

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: D.B.

A delinquent child.

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: Case No. 2010-0240
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: On Appeal from the
:
: Licking County Court of Appeals
:
: Fifth Appellate District
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: C.A. Case No. 2009 CA 00024
:
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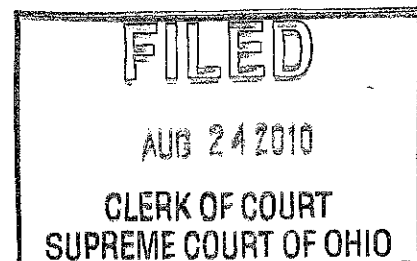


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STATEMENT OF THE CASE AND FACTS

Twelve-year-old D.B. was adjudicated delinquent of five counts of rape, following several instances of consensual sexual conduct with an eleven-year-old friend. (March 4, 2008, T.pp. 26-28). In August 2007, a complaint was filed in the Licking County Juvenile Court, alleging that D.B. was delinquent of ten counts of rape, for sexual conduct that occurred between D.B. and two of his friends from July 1, 2007 to July 31, 2007. (Complaint, August 1, 2007). The complaint charged D.B. with one count of statutory rape with A.W., who was also twelve years old; and one count of statutory rape with M.G., who was eleven. (Complaint, August 1, 2007). In Ohio, statutory rape with a child under thirteen is defined in R.C. 2907.02(A)(1)(b):

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies: (b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

The other eight counts charged D.B. with forcible rape against M.G. (Complaint, August 1, 2007). Forcible rape is defined as:

(2) No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force.

R.C. 2907.02(A)(2). The State subsequently dropped the single count which alleged sexual conduct with A.W. (Complaint, August 1, 2007). And, prior to the commencement of trial, the State amended the remaining counts from alleging rape by force under R.C. 2907.02(A)(2), to alleging violations of R.C. 2907.02(A)(1)(b) in the alternative. (August 7, 2007, T.pp. 3-6).

Defense counsel filed a pretrial motion to dismiss the complaint, arguing that since the acts between the boys were consensual and amounted to sexual experimentation, D.B. should have been charged with unruly rather than delinquent behavior. (Motion to Dismiss, September

17, 2007). Further, defense counsel argued that the application of Ohio's rape statute to D.B. was unconstitutional, given that all three boys involved were approximately the same age and the statute was ambiguous concerning which child should be prosecuted under its provisions. (Motion to Dismiss, September 17, 2007, pp. 8-9).

Though the court agreed that it was faced with a "weird" situation, since D.B. was also a member of the class that R.C. 2907.02(A)(1)(b) was enacted to protect, it overruled defense counsel's motion, finding that the plain language of the statute clearly permitted the State to file charges against D.B. (January 30, 2008, T.pp. 15-20). Moreover, the court noted:

[A]ll victims are equal and no victim is more equal than any other. So, what the Legislature has said, is if someone has sex with you, when you're under 13, whether you're consenting or not, you're a victim and the law is going to prohibit that kind of behavior.

(January 30, 2008, T.p. 18). Further, the court stated:

On the other hand, if it's a young—if the perpetrator is—is also in the protective class, that does just make it very, very strange. And reading between the lines in the cases, it seems almost as if the courts are just expecting and hoping that the prosecutor has just exercised good sense, in some sense of fairness and justice. And I think they may account for Miss Dennison's comment that they're — she wasn't able to find any appellate court cases where the two were virtually the perpetrator and the defendant—or the perpetrator and the—the victim were essentially the same age. As I said, that's what the cases say—that's the way I'm interpreting the cases and the way they're—they're reading between the lines.

(January 30, 2008, T.pp. 18-19). The court withheld ruling on the motion to dismiss until the end of trial, so that it could consider the General Assembly's intent and decide, based on the facts, whether D.B. was actually culpable of rape, and if so, whether he was culpable of R.C. 2907.02(A)(2) or (A)(1)(b). (January 30, 2008, T.p. 20).

At trial, the State presented evidence in the form of testimony from D.B.'s father, M.G., A.W., and Detective Donna Berryhill. (January 30, 2008, T.pp. 5-227). D.B.'s father, Shawn, testified that his son had low self-esteem and was frequently pushed around by other kids at

school. (January 30, 2008, T.pp. 85-86). He testified that D.B. had always been “off the growth charts,” but that he never used his size to intimidate anyone. (January 30, 2008, T.p. 85). In fact, D.B. had such problems with asserting himself that his football coaches suggested that Shawn put D.B. in wrestling, so that he could work on his timidity. (January 30, 2008, T.p. 84). M.G. and A.W. testified that D.B. initiated sexual conduct with M.G. on multiple occasions and that he gave M.G. video games in exchange for sex. (January 30, 2008, T.pp. 101-180). A.W. testified that D.B. would give M.G. video games in exchange for sex and sometimes wrestle with him beforehand. (January 30, 2008, T.p. 138). However, A.W. informed the court that M.G. would agree to participate, and D.B. never acted until M.G. said it was ok. (January 30, 2008, T.p. 138). Further, A.W. testified that he never heard D.B. threaten M.G. (January 30, 2008, T.p. 138). A.W. also testified that two nights before his father told D.B.’s father about the sexual conduct, D.B. asked A.W. if he wanted to “do it.”¹ (January 30, 2008, T.p. 128). A.W. stated that he thought about it for a while and then agreed to do it; however, they never went through with it because A.W.’s mother interrupted them. (January 30, 2008, T.pp. 128-130). A.W. testified that when his mother asked him what he and D.B. were doing, he initially lied to her about it. (January 30, 2008, T.pp. 129-130). A.W. did not indicate that he and D.B. ever exchanged anything for sexual conduct. (January 30, 2008, T.pp. 101-132).

D.B. did not deny the fact that he gave M.G. video games for sex; however, the record indicates that M.G. was the first one to suggest that they exchange something for it. Detective Donna Berryhill of the Licking County Sheriff’s Department interviewed all three boys about the incidents. According to Detective Berryhill’s report, the exchange of video games started after D.B. asked M.G. if he wanted to play the “butt rape” game:

¹ Anal intercourse. (January 30, 2008, T.pp. 127-128).

