IN THE SUPREME COURT OF OHIO
2017

In the matter of D.S.
(an alleged delinquent minor child)

Case No. 2016-0907

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 15AP-487

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STATEMENT OF THE FACTS

I. The juvenile court finds that R.C. 2907.05(A)(4) is unconstitutional as applied to this case and also dismisses the delinquency complaint under Juv.R. 9.

In November 2013, a delinquency complaint was filed against D.S. (born July 15, 2001) charging him with three counts of gross sexual imposition (GSI) under R.C. 2907.05(A)(4). R. 3. All three counts allege that D.S. engaged in sexual contact with D.M. (born December 16, 2003). *Id*. The first count alleges that D.S. "did touch and rub [D.M.] about his penis on numerous occasions." *Id*. The second and third counts allege that D.S. engaged in anal intercourse and fellatio, respectively. *Id*. D.S. moved to dismiss the complaint. R. 46. Relying on *In re D.B.*, 129 Ohio St.3d 104, 2011-Ohio-2671, D.S. argued that R.C. 2907.05(A)(4) is unconstitutional as applied to this case. *Id*., pp. 2-5. D.S. also argued that the complaint should be dismissed under Juv.R. 9 and *In re M.D.*, 38 Ohio St.3d 149 (1988). *Id*., pp. 5-6.

A hearing on the motion was held before a magistrate. D.S. presented no evidence at the hearing, but rather relied solely on the information contained in the complaint. The magistrate overruled the motion. Tr., 10-12; R. 93-95. The magistrate found that *In re D.B.* does not apply to R.C. 2907.05(A)(4) because, unlike statutory rape under R.C. 2907.02(A)(1)(b), GSI is not a strict liability offense. Tr., 10. The magistrate also refused to dismiss the complaint under Juv.R. 9, but noted that "after a trial * * * the facts may be such that it is appropriate to dismiss it then." Tr., 12.

D.S. then filed with the juvenile court an objection to the magistrate's decision. R. 96. The juvenile court sustained the objection in a written decision and entry. R. 121-122. In doing so, the juvenile court did not rely on any facts beyond those contained in the complaint. *Id*., pp. 1-2. The juvenile court stated that, given the age disparity between D.S. and D.M., "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." *Id.*, p. 3. The juvenile court noted that two of the counts could have been charged as statutory rape, and that "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." *Id*.

Although "not willing to make the GSI statute unconstitutional in all cases involving children under the age of thirteen," the juvenile court found R.C. 2907.05(A)(4) "to be unconstitutional as applied in this case." *Id.*, p. 4. The juvenile court reasoned that, because D.S. and D.M. 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." *Id.*

The juvenile court also dismissed the complaint under Juv.R. 9, finding 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." *Id*. Noting that a dependency action could be filed if the parents are not able to provide the necessary treatment, the juvenile court stated that it was not "in the best interest of either child, given the facts of this case, to continue with the prosecution of this matter." *Id*.

II. The Tenth District reverses, finding that the record does not support either an as-applied challenge or dismissal under Juv.R. 9.

The State appealed, and the Tenth District reversed. Citing decisions from multiple appellate districts, the court held that *In re D.B.* does not apply to GSI under R.C. 2907.05(A)(4) because, "as opposed to the strict liability 'sexual conduct' element of statutory rape, the mens rea of 'purpose' embedded in the 'sexual contact' element of GSI provides a way to distinguish between a victim and an offender." Opinion at ¶ 15. Because sexual contact requires proof of purpose, "R.C. 2907.05(A)(4) provides a means of differentiating between the victim and the offender, an attribute which distinguishes it from the statutory rape provision at issue in *In re*

D.B." *Id*. at ¶ 16. This is true, "no matter the age span between the minors involved." *Id*. at ¶ 17. D.S. presented no evidence that "both children acted with a purpose to arouse or gratify." *Id*., n. 4. The court further held that it is not dispositive that two of the counts could have been charged as rape under R.C. 2907.02(A)(1)(b), which would have subjected those counts to dismissal under *In re D.B.* *Id*. at ¶ 18. "The same acts may properly fit the definition of both sexual conduct and sexual contact, and it is within the discretion of the prosecutor to pursue the lesser charge." *Id*. "[O]n this record, appellant did not fulfill his burden to present clear and convincing evidence of facts which would otherwise make the act unconstitutional when applied to him." *Id*. at ¶ 19.

The Tenth District additionally held that the juvenile court abused its discretion in dismissing the complaint under Juv.R. 9. Distinguishing the present case from *In re M.D.*, the court stated that "no record evidence exists that the conduct at issue was innocent child's play showing no crime occurred or that proceeding to the adjudication stage would not be in the best interest of the child and the community." *Id*. at ¶ 25. "Compared to *In re M.D.*, the trial court's reasoning and the present record is devoid of sufficient information from which to determine whether the case is 'inappropriate' to file in juvenile court." *Id*. Therefore, the court found that "on this record, the trial court abused its discretion and committed error." *Id*.

Judge Klatt dissented on the Juv.R. 9 issue. Although acknowledging the "relatively thin" evidentiary record, Judge Klatt stated that he believed that the record supported the juvenile court's finding 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." *Id*. at ¶ 30 (Klatt, J., dissenting). According to Judge Klatt, the evidence before the juvenile court indicated

"(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." *Id*.

Judge Luper Schuster concurred. She agreed that the juvenile court abused its discretion in dismissing the complaint under Juv.R. 9, but wrote separately on D.S.'s as-applied challenge to R.C. 2907.05(A)(4). Judge Luper Schuster agreed that the mens rea element distinguishes GSI from statutory rape, but she disagreed with the lead opinion that the presence of the mens rea element "*always* provides a means of differentiating between the victim and the offender." *Id*. at ¶ 33 (Luper Schuster, J., concurring) (emphasis sic). Judge Luper Schuster stated that *In re D.B.* would apply if two children under 13 had sexual contact with each other and both acted with the requisite mens rea. *Id*. But she noted that D.S. "did not provide any evidence that both children had the requisite mens rea to make the enforcement arbitrary and discriminatory." *Id*. at ¶ 34. To the extent D.S. argued that neither he nor D.M. had the requisite mens rea, "then the defense is to an element of the crime, not an as-applied constitutional challenge." *Id*.

This Court accepted discretionary review, with Justices Pfeifer and Kennedy dissenting. *10/05/2016 Case Announcements*, 2016-Ohio-7199.

ARGUMENT

Response to First Proposition of Law: A juvenile court abuses its discretion by dismissing a complaint under Juv.R. 9 absent evidence in the record that the complaint is "appropriate" for dismissal.

D.S.'s first proposition of law claims that a juvenile court's dismissal of a compliant under Juv.R. 9 is reviewed for an abuse of discretion. This is an unremarkable legal proposition. R.C. 2152.01 and Juv.R. 9 require juvenile courts to make value judgments that entail a careful weighing of evidence regarding various factors. And such weighing is best entrusted to the discretion of the juvenile court that sees the evidence first-hand. Indeed, throughout this appeal the State has consistently argued that the juvenile court abused its discretion, and the Tenth

District applied an abuse-of-discretion standard in reversing the juvenile court's Juv.R. 9 dismissal. Opinion at ¶¶ 22, 25.

The real issue, therefore, is not what standard of review applies, but rather whether the Tenth District properly applied the abuse-of-discretion standard to this case. It did. The juvenile court did not consider or weigh any actual evidence that would enable it to properly determine whether dismissal complies with R.C. 2152.01 and Juv.R. 9. Instead, the juvenile court based its dismissal solely on the nature of the charges in the complaint. The Tenth District correctly found this to be an abuse of discretion.

I. R.C. 2152.01 requires courts to consider multiple factors in addition to the care, protection, and development of juveniles.

Any analysis into whether a juvenile court abused its discretion in dismissing a delinquency complaint must begin with the statutory purposes of delinquency dispositions. Prior to 2002, the statutory purposes were set forth in former R.C. 2151.01:

> The sections in Chapter 2151, of the Revised Code, with the exception of those sections providing for the criminal prosecution of adults, shall be liberally interpreted and construed so as to effectuate the following purposes:
>
> (A) To provide for the care, protection, and mental and physical development of children subject to Chapter 2151. of the Revised Code;
>
> (B) To protect the public interest in removing the consequences of criminal behavior and the taint of criminality from children committing delinquent acts and to substitute therefor a program of supervision, care, and rehabilitation;
>
> (C) To achieve the foregoing purposes, whenever possible, in a family environment, separating the child from its parents only when necessary for his welfare or in the interests of public safety;
>
> (D) To provide judicial procedures through which Chapter 2151 of the Revised Code is executed and enforced, and in which the

> parties are assured of a fair hearing, and their constitutional and other legal rights are recognized and enforced.

But with the enactment of 2000 Am. Sub.S.B. 179, 148 Ohio Laws, Part IV, 9447 (effective January 1, 2002), the statutory purposes are now set forth in R.C. 2152.01:

> (A) The overriding purposes for dispositions under this chapter are to provide for the care, protection, and mental and physical development of children subject to this chapter, protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender. These purposes shall be achieved by a system of graduated sanctions and services.
>
> (B) Dispositions under this chapter shall be reasonably calculated to achieve the overriding purposes set forth in this section, commensurate with and not demeaning to the seriousness of the delinquent child's or the juvenile traffic offender's conduct and its impact on the victim, and consistent with dispositions for similar acts committed by similar delinquent children and juvenile traffic offenders. The court shall not base the disposition on the race, ethnic background, gender, or religion of the delinquent child or juvenile traffic offender.
>
> (C) To the extent they do not conflict with this chapter, the provisions of Chapter 2151. of the Revised Code apply to the proceedings under this chapter.

While retaining the "care, protection, and mental and physical development of children" language in former R.C. 2151.01(A), the purposes of delinquency dispositions now set forth in R.C. 2152.01 differ from the former law in three key respects.

First, the "removing the consequences of criminal behavior and the taint of criminality from children committing delinquent acts" purpose from former R.C. 2151.01(B) is absent from R.C. 2152.01 and no longer exists in the current version of R.C. 2151.01. Both D.S. and his amicus rely on this and other similar language. Appellant Br., 7; Amicus Br., 3 ("avoiding the stigmatization and other consequences"); *id.* at 6 (referring to "collateral consequences" and "negative consequences"); *id.* at 7-9 (referring to juveniles being "stigmatized" and other

negative effects under "labeling" theory). D.S. at least acknowledges that this language comes from a "previous version of the Revised Code." Appellant Br., 7. Under current law, though, substituting "taint," "stigma," or other "consequences of criminal behavior" with "a program of supervision, care, and rehabilitation" is not a stand-alone purpose of delinquency dispositions.

Second, R.C. 2152.01(A) adds purposes that were not included in the former law. Juvenile courts now must "protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender." True, former R.C. 2151.01(B) mentioned "protect[ing] the public interest," but it defined the "public interest" solely in terms of the juvenile avoiding "the consequences of criminal behavior and the taint of criminality," which—again—is no longer a purpose of delinquency dispositions. Former R.C. 2151.01(C) also required courts to consider the "interests of public safety," but only in determining whether to "separat[e] the child from its parents." In contrast, R.C. 2152.01(A) now requires courts to consider "public interest and safety" separately from the juvenile's interests.

Third, R.C. 2152.01 dictates how courts are to achieve these statutory purposes. R.C. 2152.01(A) now requires "a system of graduated sanctions and services." Current R.C. 2151.01(A) retains the preference from former R.C. 2151.01(A) for a "family environment, separating the child from the child's parents only when necessary for the child's welfare or in the interests of public safety." But under R.C. 2152.01(B), all dispositions must "be reasonably calculated to achieve the overriding purposes set forth in [R.C. 2152.01(A)], commensurate with and not demeaning to the seriousness of the delinquent child's or the juvenile traffic offender's conduct and its impact on the victim, and consistent with dispositions for similar acts committed by similar delinquent children and juvenile traffic offenders."

These changes in S.B. 179 represent a policy shift in delinquency proceedings. Whereas former R.C. 2151.01 required juvenile courts to focus almost exclusively on the juvenile offender's interests, R.C. 2152.01 now requires courts to give equal consideration to holding juvenile offenders accountable, making victims whole, protecting the public, and rehabilitation. "The court's job, after all, is not only to attempt to correct the juvenile but to protect the public as well." *In re H.V.*, 138 Ohio St.3d 408, 2014-Ohio-812, ¶ 13, citing R.C. 2152.01(A).

II. A Juv.R. 9 dismissal must comply with R.C. 2152.01 and Juv.R. 9 itself, and such compliance requires considering evidence beyond the complaint.

A. A juvenile court's discretion to dismiss a complaint under Juv.R. 9 is not unfettered and must comply with R.C. 2152.01 and Juv.R. 9 itself.

Juv.R. 9—entitled "Intake"— encourages litigants to employ non-judicial remedies before invoking the jurisdiction of the juvenile court:

> **(A) Court Action to Be Avoided.** In all appropriate cases formal court action should be avoided and other community resources utilized to ameliorate situations brought to the attention of the court.
>
> **(B) Screening; Referral.** Information that a child is within the court's jurisdiction may be informally screened prior to the filing of a complaint to determine whether the filing of a complaint is in the best interest of the child and the public.

Although directed toward the pre-complaint intake process, courts have construed Juv.R. 9 as granting juvenile courts discretion to dismiss an already-filed delinquency complaint. See, e.g., *In re Smith*, 80 Ohio App.3d 502, 504 (1st Dist.1992). D.S.'s amicus argues that juvenile courts have unfettered discretion to dismiss a complaint under Juv.R. 9. Amicus Br., 4 ("Nothing in the language of Rule 9 purports to limit the juvenile court's discretion to dismiss a delinquency petition in any case it deems appropriate."). Amicus maintains that juveniles are

always better served by diverting them away from "juvenile justice involvement" and that any reversal of a Juv.R. 9 dismissal would "turn[] due process on its head." *Id*. at 10, 12.

These arguments are without merit. To start, there is no general due process right to avoid delinquency proceedings. The State has a valid interest in enforcing its criminal laws against juveniles. *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, ¶ 77. "'[J]uvenile delinquency laws feature inherently criminal aspects,' and the state's goals in prosecuting a criminal action and in adjudicating a juvenile delinquency case are the same: 'to vindicate a vital interest in the enforcement of *criminal* laws.'" *Id.* at ¶ 76, quoting *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, ¶ 26 (emphasis sic). Indeed, at common law, any child over seven was subject to arrest, trial, and in theory to punishment like adult offenders. *In re Gault*, 387 U.S.1, 17 (1967). The State's interest in enforcing criminal laws against juveniles gains added importance when the offense is a sexual crime against another child. The State has a compelling interest in protecting children from sexual abuse. *New York v. Ferber*, 458 U.S. 747, 757 (1982). This interest is no less compelling when the abuser is another child. Even when there is no abuse, the State has a strong interest in concluding that *all* sexual activity among young children is detrimental to their healthy development and well-being. *In re R.L.C.*, 643 S.E.2d 920, 924-925 (N.C.2007) (noting "government's strong interest in preventing sexual conduct between minors"); c.f., *Ginsberg v. New York*, 390 U.S. 629, 634-643 (1968) (discussing state interests in protecting minors from exposure to sexually explicit materials that are otherwise constitutionally protected speech when possessed by adults).

While Juv.R. 9 checks prosecutorial discretion in delinquency proceedings, a juvenile court's discretion under Juv.R. 9 to dismiss an already-filed delinquency complaint is not unfettered. Dismissal is a disposition. Juv.R. 2(A)(M) (defining "dispositional hearing" as "a

hearing to determine what action shall be taken concerning a child who is within the jurisdiction of the court."). So, like all other dispositions, any dismissal under Juv.R. 9 must comply with R.C. 2152.01. See also, Juv.R. 1(B)(3).

The text of Juv.R. 9 itself also limits a juvenile court's discretion. Juv.R. 9(A) states that formal court action should be avoided in "appropriate cases." The rule, therefore, contemplates that some cases will not be "appropriate" for dismissal. Or, as the Tenth District put it, some cases will be "inappropriate" for dismissal. Opinion at ¶¶ 24-25. At a minimum, a case is "appropriate" only if "other community resources" will "ameliorate [the] situation[]."

Juv.R. 9(B) further limits the complaints that are "appropriate" for dismissal. That provision allows for a pre-complaint screening of "information" to determine whether "the filing of a complaint is in the best interest of the child and the public." Thus, Juv.R. 9(B) limits a juvenile court's discretion to dismiss a complaint in two ways: (1) dismissal must be based on "information" available before the complaint is filed, and (2) the information must show that proceeding with the complaint is not "in the best interest of the child and public."

Although a juvenile court's discretion to dismiss a delinquency complaint under Juv.R. 9 is limited, a juvenile court has other procedural mechanisms to enter an appropriate disposition—including dismissal—at later stages in the case, when more information is known. A juvenile court can amend a complaint on its own order. Juv.R. 22(B). If the State fails to prove guilt beyond a reasonable doubt, then the juvenile court must dismiss the complaint. Juv.R. 29(F)(1); *In re Winship*, 397 U.S. 358, 368 (1970). Even if guilt is admitted or proven, the juvenile court (unless precluded by statute) may (a) "[e]nter an adjudication and proceed forthwith to disposition;" (b) "[e]nter an adjudication and continue the matter for disposition not more than six months and may make appropriate temporary orders;" (c) "[p]ostpone entry of adjudication

for not more than six months;" or (d) "[d]ismiss the complaint if dismissal is in the best interest of the child and the community." Juv.R. 29(F)(2).

Accordingly, a juvenile court has flexibility at multiple stages throughout a delinquency proceeding to enter an appropriate disposition. At all points, however, this flexibility must be exercised within the confines of R.C. 2152.01 and any other applicable statutes and procedural rules governing the court's decision.

B. Both R.C. 2152.01 and Juv.R. 9 require a juvenile court to consider evidence beyond just the "essential facts" contained in the delinquency complaint.

