evidence in the record to support the trial court's conclusion that the conduct at issue was not criminal in nature and that proceeding to the adjudication stage would not be in the best interest of the child and the community. There was evidence before the trial court indicating: (1) the ages of the children involved (age 12 and age 9 boys), (2) the children were three years apart in age, and (3) the complaint contained no allegation of force or threat of force. Given this evidence, I do not believe the trial court abused its discretion when it dismissed the complaint pursuant to Juv.R. 9.

D.S. appealed to this Honorable Court. By Decision rendered October 4, 2016, this Court issued a decision accepting this appeal.

ARGUMENT

First Proposition of Law

> A juvenile court's decision to utilize non-judicial community resources in lieu of criminal prosecution is matter Juv.R. 9(A) entrusts to the discretion of the juvenile court. That decision may not be overturned on appeal in the absence of an abuse of discretion.

A. Ohio Juvenile Law Recognizes the Special Status of Juveniles.

Ohio was one of the first states to enact juvenile court legislation, establishing the Cuyahoga County Juvenile Court in 1902. 95 Ohio Laws 785 (1902) The legislature established the juvenile system statewide in 1906. 98 Ohio Laws 314 (1906). This legislation created a juvenile court, which treated juvenile offenders differently from adults.

A key principle underlying juvenile law is that the state has the power and obligation to protect children. As a result, juvenile justice emphasizes treatment and rehabilitation. As this Court stated in *State v. Hanning*, 89 Ohio St.3d 86,88-89, 2000-Ohio-436, 728 N.E.2d 1059:

> The juvenile justice system is grounded in the legal doctrine of parens patriae, meaning that the state has the power to act as a provider of protection to those unable to care for themselves. *In re T.R.* (1990), 52 Ohio St. 3d 6, 15, 556 N.E.2d 439, 448; Black's Law Dictionary (7 Ed.1999) 1137. Since its origin, the juvenile justice system has emphasized individual assessment, the best interest of the child, treatment, and rehabilitation, with a goal of reintegrating juveniles back into society. See D'Ambra, A Legal Response to Juvenile Crime: Why Waiver of Juvenile Offenders is Not a Panacea (1997), 2 Roger Williams U.L.Rev. 277, 280.

More recently, in *State v. Aalim*, 2016-Ohio-8278, ¶ 16, this Court stated:

> The juvenile courts "occupy a unique place in our legal system." *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 65. The juvenile court system is a legislative creation based on promoting social welfare and eschewing traditional, objective criminal standards and retributive notions of justice. Id. at ¶ 66. "Since its origin, the juvenile justice system has emphasized individual assessment, the best interest of the child, treatment, and rehabilitation, with a goal of reintegrating juveniles back into society." *State v. Hanning*, 89 Ohio St.3d 86, 88, 728 N.E.2d 1059 (2000). "[T]he General Assembly has adhered to the core tenets of the juvenile system even as it has made substantive changes to the Juvenile Code in a get-tough response to increasing juvenile caseloads, recidivism, and the realization that the harms suffered by victims are not dependent upon the age of the perpetrator." *C.S.* at ¶ 74.

Since its inception, the juvenile justice system has recognized that not all unwise juvenile behavior should be criminalized. The U.S. Supreme Court in striking down the juvenile death penalty, and more recently, life without parole for juveniles has acknowledged that the juvenile's diminished stage of development requires less harsh treatment than adults. *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011. 176 L.Ed.2d 825 (2010); *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2004). See also *Thompson v. Oklahoma*, 487 U.S. 815, 835 (1988) (plurality opinion). In *Thompson*, the Court stated that "[i]nexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or

she is much more apt to be motivated by mere emotion or peer pressure than is an adult." Id. See also, *Roper v. Simmons*, 543 U.S. at 569.

In *Miller v. Alabama*, 132 S. Ct. 2455, 183 L.Ed.2d 407 (2012), the United States Supreme Court reviewed its previous decisions regarding the sentencing of juveniles.

> *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, "they are less deserving of the most severe punishments." *Graham*, 560 U.S. at 68, 130 S.Ct. at 2026, 176 L.Ed.2d 825. Those cases relied on three significant gaps between juveniles and adults. First, children have a "'lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S., at 569, 125 S.Ct. 1183, 161 L.Ed.2d 1. Second, children "are more vulnerable * * * to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. Ibid. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." Id., at 570, 125 S.Ct. 1183, 161 L.Ed. 2d 1.