D.B. then stated M.G. would ask what do I get? D.B. asked M.G. what did he want and he replied a video game. D.B. reported that M.G. asked for Grand Theft Auto. Both boys would then pull their own pants down and D.B. inserted his penis into M.G.'s butt.

(Detective Berryhill Report, July 30, 2007, p. 4). Following the initial exchange, D.B. started offering M.G. video games or allowing M.G. to come swim in D.B.'s pool in exchange for intercourse. (Detective Berryhill Report, July 30, 2007, p. 4).

M.G. verified that he told D.B. that he would "do it if I could play his video games." (January 30, 2008, T.p. 155). M.G. testified that he asked for and received video games in exchange for sex on two occasions. (January 30, 2008, T.p. 160). Further, while M.G. agreed that D.B. would wrestle with him at A.W.'s house, he testified that the wrestling would be just for fun. (January 30, 2008, T.p. 174). He also testified that, even though D.B. was bigger than him, D.B. did not use his size to intimidate him. (January 30, 2008, T.p. 176). Near the end of M.G.'s testimony, defense counsel asked him about his willingness to participate in anal and oral sex with D.B. saying, "would it be fair to say that you said yes, regardless of what you had been thinking in your head," to which M.G. replied, "Yeah." (January 30, 2008, T.p. 179).

A.W. and M.G. testified that they contacted D.B. after D.B. was charged with raping them. (January 30, 2008, T.p. 132). Specifically, A.W. would write D.B. messages on his Nintendo Wii gaming system, asking D.B. how he was doing, because he "was worried about him because he's been my friend for five years." (January 30, 2008, T.p. 132). Also, A.W. and M.G. sent D.B. Mii's² with messages attached. (January 30, 2008, T.pp. 133-134, 174). One Mii in particular was sent from A.W.'s computer, and contained the sentence, "This Mii is the heart and soul of you, me and M.G.'s friendship and we will always be friends." (January 30,

² A Mii is a Nintendo Wii gaming character, which is created by a Wii user. The characters can be exchanged over the internet since the Wii systems have internet access. (January 30, 2008, T.pp. 133-135).

2008, T.p. 134). Both A.W. and M.G. were present when that Mii was sent. (January 30, 2008, T.p. 134).

At the conclusion of the State's case, D.B.'s defense counsel made a motion to dismiss pursuant to Juv.R. 29. (January 30, 2008, T.p. 197). The court granted the motion in part and denied it in part. (January 30, 2008, T.p. 201). Specifically, the court dismissed counts 3, 4, 5, and 6 for lack of sufficient evidence, found that no force was used in counts 2, 7, and 9, and withheld ruling on the element of force in count 8 until the end of trial. (January 30, 2008, T.pp. 201-202). Further, the court addressed D.B.'s pretrial motion to dismiss:

While I specifically found that there was not force in any but one count – at least not a basis someone could find beyond a reasonable doubt – I see that there was – I do find that there was extensive cajoling, bribery, intimidation, to the point where eventually, in the other cases at least, it looks like [M.G.] gave in and did consent. Except, as I said, in Count 8. But the whole process was [D.B.]'s idea, at least according to the evidence at this point. And, again, I'm only viewing the evidence in the light most favorable to the State. [D.B.]'s older. He's bigger. It was his idea. He was insistent repeatedly. He was bribing. He did wrestle with him to get him to go along with him, even though [M.G.] eventually went along. And every single time it was about [D.B.] being sexually gratified. It wasn't about [M.G.]. So, even though they're close in age, the Motion to Dismiss based on both individuals being under age 13 I find specifically has no merit in this particular case.

(January 30, 2008, T.pp. 202-203). (Emphasis added.)

Following the court's ruling, D.B. presented evidence in the form of the testimony of three of his teachers. Charles Stern testified that there was not much difference in the socialization, maturity and peer grouping of eleven and twelve year olds. (January 30, 2008, T.p. 205). Mr. Sterns testified that he knew D.B. for a year, and M.G. for two years. (January 30, 2008, T.p. 2010). He testified that D.B. was a very respectful child in his interactions with him at school. (January 30, 2008, T.p. 206). Further, he stated that D.B. was honest and would tell the truth. (January 30, 2008, T.p. 210). He also testified that D.B. was never physically

aggressive at school nor did he use his size to control a situation. (January 30, 2008, T.p. 212). Mary Jo Layman, and Terry Kutayli also testified that D.B. was a respectful and truthful child. (January 30, 2008, T.pp. 216-217, 222-223). Ms. Kutayli testified that D.B. would tell the truth in school even when the truth could get him in trouble. (January 30, 2008, T.p. 225). Following the testimonies of the teachers, the court recessed for several weeks before reconvening to conclude the trial. (March 4, 2008, T.p. 4).

On March 4, 2008, following the admission of the exhibits presented at trial, the juvenile court adjudicated D.B. delinquent of five counts of rape, however, the court found that no force existed on any of the counts, including count 8, on which it had reserved ruling following the State's case. (March 4, 2008, T.p. 28). The court found:

But as I said last time, all victims are equal and none are more equal than others. A child under 13, who was taken into a sexual relationship, consensually, unconsensually, [sic] with a person their age, or with a person 40, is a victim, both by law and in reality. It's just—kids under 13 just shouldn't be getting involved in sex. They're just not emotionally equipped to deal with that. And I think that's what the – the statute is at. So, the whole crux of the issue is what happens when you have someone like [M.G.] who's clearly victimized under the statute, when the alleged perpetrator is also within the protected class? Well, the legislature, as they've done in other cases, have—could have said, its rape if one party's under 13 and the other party's at least three years older. They didn't do that. They don't—known [sic] how to do that and they've done it in other statutes. So, I have to interpret that as an intentional decision by the legislature.

* * *

So where does that leave us? That the behavior in the rape statute did take place. That [M.G.] is the victim. That [D.B.] is the perpetrator. But [D.B.] is also in the protected class. So, the issue then is, would a finding that [D.B.] is delinquent for the offense of rape a situation that would constitute an unfair or an unjust result? And there are a number of issues you can think about in—in that particular topic. All three of the boys are friends. The electronic communications afterwards also reveal that, even after all of this ha[d] happened, that the friendship was not completely destroyed. On the other hand, as—as I talked about earlier, what we have here is that every single time that sexual activity took place, [D.B.] was the instigator, every single time, no exception. But even beyond the fact that it was his idea, the consent from [M.G.] was not consent

freely given. Every single time it was the result of bribery, or cajoling, or physical intimidation, such as wrestling, or simply [D.B.]’s size and strength, or manipulation abusing the relationship, the friendship.