Compliance with R.C. 2152.01 and Juv.R. 9 requires a juvenile court to consider evidence beyond the information contained in the delinquency complaint. A delinquency complaint need only state the "essential facts that bring the proceeding within the jurisdiction of the court" and the "numerical designation of the statute or ordinance alleged to have been violated." Juv.R. 10(B)(1); see also, R.C. 2152.021(A)(1) ("particular facts"). A delinquency complaint need not even contain all the essential elements of the offense. *In re G.E.S.*, 9th Dist. No. 23963, 2008-Ohio-2671, ¶ 17; *In re Burgess*, 13 Ohio App.3d 374, 375 (12th Dist.1984) (disagreeing that "a complaint filed in the juvenile court alleging delinquency is to be read as strictly as a criminal indictment"). All that is required for a delinquency complaint is the "bare minimum necessary to assure that the juvenile knows the nature of the charges against him." *In re Czika*, 11th Dist. No. 2007-L-009, 2007-Ohio-4110, ¶ 18, quoting *In re Wise*, 7th Dist. No. 05 JE 40, 2007-Ohio-1393, ¶ 119 (DeGenaro, P.J., concurring in part, dissenting in part).

A delinquency complaint containing only the "bare minimum" and "essential facts" will not contain the necessary information for a juvenile court to determine whether dismissal will comply with R.C. 2152.01. For example, a complaint typically contains only minimal personal information about the juvenile (i.e., name, birth date, etc.) But R.C. 2152.01(A) requires a

juvenile court to know more than just basic biographical information about the juvenile. After all, not all juvenile offenders are alike. For some, their misdeeds may reflect typical childhood misjudgment requiring minimal corrective measures. But for others, their criminal behavior is the result of serious psychological issues requiring extensive court-supervised treatment. Some have supportive home lives that can provide a healthy environment to rehabilitate the juvenile and help him or her grow and develop. Others, unfortunately, do not. Thus, specific evidence about the juvenile's personal and family backgrounds is necessary for the court to determine whether dismissal would "provide for the care, protection, and mental and physical development" of the juvenile, or whether some other disposition would better serve this purpose. Specific evidence about the juvenile is also necessary to determine how much of a recidivism risk he or she poses. Without this evidence, the juvenile court cannot determine whether dismissal would "protect the public interest and safety" and "rehabilitate the offender."

R.C. 2152.01(A) also requires a juvenile court to consider specific evidence about the juvenile's conduct and other circumstances surrounding the offense(s). Just as every offender is different, so is every offense. Depending on the circumstances, the same statutory offense can be committed with varying levels of seriousness and with varying levels of impact on any victims. Thus, the juvenile court must determine "precisely what the juvenile did and why he did it—was it a prank of adolescence or a brutal act threatening serious consequences to himself or society unless corrected." *In re Gault*, 387 U.S. at 28. A delinquency complaint containing only the "essential facts" will not enable a juvenile court to determine whether dismissal would adequately "hold the offender accountable for the offender's actions" and "restore the victims."

Moreover, all dispositions must be "reasonably calculated" to achieve the overriding purposes of delinquency dispositions and must be "commensurate with and not demeaning to the

seriousness of the delinquent child's or the juvenile traffic offender's conduct and its impact on the victim, and consistent with dispositions for similar acts committed by similar delinquent children and juvenile traffic offenders." R.C. 2152.01(B). A juvenile court cannot compare the disposition to "similar acts committed by similar delinquent children" if all its only source of information is the "bare minimum" and "essential facts" contained in the complaint.

The text of Juv.R. 9 likewise requires a juvenile court to consider evidence external to the delinquency complaint. Juv.R. 9(A) refers to the "situation[]," which goes far beyond the minimal information contained in a complaint. The "situation" includes specific information about the juvenile offender himself or herself and the underlying facts surrounding the juvenile's conduct. And, of course, the "situation" is just one side of the equation under Juv.R. 9(A). The rule also requires a juvenile court to consider specific information about the "other community resources" that are available. A juvenile court cannot determine whether "other community resources" will "ameliorate [the] situation[]" without specific evidence about the "other community resources" and the "situation."

Juv.R. 9(B) likewise requires a juvenile court to consider evidence beyond just the delinquency complaint. The rule allows for a screening of "information" before the complaint is even filed. Thus, *information* is screened, not the complaint. The juvenile court needs more than just the "essential facts" contained in the complaint to determine whether the complaint "is in the best interest of the child and the public."

Describing a juvenile court's role in the "dispositional process," this Court has emphasized the importance of "assessing the strengths and weaknesses of the juvenile system vis-à-vis a particular child to determine how this particular juvenile fits within the system and whether the system is equipped to deal with the child successfully. That assessment requires as

much familiarity with the juvenile justice system as it does familiarity with the facts of the case." *In D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, ¶ 59. Although describing serious-youthful-offender dispositions under R.C. 2152.13(D)(2)(i), this emphasis on the "particular child" and the "facts of the case" are important in *all* dispositions, including Juv.R. 9 dismissals. A delinquency complaint containing only the "essential facts" will not contain sufficient information about the "particular child" or the "facts of the case" for a juvenile court to determine whether dismissal is an appropriate disposition.

C. The reversal in *In re M.D.* is based on multiple factors and an extensive factual record.

D.S. and his amicus rely heavily on this Court's decision in *In re M.D.*, 38 Ohio St.3d 149, but that case confirms that a dismissal must be based on evidence beyond just the minimal information contained in a delinquency complaint. M.D., then a 12 year old girl, was charged with complicity to rape. *Id*. at 150. While "playing doctor" with two other five-year old children—one boy and one girl—M.D. directed the girl to perform fellatio on the boy "ostensibly because M.D. had instructed them to take temperature that way." *Id*. After a trial, the juvenile court adjudicated M.D. a delinquent child and placed her on probation under the supervision of her parents. *Id*. The appellate court affirmed the adjudication, holding that M.D. had waived her constitutional objection to applying the rape statute to a child under 13. *Id*.

This Court reversed, holding that the waiver doctrine is discretionary. *Id*. at syllabus. On the merits, the opinion states that M.D. could not be complicit in rape because "[t]he events giving rise to the instant charges did not meet each element of the offense of complicity to rape." *Id*. at 151. Specifically, the opinion explains that fellatio requires either stimulation or sexual satisfaction, and that mere "penetration of the oral cavity is not sufficient to complete the offense." *Id*. at 152; but see, *State v. Barrett*, 3rd Dist. No. 4-06-04, 2006-Ohio-4546, ¶ 10

(noting that courts recently have relied upon "much broader definitions of fellatio"). There was no record evidence of either sexual satisfaction or oral stimulation among the five-year old participants. *In re M.D.*, 38 Ohio St.3d at152. This Court also relied on the then-existing presumption that "an infant under the age of fourteen is incapable of committing the crime of rape, rebuttable only upon proof that such child has reached the age of puberty." *Id*., citing *Williams v. State*, 14 Ohio 222 (1846); but see, *In re Washington*, 75 Ohio St.3d 390 (1996), syllabus (overruling *Williams*). "Adjudicating a child as 'delinquent' under circumstances where, as here, the child has neither committed a crime nor violated a lawful order of the juvenile court is obviously contrary to R.C. Chapter 2151." *In re M.D.*, 38 Ohio St.3d at 152.

Even assuming a rape had occurred, this Court concluded that the prosecution of M.D. "under these circumstances violates the underlying public policy of this state as expressed in R.C. Chapter 2151 and the Rules of Juvenile Procedure." *Id*. at 152-153. After discussing the values of intake and citing Juv.R. 9, the opinion notes that the complaint against M.D. violated the intake policy of the Cuyahoga County Juvenile Court that statutory rape charges "are not to be taken" when both the alleged offender and the victim are under 13. *Id*. at 153. This Court further noted that "the best interest of the child and the public" were not served by prosecuting M.D. because the five-year old boy's family had petitioned for dismissal. *Id*. at 153-154.

Moreover, this Court concluded that the delinquency complaint did not serve the "care, protection, and mental and physical development of children." *Id*. at 154. Specifically, a report from a mental health counselor prepared after M.D. was adjudicated delinquent showed her to be a "normal pre-teen." *Id*. According to a "battery of tests and evaluations" performed on M.D., there was "no compelling evidence to suggest or support * * * [her] involvement in the crime for which she has been found guilty;" her profile "deviate[d] markedly" from other sex offenders;

and she would be saddled with the "taint of criminality" for a felony sex offense where "'sex' played but a minute role" in the case." *Id*.

The holding in *In re M.D.* is based on multiple factors supported by the unique factual record in that case: (1) under then-existing law, M.D. was not complicit to rape because the five-year old participants were incapable of the sexual stimulation requirement for fellatio and children under 14 were presumed incapable of rape; (2) the complaint violated a specific intake policy of the juvenile court; (3) the family of one of the purported victims petitioned for dismissal; and (4) a mental-health report and a "battery of tests and evaluations" showed that the delinquency complaint would not further M.D.'s care, protection, and development.

The first factor—that M.D. was not complicit to rape—is particularly important. The failure to prove the alleged offense alone requires vacating a delinquency adjudication. Juv.R. 29(F)(1); *In re Winship*, 397 U.S. at 368. Accordingly, at least one court has treated this factor as dispositive in *In re M.D. In re Mark B.*, 6th Dist. No. L-99-1066 (Feb. 11, 2000) ("Notwithstanding the Supreme Court's rhetoric, its legal basis for the *M.D.* decision was that complicity cannot be charged unless an underlying offense is actually committed.").

As for the second factor—the violation of the juvenile court's intake policy—the State disagrees that a juvenile court may adopt a blanket policy that certain delinquency complaints are *never* permissible. The intake policy in *In re M.D.* was an improper attempt to grant a substantive right of immunity to an entire class of juveniles for a particular offense. While a court rule may provide a mechanism for enforcing substantive rights, it cannot create a substantive right on its own. Ohio Constitution, Article IV, Section 5(B) (local rules of practice may not be inconsistent with rules promulgated by the Supreme Court, which may not "abridge,

enlarge, or modify any substantive right"); *Smith v. Conley*, 109 Ohio St.3d 141, 2006-Ohio-2035, ¶ 9 (local rules "do not implicate constitutional rights").

Without specific information about the juvenile and the underlying facts of the case, a juvenile court cannot determine beforehand that all delinquency complaints alleging a particular offense will not serve the statutory purposes of delinquency dispositions. Further, the intake policy in *In re M.D.* conflicted with Juv.R. 9 by prohibiting an entire class of delinquency complaints without any particularized assessment into whether avoiding formal court action was "appropriate"—*i.e.*, that "other community resources" would "ameliorate [the] situation[]," and that pre-complaint "information" revealed that filing the complaint would not be "in the best interest of the child and the public."

Even if the intake policy in *In re M.D.* was valid, the opinion does not state that the deviation from the policy alone required reversal under Juv.R. 9. Rather, the intake violation combined with the other factors listed above to support this Court's overall conclusion that the delinquency complaint violated the general policies of former Chapter 2151. Indeed, the opinion relies heavily on evidence that was not available until *after* the complaint was filed—i.e., the petition to dismiss the charges, the mental-health report, and the "battery of tests and evaluations" on M.D—and thus could not have factored into a Juv.R. 9 analysis. The proper procedural vehicle to seek dismissal based on such post-complaint evidence is not Juv.R. 9, but rather Juv.R. 29(F)(2)(d). *In re Arnett*, 3rd Dist. No. 5-04-20, 2004-Ohio-5766, ¶ 16 (*In re Smith* and *In re M.D.* "provide structural and analytical insight for addressing a Juvenile Rule 29(F)(2)(d) dismissal").

Ultimately, the reversal in *In re M.D.* was based on the "mandates of [former] R.C. Chapter 2151." *In re M.D.*, 38 Ohio St.3d at 154. And the opinion makes clear that the reversal

was supported by a robust factual record showing that the delinquency complaint did not further the purposes of former Chapter 2151. To be sure, there was no trial transcript. *Id*. at 151. But this Court was in the unique position of not needing the trial transcript to conclude that that no crime occurred. The "documents and exhibits found in the record," along with the "findings of the juvenile court" established that there was no rape under then-existing law. *Id*. Despite the absence of a trial transcript, the record contained the intake policy, the petition for dismissal, and—most importantly—the mental-health evaluation and the "battery of tests and evaluations" showing M.D. to be a normal pre-teen who did not fit the profile of a sex offender. The record therefore contained ample evidence about M.D. herself that enabled this Court to conclude that the delinquency complaint did not conform to former Chapter 2151.

III. The juvenile court abused its discretion in dismissing the complaint because there was no evidence showing that dismissal complies with R.C. 2152.01 or Juv.R. 9.

In seeking dismissal, D.S. relied on nothing more than the fact that the delinquency complaint alleged sex offenses involving children. R.46, pp. 5-6; Tr., 5-6; R. 96, p. 5. D.S. offered no specific evidence about himself or his family background. Nor did he offer any specific evidence about the underlying circumstances surrounding the factual allegations in the complaint. D.S. had ample opportunity to present evidence in support of his motion to dismiss, but instead opted to rely solely on the nature of the charges in the complaint. Despite this near non-existent factual record, the juvenile court dismissed the complaint under Juv.R. 9.

The Tenth District correctly held that the juvenile court abused its discretion. First, *In re M.D.* does not support dismissal because that case pre-dates S.B. 179 and the reversal in that case was based on an extensive factual record. Second, the juvenile court based its dismissal solely on the nature of the charges and without any evidence showing that the dismissal complied with R.C. 2152.01 and Juv.R. 9. This is not to say that the juvenile court must adjudicate D.S.

delinquent. The juvenile court will be able to enter an appropriate disposition—including possibly dismissal—when more facts are known.

A. *In re M.D.* is inapposite because it applied pre-S.B. 179 law to the unique factual record in that case.

Both legally and factually, *In re M.D.* does not support the juvenile court's dismissal. Legally, the opinion in *In re M.D.* refers repeatedly to Chapter 2151, and the reversal was ultimately based on the "mandates of [former] R.C. Chapter 2151." *In re M.D.*, 38 Ohio St.3d at 154. But delinquency dispositions are now governed primarily by Chapter 2152, and the purposes of delinquency dispositions set forth in R.C. 2152.01(A) differ from those in former R.C. 2151.01. While the opinion in *In re M.D.* emphasizes that reversal was necessary to remove the "taint of criminality," *id*. at 154, this is no longer a purpose of delinquency dispositions. Even when avoiding stigma was a valid consideration, the traditional means of shielding juveniles from the stigma of delinquency proceedings is not dismissal, but rather "keeping hearings private and not publishing juveniles' names." *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, ¶ 64, citing *State v. Hanning*, 89 Ohio St.3d 86, 89 (2000); see also, Juv.R. 5(A) (requiring use of juvenile's initials); Juv.R. 27(A)(1) (governing exclusion of general public from hearings); Juv.R. 37(B) (restricting use of juvenile court records). Dismissal solely for the sake of the juvenile avoiding any negative collateral consequences runs contrary to the mandate that delinquency dispositions must be reasonably calculated to "hold the offender accountable for the offender's actions." R.C. 2152.01(A).

Factually, *In re M.D.* is inapposite because none of the four factors supporting reversal in that case is present here. D.S. has not argued—let alone established with evidence—that the State would be unable to prove the allegations against him. Nor is there any evidence that the delinquency complaint against D.S. violated any intake policy of the Franklin County Juvenile

Court. D.M.'s family did not petition for dismissal. And there are no mental-health reports or a "battery of tests and evaluations" showing that D.S. is a normal pre-teen who does not fit the profile of a sex offender.

D.S.'s amicus argues that GSI under R.C. 2907.05(A)(4) applies only to "adult perpetrators." Amicus Br., p. 2, citing 1973 Legislative Service Commission comments to Am.Sub.H.B. No. 511, 134 Ohio Laws, Part II, 1866. But amicus later admits that R.C. 2907.05(A)(4) by its terms can apply to a juvenile under 13. Amicus Br., 14. While the committee comment cited by amicus states that the rationale behind statutory rape is to prevent "vicious behavior," nothing in the report says anything about either statutory rape or R.C. 2907.05(A)(4) applying only to "adult offenders." The text of R.C. 2907.05(A)(4) states that "no person" shall engage in sexual contact with a person under 13; there is no minimum age. Compare, R.C. 2907.04(A) ("No person who is eighteen years or age or older"). "R.C. 2907.05(A)(4) expressly and unambiguously defines the class of culpable offenders as all 'person[s].' It does not * * * provide an exception for offenders of tender years." *In re Williams*, 1st Dist. Nos. C-990841, C-990842 (Dec. 22, 2000).

This Court in *In re M.D.* held that there was no fellatio (and thus no rape) because the conduct in that case involved mere "childhood curiosity and exploration." *In re M.D.*, 38 Ohio St.3d at 150. But D.S. has presented no evidence that he was simply "playing doctor" with D.M. *Id*. at 151. To the contrary, the delinquency complaint alleges that D.S. engaged in "sexual contact" with D.M., which requires a purpose of sexual arousal or gratification. R.C. 2907.01(B). By definition, "sexual contact" is not "playing doctor."

The only thing the present case has in common with *In re M.D.* is that both involve a delinquency complaint alleging sex offenses against a juvenile under 13. But the mere fact that

D.S. was under 13 does not require dismissal of the complaint under *In M.D. In re Amos*, 3rd Dist. No. 3-04-07, 2004-Ohio-7037, ¶ 8 (in a case alleging GSI under R.C. 2907.05(A)(4), the fact that the offender was under 13 "does not alone make the conduct of the type governed by *In re M.D.*"). Rather, the reversal in *In re M.D.* is based on the application of former law to the unique factual record in that case and thus has no application here.

B. The juvenile court's Juv.R. 9 analysis is flawed, and there is no evidence showing that the dismissal complies with R.C. 2152.01 or Juv.R. 9.