In recognition of these differences, the law has long recognized that juvenile courts are "rooted in social welfare philosophy rather than in the corpus juris." *Kent v. United States*, 383 U.S. 541, 554, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966). "The juvenile courts were premised on profoundly different assumptions and goals than a criminal court, *United States v. Johnson*, 28 F.3d 151, 157, 307 U.S. App. D.C. 284 (C.A.D.C.1994), (Wald, J., dissenting), and eschewed traditional, objective criminal standards and retributive notions of justice." *In re C.S.*, 115 Ohio St.3d 267, 274, 2007-Ohio-4919, 874 N.E.2d 1177, ¶ 66. The objectives of the juvenile court "are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment." *Kent* at 554.

B. Ohio Law Vests Juvenile Courts with Discretion to Utilize Community Resources in Lieu of Prosecution.

Consistent with these objectives, juvenile law empowers the juvenile court with the authority to reject formal prosecution in favor of the utilization of other resources to address the circumstances that bring the juvenile to the attention of the court. Juv. R. 9(A) rule gives the juvenile court the discretion to determine whether court action is in the best interest of the child and public and whether the hearing should be formal or informal. *In re Corcoran*, 68 Ohio App. 3d 213, 216-17, 587 N.E.2d 957 (1990) (citing to a previous version of the Revised Code that called for the law "[t]o protect the public interest in removing the consequences of criminal behavior and the taint of criminality from children committing delinquent acts and to substitute therefore a program of supervision, care, and rehabilitation[.]" Ohio Rev. Code. § 2151.01(B) (1969) (amended 2000).) *See also In re Frederick*, 63 Ohio Misc. 2d 229, 622 N.E.2d 762 (C.P. 1993).

The juvenile court has the authority to divert a child out of the juvenile court system prior to the filing of a complaint, during the pendency of a case, or at the end of the case. See generally, Ohio Juv. R. 1; R. 9: and R. 29(F)(2)(d). This Court has held that the goals of the "best interests of the child and the welfare and protection of the community *** are most effectively met at the initial intake of the juvenile by the juvenile court. The overriding rule upon intake of a child is that formal court action should be a last resort to resolving juvenile problems." *In re M.D.*, 38 Ohio St.3d 149, 153, 527 N.E.2d 286 (1988).

Review of *In re M.D.* is instructive. In that case, a twelve year old girl was charged in the Cuyahoga County Juvenile Court with complicity to rape. The complaint alleged that she caused a five year old boy to rape a five year old girl. Defense counsel

moved to dismiss the complaint and argued that prosecuting a twelve year old for a felony sex crime for playing doctor was unconstitutional. The trial court overruled the motion

At trial, the two five year old children testified that they were "playing doctor," and that at the direction of M.D., the boy dropped his pants and placed his penis in the girl's mouth, ostensibly because M.D. had instructed them to take temperature that way. The juvenile court found M.D. guilty, and the court of appeals affirmed.

This Court reversed. The Court focused on the young age of the five year old children as well as the fact that the policy of the juvenile court precluded the filing of delinquency complaints in cases where two children under thirteen engaged in "situations where there is an allegation of sexual conduct involving no force and both the alleged offender and the victim are under 13 years of age. *In re M.D.*, 38 Ohio St.3d at154. The Court concluded that the conduct alleged did not constitute an offense and further found that M.D.'s conviction was unconstitutional:

> It was inappropriate that this case was filed in juvenile court. The case having been filed, it reasonably devolved on the juvenile judge to dismiss it pursuant to the mandates of R.C. Chapter 2151. The failure to dismiss resulted in a denial of M.D.'s constitutional rights to due process under the law, see *In re Gault* (1967), 387 U.S. 1; *In re Winship* (1970), 397 U.S. 358, which should have been vindicated by the court of appeals. We proceed to rectify that court's failure to do so, and accordingly reverse the judgment of the court of appeals, and hereby vacate appellant's adjudication as a delinquent child.
>
> *In re M.D.*, 38 Ohio St.3d at154.