So, when they’re both under the protected class, but that’s the circumstances, then the question: Is it in—is there an injustice, if I would make a finding that [D.B.] committed the offense of rape? I don’t find an injustice. And I do find that [D.B.] is a delinquent for the six remaining counts of the complaint, 1, 2, 7, 8, 9 and 10. On the other hand, after thinking through the case thoroughly, after—upon the motion at the end of the State’s case, I reserved the possibility of a finding of force on one count. At this point I’m not going to make a finding of force on any of the counts. I’m going to accept Miss Rothchild’s argument that there had already been consent to the one sexual activity. And even though [D.B.] was holding his hand on [M.G.] that that wasn’t to force the act, that the act was manipulated—was agreed to by manipulating consent. So, I’m not going to find force on any of the acts.

(March 4, 2008, T.pp. 26-28). For disposition, the court imposed a five-year minimum commitment to the Ohio Department of Youth Services, maximum to D.B.’s twenty-first birthday. (April 17, 2008, T.p. 8). The court suspended the commitments, pending D.B.’s successful completion of probation. (April 17, 2008, T.p. 8). The court also ordered that D.B. attend group sex offender treatment at Moundbuilders. (April 17, 2008, T.p. 7). Though the court anticipated that D.B. would only be on probation and in treatment for several months, D.B. has spent two and a half years under supervision and in sex offender treatment to date. (April 17, 2008, T.pp. 7-8).

D.B. appealed his adjudication to the Fifth District Court of Appeals, arguing that the juvenile court’s application of R.C. 2907.02(A)(1)(b) violated due process and equal protection. *In re D.B.*, Licking App. No. 2009 CA 00024, 2009-Ohio-6841, ¶10. D.B. also argued that the juvenile court abused its discretion when it adjudicated him delinquent for consensual sexual conduct with a youth who was only one year younger than he was. *Id.* at ¶11. Finally, D.B. alleged that the juvenile court erred when it overruled his motion to suppress his statements made to law enforcement officers, as he was subjected to custodial interrogation without being

read his *Miranda* rights. *Id.* at ¶12. The Fifth District overruled D.B.'s first and second assignments of error, finding R.C. 2907.02(A)(1)(b) constitutional, and finding that the juvenile court did not abuse its discretion when it adjudicated D.B. delinquent. *Id.* at ¶23, 28. And while the Fifth District found that the juvenile court did err by not suppressing D.B.'s statements to law enforcement, the court found that the error was harmless, as there was overwhelming evidence that the conduct alleged in the complaints occurred. *Id.* at ¶45. The Fifth District's decision was announced on December 22, 2009. This timely appeal follows.

ARGUMENT

INTRODUCTION

Inherent in R.C. 2907.02(A)(1)(b) is the presumption that children under the age of thirteen are incapable of consenting to sexual conduct. Yet, twelve-year-old D.B. was found culpable of rape under that section. (Entry, February 6, 2009). D.B.'s adjudication is particularly egregious because the Licking County Juvenile Court concluded that the sexual conduct between D.B. and M.G. was consensual. (January 30, 2008, T.pp. 201-203; March 4, 2008, T.p. 28; Entry, April 23, 2008; Entry, February 6, 2009). Further, as D.B. was the only boy charged with a crime for the consensual conduct, he was treated significantly different under the law than the two other boys who likewise violated the statutory rape statute with him. Because R.C. 2907.02(A)(1)(b) contains no enforcement guidelines, the State was permitted to choose which boy to charge with a crime. As a result, D.B. was prosecuted under a statutory provision that was enacted to protect him. Accordingly, his adjudication violates the Due Process and Equal Protection Clauses of the United States and Ohio Constitutions.

PROPOSITION OF LAW

The application of R.C. 2907.02(A)(1)(b) to a child under the age of thirteen, who engages in consensual sexual conduct with another child under the age of thirteen, violates the Due Process and Equal Protection Clauses of the United States and Ohio Constitutions, because it criminalizes the consensual experimentation between two members of the same protected class, and its failure to provide guidelines designating which actor is the victim and which is the offender results in the arbitrary and discriminatory enforcement of the law to children who are both the accused and a member of the class of persons the statute was enacted to protect.

Ohio Revised Code § 2907.02(A)(1)(b) defines the rape of a child under the age of thirteen as follows:

(A)(1) No person shall engage in sexual conduct with another who is not the spouse of the offender, or who is the spouse of the offender but is living separate and apart from the offender, when any of the following applies: [* * *]

(b) The other person is less than thirteen years of age, whether or not the offender knows the age of the other person.

R.C. 2907.02(A)(1)(b). As the statute requires only that the sexual conduct and age of the victim be proven, it is considered a strict liability offense. Further, because the plain language of R.C. 2907.02(A)(1)(b) does not limit the definition of “person” to individuals of a particular age, the statute has been applied to children just as it applies to adults. See, generally, *In re M.D.* (1988), 38 Ohio St. 3d 149, 527 N.E.2d 286. This case illustrates how R.C. 2907.02(A)(1)(b) produces not only unjust results when used to prosecute a child under the age of thirteen, but also violates the United States and Ohio Constitutions.

A. R.C. 2907.02(A)(1)(b) and Due Process Considerations.

The guarantees of the Due Process Clause apply to juveniles and adults alike. *Kent v. United States* (1966), 383 U.S. 541, 86 S.Ct. 1045; *In re Gault* (1967), 387 U.S. 1, 87 S.Ct. 1428; *In re Winship* (1970), 397 U.S. 358, 90 S.Ct. 1068. In *Gault*, the Supreme Court of the United States explicitly extended federal constitutional protections to children in juvenile

delinquency proceedings. *Gault*, at 13-14. The Court determined that a child's interest in delinquency proceedings is not adequately protected without the adherence to due process principles. *Id.* at 30-31. The applicable due process standard in juvenile proceedings, as was developed in *Gault* and *Winship*, is fundamental fairness. *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 543, 91 S.Ct. 1976; see, also *In re D.H.*, 120 Ohio St. 3d 540, 2009-Ohio-9, ¶51.