Not all children who engage in sexual activity are innocently "playing doctor." *In re R.C.*, 2nd Dist. No. 22352, 2008-Ohio-773, ¶ 51 (11-year old charged with statutory rape, and the record made "clear that he and the victim were not engaged in innocent child's play"); *In re Felver*, 3rd Dist. No. 2-01-20 (April 10, 2002) (nine-year old and his sister "were not playing doctor" and the "alleged activity was sexual and included threats of violence"); *In re Mark B.*, supra (11-year old charged with GSI was "obsessed with sex" whose "hypersexual behavior had escalated and taken on a premediated and predatory tone;" he admitted that he had "sexual thoughts" prior to initiating contact with victim); *In re Carter*, 12th Dist. No. CA95-05-087 (March 11, 1996) (13-year old charged with rape "defeated any idea that his activity was no more than 'playing doctor' when he said that he acted in response to an uncontrollable urge for sex"). For all the record shows, D.S. could have sexual-predator tendencies like the juvenile in *In re Mark B.*, which would likely necessitate a delinquency disposition. There is no evidence indicating whether D.S.'s sexual activity with D.M. reflects some easily-correctible "ordinary sexual curiosity," Amicus Br., 5, or whether it is indicative of a serious problem requiring formal court action to hold D.S. accountable and to provide adequate corrective measures to prevent future offenses. In other words, the juvenile court had no idea where D.S. fit in the spectrum between "ordinary sexual curiosity" and "sexual predator." Yet despite the lack of any specific

evidence about D.S. himself or the underlying circumstances surrounding his conduct, the juvenile court dismissed the complaint. This was an abuse of discretion.

Apparently assuming that D.S. did in fact commit the offenses alleged in the complaint, the juvenile court's decision states 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." R. 121-122, p. 4. This finding is facially deficient under Juv.R. 9(A). Alternative treatment methods are *always* "available." What makes a case "appropriate" for dismissal is not the availability of alternative treatment, but rather actual evidence that "other community resources" will "ameliorate [the] situation[]."

The juvenile court could not make a proper finding under Juv.R. 9(A) because it did not know the full "situation." Other than their respective birth dates, the juvenile court knew nothing about D.S. or D.M. The juvenile court did not know whether D.S. has any psychological or other mental-health issues, and if so, to what extent he would be receptive to treatment outside the juvenile-court system. The juvenile court's only source of information regarding the offenses comes from the complaint, which alleges that D.S. engaged in sexual contact—i.e., that he acted with a sexual purpose. The juvenile court therefore could only speculate that some unidentified "alternative methods" would adequately treat both D.S. and D.M. And the juvenile court could only hope that these "alternative methods" would prevent D.S. from engaging in sexual misconduct in the future.

The juvenile court further stated that "[i]f the parents are not able to provide the treatment necessary, a dependency action may be filed on behalf of the child needing services." R. 121-122, p. 4. But there was no evidence that D.S.'s parents were willing and able to provide the necessary treatment. Indeed, by suggesting that "a dependency action may be filed," the juvenile

court openly acknowledged the possibility that D.S.'s parents would *fail* to do so. When a juvenile court openly acknowledges the possibility that a juvenile will not receive the necessary treatment without formal court action, the proper course is not to hope that a future dependency action will solve the problem. The proper course is to overrule the motion to dismiss and proceed with the delinquency complaint. That way, if the juvenile is ultimately adjudicated delinquent, the juvenile court can *ensure* that the juvenile receives the necessary treatment, or the court can enter some other appropriate disposition when more facts are known.

Moreover, the juvenile court's "just file a dependency action" approach improperly assumes that any failure of treatment would be the fault of D.S.'s parents. But it could be that, through no fault of D.S.'s parents, the only way to effectively treat D.S. is through a delinquency adjudication and court-supervised treatment. Without any specific evidence about D.S. and his family background, the juvenile court had no basis to conclude that a dependency action would "ameliorate [the] situation[]" any more effectively than a delinquency adjudication.

Apparently referring to Juv.R. 9(B), the juvenile court next stated: "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." R. 121-122, p. 4. The juvenile court, however, did not know "the facts of this case" because there was no evidence about D.S. or the underlying circumstances surrounding his conduct. The juvenile court relied on no information beyond the minimal information contained in the complaint. The juvenile court could only speculate that proceeding with the delinquency complaint would not be in either D.S.'s or D.M.'s best interest.

Although the juvenile court's decision does not reference R.C. 2152.01, the record does not support that dismissal complies with that statute. Without specific evidence, the juvenile court could not know whether dismissal would provide for D.S.'s "care, protection, and mental

and physical development." R.C. 2152.01(A). Indeed, by expressly contemplating a future dependency action, the juvenile court openly acknowledged the possibility that dismissal would *not* serve this purpose. Without specific evidence, the juvenile court could not know whether dismissal would adequately hold D.S. "accountable for [his] actions." *Id*. After all, the complaint alleges serious sexual misconduct that by definition was not "playing doctor." Without specific evidence, the juvenile court could not know whether dismissal would "restore" D.M. or "rehabilitate" D.S. *Id*. And without specific evidence, the juvenile court could not know whether dismissal would be "commensurate with and not demeaning to the seriousness of [D.S.'s] conduct and its impact on [D.M.], and consistent with dispositions for similar acts committed by similar delinquent children." R.C. 2152.01(B).

True, on the same day he filed his motion to dismiss, D.S. filed a motion to suppress. R. 51. While the suppression motion briefly describes D.S.'s living arrangements (D.S. and his father lived with D.M. and his mother) and the circumstances surrounding his interview with police, it sheds no additional light about D.S., D.M., or the factual circumstances underlying the complaint. Thus, nothing in the suppression motion supports dismissal under Juv.R. 9. The record also states that magistrate ordered a competency evaluation. R. 24. But the competency evaluation itself is not in the record, and it is not mentioned at any point by the parties or the juvenile court. The competency evaluation could not support the Juv.R. 9 dismissal anyway because it was created *after* the filing of the complaint and a competency evaluation is unlikely to contain information that would support dismissal under R.C. 2152.01 and Juv.R. 9. *In re Kovalchik*, 5th Dist. No. 06CA20, 2006-Ohio-6049, ¶¶ 14 (dismissal was "premature" because the State was given the opportunity to dispute only the issue of competency, and not culpability).

Judge Klatt's dissent is unpersuasive. He maintained that it was sufficient that the juvenile court knew the following facts: "(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." Opinion at ¶ 30 (Klatt, J., dissenting). The first two facts are really just the same fact expressed in different ways. But the juvenile court needed to know much more than just the age difference between D.S. and D.M. to determine whether dismissal would comply with R.C. 2152.01 and Juv.R. 9. Not all 12-year old are alike, and neither are all nine-year olds. Simply reciting D.S.'s and D.M.'s ages does not portray the full "situation."

As for the third fact, the absence of a force allegation proves nothing because force is not an element under R.C. 2907.05(A)(4). Despite the absence of a force allegation in the complaint, the State's response to D.S.'s dismissal motion states that D.S. was the "aggressor" and that D.M. articulated the "unwanted" sexual contact. R. 80, pp. 3, 4. D.S. did not contest these statements in the State's response. Even when force is not an element, a juvenile still may have engaged in force or other forms of pressure that would weigh heavily against dismissal. See, e.g., *In re R.H.* at ¶ 51 (where 11-year old was charged with statutory rape, "there is evidence in the record before us that the activity herein was sexual, forceful, and nonconsensual"); *In re N.K.*, 8th Dist. No. 82332, 2003-Ohio-7059, ¶ 14 (ten-year old charged with statutory rape and GSI, "the trial of the matter included evidence of force"); *In re Felver*, supra (nine-year old was charged with GSI; "[t]he alleged activity was sexual and included threats of violence"). These cases confirm the obvious: That the allegations in a delinquency complaint do not paint a complete picture of what *actually* happened.

Although involving a dismissal under Juv.R. 29(F)(2)(d), the Third District in *In re Arnett* at ¶¶ 17-19 held that a dismissal is improper if based on an inadequate record:

> Unfortunately, in contrast with the *Smith* and *M .D.* cases, *supra*, there is virtually nothing in this record to support the conclusions of the trial court as to the "best interest of the child and the community." Instead, the juvenile court in this case appeared to rely on factors which were essentially irrelevant to the charged crime as well as the court's own indication that even though true, these allegations "should not be the basis of a criminal conviction" and that the criminal statute in this case "was not meant to apply to this type of situation."
>
> For example, the court noted that the sexual encounter was consensual and non-violent, factors which may mitigate the possible disposition but are not defenses to the charge and do not directly bear upon the best interest of the child and the community. The court also declared that a finding of guilt would expose the defendant to severe criminal penalties; however, there was no character evidence, psychological reports, or other impact evidence in the record to assist the trial court in determining, or to assist this Court in reviewing, whether a dismissal was, in fact, in the best interest of the child and the community. Moreover, submitting the case entirely on the joint stipulation of counsel deprived the court of the opportunity to observe the testimony of any witness, the alleged victim, or the defendant. As a result, and perhaps most importantly, there are no relevant factual or legal determinations in the record to distinguish the Juv. R. 29(F)(2)(d) dismissal of this case from every other juvenile delinquency case involving a twelve year old and a fifteen year old under the same charge.
>
> In the absence of anything in the record to establish why a dismissal was in the best interest of the child and the community, and in the absence of any findings by the trial court directed specifically to the best interest of the child and the community, we cannot conclude that the provisions of Juvenile Rule 29(F)(2)(d) were followed in this case. Under these circumstances we must find that the trial court's dismissal of the charges constituted an abuse of discretion.

In *In re Arnett*, the parties submitted the case for adjudication based on facts outlined in a police report and the parties' verbal recitation to the court of a "loose trial outline of expected witnesses and testimony." *Id*. at ¶ 3. Although this minimal record revealed some factors that mitigated the offense, the court held it was not enough to support the dismissal in that case.

The record in the present case is even sparser. Rather than relying on any evidence showing that dismissal would comply with R.C. 2152.01 and Juv.R. 9, the juvenile court dismissed the complaint apparently because it believes juveniles under 13 should *never* be charged under R.C. 2907.05(A)(4). As explained in the State's response to D.S.'s second proposition of law, R.C. 2907.05(A)(4) is constitutionally applied to juveniles under 13. Juv.R. 9 is not a back-up mechanism to invalidate a statute when a constitutional challenge falls short. Nor is Juv.R. 9 an appropriate forum to air public-policy grievances against a statute.

C. The juvenile court retains flexibility to enter an appropriate disposition—including dismissal—later in the case when more facts are known.

To be clear, the State does not seek to deprive juvenile courts of flexibility to enter appropriate dispositions. But any disposition must comply with R.C. 2152.01 and any other applicable statutes and procedural rules. While the juvenile court abused its discretion in dismissing the complaint under Juv.R. 9, the issue boils down to *timing*. The dismissal was simply too soon. As the magistrate noted in overruling D.S.'s motion to dismiss, "after a trial * * * the facts may be such that it is appropriate to dismiss [the complaint] then." Tr., 12. If on remand the case goes to trial and the evidence shows that D.S. truly was just "playing doctor"—i.e., that he acted without a sexual purpose—then the juvenile court will be required to dismiss the complaint because the State will have failed to prove an element of the offenses. Juv.R. 29(F)(1); *In re Winship*, 397 U.S. at 368. Alternatively, if the allegations against D.S. are admitted or proven, the factual record at that point may sufficiently support a dismissal under Juv.R. 29(F)(2)(d). If D.S. is adjudicated delinquent and dismissal is not appropriate, the juvenile court will have discretion to enter an appropriate disposition that is reasonably calculated to achieve the overriding purposes of delinquency dispositions. R.C. 2152.01(B).

Avoiding the "taint of criminality" is no longer a purpose of delinquency dispositions, but the law nonetheless minimizes stigma of delinquency dispositions. In addition to the measures discussed above (infra, 19), D.S. will not be subject to any sexual-offender registration requirements in Ohio because he was under 14 at the time of the offenses. R.C. 2152.191(A); R.C. 2152.82(A)(2). If the juvenile court dismisses the complaint or finds D.S. not to be delinquent, the records of the case are automatically sealed. R.C. 2151.356(B)(1)(d). Otherwise, D.S. can seek to have the records sealed six months after the termination of any order relating to the adjudication. R.C. 2151.356(C)(1)(a)(i). If the court seals the records, they must be expunged after five years or when D.S. turns 23, whichever is earlier. R.C. 2151.358(A). D.S. could also seek expungement at an earlier date. R.C. 2151.358(B).

But what the juvenile court could not do was dismiss the complaint under Juv.R. 9 at the outset of the case based solely on the nature of the charges and without any factual record supporting the dismissal. The Tenth District correctly held that the juvenile court abused its discretion in doing so.

Response to Second Proposition of Law: R.C. 2907.05(A)(4) is not unconstitutional as applied to juveniles under 13 years old.

D.S.'s second proposition of law claims that R.C. 2907.05(A)(4) is unconstitutionally vague and violates equal protection as applied to any juvenile under 13. Initially, there is a mismatch between D.S.'s proposition of law and the juvenile court's decision. The juvenile court explicitly declined to hold R.C. 2907.05(A)(4) unconstitutional as applied to anyone under 13. R. 121-122, p. 4. It only found the statute unconstitutional as applied to *this* case because D.S. and D.M. are "quite close in age." *Id*. Regardless, both D.S.'s broadly-worded proposition of law and the juvenile court's narrower holding are without merit.

Statutes are presumed constitutional, and the burden is on the person challenging the statute to prove otherwise beyond a reasonable doubt. *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶ 17, citing *Klein v. Leis*, 99 Ohio St.3d 537, 2003-Ohio-4779, ¶ 4. In an as-applied challenge, "the burden is upon the party making the attack to present clear and convincing evidence of a presently existing state of facts which makes the Act unconstitutional and void when applied thereto." *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231 (1988), citing *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329 (1944), paragraph six of the syllabus.

R.C. 2907.05(A)(4) is not unconstitutional as applied to D.S. or any other juvenile under 13. First, purely as a matter of statutory language, the holding in *In re D.B.* does not apply to R.C. 2907.05(A)(4) because GSI requires proof of a sexual purpose, which distinguishes the "offender" from the "victim." Second, even if *In re D.B.* is potentially applicable to R.C. 2907.05(A)(4), D.S. submitted no proof that D.M. was an "offender" under the statute or that he and D.M. were identically situated. And third, the State respectfully submits that *In re D.B.* was wrongly decided and should be overruled or at least confined to the narrow circumstances of that case.

I. R.C. 2907.05(A)(4) is constitutional as applied to juveniles under 13.

A. *In re D.B.* held that R.C. 2907.02(A)(1)(b) may not be applied to juveniles under 13 because it does not distinguish between "offender" and "victim."

In *In re D.B.*, this Court held that statutory rape under 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." *In re D.B.* at syllabus. According to *In re D.B.*, R.C. 2907.02(A)(1)(b) is unconstitutionally vague when applied to juveniles under 13 because it "authorizes and encourages arbitrary and discriminatory enforcement." *Id*. at ¶ 24. "[W]hen 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." *Id.* If the facts alleged in the complaint were true, then both D.B. and the other child with whom he engaged in sexual conduct, M.G., would be in violation of R.C. 2907.02(A)(1)(b). *Id*. at ¶ 25. D.B. and M.G. engaged in sexual conduct with each other, yet only D.B. was charged. *Id*. at ¶ 26. These facts "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." *Id.*

This Court further held that R.C. 2907.02(A)(1)(b) violates equal protection. "The plain language of the statute makes it clear that every person who engages in sexual conduct with a child under the age of 13 is strictly liable for statutory rape, and the statute must be enforced equally and without regard to the particular circumstances of an individual's situation." *Id*. at ¶ 30. When two juveniles under 13 engage in sexual conduct, "both parties could be prosecuted as identically situated," and charging one but not the other "violates the Equal Protection Clause's mandate that persons similarly circumstanced shall be treated alike." *Id*.

B. The mens rea element in R.C. 2907.05(A)(4) distinguishes the "offender" from the "victim."

GSI under R.C. 2907.05(A)(4) does not share the attributes of statutory rape under R.C. 2907.02(A)(1)(b) that *In re D.B.* found problematic. Whereas "sexual conduct" in R.C. 2907.02(A)(1)(b) requires no mens rea, R.C. 2907.05(A)(4) requires "sexual contact," which requires proof that the offender act "for the purpose of sexually arousing or gratifying either person." R.C. 2907.01(B). GSI "requires a specific intent behind the touching—the touching must be intended to achieve sexual arousal or gratification." *State v. Dunlap*, 129 Ohio St.3d 461, 2011-Ohio-4111, ¶ 25.

The purpose element in R.C. 2907.05(A)(4) removes it from *In re D.B.* When sexual contact occurs between two juveniles under 13, the purpose element in R.C. 2907.05(A)(4)

provides a means to distinguish the "offender" from the "victim." The statute therefore does not encourage arbitrary or discriminatory enforcement. Nor does R.C. 2907.05(A)(4) violate equal protection. Unlike R.C. 2907.02(A)(1)(b), which provides no means of distinguishing two juveniles under 13 who engage in sexual conduct with each other, R.C. 2907.05(A)(4) by its plain terms applies only to those who act with a sexual purpose. Thus, when sexual contact occurs between two juveniles under 13, the two are not necessarily identically situated and they need not be treated alike under R.C. 2907.05(A)(4).