Although *In re M.D.*, is factually distinguishable from the case at bar, the underlying principle that juvenile courts have the authority if not obligation to dismiss delinquency charges in the best interests of the child remains valid. "Whether a [juvenile]

proceeding should be dismissed or reach the merits is within the sound discretion of the trial judge." *In re Arnett, 3rd Dist. Hancock App. O. 5-04-20*, 2004-Ohio-5766, at¶ 9; *In re Corcoran*, 68 Ohio App.3d 213, 216, 587 N.E.2d 957 (1990); accord, *In re Carter*, 12th Dist. Butler No. CA95-05-087, (March 11, 1996). "The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983); *Steiner v. Custer*, 137 Ohio St. 448, 31 N.E. 2d 855 (1940); *Conner v. Conner*, 170 Ohio St. 85, 162 N.E. 2d 852 (1950); *Chester Township v. Geauga Co. Budget Comm*., 48 Ohio St. 2d 372, 358 N.E. 2d 610 (1976). "Abuse of discretion" implies not merely error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency. *State v. Tijerina*, 99 Ohio App.3d 7, 649 N.E.2d 1256 (1994).

The juvenile court below specifically found that the prosecution of D.S. was unconstitutional given the *In re D.B.* opinion. The court further found that:

> "there are alternative methods available to provide for the treatment needs of both children and to protect the community as a whole without the use of formal Court action. If the parents are not able to provide the treatment necessary, a dependency action may be filed on behalf of the child needing the services. The Court does not find it is in the best interest of either child, given the facts of this case, to continue with the prosecution of this matter."

This determination is entitled to great deference. It may not be set aside absent a demonstration of abuse of discretion—a heavy burden that the State did not met. As Judge Klatt pointed out in his dissent, the record contains evidence to support the trial court's conclusion that the conduct at issue was not criminal in nature and that proceeding to the adjudication stage would not be in the best interest of the child and the community.

There was evidence before the trial court indicating: (1) the ages of the children involved (age 12 and age 9 boys), (2) the children were three years apart in age, and (3) the complaint contained no allegation of force or threat of force.

The State has urged that it has the right and responsibility to prosecute the case fully. But the State's discretion to do so is not unlimited. Nationally recognized standards governing prosecutorial discretion indicate that in appropriate cases, a prosecutor should

> …consider the possibility of a noncriminal disposition, formal or informal, or a deferred prosecution or other diversionary disposition, when deciding whether to initiate or prosecute criminal charges. The prosecutor should be familiar with the services and resources of other agencies, public or private, that might assist in the evaluation of cases for diversion or deferral from the criminal process.
>
> ABA Criminal Justice Section Standards: Prosecution Function, Discretion in Filing, Declining, Maintaining, and Dismissing Criminal Charges 3-4.4(f) (4th Ed. 2015).

Prosecutors nationwide are encouraged to consider diverting a child's case out of juvenile court to assure the child does not penetrate deeper into the court system and thereby suffer greater consequences from adjudication. Diversion programs allow for a defendant to attend counseling or educational classes. This would be appropriate even where evidence exists to support a conviction as it is within a prosecutor's discretion to decline to prosecute for good cause consistent with the public interest.

It is within a prosecutor's discretion to decline to prosecute for good cause consistent with the public interest even where evidence exists to support a conviction. ABA Standards, supra, Discretion in the Charging Decision 3-3.9. Ohio is no exception to this national trend. Ohio Juvenile Rule 9 encourages prosecutors to utilize their broad procedural discretion to act in the best interests of the child and the community by electing not to prosecute a juvenile.

The State argued below that the record does not contain evidence sufficient to support the juvenile court's decision. But the court expressly stated in its decision:

> The Court further finds this case should be DISMISSED under Rule 9 as there are alternative methods available to provide for the treatment needs of both children and to protect the community as a whole without the use of formal Court action. If the parents are not able to provide the treatment necessary, a dependency action may be filed on behalf of the child needing the services. The Court does not find it is in the best interest of either child, given the facts of this case, to continue with the prosecution of this matter.

This would certainly appear to be an appropriate resolution of a case in which two children who were under thirteen and who lived in the same household engaged in sexual conduct and contact on a single day. The State claimed in its memorandum opposing the defense motion to dismiss that D.S. was the aggressor, but it neither pointed to nor offered any facts to support this argument. It should also be noted that when a juvenile court makes a similar ruling before the filing of formal charges, the record would likely contain far less information explaining the court's ruling

Second Proposition of Law

> R.C. 2907.05(A)(4) is unconstitutional as applied to a child under the age of 13, who allegedly engaged in sexual contact with another child under 13.