An unconstitutionally vague statute violates the Due Process Clause of the Fourteenth Amendment. *Kolender v. Lawson* (1983), 461 U.S. 352, 357, 103 S.Ct. 1855. A penal law is void for vagueness if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" or fails to establish guidelines to prevent "arbitrary and discriminatory enforcement" of the law. *Id.* at 357. Of these, "the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith v. Goguen* (1974), 415 U.S. 566, 574-75, 94 S.Ct. 1242.

In *Smith v. Goguen*, the United State Supreme Court analyzed whether a Massachusetts flag-misuse statute violated the Due Process Clause of the Fourteenth Amendment for vagueness. The statute at issue made it a crime for anyone who "publicly mutilates, tramples upon, defaces, or treats contemptuously the flag of the United States...." *Id.* at 568-569. Mr. Goguen violated the statute by wearing a small cloth version of the flag sewn on the seat of his pants. *Id.* at 567. He was standing on a public street when two officers saw the flag and subsequently filed a complaint under the contempt provision of the flag-misuse statute. *Id.* Mr. Goguen was found guilty of the offense and was sentenced to six months in the Massachusetts House of Corrections. *Id.* at 569. Mr. Goguen's conviction was overturned by the Ninth Circuit

Court of Appeals, which found that the phrase “treats contemptuously” was void for vagueness, as “what is contempt to one man may be a work of art to another.” *Id.* at 572.

Though the Supreme Court affirmed the Ninth Circuit’s decision, it did so based on slightly different reasoning. The Court noted that “casual treatment of the flag has become a widespread phenomenon” and that people employed wearing the flag for adornment or in an attempt to attract attention. *Id.* at 573. And while others might have viewed the casual use of the flag as contemptuous, “in a time of widely varying attitudes and tastes for displaying something as ubiquitous as the United States flag or representations of it, it could hardly be the purpose of the Massachusetts Legislature to make criminal every informal use of the flag.” *Id.* As such, the lack of a specific standard of conduct explaining what constituted “treat contemptuously,” resulted in the statute making “such a standardless sweep [that it allowed] policemen, prosecutors, and juries to pursue their personal predilections.” *Id.* at 575.

In affirming the Ninth Circuit’s decision, the Supreme Court cited to Justice Black’s concurring opinion in *Gregory v. City of Chicago* (1969), 394 U.S. 111, 120, 89 S.Ct. 946, in which Justice Black voiced a concern against entrusting lawmaking to the “moment-to-moment judgment of the policeman on his beat.” *Id.* at 575. Further, the Court cited to a portion of the state’s oral argument in a lower court, in which the state conceded that:

A war protestor who, while attending a rally at which it begins to rain, evidences his disrespect for the American flag by contemptuously covering himself with it in order to avoid getting wet, would be prosecuted under the Massachusetts statute. Yet a member of the American Legion who, caught in the same rainstorm while returning from an ‘America – Love it or Leave It’ rally, similarly uses the flag, but does so regrettably and without a contemptuous attitude would not be prosecuted.

Id. at 576, citing *Goguen v. Smith*, (1st Cir. 1972) 471 F.2d 88, 102. Thus, the charging of a violator of the Massachusetts flag-misuse statute was left solely up to the opinion and predisposition of the officer issuing the citation. Id.

Similarly, the Supreme Court in *Kolender* held that a California disorderly conduct statute was unconstitutionally vague for failing to “clarify what is contemplated by the requirement that a suspect provide a ‘credible and reliable’ identification” to law enforcement upon being stopped for loitering. *Kolender*, at 353-354. The statute at issue charged individuals with disorderly conduct for loitering and “wandering the streets from place to place.” Id. at 354. Persons were free to go if they provided the inquiring law enforcement officer with credible and reliable identification. Id. The statute did not define what constituted credible and reliable identification. Id. The appellee had been arrested fifteen times under the loitering statute, prosecuted twice, and convicted once. Id.

The Supreme Court determined that, since the statute contained no standard for determining what a suspect had to do in order to satisfy the requirement of providing credible and reliable identification, it vested “complete discretion in the hands of the police to determine whether the suspect ha[d] satisfied the statute and was free to go on his way in the absence of probable cause for arrest.” Id. The Court followed the reasoning it announced in *Smith v. Goguen* and found that the full discretion allotted the police left lawmaking to the sole judgment of the officer who stopped a person for loitering. Id. at 360. This discretion “furnish[ed] a convenient tool for ‘harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.’” Id., citing *Papachristou v. City of Jacksonville* (1972), 405 U.S. 156, 170, 92 S.Ct. 839. Further, it also “confer[red] on police a

virtually unrestrained power to arrest and charge persons with a violation.” *Id.* citing *Lewis v. City of New Orleans* (1975), 415 U.S. 130, 135, 94 S.Ct. 970.

A similar type of unfettered discretion is granted to police and prosecutors in Ohio who are faced with the choice of whom to charge with statutory rape under R.C. 2907.02(A)(1)(b) when both actors are under the age of consent.

Though the plain language of R.C. 2907.02(A)(1)(b) appears to clearly define the class of persons who may be found culpable of the offense, the statute fails to give the State guidelines as to which actor to charge with a crime when both parties are under the age of thirteen. Unlike a violation of R.C. 2907.02(A)(2), in which the element of “force” guides the State as to whom to charge with an offense, R.C. 2907.02(A)(1)(b) contains no such requirement. R.C. 2907.02(A)(1)(b) defines a strict liability offense, which requires proof of only sexual conduct with a child under the age of thirteen. Thus, any time two children under the age of thirteen participate in sexual conduct, both fit the definition of victim and both fit the definition of the offender. This means that the State should charge both youth, or neither. But here, the State chose to designate one as the victim and one as the offender.

Prosecutors have historically been granted broad discretion in determining whether to file criminal charges against an individual. *Wayte v. United States* (1985), 470 U.S. 598, 607, 105 S.Ct. 1524 (“[S]o 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.”) However, the lack of guidelines for enforcement of this particular statute presents a unique problem. Since R.C. 2907.02(A)(1)(b) does not give any guidelines when applying the statute to two underage children who engage in sexual conduct, the State must determine, without any guidance from the

statute, whom to charge as an offender. This opens the door for a number of potential biases and presumptions to influence the prosecutor's decision-making.