Accordingly, multiple Ohio appellate courts have held that, in light of the purpose element in "sexual contact," *In re D.B.* does not apply to R.C. 2907.05(A)(4). *In re B.O.*, 6th Dist. No. H-16-022, 2017-Ohio-43, ¶ 11 ("The inclusion of a mens rea element distinguishes gross sexual imposition under R.C. 2907.05(A)(4) from statutory rape by 'provid[ing] a way to differentiate between the victim and the offender.'"), quoting *In re K.C.*, 32 N.E.3d 988, 2015-Ohio-1613, ¶ 13 (1st Dist.); *In re K.A.*, 8th Dist. Nos. 98924, 99144, 2013-Ohio-2997, ¶ 11 ("The mens rea of 'purpose' to cause sexual arousal or gratification provides a way to differentiate the victim from the offender."); *In re T.A.*, 2nd Dist. Nos. 2011-CA-28, 2011-CA-35, 2012-Ohio-3174, ¶ 26 ("Statutory Rape only involves the offender engaging in a proscribed act, regardless of his intent. Gross Sexual Imposition involves both a proscribed act and a purpose—the purpose to cause sexual arousal or gratification. This permits ready differentiation between the victim and the offender."). At least two out-of-state courts have reached the same conclusion. *State v. Colton M.*, 875 N.W.2d 642, ¶ 13 (Wis.App.2015) (distinguishing *In re D.B.* because the statute requires a sexual purpose); *W.C.B. v. State*, 855 N.E.2d 1057, 1062 (Ind.App.2006) ("[T]he statute does not encourage arbitrary and discriminatory enforcement, inasmuch as its

provisions are satisfied if a person with the requisite intent engages in defined sexual acts with a child under the age of fourteen.").

The fact that juveniles under 13 are the "protected class" under R.C. 2907.05(A)(4) does not preclude them from being an "offender." The statue defines the protected class, and it also defines the potential class of offenders. And nothing in R.C. 2907.05(A)(4) requires that the offender be a certain age. Infra, 20. Applying a statute to a member of the "protected class" is not unconstitutional. *In re L.Z.*, 61 N.E.3d 776, 2016-Ohio-1337, ¶¶ 31-46 (5th Dist.) (rejecting argument that R.C. 2907.31(A)(1) may not be applied to a juvenile because it was enacted to protect juveniles); *In re J.P.*, 11th Dist. No. 2011-G-3023, 2012-Ohio-1451, ¶¶ 24-35 (same); *W.C.B.*, 855 N.E.2d at 1060 ("[C]hild molesting statute may, in fact, apply to perpetrators who fall within the protected age group set forth in the statute at the time they commit the molestation.").

D.S. argues that R.C. 2907.05(A)(4) provides no way to differentiate between the "offender" and "victim" because the statute requires proof of a purpose to sexually arouse or gratify "either person." Appellant Br., 18. But even if one acts with a purpose to sexually arouse or gratify the other person, this does not mean that the other person shares this intent or that he or she is an "offender." No matter who the actor intends to sexually arouse or gratify (himself or herself or the other person), the fact that R.C. 2907.05(A)(4) requires proof of purpose distinguishes the "offender" from the "victim."

Nor does it matter that R.C. 2907.05(A)(4) is strict liability with respect to the other person's age. Appellant Br., 16. The statute requires proof that the acts be committed with a specific purpose, and that is enough to distinguish it from statutory rape under R.C. 2907.02(A)(1)(b), which requires no mens rea for any element.

Equally without merit is D.S.'s argument that the mens rea element required for sexual contact is not a dispositive distinction because sexual arousal or gratification is implicit in all sexual conduct. Appellant Br., 16. *In re D.B.* did not assume that the children in that case acted with a sexual purpose. To the contrary, that statutory rape under R.C. 2907.02(A)(1)(b) is a strict-liability offense played a key role in this Court's decision. *In re D.B.* at ¶¶ 13, 30. Plus, D.S.'s argument in this regard is based on a faulty premise. Especially with children, there can be any number of non-sexual motives for sexual conduct. Indeed, a recurring defense argument in child sex cases is that some children are not culpable because they had no sexual purpose—i.e., they were "playing doctor." *In re M.D.* provides a perfect example. Even if sexual conduct implies a sexual motive in adults, *State v. Gillingham*, 2nd Dist. No. 20671, 2006-Ohio-5758, ¶ 31, there is no such implication with children.

C. Even after *In re D.B.*, the State may regulate sexual activity—including sexual conduct—among juveniles under 13 through other statutes.

Both D.S. and his amicus argue that R.C. 2907.05(A)(4) is unconstitutional as applied to juveniles under 13 for reasons not stated in *In re D.B.* These arguments are without merit.

D.S. argues that, because counts two and three allege acts that constitute sexual conduct—and thus could have been charged as statutory rape—the State was seeking to achieve indirectly through R.C. 2907.05(A)(4) what *In re D.B.* prohibited it from doing directly. Appellant Br., 17. The juvenile court relied on this rationale in its decision. R. 121-122, p. 4. While *In re D.B.* held that R.C. 2907.02(A)(1)(b) is unconstitutional as applied to juveniles under 13, nothing in *In re D.B.* prohibits the State from using *other* statutes to regulate sexual conduct among juveniles under 13. *In re Williams*, supra (delinquents could not claim to have been prejudiced by any constitutional infirmity in R.C. 2907.02(A)(1)(b), because they were ultimately adjudicated under R.C. 2907.05(A)(4)). *In re D.B.* was based on the specific wording

of R.C. 2907.02(A)(1)(b). It did not purport to preclude entirely the State from regulating sexual conduct among juveniles under 13.

D.S.'s amicus argues that R.C. 2907.05(A)(4) is unconstitutional as applied to this case because the State may not criminalize *any* sexual activity among juveniles under 13 (at least when there is no force involved). Amicus Br., 13-19. This broad attack on R.C. 2907.05(A)(4) was not raised below nor included in D.S.'s memorandum supporting jurisdiction. In any event, it is without merit. It is of course true that adults have a constitutional right to consensual sexual activity, but this right does not extend to juveniles. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("the present case does not involve minors."). As stated above (infra, 9), the State has a compelling interest in regulating sexual activity among juveniles. *In re R.L.C.*, 643 S.E.2d at 924-925; *Michael M. v. Superior Court of Sonoma Cty.*, 450 U.S. 464 (1981) (upholding application of statutory-rape law that prohibited sexual conduct with any female under 18 against a 17-year old male). Applying R.C. 2907.05(A)(4) to juveniles under 13 rationally serves this interest. A juvenile under 13 is no less a "victim" under R.C. 2907.05(A)(5) when the "offender" is another juvenile under 13. As one court has stated, "[i]t is contrary to the law's intent, and to common sense, to establish a policy that withdraws the law's protection from the victim in order to protect the violator, even one who is a minor." *In re John C.*, 569 A.2d 1154, 1156 (Ct.App.1990) (upholding delinquency adjudication of minor who engaged in sexual contact with another minor). Also, sexual activity among juveniles under 13 creates health risks and may have physical and psychological implications for *all* participants. *In re R.L.C.*, 643 S.E.2d at 925.

Amicus points out that children do not have the same decision-making capacity as adults and that juveniles under 13 are deemed incapable of consenting to sexual activity. Amicus Br.,

14-15. But there is no inherent contradiction between presuming that juveniles under 13 cannot consent to sexual activity and that they are able to form the requisite intent for such activity:

> Consent is neither an element to be proved in a child molestation case nor a defense to such a charge, and there is nothing in the statute that correlates age with a perpetrator's ability to consent. Nonetheless, even if the perpetrator's consent were an element of the offense, such 'consent' could be established by showing the required element of criminal intent.

W.C.B., 855 N.E.2d at 1061 (quoting earlier case).

Indeed, children's inability to fully appreciate the physical and emotional consequences of sexual activity is all the more reason to apply R.C. 2907.05(A)(4) to juveniles under 13. *R.L.C.*, 643 S.E.2d at 925 (noting that "many minors, especially those in their most formative years, are unable to make reasoned decisions based upon their limited life experience and education whether to engage in these sexual activities"); *Bellotti v. Baird*, 443 U.S. 622, 634 (1979) (one reason children's constitutional rights cannot be equated to adults' is their "inability to make critical decisions in an informed, mature manner"). Applying R.C. 2907.05(A)(5) to juveniles under 13 protects not only the "victim," but also the "offender" from his or her own inability to make informed decisions about sexual activity.

D.S.'s amicus states that "it is not an individual's intent to give or receive sexual gratification that validates statutory rape laws like Section 2907.05(A)(4). Rather, it is the inherently coercive nature of sexual contact between a youth and an older individual, substituting for a separate finding of threat, force, or diminished capacity to consent, that justifies criminalizing sexual contact with children under 13." Amicus Br., 15. As a general matter, the State's compelling interest in regulating sexual activity among juveniles is what "validates" R.C. 2907.05(A)(4). This interest is not limited to addressing the "inherent coercion" between adults and juveniles. It also includes addressing sexual activity among juveniles. This is reflected by

the fact that R.C. 2907.05(A)(4) by its terms is not limited to adult perpetrators. Infra, 10. The sexual-purpose element "validates" applying R.C. 2907.05(A)(5) to juveniles under 13, insofar as the purpose element removes the statute from *In re D.B.*

Finally, amicus argues that, because sexual experimentation is a natural part of development, juvenile offenders are less culpable than adult offenders. Amicus Br., 16-17. Amicus argues at length that a delinquency adjudication under R.C. 2907.05(A)(4) carries harsh consequences. Amicus Br., 18-28. Both amicus and D.S. rely heavily on case law discussing the differences between juveniles and adults for punishment purposes. Appellant Br., 5-6; Amicus Br., 7, 16. But these punishment-related issues have no bearing on the constitutionality of applying R.C. 2907.05(A)(4) to juveniles under 13. D.S. has not even been adjudicated delinquent, let alone subject to any "punishment." The State may fail to prove the allegations in the complaint, in which case the juvenile court will dismiss the complaint and punishment is a non-issue. Juv.R. 29(F)(1). Even if the juvenile court does adjudicate D.S. delinquent, and even if the court does not dismiss the complaint under Juv.R. 29(F)(2)(d), the court will impose an appropriate juvenile disposition, which must comply with R.C. 2152.01 and all other relevant legal standards. D.S. can raise any objections to the disposition at that point. Until then, these punishment-related objections have nothing to do with whether R.C. 2907.05(A)(4) may be constitutionally applied to juveniles under 13.

II. Even if *In re D.B.* could apply to R.C. 2907.05(A)(4), D.S. failed to satisfy his evidentiary burden for an as-applied challenge.

For the reasons stated above, this Court need look no further than the language of R.C. 2907.05(A)(4) to conclude that the statute is constitutional as applied to juveniles under 13. But even if *In re D.B.* could potentially apply to R.C. 2907.05(A)(4), D.S. failed to satisfy his evidentiary burden of showing that the statute was unconstitutionally applied in this case.

D.S. presented no evidence that D.M. is an "offender" under R.C. 2907.05(A)(4). Specifically, there is no evidence that D.M. acted with a sexual purpose to gratify either himself or D.S. In fact, the record suggests the opposite. The State's response to D.S.'s dismissal motion states that D.S. was the "aggressor" and that D.M. articulated the "unwanted" sexual contact. R. 80, pp. 3, 4. D.S. offered no evidence to dispute these allegations. In *In re D.B.*, this Court emphasized that the allegations in the complaint was enough to establish that both D.G. and M.G. violated R.C. 2907.02(A)(1)(b). *In re D.B.* at ¶ 25. The same cannot be said in the present case. The complaint alleges that D.S. engaged in "sexual contact" with D.M., but it does not allege that D.M. had "sexual contact" with D.S. The complaint does allege in the alternative that D.S. caused D.M. to have sexual contact with himself (D.M.). But this is a non-sequitur because R.C. 2907.05(A) requires (1) sexual contact "with another," (2) to cause the victim to have sexual contact with the offender, or (3) to cause two or more persons to have sexual contact with each other. Sexual contact with oneself does not constitute GSI.

Given this absence of evidence, D.S. failed to satisfy his burden of presenting "clear and convincing evidence of a presently existing state of facts" that make applying R.C. 2907.05(A)(4) to the present case unconstitutional. *Cleveland Lumber Gear Co*, 35 Ohio St.3d at 231. Because there is no evidence D.M. acted with a sexual purpose, applying R.C. 2907.05(A)(4) to D.S. but not D.M. does not constitute "arbitrary or discriminatory enforcement." *In re D.B.* at ¶ 26. And without any evidence that D.M. acted with a sexual purpose, D.S. failed to show that the two were "identically situated" such that both he and D.M. "could have been charged under the offense." *Id*. at ¶ 30.

The juvenile court's holding that applying R.C. 2907.05(A)(4) to D.S. is unconstitutional because he and D.M. are "quite close in age" is flawed. The juvenile court held that "it is

difficult to distinguish between the parties and not as easy to determine who should be charged given the closeness of their ages." R. 121-122, p. 3. But the premise behind *In re D.B.* is not that it was "more difficult" or "not easy" under R.C. 2907.02(A)(1)(b) to distinguish the juveniles in that case, but rather that it was *impossible* to do so. Even when two juveniles under 13 are "quite close in age," the purpose element in R.C. 2907.05(A)(4) provides a means to distinguish the "offender" from the "victim." No matter how close D.S. and D.M. are in age, the fact remains that D.S. presented no evidence that D.M. was an "offender" under the statute.

Even without the purpose element, whether D.S. and D.M. are "quite close in age" is not enough to make them indistinguishable. D.S. is two years and five months older than D.M. At the time of the incidents, D.S. was three months past his twelfth birthday, and D.M. was two months shy of his tenth birthday. The juvenile court wrongly assumed that all 12-year olds are similar to all nine-year olds. Children develop at different ages and at different rates. Thus, a 12-year old can be much more physically and emotionally advanced than a child who has yet to reach his tenth birthday. A 12-year old may be several years into puberty, whereas a nine or ten year old may have yet to begin or only recently begun puberty. *National Institute of Health, U.S. National Library of Medicine*, http://medlineplus/ency/patientinstructions/000650.htm (noting that most boys start puberty somewhere between ages 9 and 16 and that there is a "wide age range when puberty starts") (last visited 2-11-17).

While the age disparities in *In re B.O.*, *In re T.A.*, *In re K.A.*, and *In re K.C.* were all greater than the 29 months separating D.S. and D.M., none of the holdings in those cases turned solely on the ages of the individuals involved. Rather, those cases all focused on the statutory language differentiating R.C. 2907.05(A)(5) from R.C. 2907.02(A)(1)(b). Age is no doubt a factor in determining whether someone acts with a sexual purpose. After all, some children are

so young that they are incapable of forming a sexual purpose. *In re M.D.*, 38 Ohio St.3d at 152; *In re T.A.* at ¶ 26. But age is by no means the only factor. The record does not disclose that D.M. had the "capacity to develop the *mens rea* for the gross sexual imposition." R. 121-122, p. 3. But even if D.M. did have this capacity, the record does not show that he actually *did* have the necessary sexual purpose.

There is an element of irony to the juvenile court's "quite close in age" finding. The juvenile court found that R.C. 2907.05(A)(4) is unconstitutionally vague as applied to this case, but it is the juvenile court's decision that is vague. While "not willing to make the GSI statute unconstitutional in all cases involving children under the age of thirteen," the juvenile court held that R.C. 2907.05(A)(4) was unconstitutionally applied "in this case." R. 121-122, p. 4. Because the juvenile court relied solely on the ages of D.S. and D.M., its holding raises more questions than answers. If 29 months is not enough of an age disparity to constitutionally apply R.C. 2907.05(A)(4), how much would be enough? Would 29 months be enough of an age disparity if both children were younger, say ten and seven? The juvenile court held that it was arbitrary to charge D.S., but it was the juvenile court that acted arbitrarily by deciding—without a factual record—that the 29 months separating D.S. and M.S. was not enough of an age disparity.

Proper development of the record is crucial in adjudicating an as-applied challenge. *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, ¶ 22 There cannot be an as-applied challenge when there is no "true evidence" before the court, and "counsel's evaluation of what the evidence in an actual trial * * * might develop [is] not tantamount to probative facts." *State v. Beckley*, 5 Ohio St.3d 4, 6 (1983). The juvenile court, however, knew nothing about D.S. or D.M. except their ages. It knew nothing about their respective physical and emotional

developments. And other than the allegations in the complaint, the only thing the juvenile court knew about the incidents themselves comes from the State's memorandum opposing D.S.'s dismissal motion, which states that D.S. was the "aggressor" and that D.M. articulated the "unwanted" sexual contact. On this record, the juvenile court erred in holding that R.C. 2907.05(A)(4) is unconstitutional as applied to this case.

III. *In re D.B.* was wrongly decided and should be either overruled or at the very least confined to the narrow facts of that case.

For the foregoing reasons, this Court should affirm the Tenth District's judgment reversing the juvenile court's holding that the statute is unconstitutional as applied to this case. But even if this Court affirms the Tenth District for either or both of the reasons stated above, the State respectfully requests that this Court reexamine *In re D.B.* Because *In re D.B.* prohibits charging any juvenile under 13 with statutory rape under R.C. 2907.02(A)(1)(b), the only realistic way this Court could ever reexamine *In re D.B.* is in the context of some *other* statute. This case presents such an opportunity.

Stare decisis does not apply with the same force when constitutional interpretation is at issue. *Rocky River v. State Emp. Relations Bd.*, 43 Ohio St.3d 1, 5 (1989). Stare decisis concerns also have less force when there are no reliance interests involved. *State v. Silverman*, 121 Ohio St.3d 581, 2009-Ohio-1576, ¶ 31. The State respectfully submits that *In re D.B.* was wrongly decided. Indeed, at least two courts outside Ohio have expressly declined to follow *In re D.B. United States v. JDT*, 762 F.3d 984, 998-999 (9th Cir.2014) (upholding constitutionality of federal statutory-rape statute); *In re Welfare of B.A.H.*, 845 N.W.2d 158, 162-166 (Minn.2014), nn. 4 & 5 (upholding constitutionality of Minnesota's statutory rape statute). Moreover, it is highly doubtful that juveniles under 13 have "conduct[ed] their affairs" in

reliance on *In re D.B. Silverman* at ¶ 31. Accordingly, the State respectfully submits that *In re D.B.* should be overruled or at least confined to the narrow circumstances of that case.