A. The Court Should Address the Constitutional Issue.

The argument under this Proposition of Law challenges the constitutionality of R.C. 2907.05(A)(4) as applied to cases involving two children under thirteen who engage in sexual contact not involving force. Typically reviewing courts are to avoid deciding questions of constitutional law if a case can be decided on non-constitutional grounds. *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, 814 N.E.2d 1201, ¶ 9; *Hall China Co. v. Public Utilities*

Comm., 50 Ohio St. 2d 206, 210, 364 N.E.2d 852 (1997); *Norandex, Inc. v. Limbach,* 69 Ohio St.3d 26, 28, 1994 Ohio 536, 630 N.E.2d 329 (1994); *In re Boggs*, 50 Ohio St.3d 217, 221, 553 N.E.2d 676 (1990); *Kinsey v. Police & Firemen's Disability & Pension Fund Bd. Of Trustees*, 49 Ohio St.3d 224, 225, 551 N.E.2d 989 (1990). The juvenile court decided both that R.C. 2907;.05(A) was unconstitutional as applied to D.S. and that utilization of community resources was in his best interests. The two findings are so intertwined that the Court should address both the App.R. 9(A) argument and the issue regarding the constitutionality of R.C. 2907.05(A).

B. The Rule of *In re D.B.*—R.C. 2907.02(A)(1)(b) Is Unconstitutionality as Applied to Children Under 13.

In re D.B., this Court reviewed R. C. 2907.02(A)(1)(b), Ohio's statutory rape statute, and its constitutionality in cases in which the alleged offender and victim were both under the age of thirteen. The Court held that "R.C. 2907.02(A)(1)(b) is unconstitutional as applied to a child under the age of 13 who engages in sexual conduct with another child under 13." The Court found that the statute, when applied to a child under 13, violates that child's right to due process and equal protection under the law. The judgment was reversed, and the cause remanded.

The Court reasoned that the application of the statute to a child under 13 violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, §16, of the Ohio Constitution, because it criminalizes sexual conduct between two members of the protected class and fails to provide guidelines designating which actor is the offender and which actor is

the victim. This lack of specificity or guidance results in the arbitrary enforcement of the law to children who are both the accused and members of the protected class. When faced with a criminal statute under which a child may be both a perpetrator and victim, and without guidance from the legislature, the risk of the state arbitrarily prosecuting one child over the other is inherent, including the possibility that a prosecutor's personal assumptions or biases relating to gender and sexuality may influence his or her charging decisions. At the outset, the Court reviewed constitutional authority applicable to the vagueness doctrine:

> Due process is not satisfied if a statute is unconstitutionally vague. *Skilling v. United States* (2010), U.S. , 130 S.Ct. 2896, 2928, 177 L.Ed.2d 619. "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement. *Chicago v. Morales*, 527 U.S. 41, 56-57, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999)." *Hill v. Colorado* (2000), 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597.
>
> The United States Supreme Court has identified the second reason as the primary concern of the vagueness doctrine: "[T]he more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine — the requirement that a legislature establish minimal guidelines to govern law enforcement.' *Smith [v. Goguen* (1974)], 415 U.S. [566, 574, 94 S.Ct. 1242, 39 L.Ed.2d 605]. * * * Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' Id., at 575, 94 S.Ct, at 1248." *Kolender v. Lawson* (1983), 461 U.S. 352, 358, 103 S. Ct. 1855, 75 L. Ed. 2d 903. This prong of the vagueness doctrine not only upholds due process, but also serves to protect the separation of powers: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government." *United States v. Reese* (1876), 92 U.S. 214, 221, 23 L.Ed. 563.