Historically, statutory rape statutes were enacted to protect the chastity of young women. (See Brief of Amicus Curiae, p. 28). But today, modern statutory rape laws are gender neutral and designed to protect all children from sexual exploitation and assault. Carolyn E. Cocca, *Jailbait: The Politics of Statutory Rape Laws in the United States* (2004) at 9; Tina M. Allen, *Gender – Neutral Statutory Rape Laws: Legal Fictions disguised as Remedies to Male Child Exploitation*, 80 U. Det. Mercy L. Rev. 111, 112-115 (2002); Heidi Kitrosser, *Meaningful Consent: Towards a New Generation of Statutory Rape Laws*, 4 Va. J. Soc.Pol'y & L. No. 2, Winter 1997, at 287. However, although a statutory rape law may make no reference to gender, there is an inherent danger of discriminatory enforcement if the government actors exercise their discretion in accordance with sexual stereotypes. Tina M. Allen, at 111, 116-118.

Notwithstanding the wording of gender neutral statutes, statutory rape laws have almost always been enforced against boys under the age of consent, but not girls. Thus, when there is male-female underage consensual sex, the male is typically viewed as the perpetrator and more likely to be charged with statutory rape. See *Commonwealth v. Bernardo B.* (2009), 453 Mass. 158, 900 N.E. 2d 834 (court found that selective prosecution existed where, in enforcing a statutory rape provision against an underage boy who engaged in consensual sexual conduct with two underage girls, the prosecution opted to charge only the boy and not the girls, even though all three had violated the statute in question). This presumption is not limited to cases of heterosexual sex.

Another gender stereotype that is often displayed in statutory rape cases is the idea that in the case of same-sex activity, there is a more masculine perpetrator who receives more or all of

the sexual gratification from the sexual conduct, and that the more feminine male in a same-sex scenario, or the female in a heterosexual scenario, receives little or no gratification and is dominated in a coercive fashion. Katayoon Majd, Jody Marksamer & Carolyn Reyes, *Hidden Injustice: Lesbian, Gay, Bisexual and Transgender Youth in Juvenile Courts* at 3 (2009) (indicating LGBT “biases can cloud decisions related to arrest, charging, adjudication, and disposition, with the cumulative effect of punishing or criminalizing LGBT adolescent sexuality and gender identity). Stereotypes such as these are pervasive in the system, resulting in the disproportionate charging of individuals who engage in same-sex activity. *Id.*

In this case, law enforcement, the State, and the juvenile court assigned a victim and an offender based on factors not contained in R.C. 2907.02(A)(1)(b). In the initial complaint, D.B. was charged with rape against A.W. and M.G. (Complaint, August 1, 2007). However, the State dropped the charge involving A.W. prior to trial. (Complaint, August 1, 2007). Though a specific reason for dropping the charge with A.W. was not cited, the record shows that A.W. and D.B. both performed fellatio on each other. (Berryhill Report, July 30, 2007, p. 2). Thus, as they both engaged in an identical activity, it may have been perceived that there was a reciprocal exchange between them. The record does not demonstrate that D.B. and M.G. exhibited identical roles in their sexual conduct. Their conduct, though no less consensual according to the court’s legal findings, was markedly different. This, coupled with the fact that the State chose not to file any charge against A.W. leads to the reasonable inference that the parties believed D.B.’s behavior was more unsavory in M.G.’s case because M.G. was not participating in their sexual conduct in an identical way. Further, Detective Berryhill’s testimony was that D.B.’s dad reported to her that “[D.B.] had been sodomizing [M.G.],” indicating that D.B. was the primary actor, or perpetrator, and M.G. was the victim. (January 30, 2008, T.p. 28).

After the presentation of the case, the State argued that D.B. was the perpetrator because he initiated each instance of sexual conduct between him and M.G. (March 4, 2008, T.pp. 10). And, the court determined that M.G. was “clearly victimized” because D.B. was older, bigger, repeatedly requested to engage in intercourse, and gave M.G. video games in exchange for sex. (January 30, 2008, T.pp. 202-203; March 4, 2008, T.p. 26-28). Yet, none of these factors are statutorily relevant to determining which actor is the offender when a child under thirteen is charged with statutory rape. Further, R.C. 2907.02(A)(1)(b) contains no requirement that the offender be the initiator of the contact, the larger of two children, or even the older of two children. It gives no guidance whatsoever. Instead, it leaves the designating of an offender solely up to the “opinion and predisposition” of the State. *Goguen v. Smith*, at 102.

“Where inherently vague statutory language permits such selective law enforcement, there is a denial of due process.” *Smith v. Goguen*, at 576. Though D.B. was twelve at the time of the conduct, at trial, the prosecutor justified charging only D.B. for statutory rape by arguing that it had prosecuted other children who were *over* the age of thirteen for violations of R.C. 2907.02(A)(1)(b), even when the conduct alleged was consensual or when the alleged victim initiated the conduct. (January 30, 2008, T.p. 13). However, the State’s logic is misplaced in this case. The fact that it was able to adjudicate a child over the age of consent with rape of a child under the age of consent does not justify the prosecution of a child *under* the age of consent for that same conduct. On the contrary, because Ohio’s statutory rape statute gives absolutely no enforcement guidelines for applying this statute to a child under the age of consent, an unjust result occurs every time a child under the age of thirteen is prosecuted for a violation of R.C. 2907.02(A)(1)(b). As such, the provision’s vague construction renders the section unconstitutional as applied to children under the age of thirteen.

The charging of one underage child with statutory rape for sexual conduct with another underage child is particularly offensive in this case, as the court expressly determined that the conduct between D.B. and M.G. was consensual. (January 30, 2008, T.pp. 202-203). Despite the fact that the juvenile court displayed its disdain for the behavior and for the bartering that took place prior to D.B.'s and M.G.'s engaging in sexual conduct, the court ultimately found that no force existed and that M.G. consented. (January 30, 2008, T.pp. 202-203).