A. A "plain" and "clear" statute cannot be unconstitutionally vague.

In re D.B.'s vagueness analysis is flawed. The main objectives of the void-for-vagueness doctrine are (1) to provide fair warning to allow persons of ordinary intelligence a reasonable opportunity to understand what the law prohibits, and (2) to prevent arbitrary and discriminatory enforcement of the law. *City of Chicago v. Morales*, 527 U.S. 41, 57 (1999). Thus, criminal statutes must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

Although the arbitrary-enforcement objective is the "most meaningful aspect of the vagueness doctrine," *Smith v. Goguen*, 415 U.S. 566, 574 (1974), one claiming that a statute encourages arbitrary enforcement must still make the threshold showing that the statute is vague. When the Supreme Court mentions arbitrary enforcement in its vagueness cases, it is not referring to law enforcement's discretion in deciding whom among multiple violators to charge. Rather, it is referring to vague statutes that give law enforcement too much discretion in deciding what constitutes a violation in the first place. See, e.g., *Johnson v. United States*, 135 S.Ct. 2551, 2557-2560 (2015) ("serious potential risk of physical injury" leaves uncertainty regarding how to estimate risk and how much risk the statute requires); *Morales*, 527 U.S. at 61 (loitering statute provided "absolute discretion to police officers to determine what activities constitute loitering."); *Kolender*, 461 U.S. at 358 (loitering statute gave police officers "complete discretion" "to determine whether the suspect has satisfied the statute").

So even when the arbitrary-enforcement objective is at issue, the constitutional void-for-vagueness inquiry still begins with the basic question: Is the statute vague? *In re Welfare of B.A.H.*, 845 N.W.2d at 163 ("Naturally, the essential question in a vagueness challenge is whether the statute is vague."). And there is nothing vague about R.C. 2907.02(A)(1)(b). The statute contains the necessary "minimal guidelines to govern law enforcement." *Morales*, 527 U.S. at 60, quoting *Kolender*, 461 U.S. at 358. These are (1) whether an individual engaged in sexual conduct, and (2) whether the other person was under 13 years old.

Indeed, *In re D.B.* acknowledged that R.C. 2907.02(A)(1)(b) uses "plain language" and "makes clear" what is prohibited. *In re D.B.* at ¶ 30. A statute that is "plain" and "clear" cannot be unconstitutionally vague. *JDT* , 762 F.3d at 998-999 ("plain language" of statutory-rape statue "is not susceptible to the same discretionary determinations as those in *Kolender* and *Morales*."); *W.C.B.*, 855 N.E.2d at 1062 (rejecting vagueness challenge because "[t]he language of the statute makes it clear that it applies to 'a person' who commits the requisite act."); *In re John C.*, 569 A.2d at 1156 (rejecting claim that the defendant "had no notice" that statutory-rape statute could be applied to a minor because the "[s]tatutory language was clear on its face").

In re D.B.'s concern that two juveniles under 13 who engage in sexual conduct with each other are both in violation of R.C. 2907.02(A)(1)(b) stems not from any vagueness in the statute, but rather from the unavoidable reality that, in some circumstances, multiple individuals may violate a statute. But the fact that law enforcement officials must occasionally choose whom (if any) among multiple violators to prosecute does not invalidate a statute—especially where, as here, the statute itself is "plain" and "clear." While the void-for-vagueness doctrine seeks to prevent giving law enforcement complete discretion in deciding whether a statute is violated, it does not prohibit giving law enforcement discretion in deciding whom among multiple violators

to prosecute. After all, "enforcement requires the exercise of some degree of police judgment." *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972).

The Minnesota Supreme Court described the flaws in *In re D.B.*'s vagueness holding:

> The court [in *In re D.B.*] addressed neither why the charging decision was discriminatory nor, more fundamentally, how the statute was vague. Rather, the court apparently perceived discrimination and then inferred that the statute must have authorized or encouraged discriminatory enforcement and, therefore, was unconstitutionally vague.

In re Welfare of B.A.H., 845 N.W.2d at 164, n. 4.

B. The State has discretion to decide whom among multiple violators to charge.

The equal-protection holding in *In D.B.* is also flawed. On the one hand, *In re D.B.* states that R.C. 2907.02(A)(1)(b) "must be enforced equally and without regard to the particular circumstances of an individual's situation." *In re D.B.* at ¶ 30. On the other hand, the opinion states that two juveniles under 13 who engage in sexual conduct are "identically situated" and that "Equal Protection Clause's mandate that persons similarly circumstanced shall be treated alike." *Id*. It is impossible to conclude that two individuals are "identically situated" or "similarly circumstanced" without considering the "particular circumstances of an individual's situation." The "particular circumstances of an individual's situation" are what differentiate one individual from another and explain why, when two juveniles under13 engage in sexual conduct with each other, law enforcement may choose to charge one but not the other. And the "particular circumstances of an individual's situation" constitute more than just whether he or she meets the statutory elements of an offense.

Consider *In re D.B.* itself. According to the opinion, D.B. "always initiated" the sexual conduct with M.G. and "would either bargain with, or use physical force on, M.G. to convince M.G. to engage in sexual conduct." *Id.* at ¶ 5. D.B. "bribed" M.G. and "was substantially bigger

than other children his age." *Id*. at ¶¶ 5-6. These "particular circumstances" of D.B.'s and M.G.'s "situation[s]" show that the two juveniles were not "identically situated" or "similarly circumstanced" and justified charging D.B.—but not M.G.—with statutory rape.

Moreover, it is well-settled that "[i]n the ordinary case, 'so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.'" *United States v. Armstrong*, 517 U.S. 456, 464 (1996), quoting *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). To prove an equal protection violation, the defendant must show that the decision to prosecute was based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Armstrong*, 517 U.S. at 464, quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962). The defendant must establish a discriminatory effect and a discriminatory purpose based on the unjustifiable standard. *Armstrong*, 517 U.S. at 465.

Thus, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." *Oyler*, 368 U.S. at 456. "Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation so long as the selection was not deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Bordenkircher*, 434 U.S. at 364 (internal quotation marks and brackets omitted).

Prosecutors can rightly give "full consideration" to a "wide range of factors" in deciding whether to prosecute, beyond just the strength of the prosecution's case. *United States v. Lovasco*, 431 U.S. 783, 794 (1977). This far-ranging inquiry includes the decision to prosecute some offenders and not to prosecute others. The prosecutor's inquiry can include consideration of factors related to the offender's "culpability, as distinguished from his legal guilt." *Id*.

"Rather than deviating from elementary standards of 'fair play and decency,' a prosecutor abides by them if he refuses to seek indictments until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt." *Id.* at 795.

This Court in *In re D.B.* did not mention these well-settled principles. Indeed, this Court's equal-protection analysis "seems to preclude the exercise of discretion in charging and other prosecutorial decisions." *In re Welfare of B.A.H.*, 845 N.W.2d at 166, fn. 5. This Court erroneously stated that "the statute must be enforced equally." *In re D.B.* at ¶ 30. Prosecutors have broad discretion in making their charging decisions and need not charge every known offender. Conscious selectivity is allowed. This Court stated that the statute must be enforced "without regard to the particular circumstances of the individual's situation." *Id*. But a prosecutor's discretion extends beyond an assessment of the strength of the prosecution's case under the statutory elements and includes consideration of enforcement policies and the relative culpabilities of offenders. The facts revealed in the *In re D.B.* opinion confirm that the prosecutor was well within his discretion in charging D.B. and not M.G.

* * *

In the end, R.C. 2907.05(A)(4) is not unconstitutionally vague or violate equal protection as applied to D.S or other juveniles under 13. The statutory language provides fair warning as to what the law prohibits and confines law enforcement's discretion in determining what constitutes a violation. There is no proof in the present case that both D.S. and D.M. violated R.C. 2907.05(A)(4). But even in circumstances when two juveniles under 13 both satisfy the elements of the statute, law enforcement's decision to charge one and not the other does not make R.C. 2907.05(A)(4) unconstitutionally vague. And absent any proof of invidious

discrimination—and in the present case, there is no such proof—the decision to charge one but not the other does not violate Equal Protection.

CONCLUSION

For the foregoing reasons, the Tenth District's judgment should be affirmed.[1]

Respectfully submitted,

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[1] If this Court sua sponte contemplates a decision upon an issue not briefed, the State respectfully requests notice of that intention and requests an opportunity to brief the issue before this Court makes its decision. *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170 (1988).

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was served via electronic mail day, February 13, 2017, to the following:

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APPENDIX

Baldwin's Ohio Revised Code Annotated
Title XXI. Courts--Probate--Juvenile (Refs & Annos)
Chapter 2151. Juvenile Courts--General Provisions (Refs & Annos)
Construction; Definitions

R.C. § 2151.01

2151.01 Construction; purpose

Currentness

The sections in Chapter 2151. of the Revised Code, with the exception of those sections providing for the criminal prosecution of adults, shall be liberally interpreted and construed so as to effectuate the following purposes:

(A) To provide for the care, protection, and mental and physical development of children subject to Chapter 2151. of the Revised Code, whenever possible, in a family environment, separating the child from the child's parents only when necessary for the child's welfare or in the interests of public safety;

(B) To provide judicial procedures through which Chapters 2151. and 2152. of the Revised Code are executed and enforced, and in which the parties are assured of a fair hearing, and their constitutional and other legal rights are recognized and enforced.

CREDIT(S)

(2000 S 179, § 3, eff. 1-1-02; 1969 H 320, eff. 11-19-69)

R.C. § 2151.01, OH ST § 2151.01
Current through Files 157, 161 to 169 and 172 to 178 of the 131st General Assembly (2015-2016).

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Baldwin's Ohio Revised Code Annotated
Title XXI. Courts--Probate--Juvenile (Refs & Annos)
Chapter 2151. Juvenile Courts--General Provisions (Refs & Annos)
Hearing and Disposition

R.C. § 2151.356

2151.356 Criteria for sealing records; notice

Effective: September 19, 2014
Currentness

(A) The records of a case in which a person was adjudicated a delinquent child for committing a violation of section 2903.01, 2903.02, or 2907.02 of the Revised Code shall not be sealed under this section.

(B)(1) The juvenile court shall promptly order the immediate sealing of records pertaining to a juvenile in any of the following circumstances:

(a) If the court receives a record from a public office or agency under division (B)(2) of this section;

(b) If a person was brought before or referred to the court for allegedly committing a delinquent or unruly act and the case was resolved without the filing of a complaint against the person with respect to that act pursuant to section 2151.27 of the Revised Code;

(c) If a person was charged with violating division (E)(1) of section 4301.69 of the Revised Code and the person has successfully completed a diversion program under division (E)(2)(a) of section 4301.69 of the Revised Code with respect to that charge;

(d) If a complaint was filed against a person alleging that the person was a delinquent child, an unruly child, or a juvenile traffic offender and the court dismisses the complaint after a trial on the merits of the case or finds the person not to be a delinquent child, an unruly child, or a juvenile traffic offender;

(e) Notwithstanding division (C) of this section and subject to section 2151.358 of the Revised Code, if a person has been adjudicated an unruly child, that person has attained eighteen years of age, and the person is not under the jurisdiction of the court in relation to a complaint alleging the person to be a delinquent child.

(2) The appropriate public office or agency shall immediately deliver all original records at that public office or agency pertaining to a juvenile to the court, if the person was arrested or taken into custody for allegedly committing a delinquent or unruly act, no complaint was filed against the person with respect to the commission of the act pursuant to section 2151.27 of the Revised Code, and the person was not brought before or referred to the court for the commission of the act. The records delivered to the court as required under this division shall not include fingerprints, DNA specimens, and DNA records described under division (A)(3) of section 2151.357 of the Revised Code.

(C)(1) The juvenile court shall consider the sealing of records pertaining to a juvenile upon the court's own motion or upon the application of a person if the person has been adjudicated a delinquent child for committing an act other than a violation of section 2903.01, 2903.02, or 2907.02 of the Revised Code, an unruly child, or a juvenile traffic offender and if, at the time of the motion or application, the person is not under the jurisdiction of the court in relation to a complaint alleging the person to be a delinquent child. The court shall not require a fee for the filing of the application. The motion or application may be made on or after the time specified in whichever of the following is applicable:

(a) If the person is under eighteen years of age, at any time after six months after any of the following events occur:

(i) The termination of any order made by the court in relation to the adjudication;

(ii) The unconditional discharge of the person from the department of youth services with respect to a dispositional order made in relation to the adjudication or from an institution or facility to which the person was committed pursuant to a dispositional order made in relation to the adjudication;

(iii) The court enters an order under section 2152.84 or 2152.85 of the Revised Code that contains a determination that the child is no longer a juvenile offender registrant.

(b) If the person is eighteen years of age or older, at any time after the later of the following:

(i) The person's attainment of eighteen years of age;

(ii) The occurrence of any event identified in divisions (C)(1)(a)(i) to (iii) of this section.

(2) In making the determination whether to seal records pursuant to division (C)(1) of this section, all of the following apply:

(a) The court may require a person filing an application under division (C)(1) of this section to submit any relevant documentation to support the application.

(b) The court may cause an investigation to be made to determine if the person who is the subject of the proceedings has been rehabilitated to a satisfactory degree.

(c) The court shall promptly notify the prosecuting attorney of any proceedings to seal records initiated pursuant to division (C)(1) of this section.

(d)(i) The prosecuting attorney may file a response with the court within thirty days of receiving notice of the sealing proceedings.

(ii) If the prosecuting attorney does not file a response with the court or if the prosecuting attorney files a response but indicates that the prosecuting attorney does not object to the sealing of the records, the court may order the records of the person that are under consideration to be sealed without conducting a hearing on the motion or application. If the court decides in its discretion to conduct a hearing on the motion or application, the court shall conduct the hearing within thirty days after making that decision and shall give notice, by regular mail, of the date, time, and location of the hearing to the prosecuting attorney and to the person who is the subject of the records under consideration.

(iii) If the prosecuting attorney files a response with the court that indicates that the prosecuting attorney objects to the sealing of the records, the court shall conduct a hearing on the motion or application within thirty days after the court receives the response. The court shall give notice, by regular mail, of the date, time, and location of the hearing to the prosecuting attorney and to the person who is the subject of the records under consideration.

(e) After conducting a hearing in accordance with division (C)(2)(d) of this section or after due consideration when a hearing is not conducted, except as provided in division (B)(1)(c) of this section, the court may order the records of the person that are the subject of the motion or application to be sealed if it finds that the person has been rehabilitated to a satisfactory degree. In determining whether the person has been rehabilitated to a satisfactory degree, the court may consider all of the following:

(i) The age of the person;

(ii) The nature of the case;

(iii) The cessation or continuation of delinquent, unruly, or criminal behavior;

(iv) The education and employment history of the person;

(v) The granting of a new tier classification or declassification from the juvenile offender registry pursuant to section 2152.85 of the Revised Code, except for public registry-qualified juvenile offender registrants;

(vi) Any other circumstances that may relate to the rehabilitation of the person who is the subject of the records under consideration.

(D)(1)(a) The juvenile court shall provide verbal notice to a person whose records are sealed under division (B) of this section, if that person is present in the court at the time the court issues a sealing order, that explains what sealing a record means, states that the person may apply to have those records expunged under section 2151.358 of the Revised Code, and explains what expunging a record means.

(b) The juvenile court shall provide written notice to a person whose records are sealed under division (B) of this section by regular mail to the person's last known address, if that person is not present in the court at the time the court issues a sealing order and if the court does not seal the person's record upon the court's own motion, that explains what sealing

a record means, states that the person may apply to have those records expunged under section 2151.358 of the Revised Code, and explains what expunging a record means.

(2) Upon final disposition of a case in which a person has been adjudicated a delinquent child for committing an act other than a violation of section 2903.01, 2903.02, or 2907.02 of the Revised Code, an unruly child, or a juvenile traffic offender, the juvenile court shall provide written notice to the person that does all of the following:

(a) States that the person may apply to the court for an order to seal the record;

(b) Explains what sealing a record means;

(c) States that the person may apply to the court for an order to expunge the record under section 2151.358 of the Revised Code;

(d) Explains what expunging a record means.

(3) The department of youth services and any other institution or facility that unconditionally discharges a person who has been adjudicated a delinquent child, an unruly child, or a juvenile traffic offender shall immediately give notice of the discharge to the court that committed the person. The court shall note the date of discharge on a separate record of discharges of those natures.

CREDIT(S)

(2014 S 143, eff. 9-19-14; 2012 S 337, eff. 9-28-12; 2006 H 137, eff. 10-9-06)

R.C. § 2151.356, OH ST § 2151.356
Current through Files 157, 161 to 169 and 172 to 178 of the 131st General Assembly (2015-2016).

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Title XXI. Courts--Probate--Juvenile (Refs & Annos)
Chapter 2151. Juvenile Courts--General Provisions (Refs & Annos)
Hearing and Disposition

R.C. § 2151.358

2151.358 Expungement of sealed records

Effective: June 27, 2012
Currentness

(A) The juvenile court shall expunge all records sealed under section 2151.356 of the Revised Code five years after the court issues a sealing order or upon the twenty-third birthday of the person who is the subject of the sealing order, whichever date is earlier.

(B) Notwithstanding division (A) of this section, upon application by the person who has had a record sealed under section 2151.356 of the Revised Code, the juvenile court may expunge a record sealed under section 2151.356 of the Revised Code. In making the determination whether to expunge records, all of the following apply:

(1) The court may require a person filing an application for expungement to submit any relevant documentation to support the application.

(2) The court may cause an investigation to be made to determine if the person who is the subject of the proceedings has been rehabilitated to a satisfactory degree.

(3) The court shall promptly notify the prosecuting attorney of any proceedings to expunge records.

(4)(a) The prosecuting attorney may file a response with the court within thirty days of receiving notice of the expungement proceedings.