The Court went on to apply this authority in an analysis of R.C. 2907.02(A)(1)(b) as applied to cases in which a child under the age of 13 engages in sexual conduct with another child under 13:

> As applied to children under the age of 13 who engage in sexual conduct with other children under the age of 13, R.C. 2907.02(A)(1)(b) is unconstitutionally vague because the statute authorizes and encourages arbitrary and discriminatory enforcement. When an adult engages in sexual conduct with a child under the age of 13, it is clear which party is the offender and which is the victim. But when two children under the age of 13 engage in sexual conduct with each other, each child is both an offender and a victim, and the distinction between those two terms breaks down.
>
> The facts of this case provide an example of the temptation for prosecutors to label one child as the offender and the other child as the victim. Based apparently upon the theory that D.B. forced M.G. to engage in sexual conduct, the state alleged that D.B., but not M.G., had engaged in conduct that constituted statutory rape. However, while the theory of D.B. as the aggressor was consistent with the counts alleging a violation of RC. 2907.02(A)(2), which proscribes rape by force, this theory is incompatible with the counts alleging a violation of statutory rape because anyone who engages in sexual conduct with a minor under the age of 13 commits statutory rape regardless of whether force was used. Thus, if the facts alleged in the complaint were true, D.B. and M.G. would both be in violation of RC. 2907.02(A)(1)(b).
>
> The prosecutor's choice to charge D.B. but not M.G. is the very definition of discriminatory enforcement. D.B. and M.G. engaged in sexual conduct with each other, yet only D.B. was charged.3 The facts of this case demonstrate that R.C. 2907.02(A)(1)(b) authorizes and encourages arbitrary and discriminatory enforcement when applied to offenders under the age of 13. The statute is thus unconstitutionally vague as applied to this situation.
>
> It must be emphasized that the concept of consent plays no role in whether a person violates R.C. 2907.02(A)(1)(b): children under the age of 13 are legally incapable of consenting to sexual conduct. Furthermore, whether D.B. used force to engage in sexual conduct does not play a role in our consideration of R.C. 2907.02(A)(1)(b).

> The trial court found that D.B. did not use force. Whether an offender used force is irrelevant to the determination whether the offender committed rape under R.C. 2907.02(A)(1)(b).

In re D.B., ¶¶ 23-27.

The Court went on to find that the statute violated the equal protection guarantees of the United States and Ohio Constitutions. *In re D.B.*, ¶¶ 29-30.

B. R.C. 2907.05(A)(4) Suffers From the Same Constitutional Infirmities as R.C. 2907.02(A)(1)(b).

In this case, the State argued, and two of the judges of the Court of Appeals below found, that *D.B.* is inapplicable here because it involved the constitutionality of R.C. 2907.02(A)(1)(b), Ohio's statutory rape provision, as opposed to the present case which involves charges of gross sexual imposition in violation of R.C. 2907.05(A)(4). The State sees this distinction as dispositive, basing its argument upon the difference in the statutory definitions of *sexual conduct* (an element of the offense of rape) and of *sexual contact* (an element of gross sexual imposition.) R.C. 2907.01(B) defines *sexual contact* as

> any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

while R.C. 2907.01(A) defines *sexual conduct* as

> vaginal intercourse between a male and female; anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and, without privilege to do so, the insertion, however slight, of any part of the body or any instrument, apparatus, or other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

In the State's view, R.C.2907.01(B)'s use of the "for the purpose of sexually arousing or gratifying *either person*" language somehow removes gross sexual imposition

from the *D.B.* analysis. Unquestionably, this Court has held that R.C. 2907.05(A)(4) establishes a "mens rea of purpose in regard to the sexual contact between the defendant and the victim." *State v. Dunlap,* 129 Ohio St.3d 461, 2011-Ohio-4111, 953 N.E.2d 816, ¶1. But *Dunlap* did not involve two children under thirteen. Rather, it involved an adult defender and victims under thirteen. Moreover, this aspect of the *Dunlap* opinion addressed the sufficiency of an indictment and jury instructions on this offense. Significantly, the *Dunlap* opinion held that the "victim's age is a strict liability element of an R.C. 2907.05(A)(4) violation" and that "defendants are held strictly liable for that element of a violation…" *State v. Dunlap,* at ¶18.

Questions arise from the State's argument: Can one engage in *sexual conduct* without *sexual contact*? Isn't sexual arousal or gratification implicit in the acts of intercourse contained in the definition of *sexual conduct*? Authority holds that for purposes of the crime of rape, which requires proof of "sexual conduct", the definitions of sexual conduct in R.C. 2907.01(A) necessarily imply that the actor's motive is sexual gratification, and so no further proof of sexual gratification is required when sexual conduct is proved. *State v. Gillingham*, 2d Dist. Montgomery No. 20671, 2006-Ohio-5758, ¶31. The distinction between the two offenses is not dispositive of the constitutional issue.