B. 2907.02(A)(1)(b) and Equal Protection.

The guarantee of equal protection of the laws means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same place and under like circumstances. Fourteenth Amendment to the United States Constitution; Ohio Const., Art 1, Sec.2. The Ohio Constitution provides, "all political power is inherent in the people. Government is instituted for their equal protection and benefit...." Ohio Const., Art. I, Sec. 2. In order to be constitutional, a law must be applicable to all persons under like circumstances and not subject individuals to an arbitrary exercise of power. *Conley v. Shearer*, 64 Ohio St. 3d 284, 288-289, 1992-Ohio-133. In other words, the Equal Protection Clause prevents the state from treating differently or arbitrarily, persons who are in all relevant respects alike. *Park Corp. v. Brook Park*, 102 Ohio St. 3d 166, 2004-Ohio-2237. The Equal Protection clause of the Ohio Constitution has been interpreted to be essentially identical in scope to the analogous provision of the U.S. Constitution. *State v. Brown* (1996), 117 Ohio App.3d 6, 10, 689 N.E. 2d 979.

The United States Supreme Court has found that while children's constitutional rights are not "indistinguishable from those of adults *** children generally are protected by the same constitutional guarantees against governmental deprivations as are adults." *Bellotti v. Baird*

(1979), 443 U.S. 622, 635, 99 S.Ct. 3035. Therefore, children are entitled to the same safeguards that the Equal Protection Clauses provide their adult counterparts.

While the legislature may impose special burdens on defined classes in order to achieve permissible ends, equal protection requires that the distinctions drawn are relevant to the purpose for which the classification is made. *Rinaldi v. Yeager* (1966), 384 U.S. 305, 309, 86 S.Ct. 1497 (there must be some rationality in the nature of the classes singled out). Thus, the proper standard of review for statutory classification is the rational basis test. *Massachusetts Board of Retirement v. Murgia* (1976), 427 U.S. 307, 315, 96 S.Ct. 2562. This Court has observed:

Under a traditional equal protection analysis, class distinctions in legislation are permissible if they bear some rational relationship to a legitimate governmental objective. Departures from traditional equal protection principals are permitted only when burdens upon suspect classifications or abridgments of fundamental rights are involved.

State v. Thompkins (1996), 75 Ohio St. 3d 558, 1996-Ohio-264 quoting *State ex rel. Vana v. Maple Hts. City Council* (1990), 54 Ohio St. 3d 91, 92, 561 N.E. 2d 909. Thus, in order for this Court to determine whether R.C. 2907.02(A)(1)(b) is constitutional as applied to a child under thirteen, its language must be analyzed through this test.

It is a well-established rule of statutory construction that if words in a statute are unambiguous, a court must look no further than the face of the statute and simply apply its terms. *State ex rel. Jones v. Conrad* (2001), 92 Ohio St. 3d 389, 392, 750 N.E.2d 583. However, courts are to presume that the legislature did not intend to enact statutes that produce absurd results. *Id.* The paramount concern in interpretation of a statute is to ascertain and give effect to the legislature's intent in enacting that statute. *State v. S.R.* (1992), 63 Ohio St. 3d 590, 594, 589 N.E.2d 1319. Thus, the absurd result doctrine should preserve legislative intent when it is narrowly applied. *Citizen v. United States Dep't of Justice* (1989), 491 U.S. 440, 470, 109 S.Ct.

2558 (“When used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking of Congress, but rather demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way”). However, while the “plain language interpretation of a statute enjoys a robust presumption in its favor, it is also true that [a legislative body] cannot, in every instance, be counted on to have said what it meant or to have meant what it said.” *FBI v. Abramson* (1982), 456 U.S. 615, 638, 102 S.Ct. 2054.

Throughout this case, the State has argued that D.B. can be found culpable of rape under R.C. 2907.02(A)(1)(b) because the plain language of the statute creates a strict liability offense, for which the General Assembly made no exceptions. However, if this is true, and the General Assembly intended for children under thirteen to be prosecuted for violating R.C. 2907.02(A)(1)(b), then, in cases where two children under the age of thirteen participate in sexual conduct with each other, each should be charged with rape. Thus, each becomes each other’s victim and each other’s offender for the same conduct. This produces an absurd result, which could not have been intended by the General Assembly. If this result is what the General Assembly intended, then the statute violates equal protection.

A similar question was recently addressed by the Supreme Court of Utah, where a thirteen-year-old girl and twelve-year-old boy had a child together after having consensual sex. *State of Utah, in the interest of Z.C.* (2007), 2007 U.T. 54, 165 P.3d. 1206. The statute at issue in *Z.C.* prohibited any person from engaging in sexual activity with a child under the age of fourteen. *Id.* at fn 1. Both *Z.C.* and her “victim” were charged with sexual abuse of a child under the relevant code section. *Id.* at ¶1. Following the denial of her motion to dismiss the complaint, *Z.C.* entered an admission to the charge, on the condition that she be able to appeal

the denial of her motion to dismiss. *Id.* at ¶2. She raised two arguments on appeal: 1) that it was not the legislature's intent for a child under fourteen to be charged with sexual abuse of a child for engaging in consensual sexual activity with another youth under fourteen; and 2) that if that were the legislature's intent, *Utah Code Section 76-5-404.1* violated her state constitutional right to the uniform operation of the law. *Id.* at ¶4.

In addressing the question of legislative intent first, the Supreme Court of Utah found that the plain language of Utah's statutory rape statute indeed allowed Z.C. to be adjudicated delinquent of abuse of a child. *Id.* at ¶5. However, the court determined that applying the statute to Z.C. as a victim and perpetrator produced an absurd result that could not have been intended by the Utah legislature. *Id.* In its analysis the court determined that:

Sexual abuse of a child is one of the most heinous crimes recognized by our penal code. The gravity of this crime is reflected by the fact that it is punished as a second degree felony if committed by an adult. Child sex abuse merits serious penalties because of the extreme psychological harm that the perpetrator causes the victim. Therefore, like all forms of sexual assault, child sex abuse presupposes that a single act of abuse involves a victim, whom the state endeavors to protect, and a perpetrator, whom the statute punishes for harming the victim.