(b) If the prosecuting attorney does not file a response with the court or if the prosecuting attorney files a response but indicates that the prosecuting attorney does not object to the expungement of the records, the court may order the records of the person that are under consideration to be expunged without conducting a hearing on the application. If the court decides in its discretion to conduct a hearing on the application, the court shall conduct the hearing within thirty days after making that decision and shall give notice, by regular mail, of the date, time, and location of the hearing to the prosecuting attorney and to the person who is the subject of the records under consideration.

(c) If the prosecuting attorney files a response with the court that indicates that the prosecuting attorney objects to the expungement of the records, the court shall conduct a hearing on the application within thirty days after the court receives the response. The court shall give notice, by regular mail, of the date, time, and location of the hearing to the prosecuting attorney and to the person who is the subject of the records under consideration.

(5) After conducting a hearing in accordance with division (B)(4) of this section or after due consideration when a hearing is not conducted, the court may order the records of the person that are the subject of the application to be expunged if it finds that the person has been rehabilitated to a satisfactory degree. In determining whether the person has been rehabilitated to a satisfactory degree, the court may consider all of the following:

(a) The age of the person;

(b) The nature of the case;

(c) The cessation or continuation of delinquent, unruly, or criminal behavior;

(d) The education and employment history of the person;

(e) Any other circumstances that may relate to the rehabilitation of the person who is the subject of the records under consideration.

(C) If the juvenile court is notified by any party in a civil action that a civil action has been filed based on a case the records for which are the subject of a sealing order, the juvenile court shall not expunge a record sealed under section 2151.356 of the Revised Code until the civil action has been resolved and is not subject to further appellate review, at which time the records shall be expunged pursuant to division (A) of this section.

(D)(1) A juvenile court that issues a protection order or approves a consent agreement under section 2151.34 or 3113.31 of the Revised Code shall automatically seal all of the records of the proceeding in which the order was issued or agreement approved on the date the person against whom the protection order was issued or the consent agreement approved attains the age of nineteen years if the court determines that the person has complied with all of the terms of the protection order or consent agreement.

(2) In a proceeding under section 2151.34 of the Revised Code, if the juvenile court does not issue any protection order under division (E) of that section, the court shall automatically seal all of the records in that proceeding. In a proceeding under section 3113.31 of the Revised Code, if the juvenile court does not issue any protection order or approve any consent agreement under division (E) of that section, the court shall automatically seal all of the records in that proceeding.

(3)(a) If a juvenile court that issues a protection order or approves a consent agreement under section 2151.34 or 3113.31 of the Revised Code determines that the person against whom the protection order was issued or the consent agreement approved has not complied with all of the terms of the protection order or consent agreement, the court shall consider sealing all of the records of the proceeding in which the order was issued or agreement approved upon the court's own motion or upon the application of a person. The court may make the motion or the person who is the subject of the records under consideration may apply for an order sealing the records of the proceeding at any time after two years after the expiration of the protection order or consent agreement.

(b) In making a determination whether to seal records pursuant to division (D)(3) of this section, all of the following apply:

(i) The court may require a person filing an application under division (D)(3) of this section to submit any relevant documentation to support the application.

(ii) The court shall promptly notify the victim or the victim's attorney of any proceedings to seal records initiated pursuant to division (D)(3) of this section.

(iii) The victim or the victim's attorney may file a response with the court within thirty days of receiving notice of the sealing proceedings.

If the victim or the victim's attorney does not file a response with the court or if the victim or the victim's attorney files a response but indicates that the victim or the victim's attorney does not object to the sealing of the records, the court may order the records of the person that are under consideration to be sealed without conducting a hearing on the motion or application. If the court decides in its discretion to conduct a hearing on the motion or application, the court shall conduct the hearing within thirty days after making that decision and shall give notice, by regular mail, of the date, time, and location of the hearing to the victim or the victim's attorney and to the person who is the subject of the records under consideration.

If the victim or the victim's attorney files a response with the court that indicates that the victim or the victim's attorney objects to the sealing of the records, the court shall conduct a hearing on the motion or application within thirty days after the court receives the response. The court shall give notice, by regular mail, of the date, time, and location of the hearing to the victim or the victim's attorney and to the person who is the subject of the records under consideration.

(iv) After conducting a hearing in accordance with division (D)(3)(b)(iii) of this section or after due consideration when a hearing is not conducted, the court may order the records of the person that are the subject of the motion or application to be sealed.

(4) Inspection of the records sealed pursuant to division (D)(1), (2), or (3) of this section may be made only by the following persons or for the following purposes:

(a) By a law enforcement officer or prosecutor, or the assistants of either, to determine whether the nature and character of the offense with which a person is to be charged would be affected by virtue of the person's previously having been convicted of a crime;

(b) By the parole or probation officer of the person who is the subject of the records, for the exclusive use of the officer in supervising the person while on parole or under a community control sanction or a post-release control sanction, and in making inquiries and written reports as requested by the court or adult parole authority;

(c) Upon application by the person who is the subject of the records, by the persons named in the application;

(d) By a law enforcement officer who was involved in the case, for use in the officer's defense of a civil action arising out of the officer's involvement in that case;

(e) By a prosecuting attorney or the prosecuting attorney's assistants, to determine a defendant's eligibility to enter a pre-trial diversion program established pursuant to section 2935.36 of the Revised Code;

(f) By any law enforcement agency or any authorized employee of a law enforcement agency or by the department of rehabilitation and correction as part of a background investigation of a person who applies for employment with the agency as a law enforcement officer or with the department as a corrections officer;

(g) By any law enforcement agency or any authorized employee of a law enforcement agency, for the purposes set forth in, and in the manner provided in, section 2953.321 of the Revised Code;

(h) By the bureau of criminal identification and investigation or any authorized employee of the bureau for the purpose of providing information to a board or person pursuant to division (F) or (G) of section 109.57 of the Revised Code;

(i) By the bureau of criminal identification and investigation or any authorized employee of the bureau for the purpose of performing a criminal history records check on a person to whom a certificate as prescribed in section 109.77 of the Revised Code is to be awarded;

(j) By the bureau of criminal identification and investigation or any authorized employee of the bureau for the purpose of conducting a criminal records check of an individual pursuant to division (B) of section 109.572 of the Revised Code that was requested pursuant to any of the sections identified in division (B)(1) of that section;

(k) By the bureau of criminal identification and investigation, an authorized employee of the bureau, a sheriff, or an authorized employee of a sheriff in connection with a criminal records check described in section 311.41 of the Revised Code;

(l) By the attorney general or an authorized employee of the attorney general or a court for purposes of determining a person's classification pursuant to Chapter 2950. of the Revised Code.

When the nature and character of the offense with which a person is to be charged would be affected by the information, it may be used for the purpose of charging the person with an offense.

(E) In addition to the methods of expungement provided for in divisions (A) and (B) of this section, a person who has been adjudicated a delinquent child for having committed an act that would be a violation of section 2907.24, 2907.241, or 2907.25 of the Revised Code if the child were an adult may apply to the adjudicating court for the expungement of the record of adjudication if the person's participation in the act was a result of the person having been a victim of human trafficking. The application shall be made in the same manner as an application for expungement under section 2953. 38 of the Revised Code, and all of the provisions of that section shall apply to the expungement procedure.

(F) After the records have been expunged under this section, the person who is the subject of the expunged records properly may, and the court shall, reply that no record exists with respect to the person upon any inquiry in the matter.

CREDIT(S)

(2012 H 262, eff. 6-27-12; 2010 H 10, eff. 6-17-10; 2006 H 137, eff. 10-9-06)

R.C. § 2151.358, OH ST § 2151.358
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Title XXI. Courts--Probate--Juvenile (Refs & Annos)
Chapter 2152. Juvenile Courts--Criminal Provisions (Refs & Annos)
General Provisions (Refs & Annos)

R.C. § 2152.01

2152.01 Purposes; applicability of law

Currentness

(A) The overriding purposes for dispositions under this chapter are to provide for the care, protection, and mental and physical development of children subject to this chapter, protect the public interest and safety, hold the offender accountable for the offender's actions, restore the victim, and rehabilitate the offender. These purposes shall be achieved by a system of graduated sanctions and services.

(B) Dispositions under this chapter shall be reasonably calculated to achieve the overriding purposes set forth in this section, commensurate with and not demeaning to the seriousness of the delinquent child's or the juvenile traffic offender's conduct and its impact on the victim, and consistent with dispositions for similar acts committed by similar delinquent children and juvenile traffic offenders. The court shall not base the disposition on the race, ethnic background, gender, or religion of the delinquent child or juvenile traffic offender.

(C) To the extent they do not conflict with this chapter, the provisions of Chapter 2151. of the Revised Code apply to the proceedings under this chapter.

CREDIT(S)
(2000 S 179, § 3, eff. 1-1-02)

R.C. § 2152.01, OH ST § 2152.01
Current through Files 157, 161 to 169 and 172 to 178 of the 131st General Assembly (2015-2016).

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General Provisions (Refs & Annos)

R.C. § 2152.021

2152.021 Complaint; indictment; hearing on whether to hold complaint in abeyance pending diversion

Effective: June 27, 2012 to April 5, 2017
Currentness

<This section effective until 4-6-17. See, also, section 2152.021 effective 4-6-17.>

(A)(1) Subject to division (A)(2) of this section, any person having knowledge of a child who appears to be a juvenile traffic offender or to be a delinquent child may file a sworn complaint with respect to that child in the juvenile court of the county in which the child has a residence or legal settlement or in which the traffic offense or delinquent act allegedly occurred. The sworn complaint may be upon information and belief, and, in addition to the allegation that the child is a delinquent child or a juvenile traffic offender, the complaint shall allege the particular facts upon which the allegation that the child is a delinquent child or a juvenile traffic offender is based.

If a child appears to be a delinquent child who is eligible for a serious youthful offender dispositional sentence under section 2152.11 of the Revised Code and if the prosecuting attorney desires to seek a serious youthful offender dispositional sentence under section 2152.13 of the Revised Code in regard to the child, the prosecuting attorney of the county in which the alleged delinquency occurs may initiate a case in the juvenile court of the county by presenting the case to a grand jury for indictment, by charging the child in a bill of information as a serious youthful offender pursuant to section 2152.13 of the Revised Code, by requesting a serious youthful offender dispositional sentence in the original complaint alleging that the child is a delinquent child, or by filing with the juvenile court a written notice of intent to seek a serious youthful offender dispositional sentence. This paragraph does not apply regarding the imposition of a serious youthful offender dispositional sentence pursuant to section 2152.121 of the Revised Code.

(2) Any person having knowledge of a child who appears to be a delinquent child for being an habitual or chronic truant may file a sworn complaint with respect to that child, or with respect to that child and the parent, guardian, or other person having care of the child, in the juvenile court of the county in which the child has a residence or legal settlement or in which the child is supposed to attend public school. The sworn complaint may be upon information and belief and shall allege that the child is a delinquent child for being a chronic truant or an habitual truant who previously has been adjudicated an unruly child for being a habitual truant and, in addition, the particular facts upon which that allegation is based. If the complaint contains allegations regarding the child's parent, guardian, or other person having care of the child, the complaint additionally shall allege that the parent, guardian, or other person having care of the child has failed to cause the child's attendance at school in violation of section 3321.38 of the Revised Code and, in addition, the particular facts upon which that allegation is based.

(B) Any person with standing under applicable law may file a complaint for the determination of any other matter over which the juvenile court is given jurisdiction by section 2151.23 of the Revised Code. The complaint shall be filed in the county in which the child who is the subject of the complaint is found or was last known to be found.

(C) Within ten days after the filing of a complaint or the issuance of an indictment, the court shall give written notice of the filing of the complaint or the issuance of an indictment and of the substance of the complaint or indictment to the superintendent of a city, local, exempted village, or joint vocational school district if the complaint or indictment alleges that a child committed an act that would be a criminal offense if committed by an adult, that the child was sixteen years of age or older at the time of the commission of the alleged act, and that the alleged act is any of the following:

(1) A violation of section 2923.122 of the Revised Code that relates to property owned or controlled by, or to an activity held under the auspices of, the board of education of that school district;

(2) A violation of section 2923.12 of the Revised Code, of a substantially similar municipal ordinance, or of section 2925.03 of the Revised Code that was committed on property owned or controlled by, or at an activity held under the auspices of, the board of education of that school district;

(3) A violation of section 2925.11 of the Revised Code that was committed on property owned or controlled by, or at an activity held under the auspices of, the board of education of that school district, other than a violation of that section that would be a minor drug possession offense if committed by an adult;

(4) A violation of section 2903.01, 2903.02, 2903.03, 2903.04, 2903.11, 2903.12, 2907.02, or 2907.05 of the Revised Code, or a violation of former section 2907.12 of the Revised Code, that was committed on property owned or controlled by, or at an activity held under the auspices of, the board of education of that school district, if the victim at the time of the commission of the alleged act was an employee of the board of education of that school district;

(5) Complicity in any violation described in division (C)(1), (2), (3), or (4) of this section that was alleged to have been committed in the manner described in division (C)(1), (2), (3), or (4) of this section, regardless of whether the act of complicity was committed on property owned or controlled by, or at an activity held under the auspices of, the board of education of that school district.

(D) A public children services agency, acting pursuant to a complaint or an action on a complaint filed under this section, is not subject to the requirements of section 3127.23 of the Revised Code.

(E) For purposes of the record to be maintained by the clerk under division (B) of section 2152.71 of the Revised Code, when a complaint is filed that alleges that a child is a delinquent child, the court shall determine if the victim of the alleged delinquent act was sixty-five years of age or older or permanently and totally disabled at the time of the alleged commission of the act.

(F)(1) At any time after the filing of a complaint alleging that a child is a delinquent child and before adjudication, the court may hold a hearing to determine whether to hold the complaint in abeyance pending the child's successful completion of actions that constitute a method to divert the child from the juvenile court system if the child agrees to the hearing and either of the following applies:

(a) The act charged would be a violation of section 2907.24, 2907.241, or 2907.25 of the Revised Code if the child were an adult.

(b) The court has reason to believe that the child is a victim of a violation of section 2905.32 of the Revised Code, regardless of whether any person has been convicted of a violation of that section or of any other section for victimizing the child, and the act charged is related to the child's victimization.

(2) The prosecuting attorney has the right to participate in any hearing held under division (F)(1) of this section, to object to holding the complaint that is the subject of the hearing in abeyance, and to make recommendations related to diversion actions. No statement made by a child at a hearing held under division (F)(1) of this section is admissible in any subsequent proceeding against the child.

(3) If either division (F)(1)(a) or (b) of this section applies, the court shall promptly appoint a guardian ad litem for the child. The court shall not appoint the child's attorney as guardian ad litem. If the court decides to hold the complaint in abeyance, the guardian ad litem shall make recommendations that are in the best interest of the child to the court.

(4) If after a hearing the court decides to hold the complaint in abeyance, the court may make any orders regarding placement, services, supervision, diversion actions, and conditions of abeyance, including, but not limited to, engagement in trauma-based behavioral health services or education activities, that the court considers appropriate and in the best interest of the child. The court may hold the complaint in abeyance for up to ninety days while the child engages in diversion actions. If the child violates the conditions of abeyance or does not complete the diversion actions to the court's satisfaction within ninety days, the court may extend the period of abeyance for not more than two additional ninety-day periods.

(5) If the court holds the complaint in abeyance and the child complies with the conditions of abeyance and completes the diversion actions to the court's satisfaction, the court shall dismiss the complaint and order that the records pertaining to the case be expunged immediately. If the child fails to complete the diversion actions to the court's satisfaction, the court shall proceed upon the complaint.

CREDIT(S)

(2012 H 262, eff. 6-27-12; 2011 H 86, eff. 9-30-11; 2004 S 185, eff. 4-11-05; 2000 S 179, § 3, eff. 1-1-02)

R.C. § 2152.021, OH ST § 2152.021
Current through Files 157, 161 to 169 and 172 to 178 of the 131st General Assembly (2015-2016).

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Chapter 2152. Juvenile Courts--Criminal Provisions (Refs & Annos)
Dispositional Orders

R.C. § 2152.13

2152.13 Serious youthful offender dispositional sentence

Effective: September 30, 2011
Currentness

(A) A juvenile court shall impose a serious youthful dispositional sentence on a child when required under division (B)(3) of section 2152.121 of the Revised Code. In such a case, the remaining provisions of this division and divisions (B) and (C) do not apply to the child, and the court shall impose the mandatory serious youthful dispositional sentence under division (D)(1) of this section.

In all other cases, a juvenile court may impose a serious youthful offender dispositional sentence on a child only if the prosecuting attorney of the county in which the delinquent act allegedly occurred initiates the process against the child in accordance with this division, and the child is an alleged delinquent child who is eligible for the dispositional sentence. The prosecuting attorney may initiate the process in any of the following ways:

(1) Obtaining an indictment of the child as a serious youthful offender;

(2) The child waives the right to indictment, charging the child in a bill of information as a serious youthful offender;

(3) Until an indictment or information is obtained, requesting a serious youthful offender dispositional sentence in the original complaint alleging that the child is a delinquent child;

(4) Until an indictment or information is obtained, if the original complaint does not request a serious youthful offender dispositional sentence, filing with the juvenile court a written notice of intent to seek a serious youthful offender dispositional sentence within twenty days after the later of the following, unless the time is extended by the juvenile court for good cause shown:

(a) The date of the child's first juvenile court hearing regarding the complaint;

(b) The date the juvenile court determines not to transfer the case under section 2152.12 of the Revised Code.

After a written notice is filed under division (A)(4) of this section, the juvenile court shall serve a copy of the notice on the child and advise the child of the prosecuting attorney's intent to seek a serious youthful offender dispositional sentence in the case.

(B) If an alleged delinquent child is not indicted or charged by information as described in division (A)(1) or (2) of this section and if a notice or complaint as described in division (A)(3) or (4) of this section indicates that the prosecuting attorney intends to pursue a serious youthful offender dispositional sentence in the case, the juvenile court shall hold a preliminary hearing to determine if there is probable cause that the child committed the act charged and is by age eligible for, or required to receive, a serious youthful offender dispositional sentence.