The State's argument collapses for two reasons. First, two of the counts at issue here—the second and third counts—allege acts of intercourse. Count two alleges fellatio, and count three alleges anal intercourse. These allegations are allegations of rape although the complaint designates them as gross sexual imposition in a transparent

attempt at avoiding the *D.B.* holding. The State should not be permitted to do indirectly what *D.B.* prevents it from doing directly.

Second, the presence of the "purpose" language in the definition of sexual contact does not preclude application of the *D.B.* analysis. The aspect of the definition of rape at issue in *D.B.* deals with *sexual conduct* with an individual under 13 years of age whom the law presumes incapable of consenting to the conduct. The constitutional issue in *D.B.* arose from the prosecution of an individual under 13 for engaging in *sexual conduct* with someone who is also under the age of 13. The same infirmities addressed in *D.B.* also arise in the prosecution of someone under the age of 13 for engaging in *sexual contact* with another who is also underage. The presence of the "purpose" language does not affect the analysis.

The State relied upon *In re T.A.*, 2nd Dist. Nos. 2011-CA-28, 2011-CA-35, 2012-Ohio-3174; *In re K.A.*, 8th Dist. Nos. 98924, 99144, 2013-Ohio-2997; *In re K.C.*, 2015-Ohio-1613, 32 N.E.3d. 988, (1st Dist.) in support of its argument. The juvenile court below appropriately gave these cases little weight because they are factually dissimilar from the case at bar. The court noted that the age difference in this case (D.S. was twelve at the time of the alleged offenses while the other child was nine) is less than the age differences in the other cases (T.A. was over ten while his victim was two; K.A. was twelve while the victim was five; K.C. was twelve while the victim was six.)

The *T.A.* case was also procedurally different from this case. The appellant in *T.A.* had entered an admission to an amended charge of gross sexual imposition before the Supreme Court's decision in *D.B.*, and attempted to use the *D.B.* holding as a basis for withdrawing that admission. The Second District Court of Appeals found that the trial

court had failed to comply with Juv.R. 29(D) and, as a result, found that the appellant's admission to the amended charge of gross sexual imposition was invalid. Curiously, though, the appellate court went on to address the constitutionality argument.

Moreover, these three cases are based upon a fundamentally flawed analysis. The cases deemed that the "purpose" language provides a way to differentiate between the victim and the offender. But the definition in question reads:

> …for the purpose of sexually arousing or gratifying *either person*. (Emphasis added.)

It is impossible to see how this language provides any basis whatsoever to differentiate between victim and offender, since it turns on the purpose to gratify either party. It should also be noted that the very language of the complaint filed below states that D.S. engaged in sexual contact or that D.S. caused D.M. to engage in sexual contact. Since the element of purpose (i.e., "for purpose of sexually arousing or gratifying either person") lies in the definition of sexual contact, the allegation that D.S. caused D.M. to engage in sexual contact does little to distinguish who the offender is. One cannot engage in sexual contact without the purpose of sexually arousing or gratifying either person. The language of the indictment seems to suggest that both D.S. and D.M. had this purpose.

The *D.B.* decision found, that as applied to children under the age of 13 who engage in sexual conduct with other children under the age of 13, R.C. 2907.02(A)(1)(b) is unconstitutionally vague because the statute authorizes and encourages arbitrary and discriminatory enforcement. When an adult engages in sexual conduct with a child under the age of 13, it is clear which party is the offender and which is the victim. But when

two children under the age of 13 engage in sexual conduct with each other, each child is both an offender and a victim, and the distinction between those two terms breaks down.

Similarly, when two children under the age of 13 engage in sexual contact, the same analysis applies—particularly where, as here, the activity alleged as sexual contact is actually sexual conduct (intercourse). The *D.B.* analysis, then, applies notwithstanding the definitional differences between sexual conduct and sexual contact. The decision of the juvenile court below, then, was not erroneous. Rather, it was consistent with the analysis of this Court in *D.B.*

CONCLUSION

For the foregoing reasons, Appellant respectfully urges this Court to reverse the judgment of the Franklin County Court of Appeals.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Brief of Appellant D.S. was served upon the following counsel by hand delivery, this 22nd day of December 2016:

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APPENDIX

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