Id. at ¶18. However, the state of Utah in Z.C.'s case charged both youth with an offense based on the strict liability language in the charging section, and treated both children as perpetrators and both children as victims. *Id.* at ¶19. As such, the state was not protecting a victim, but was punishing two perpetrators in what was essentially a victimless offense. *Id.*

The Utah Supreme Court could not reconcile this application of the law with the Utah legislature's intent. The court found it untenable to believe that the state considered Z.C. a victim in one case, but a perpetrator in the other, when the conduct charged arose from the same incident. *Id.* at fn 8. The court also determined that, had the Utah legislature intended to punish both children for their consensual conduct in which there was no victim, it could have done so

through one of the fornication laws, without designating the children as victims and offenders for the same offense. *Id.* at ¶20.

In addition, the court examined a legislative development since Z.C.'s original adjudication and appeal. *Id.* at ¶18-21. Following Z.C.'s adjudication, the Utah legislature passed a bill that amended the diversion statute to allow diversions for sexual offenses committed by children under the age of sixteen, provided that "the person did not use coercion or force; there is no more than two years' difference between the ages of the participants; and it would be in the best interest of the person to grant diversion." *Id.* at ¶22. The court found that the underlying purpose of the amendment was to avoid prosecuting children with facts similar to the facts of Z.C. in the future. *Id.* The court highlighted the amending bill's sponsor, who stated "I think most of us would agree that when twelve and thirteen year olds get involved in this kind of behavior it's certainly not something we want to allow or encourage. We also probably do not want to convict them both of 'rape of a child.'" *Id.*

The court vacated Z.C.'s adjudication, finding that the statute could not be applied in situations where no victim or perpetrator could be identified. *Id.* at ¶24. Specifically the court found that where both actors were under the age of consent, were of similar age, and where no evidence of force existed, the application of the statute produced an absurd result. *Id.* Further, the court found that the Utah legislature did not intend to apply the child abuse statute to Z.C. for consensual sex with another child under the threshold age for legal consent.³ *Id.*

³ The court noted that it "employ[ed] the term 'consensual' in its conventional, rather than its legal, sense," as children under fourteen were not capable of legal consent to intercourse or sexual touching in Utah. *Z.C.*, at fn.1, citing *Utah Code Ann.* § 76-5-406(9)(2003).

Further, the Court found that, even though Z.C.'s case arose from the state charging both youth with an offense for the same conduct, its holding was equally applicable to circumstances where the state charged only one youth with an offense. Specifically, the Court found that:

Our analysis would likewise apply to all cases similar to Z.C.'s even if the State elected to charge only one of the minors involved. We hold that the application of Utah Code Section 76-5-4041 is absurd where no true perpetrator or victim exists. And the State may not create a perpetrator and a victim *through selective prosecution*.

Id. at fn 10. (Emphasis added.)

In this case, the juvenile court declined to find D.B. delinquent of forcible rape under R.C. 2907.02(A)(2). Instead, the court determined that M.G. consented to the sexual conduct.⁴ (January 30, 2008, T.pp. 202-203). As such, D.B.'s adjudication was not an instance of the State protecting M.G., as he consented to the sexual activity; rather, it was punishing D.B. for their conduct. Thus, the statute permitted the State to protect one child with the law, while prosecuting the other, though both were similarly situated. Further, since A.W. and D.B. also participated in sexual conduct while each was under thirteen, the fact that the State failed to pursue any charges against A.W. further illustrates that, despite the language of R.C. 2907.02(A)(1)(b), D.B. was treated significantly differently than his two counterparts, who participated in consensual sexual conduct with him.

An identical issue to D.B.'s was considered by the Superior Court of Pennsylvania after an eleven-year-old boy was adjudicated delinquent of statutory rape of another eleven-year-old boy for non-forcible sexual conduct. *In the Interest of B.A.M.* (2002), 2002 Pa. Super 284, 806 A.2d 893. In *B.A.M.*, two young boys had anal intercourse with each other in the woods. Id. at

⁴ As it is inherent in R.C. 2907.02(A)(1)(b) that children under 13 cannot consent to sexual conduct, it appears as though the juvenile court was utilizing the ordinary use of the term "consent," similar to the court in *Z.C.*

¶2. After one youth's grandmother found out about the activity, B.A.M. was charged with forcible rape, forcible compulsion, sexual assault for lack of consent, and statutory rape. *Id.* at

¶3. Following his adjudicatory hearing, the juvenile court concluded that no force existed. *Id.* However, due to the strict liability construction of the statutory rape charge, the court found B.A.M. delinquent of rape of a child under thirteen. *Id.*

B.A.M. raised three assignments of error related to his adjudication, the first of which asked:

Whether the trial court erred in concluding that an 11 year old who has sex with another 11 year old could be found to have committed the offenses of Rape and Involuntary Deviate Sexual Intercourse based solely upon the provision in each statute which outlaws engaging in sexual intercourse with a person who is less than 13 years old.

Id. at ¶4. The court found it necessary to address the first assignment only, noting that it, “points out the absurdity of holding an 11-year-old boy criminally responsible for having consensual sexual relations with another 11-year-old boy.” *Id.* at ¶5. The specific issue *B.A.M.* raised was whether the word “person” in both statutory rape sections was to be interpreted so broadly as to include both children and adults. *Id.* at ¶7. Ultimately, the court found that the word “person” did not apply to B.A.M. *Id.* at ¶21.

In reaching its conclusion, the court determined that “the statutes before us are deliberately protective, and are specifically intended by the Legislature to shield young children from sexual predation by older teenagers and adults.” *Id.* at ¶11. However, “appellant and only appellant was adjudicated delinquent of two first-degree felonies for participating in consensual sex with a person his own age, a result which would not have occurred had both children been thirteen.” *Id.* The court found this result “ludicrous.” *Id.*

Previous versions of Pennsylvania’s statutory rape statute set a four-year age difference between the perpetrator and the victim, indicating the intent to prohibit any deviate sexual intercourse between an adult and a minor. *Id.* at ¶12-13, citing *Commonwealth v. Charles* (1985), 339 Pa. Super. 284, 488 A.2d 1126, 1129, fn 3. The prior enactment also included a clause where “lack of consent” had to be proven, allowing for instances of consensual sexual conduct with minors of like age. *Id.* at ¶13. The previous version’s constitutionality had been upheld because the state had a legitimate government interest in protecting children from sexual predators and non-consensual contact with both adults and older teenagers. *Id.* at ¶14. The court could find no legitimate government interest in prosecuting consensual sexual conduct between two children under thirteen. *Id.* at ¶17.