(C)(1) A child for whom a serious youthful offender dispositional sentence is sought by a prosecuting attorney has the right to a grand jury determination of probable cause that the child committed the act charged and that the child is eligible by age for a serious youthful offender dispositional sentence. The grand jury may be impaneled by the court of common pleas or the juvenile court.

Once a child is indicted, or charged by information or the juvenile court determines that the child is eligible for a serious youthful offender dispositional sentence, the child is entitled to an open and speedy trial by jury in juvenile court and to be provided with a transcript of the proceedings. The time within which the trial is to be held under Title XXIX of the Revised Code commences on whichever of the following dates is applicable:

(a) If the child is indicted or charged by information, on the date of the filing of the indictment or information.

(b) If the child is charged by an original complaint that requests a serious youthful offender dispositional sentence, on the date of the filing of the complaint.

(c) If the child is not charged by an original complaint that requests a serious youthful offender dispositional sentence, on the date that the prosecuting attorney files the written notice of intent to seek a serious youthful offender dispositional sentence.

(2) If the child is detained awaiting adjudication, upon indictment or being charged by information, the child has the same right to bail as an adult charged with the offense the alleged delinquent act would be if committed by an adult. Except as provided in division (D) of section 2152.14 of the Revised Code, all provisions of Title XXIX of the Revised Code and the Criminal Rules shall apply in the case and to the child. The juvenile court shall afford the child all rights afforded a person who is prosecuted for committing a crime including the right to counsel and the right to raise the issue of competency. The child may not waive the right to counsel.

(D)(1) If a child is adjudicated a delinquent child for committing an act under circumstances that require the juvenile court to impose upon the child a serious youthful offender dispositional sentence under section 2152.11 of the Revised Code, all of the following apply:

(a) The juvenile court shall impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.

(b) The juvenile court also shall impose upon the child one or more traditional juvenile dispositions under sections 2152.16, 2152.19, and 2152.20, and, if applicable, section 2152.17 of the Revised Code.

(c) The juvenile court shall stay the adult portion of the serious youthful offender dispositional sentence pending the successful completion of the traditional juvenile dispositions imposed.

(2)(a) If a child is adjudicated a delinquent child for committing an act under circumstances that allow, but do not require, the juvenile court to impose on the child a serious youthful offender dispositional sentence under section 2152.11 of the Revised Code, all of the following apply:

(i) If the juvenile court on the record makes a finding that, given the nature and circumstances of the violation and the history of the child, the length of time, level of security, and types of programming and resources available in the juvenile system alone are not adequate to provide the juvenile court with a reasonable expectation that the purposes set forth in section 2152.01 of the Revised Code will be met, the juvenile court may impose upon the child a sentence available for the violation, as if the child were an adult, under Chapter 2929. of the Revised Code, except that the juvenile court shall not impose on the child a sentence of death or life imprisonment without parole.

(ii) If a sentence is imposed under division (D)(2)(a)(i) of this section, the juvenile court also shall impose upon the child one or more traditional juvenile dispositions under sections 2152.16, 2152.19, and 2152.20 and, if applicable, section 2152.17 of the Revised Code.

(iii) The juvenile court shall stay the adult portion of the serious youthful offender dispositional sentence pending the successful completion of the traditional juvenile dispositions imposed.

(b) If the juvenile court does not find that a sentence should be imposed under division (D)(2)(a)(i) of this section, the juvenile court may impose one or more traditional juvenile dispositions under sections 2152.16, 2152.19, 2152.20, and, if applicable, section 2152.17 of the Revised Code.

(3) A child upon whom a serious youthful offender dispositional sentence is imposed under division (D)(1) or (2) of this section has a right to appeal under division (A)(1), (3), (4), or (5) of section 2953.08 of the Revised Code the adult portion of the serious youthful offender dispositional sentence when any of those divisions apply. The child may appeal the adult portion, and the court shall consider the appeal as if the adult portion were not stayed.

CREDIT(S)

(2011 H 86, eff. 9-30-11; 2002 H 393, eff. 7-5-02; 2000 S 179, § 3, eff. 1-1-02)

R.C. § 2152.13, OH ST § 2152.13
Current through Files 157, 161 to 169 and 172 to 178 of the 131st General Assembly (2015-2016).

End of Document

Baldwin's Ohio Revised Code Annotated
Title XXI. Courts--Probate--Juvenile (Refs & Annos)
Chapter 2152. Juvenile Courts--Criminal Provisions (Refs & Annos)
Dispositional Orders

R.C. § 2152.191

2152.191 Application of certain sections of Revised Code to child adjudicated a delinquent child for committing sexually oriented offense

Effective: January 1, 2008
Currentness

If a child is adjudicated a delinquent child for committing a sexually oriented offense or a child-victim oriented offense, if the child is fourteen years of age or older at the time of committing the offense, and if the child committed the offense on or after January 1, 2002, both of the following apply:

(A) Sections 2152.82 to 2152.86 and Chapter 2950. of the Revised Code apply to the child and the adjudication.

(B) In addition to any order of disposition it makes of the child under this chapter, the court may make any determination, adjudication, or order authorized under sections 2152.82 to 2152.86 and Chapter 2950. of the Revised Code and shall make any determination, adjudication, or order required under those sections and that chapter.

CREDIT(S)
(2007 S 10, eff. 1-1-08; 2003 S 5, eff. 7-31-03; 2001 S 3, eff. 1-1-02)

R.C. § 2152.191, OH ST § 2152.191
Current through Files 157, 161 to 169 and 172 to 178 of the 131st General Assembly (2015-2016).

End of Document

Baldwin's Ohio Revised Code Annotated
Title XXI. Courts--Probate--Juvenile (Refs & Annos)
Chapter 2152. Juvenile Courts--Criminal Provisions (Refs & Annos)
Juvenile Offender Registrants

R.C. § 2152.82

2152.82 Juvenile offender registrant

Effective: January 1, 2008
Currentness

(A) The court that adjudicates a child a delinquent child shall issue as part of the dispositional order an order that classifies the child a juvenile offender registrant and specifies that the child has a duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code if all of the following apply:

(1) The act for which the child is adjudicated a delinquent child is a sexually oriented offense or a child-victim oriented offense that the child committed on or after January 1, 2002.

(2) The child was fourteen, fifteen, sixteen, or seventeen years of age at the time of committing the offense.

(3) The court has determined that the child previously was adjudicated a delinquent child for committing any sexually oriented offense or child-victim oriented offense, regardless of when the prior offense was committed and regardless of the child's age at the time of committing the offense.

(4) The court is not required to classify the child as both a juvenile offender registrant and a public registry-qualified juvenile offender registrant under section 2152.86 of the Revised Code.

(B) An order required under division (A) of this section shall be issued at the time the judge makes the order of disposition for the delinquent child. Prior to issuing the order required by division (A) of this section, the judge shall conduct a hearing under section 2152.831 of the Revised Code to determine whether the child is 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. If the court determines that the delinquent child to whom the order applies is a tier III sex offender/child-victim offender and the child is not a public registry-qualified juvenile offender registrant, the judge may impose a requirement subjecting the child to the victim and community notification provisions of sections 2950.10 and 2950.11 of the Revised Code. When a judge issues an order under division (A) of this section, all of the following apply:

(1) The judge shall include in the order a statement that, upon completion of the disposition of the delinquent child that was made for the sexually oriented offense or child-victim oriented offense upon which the order is based, a hearing will be conducted, and the order and any determinations included in the order are subject to modification or termination pursuant to sections 2152.84 and 2152.85 of the Revised Code.

(2) The judge shall provide to the delinquent child and to the delinquent child's parent, guardian, or custodian the notice required under divisions (A) and (B) of section 2950.03 of the Revised Code and shall provide as part of that notice a copy of the order.

(3) The judge shall include the order in the delinquent child's dispositional order and shall specify in the dispositional order that the order issued under division (A) of this section was made pursuant to this section.

(4) If the court determines that the delinquent child to whom the order applies is a tier III sex offender/child-victim offender, if the child is not a public registry-qualified juvenile offender registrant, and if the judge imposes a requirement subjecting the child to the victim and community notification provisions of sections 2950.10 and 2950.11 of the Revised Code, the judge shall include the requirement in the order.

(5) The court shall include in the order its determination made at the hearing held under section 2151.831 of the Revised Code as to whether the delinquent child is 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.

(C) Except as provided in division (D) of this section, an order issued under division (A) of this section and any determinations included in the order shall remain in effect for the period of time specified in section 2950.07 of the Revised Code, subject to a modification or termination of the order under section 2152.84 or 2152.85 of the Revised Code, and section 2152.851 of the Revised Code applies regarding the order and the determinations. If an order is issued under division (A) of this section, the child's attainment of eighteen or twenty-one years of age does not affect or terminate the order, and the order remains in effect for the period of time described in this division.

(D) If a court issues an order under division (A) of this section before January 1, 2008, not later than February 1, 2008, the court shall terminate the order and issue a new order that reclassifies the child as both a juvenile offender registrant and a public registry-qualified juvenile offender registrant pursuant to section 2152.86 of the Revised Code if the court imposed on the child a serious youthful offender dispositional sentence under section 2152.13 of the Revised Code and if the act that was the basis of the classification of the delinquent child as a juvenile offender registrant and is the basis of the serious youthful offender dispositional sentence is any of the following:

(1) Committing, attempting to commit, conspiring to commit, or complicity in committing a violation of section 2907.02 of the Revised Code, division (B) of section 2907.05 of the Revised Code, or section 2907.03 of the Revised Code if the victim of the violation was less than twelve years of age;

(2) Committing, attempting to commit, conspiring to commit, or complicity in committing a violation of section 2903.01, 2903.02, or 2905.01 of the Revised Code that was committed with a purpose to gratify the sexual needs or desires of the child.

CREDIT(S)

(2007 S 10, eff. 1-1-08; 2003 S 5, eff. 7-31-03; 2002 H 393, eff. 7-5-02; 2001 S 3, eff. 1-1-02)

R.C. § 2152.82, OH ST § 2152.82
Current through Files 157, 161 to 169 and 172 to 178 of the 131st General Assembly (2015-2016).

End of Document

Baldwin's Ohio Revised Code Annotated
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2907. Sex Offenses (Refs & Annos)
Sexual Assaults

R.C. § 2907.04

2907.04 Unlawful sexual conduct with a minor

Currentness

(A) No person who is eighteen years of age or older shall engage in sexual conduct with another, who is not the spouse of the offender, when the offender knows the other person is thirteen years of age or older but less than sixteen years of age, or the offender is reckless in that regard.

(B) Whoever violates this section is guilty of unlawful sexual conduct with a minor.

(1) Except as otherwise provided in divisions (B)(2), (3), and (4) of this section, unlawful sexual conduct with a minor is a felony of the fourth degree.

(2) Except as otherwise provided in division (B)(4) of this section, if the offender is less than four years older than the other person, unlawful sexual conduct with a minor is a misdemeanor of the first degree.

(3) Except as otherwise provided in division (B)(4) of this section, if the offender is ten or more years older than the other person, unlawful sexual conduct with a minor is a felony of the third degree.

(4) If the offender previously has 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, unlawful sexual conduct with a minor is a felony of the second degree.

CREDIT(S)

(2000 H 442, eff. 10-17-00; 1995 S 2, eff. 7-1-96; 1990 H 44, eff. 7-24-90; 1972 H 511)

R.C. § 2907.04, OH ST § 2907.04
Current through Files 157, 161 to 169 and 172 to 178 of the 131st General Assembly (2015-2016).

End of Document

Baldwin's Ohio Revised Code Annotated
Title XXIX. Crimes--Procedure (Refs & Annos)
Chapter 2907. Sex Offenses (Refs & Annos)
Obscenity

R.C. § 2907.31

2907.31 Disseminating matter harmful to juveniles

Currentness

(A) No person, with knowledge of its character or content, shall recklessly do any of the following:

(1) Directly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles any material or performance that is obscene or harmful to juveniles;

(2) Directly offer or agree to sell, deliver, furnish, disseminate, provide, exhibit, rent, or present to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles any material or performance that is obscene or harmful to juveniles;

(3) While in the physical proximity of the juvenile or law enforcement officer posing as a juvenile, allow any juvenile or law enforcement officer posing as a juvenile to review or peruse any material or view any live performance that is harmful to juveniles.

(B) The following are affirmative defenses to a charge under this section that involves material or a performance that is harmful to juveniles but not obscene:

(1) The defendant is the parent, guardian, or spouse of the juvenile involved.

(2) The juvenile involved, at the time of the conduct in question, was accompanied by the juvenile's parent or guardian who, with knowledge of its character, consented to the material or performance being furnished or presented to the juvenile.

(3) The juvenile exhibited to the defendant or to the defendant's agent or employee a draft card, driver's license, birth record, marriage license, or other official or apparently official document purporting to show that the juvenile was eighteen years of age or over or married, and the person to whom that document was exhibited did not otherwise have reasonable cause to believe that the juvenile was under the age of eighteen and unmarried.

(C)(1) It is an affirmative defense to a charge under this section, involving material or a performance that is obscene or harmful to juveniles, that the material or performance was furnished or presented for a bona fide medical, scientific,

educational, governmental, judicial, or other proper purpose, by a physician, psychologist, sociologist, scientist, teacher, librarian, clergyman, prosecutor, judge, or other proper person.

(2) Except as provided in division (B)(3) of this section, mistake of age is not a defense to a charge under this section.

(D)(1) A person directly sells, delivers, furnishes, disseminates, provides, exhibits, rents, or presents or directly offers or agrees to sell, deliver, furnish, disseminate, provide, exhibit, rent, or present material or a performance to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles in violation of this section by means of an electronic method of remotely transmitting information if the person knows or has reason to believe that the person receiving the information is a juvenile or the group of persons receiving the information are juveniles.

(2) A person remotely transmitting information by means of a method of mass distribution does not directly sell, deliver, furnish, disseminate, provide, exhibit, rent, or present or directly offer or agree to sell, deliver, furnish, disseminate, provide, exhibit, rent, or present the material or performance in question to a juvenile, a group of juveniles, a law enforcement officer posing as a juvenile, or a group of law enforcement officers posing as juveniles in violation of this section if either of the following applies:

(a) The person has inadequate information to know or have reason to believe that a particular recipient of the information or offer is a juvenile.

(b) The method of mass distribution does not provide the person the ability to prevent a particular recipient from receiving the information.

(E) If any provision of this section, or the application of any provision of this section to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of this section or related sections that can be given effect without the invalid provision or application. To this end, the provisions are severable.

(F) Whoever violates this section is guilty of disseminating matter harmful to juveniles. If the material or performance involved is harmful to juveniles, except as otherwise provided in this division, a violation of this section is a misdemeanor of the first degree. If the material or performance involved is obscene, except as otherwise provided in this division, a violation of this section is a felony of the fifth degree. If the material or performance involved is obscene and the juvenile to whom it is sold, delivered, furnished, disseminated, provided, exhibited, rented, or presented, the juvenile to whom the offer is made or who is the subject of the agreement, or the juvenile who is allowed to review, peruse, or view it is under thirteen years of age, violation of this section is a felony of the fourth degree.

CREDIT(S)

(2002 H 490, eff. 1-1-04; 1995 S 2, eff. 7-1-96; 1988 H 790, eff. 3-16-89; 1988 H 51; 1972 H 511)

R.C. § 2907.31, OH ST § 2907.31
Current through Files 157, 161 to 169 and 172 to 178 of the 131st General Assembly (2015-2016).

End of Document

Baldwin's Ohio Revised Code Annotated
Rules of Juvenile Procedure (Refs & Annos)

Juv. R. Rule 2

Juv R 2 Definitions

Currentness

As used in these rules:

(A) "Abused child" has the same meaning as in section 2151.031 of the Revised Code.

(B) "Adjudicatory hearing" means a hearing to determine whether a child is a juvenile traffic offender, delinquent, unruly, abused, neglected, or dependent or otherwise within the jurisdiction of the court.

(C) "Agreement for temporary custody" means a voluntary agreement that is authorized by section 5103.15 of the Revised Code and transfers the temporary custody of a child to a public children services agency or a private child placing agency.

(D) "Child" has the same meaning as in sections 2151.011 and 2152.02 of the Revised Code.

(E) "Chronic truant" has the same meaning as in section 2151.011 of the Revised Code.

(F) "Complaint" means the legal document that sets forth the allegations that form the basis for juvenile court jurisdiction.

(G) "Court proceeding" means all action taken by a court from the earlier of (1) the time a complaint is filed and (2) the time a person first appears before an officer of a juvenile court until the court relinquishes jurisdiction over such child.

(H) "Custodian" means a person who has legal custody of a child or a public children's services agency or private child-placing agency that has permanent, temporary, or legal custody of a child.

(I) "Delinquent child" has the same meaning as in section 2152.02 of the Revised Code.

(J) "Dependent child" has the same meaning as in section 2151.04 of the Revised Code.

(K) "Detention" means the temporary care of children in restricted facilities pending court adjudication or disposition.

(L) "Detention hearing" means a hearing to determine whether a child shall be held in detention or shelter care prior to or pending execution of a final dispositional order.

(M) "Dispositional hearing" means a hearing to determine what action shall be taken concerning a child who is within the jurisdiction of the court.

(N) "Guardian" means a person, association, or corporation that is granted authority by a probate court pursuant to Chapter 2111 of the Revised Code to exercise parental rights over a child to the extent provided in the court's order and subject to the residual parental rights of the child's parents.

(O) "Guardian ad litem" means a person appointed to protect the interests of a party in a juvenile court proceeding.

(P) "Habitual truant" has the same meaning as in section 2151.011 of the Revised Code.

(Q) "Hearing" means any portion of a juvenile court proceeding before the court, whether summary in nature or by examination of witnesses.

(R) "Indigent person" means a person who, at the time need is determined, is unable by reason of lack of property or income to provide for full payment of legal counsel and all other necessary expenses of representation.

(S) "Juvenile court" means a division of the court of common pleas, or a juvenile court separately and independently created, that has jurisdiction under Chapters 2151 and 2152 of the Revised Code.

(T) "Juvenile judge" means a judge of a court having jurisdiction under Chapters 2151 and 2152 of the Revised Code.

(U) "Juvenile traffic offender" has the same meaning as in section 2151.021 of the Revised Code.

(V) "Legal custody" means a legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. An individual granted legal custody shall exercise the rights and responsibilities personally unless otherwise authorized by any section of the Revised Code or by the court.

(W) "Mental examination" means an examination by a psychiatrist or psychologist.

(X) "Neglected child" has the same meaning as in section 2151.03 of the Revised Code.

(Y) "Party" means a child who is the subject of a juvenile court proceeding, the child's spouse, if any, the child's parent or parents, or if the parent of a child is a child, the parent of that parent, in appropriate cases, the child's custodian, guardian, or guardian ad litem, the state, and any other person specifically designated by the court.

(Z) "Permanent custody" means a legal status that vests in a public children's services agency or a private child-placing agency, all parental rights, duties, and obligations, including the right to consent to adoption, and divests the natural parents or adoptive parents of any and all parental rights, privileges, and obligations, including all residual rights and obligations.

(AA) "Permanent surrender" means the act of the parents or, if a child has only one parent, of the parent of a child, by a voluntary agreement authorized by section 5103.15 of the Revised Code, to transfer the permanent custody of the child to a public children's services agency or a private child-placing agency.

(BB) "Person" includes an individual, association, corporation, or partnership and the state or any of its political subdivisions, departments, or agencies.

(CC) "Physical examination" means an examination by a physician.

(DD) "Planned permanent living arrangement" means an order of a juvenile court pursuant to which both of the following apply:

(1) The court gives legal custody of a child to a public children's services agency or a private child-placing agency without the termination of parental rights;

(2) The order permits the agency to make an appropriate placement of the child and to enter into a written planned permanent living arrangement agreement with a foster care provider or with another person or agency with whom the child is placed.

(EE) "Private child-placing agency" means any association, as defined in section 5103.02 of the Revised Code that is certified pursuant to sections 5103.03 to 5103.05 of the Revised Code to accept temporary, permanent, or legal custody of children and place the children for either foster care or adoption.

(FF) "Public children's services agency" means a children's services board or a county department of human services that has assumed the administration of the children's services function prescribed by Chapter 5153 of the Revised Code.

(GG) "Removal action" means a statutory action filed by the superintendent of a school district for the removal of a child in an out-of-county foster home placement.

(HH) "Residence or legal settlement" means a location as defined by section 2151.06 of the Revised Code.

(II) "Residual parental rights, privileges, and responsibilities" means those rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the child, including but not limited to the privilege of reasonable visitation, consent to adoption, the privilege to determine the child's religious affiliation, and the responsibility for support.

(JJ) "Rule of court" means a rule promulgated by the Supreme Court or a rule concerning local practice adopted by another court that is not inconsistent with the rules promulgated by the Supreme Court and that is filed with the Supreme Court.

(KK) "Serious youthful offender" means a child eligible for sentencing as described in sections 2152.11 and 2152.13 of the Revised Code.

(LL) "Serious youthful offender proceedings" means proceedings after a probable cause determination that a child is eligible for sentencing as described in sections 2152.11 and 2152.13 of the Revised Code. Serious youthful offender proceedings cease to be serious youthful offender proceedings once a child has been determined by the trier of fact not to be a serious youthful offender or the juvenile judge has determined not to impose a serious youthful offender disposition on a child eligible for discretionary serious youthful offender sentencing.

(MM) "Shelter care" means the temporary care of children in physically unrestricted facilities, pending court adjudication or disposition.

(NN) "Social history" means the personal and family history of a child or any other party to a juvenile proceeding and may include the prior record of the person with the juvenile court or any other court.

(OO) "Temporary custody" means legal custody of a child who is removed from the child's home, which custody may be terminated at any time at the discretion of the court or, if the legal custody is granted in an agreement for temporary custody, by the person or persons who executed the agreement.

(PP) "Unruly child" has the same meaning as in section 2151.022 of the Revised Code.

(QQ) "Ward of court" means a child over whom the court assumes continuing jurisdiction.

CREDIT(S)

(Adopted eff. 7-1-72; amended eff. 7-1-94, 7-1-98, 7-1-01, 7-1-02)

Juvenile Procedure, Rule 2, OH ST JUV P Rule 2
Current with amendments received through August 1, 2016.

Baldwin's Ohio Revised Code Annotated
Rules of Juvenile Procedure (Refs & Annos)

Juv. R. Rule 5

Juv R 5 Use of juvenile's initials

Currentness

(A) In a juvenile court decision submitted for publication, the names of all juveniles shall be replaced with initials in the caption and body of the published decision. In any press release or other public presentation of information from a juvenile court, the names of any juvenile shall be replaced with initials.

(B) Juvenile courts may enact local rules for the use of juveniles' initials in juvenile court documents. In the absence of a local rule, all juvenile court pleadings and other documents filed in any juvenile court shall use the full names of juveniles rather than their initials.

CREDIT(S)
(Adopted eff. 7-1-12)

Juvenile Procedure, Rule 5, OH ST JUV P Rule 5
Current with amendments received through August 1, 2016.

End of Document

Baldwin's Ohio Revised Code Annotated
Rules of Juvenile Procedure (Refs & Annos)

Juv. R. Rule 10

Juv R 10 Complaint

Currentness

(A) Filing. Any person having knowledge of a child who appears to be a juvenile traffic offender, delinquent, unruly, neglected, dependent, or abused may file a complaint with respect to the child in the juvenile court of the county in which the child has a residence or legal settlement, or in which the traffic offense, delinquency, unruliness, neglect, dependency, or abuse occurred.

Persons filing complaints that a child appears to be an unruly or delinquent child for being an habitual or chronic truant and the parent, guardian, or other person having care of the child has failed to cause the child to attend school may also file the complaint in the county in which the child is supposed to attend public school.

Any person may file a complaint to have determined the custody of a child not a ward of another court of this state, and any person entitled to the custody of a child and unlawfully deprived of such custody may file a complaint requesting a writ of habeas corpus. Complaints concerning custody shall be filed in the county where the child is found or was last known to be.

Any person with standing may file a complaint for the determination of any other matter over which the juvenile court is given jurisdiction by the Revised Code. The complaint shall be filed in the county in which the child who is the subject of the complaint is found or was last known to be. In a removal action, the complaint shall be filed in the county where the foster home is located.

When a case concerning a child is transferred or certified from another court, the certification from the transferring court shall be considered the complaint. The juvenile court may order the certification supplemented upon its own motion or that of a party.

(B) Complaint: General Form. The complaint, which may be upon information and belief, shall satisfy all of the following requirements:

(1) State in ordinary and concise language the essential facts that bring the proceeding within the jurisdiction of the court, and in juvenile traffic offense and delinquency proceedings, shall contain the numerical designation of the statute or ordinance alleged to have been violated;

(2) Contain the name and address of the parent, guardian, or custodian of the child or state that the name or address is unknown;

(3) Be made under oath.

(C) Complaint: Juvenile Traffic Offense. A Uniform Traffic Ticket shall be used as a complaint in juvenile traffic offense proceedings.

(D) Complaint: Permanent Custody. A complaint seeking permanent custody of a child shall state that permanent custody is sought.

(E) Complaint: Temporary Custody. A complaint seeking temporary custody of a child shall state that temporary custody is sought.

(F) Complaint: Planned Permanent Living Arrangement. A complaint seeking the placement of a child into a planned permanent living arrangement shall state that placement into a planned permanent living arrangement is sought.

(G) Complaint: Habeas Corpus. Where a complaint for a writ of habeas corpus involving the custody of a child is based on the existence of a lawful court order, a certified copy of the order shall be attached to the complaint.

CREDIT(S)

(Adopted eff. 7-1-72; amended eff. 7-1-75, 7-1-76, 7-1-94, 7-1-98, 7-1-01, 7-1-02)

Juvenile Procedure, Rule 10, OH ST JUV P Rule 10
Current with amendments received through August 1, 2016.

Baldwin's Ohio Revised Code Annotated
Rules of Juvenile Procedure (Refs & Annos)

Juv. R. Rule 22

Juv R 22 Pleadings and motions; defenses and objections

Currentness

(A) Pleadings and Motions. Pleadings in juvenile proceedings shall be the complaint and the answer, if any, filed by a party. A party may move to dismiss the complaint or for other appropriate relief.

(B) Amendment of Pleadings. Any pleading may be amended at any time prior to the adjudicatory hearing. After the commencement of the adjudicatory hearing, a pleading may be amended upon agreement of the parties or, if the interests of justice require, upon order of the court. A complaint charging an act of delinquency may not be amended unless agreed by the parties, if the proposed amendment would change the name or identity of the specific violation of law so that it would be considered a change of the crime charged if committed by an adult. Where requested, a court order shall grant a party reasonable time in which to respond to an amendment.

(C) Answer. No answer shall be necessary. A party may file an answer to the complaint, which, if filed, shall contain specific and concise admissions or denials of each material allegation of the complaint.

(D) Prehearing Motions. Any defense, objection or request which is capable of determination without hearing on the allegations of the complaint may be raised before the adjudicatory hearing by motion. The following must be heard before the adjudicatory hearing, though not necessarily on a separate date:

(1) Defenses or objections based on defects in the institution of the proceeding;

(2) Defenses or objections based on defects in the complaint (other than failure to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceeding);

(3) Motions to suppress evidence on the ground that it was illegally obtained;

(4) Motions for discovery;

(5) Motions to determine whether the child is eligible to receive a sentence as a serious youthful offender.

(E) Motion Time. Except for motions filed under division (D)(5) of this rule, all prehearing motions shall be filed by the later of:

(1) seven days prior to the hearing, or

(2) ten days after the appearance of counsel.

Rule 22(D)(5) motions shall be filed by the later of:

(1) twenty days after the date of the child's initial appearance in juvenile court; or

(2) twenty days after denial of a motion to transfer.

The filing of the Rule 22(D)(5) motion shall constitute notice of intent to pursue a serious youthful offender disposition.

The court in the interest of justice may extend the time for making prehearing motions.

The court for good cause shown may permit a motion to suppress evidence under division (D)(3) of this rule to be made at the time the evidence is offered.

(F) State's Right to Appeal Upon Granting a Motion to Suppress. In delinquency proceedings the state may take an appeal as of right from the granting of a motion to suppress evidence if, in addition to filing a notice of appeal, the prosecuting attorney certifies that (1) the appeal is not taken for the purpose of delay and (2) the granting of the motion has rendered proof available to the state so weak in its entirety that any reasonable possibility of proving the complaint's allegations has been destroyed.

Such appeal shall not be allowed unless the notice of appeal and the certification by the prosecuting attorney are filed with the clerk of the juvenile court within seven days after the date of the entry of the judgment or order granting the motion. Any appeal which may be taken under this rule shall be diligently prosecuted.

A child in detention or shelter care may be released pending this appeal when the state files the notice of appeal and certification.

This appeal shall take precedence over all other appeals.

CREDIT(S)

(Adopted eff. 7-1-72; amended eff. 7-1-77, 7-1-94, 7-1-01, 7-1-12)

Juvenile Procedure, Rule 22, OH ST JUV P Rule 22
Current with amendments received through August 1, 2016.

End of Document

Baldwin's Ohio Revised Code Annotated
Rules of Juvenile Procedure (Refs & Annos)

Juv. R. Rule 27

Juv R 27 Hearings: general

Currentness

(A) General Provisions. Unless otherwise stated in this rule, the juvenile court may conduct its hearings in an informal manner and may adjourn its hearings from time to time.

The court may excuse the attendance of the child at the hearing in neglect, dependency, or abuse cases.

(1) *Public Access to Hearings.* In serious youthful offender proceedings, hearings shall be open to the public. In all other proceedings, the court may exclude the general public from any hearing, but may not exclude either of the following:

(a) persons with a direct interest in the case;

(b) persons who demonstrate, at a hearing, a countervailing right to be present.

(2) *Separation of Juvenile and Adult Cases.* Cases involving children shall be heard separate and apart from the trial of cases against adults, except for cases involving chronic or habitual truancy.

(3) *Jury Trials.* The court shall hear and determine all cases of children without a jury, except for the adjudication of a serious youthful offender complaint, indictment, or information in which trial by jury has not been waived.

(B) Special Provisions for Abuse Neglect and Dependency Proceedings.

(1) In any proceeding involving abuse, neglect, or dependency at which the court removes a child from the child's home or continues the removal of a child from the child's home, or in a proceeding where the court orders detention, the court shall determine whether the person who filed the complaint in the case and removed the child from the child's home has custody of the child or will be given custody and has made reasonable efforts to do any of the following:

(a) Prevent the removal of the child from the child's home;

(b) Eliminate the continued removal of the child from the child's home;

(c) Make it possible for the child to return home.

(2) In a proceeding involving abuse, neglect, or dependency, the examination made by the court to determine whether a child is a competent witness shall comply with all of the following:

(a) Occur in an area other than a courtroom or hearing room;

(b) Be conducted in the presence of only those individuals considered necessary by the court for the conduct of the examination or the well being of the child;

(c) Be recorded in accordance with Juv. R. 37 or Juv. R. 40. The court may allow the prosecutor, guardian ad litem, or attorney for any party to submit questions for use by the court in determining whether the child is a competent witness.

(3) In a proceeding where a child is alleged to be an abused child, the court may order that the testimony of the child be taken by deposition in the presence of a judge or a magistrate. On motion of the prosecuting attorney, guardian ad litem, or a party, or in its own discretion, the court may order that the deposition be videotaped. All or part of the deposition is admissible in evidence where all of the following apply:

(a) It is filed with the clerk;

(b) Counsel for all parties had an opportunity and similar motive at the time of the taking of the deposition to develop the testimony by direct, cross, or redirect examination;

(c) The judge or magistrate determines there is reasonable cause to believe that if the child were to testify in person at the hearing, the child would experience emotional trauma as a result of the child's participation at the hearing.

CREDIT(S)

(Adopted eff. 7-1-72; amended eff. 7-1-76, 7-1-94, 7-1-96, 7-1-01)

Footnotes

1 So in original; should this read "Juv. R. 27(B)(2)"

Juvenile Procedure, Rule 27, OH ST JUV P Rule 27

Current with amendments received through August 1, 2016.

End of Document

Baldwin's Ohio Revised Code Annotated
Rules of Juvenile Procedure (Refs & Annos)

Juv. R. Rule 37

Juv R 37 Recording of proceedings

Currentness

(A) Recording of Proceedings. The juvenile court shall make a record of adjudicatory and dispositional proceedings in abuse, neglect, dependent, unruly, and delinquent cases; permanent custody cases; and proceedings before magistrates. In all other proceedings governed by these rules, a record shall be made upon request of a party or upon motion of the court. The record shall be taken in shorthand, stenotype, or by any other adequate mechanical, electronic, or video recording device.

(B) Restrictions on Use of Recording or Transcript. No public use shall be made by any person, including a party, of any juvenile court record, including the recording or a transcript of any juvenile court hearing, except in the course of an appeal or as authorized by order of the court or by statute.

CREDIT(S)

(Adopted eff. 7-1-72; amended eff. 7-1-96, 7-1-01)

Juvenile Procedure, Rule 37, OH ST JUV P Rule 37
Current with amendments received through August 1, 2016.

End of Document

Baldwin's Ohio Revised Code Annotated
Constitution of the State of Ohio
Article IV. Judicial (Refs & Annos)

OH Const. Art. IV, § 5

O Const IV Sec. 5 Powers and duties of supreme court; superintendence of courts; rules

Currentness

(A) (1) In addition to all other powers vested by this article in the supreme court, the supreme court shall have general superintendence over all courts in the state. Such general superintending power shall be exercised by the chief justice in accordance with rules promulgated by the supreme court.

(2) The supreme court shall appoint an administrative director who shall assist the chief justice and who shall serve at the pleasure of the court. The compensation and duties of the administrative director shall be determined by the court.

(3) The chief justice or acting chief justice, as necessity arises, shall assign any judge of a court of common pleas or a division thereof temporarily to sit or hold court on any other court of common pleas or division thereof or any court of appeals or shall assign any judge of a court of appeals temporarily to sit or hold court on any other court of appeals or any court of common pleas or division thereof and upon such assignment said judge shall serve in such assigned capacity until the termination of the assignment. Rules may be adopted to provide for the temporary assignment of judges to sit and hold court in any court established by law.

(B) The supreme court shall prescribe rules governing practice and procedure in all courts of the state, which rules shall not abridge, enlarge, or modify any substantive right. Proposed rules shall be filed by the court, not later than the fifteenth day of January, with the clerk of each house of the general assembly during a regular session thereof, and amendments to any such proposed rules may be so filed not later than the first day of May in that session. Such rules shall take effect on the following first day of July, unless prior to such day the general assembly adopts a concurrent resolution of disapproval. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Courts may adopt additional rules concerning local practice in their respective courts which are not inconsistent with the rules promulgated by the supreme court. The supreme court may make rules to require uniform record keeping for all courts of the state, and shall make rules governing the admission to the practice of law and discipline of persons so admitted.

(C) The chief justice of the supreme court or any judge of that court designated by him shall pass upon the disqualification of any judge of the courts of appeals or courts of common pleas or division thereof. Rules may be adopted to provide for the hearing of disqualification matters involving judges of courts established by law.

CREDIT(S)

(1973 SJR 30, am. eff. 11-6-73; 132 v HJR 42, adopted eff. 5-7-68)

Const. Art. IV, § 5, OH CONST Art. IV, § 5

Current through Files 157, 161 to 169 and 172 to 178 of the 131st General Assembly (2015-2016).

End of Document