After considering the language contained in the previous versions of the statutory rape provisions, the court addressed the strict liability construction of the statute:

It is clear that these statutes and their predecessors were designed to protect from older predators children who, by virtue of their immaturity, lack of information, and uninformed judgment, were unable to consent to sexual relations. In order to remove as a defense the assertion by an adult or older teen that a child willingly participated in sexual activity, the Legislature enacted into law the principle that any child under 13 is incapable of consent, i.e., incapable of understanding the implications and consequences of the act.

Id. at ¶15. And, as the legislature clearly deemed children under 13 to be incapable to consenting to sexual activity, they “must be presumed, absent clear evidence to the contrary, to be equally incapable, in any sense implicating criminal liability, of initiating such conduct;” otherwise, the child’s adjudication is a matter of strict criminal liability without any demonstration that he intended or was capable of intending the result. *Id.* at ¶18.

Moreover, the court found it absurd to punish one child while the other faced no sanction for the same behavior. The court found that, “once a per se mental ability or disability is

assigned to persons [under the age of 13], the same categorization cannot be applied to include some and exclude others of that same age, absent clear proof that the exemption is justifiable.” *Id.* at ¶19. As such, the court determined that the legislature did not contemplate sex between two underage children when it drafted the statute. *Id.* To hold otherwise would “underscore the unintended irony of the trial court’s finding that the only legitimate focus of concern must be the victim, because of his ‘status as a delicate minor...[w]e refuse to afford one willing participant such ascendancy over the other when both were equal ‘offenders.’ Such a result is not only irrational, but a travesty of justice.” *Id.* at ¶19-20.

Similar to the juvenile court’s finding in *B.A.M.*, the Licking County Juvenile Court found that M.G.’s age called for D.B.’s prosecution, as a child under thirteen, who “was taken into a sexual relationship” with an adult or a child their own age “is a victim, both by law and in reality,” and “if someone has sex with you, when you’re under 13, whether you’re consenting or not, you’re a victim and the law is going to prohibit that kind of behavior.” (March 4, 2008, T.p. 26; January 30, 2008, T.p. 18). Yet the court only applied this reasoning to M.G.’s status as a victim. In no way did the court consider the fact that, with a finding of consent, it had put M.G. and D.B.’s conduct on equal footing under R.C. 2907.02(A)(1)(b), thus creating a situation where it employed disparate treatment to two children equally situated under the law. Since the language of R.C. 2907.02(A)(1)(b) does not expressly prohibit this arbitrary enforcement, it violates the basic tenet of equal protection, which requires that a law be applicable to all persons under like circumstances and not subject individuals to an arbitrary exercise of power. *Conley*, at 288-289.

The Supreme Court of Vermont also analyzed this question and determined that a juvenile cannot be adjudicated delinquent for statutory rape of another youth, if both children are

under the age of consent at the time of the sexual conduct, as both are within the class that the statutory rape statute was enacted to protect. *In re G.T.*(2000), 170 Vt. 507, 758 A.2d 301, 507.

The statute at issue in *G.T.* charged a person with statutory rape when that person engaged “in a sexual act with another person and...the other person is under the age of 16, except where the persons are married to each other and the sexual act is consensual[.]” *Id.* at 508. *G.T.* was fourteen years old when he had sexual intercourse with *M.N.*, a twelve-year-old girl. *Id.* at 508. The two were watching a movie together, when *G.T.* initiated the sexual conduct. *Id.* Though *M.N.* said that the intercourse hurt, she did not tell *G.T.* to stop. *Id.* *M.N.*’s mother returned home, surprising the youth. *Id.* *M.N.*’s mother and her boyfriend made *G.T.* leave the house, after which *M.N.* began to cry. *Id.* *G.T.* was adjudicated delinquent of statutory rape. *Id.*

The state in *G.T.* urged the court to find that the construction of the statutory rape statute provided no exceptions, and that *G.T.*’s membership in the protected class was of no consequence. *Id.* at 509. *G.T.* argued that, despite the statute’s strict liability construction, the penalties associated with a conviction of the statutory rape statute created an absurd, irrational, and unjust result, such that it could not have been intended by the legislature. *Id.* at 509.

The Vermont Supreme Court reviewed the statute and found three reasons to question its plain meaning and its applicability to children who were also members of the protected class. *Id.* at 510. First, the court examined previous acts of the legislature that were inconsistent with the plain language of the statute. *Id.* One inconsistency concerned the state’s registry for child abusers. *Id.* The court noted that if the state’s theory was correct, and the legislature intended to charge all youth under 16 with violating the Vermont statutory rape provisions, then under the state’s abuse and neglect statutes, both participants would have to be listed in the Vermont

registry of child abusers, as both victim and perpetrator, representing a substantial stigma for the perpetrator and a substantial privacy invasion for the abused child. *Id.* at 512, citing *In re Selivonik* (1995), 164 Vt. 383, 385, 670 A.2d 831, 833, fn.2.

The court highlighted Title X and a teenager's ability to obtain family planning methods and services without the consent of their parent. *Id.* at 513. Specifically, the court cited the objectives of Family Planning Services and Population Research Act, which included making voluntary planning services and methods available to all persons desiring those services, including adolescents. *Id.* at 512-513. Considering the fact that Title X provided for youth to obtain contraception and other family planning implements without the consent of their parents, the court was not persuaded that the legislature intended for family planning providers to aid the commission of a felony by providing birth control and other services to children under the statutory age of consent who were engaging in consensual conduct with each other. *Id.* Specifically, the court found that:

At best, the State's interpretation means that family planning providers are put in the position where they must abet the commission of a felony and may not disclose their assistance. At worst, they are placed between directly conflicting legal requirements: to disclose child abuse that they reasonably believe is occurring, and to comply with federal confidentiality requirements. We must question a statutory construction that would create such a conflict.

Id. As such, the court found that applying the statutory rape provision to G.T. was inconsistent with the child abuse reporting statute and the legislatively-approved family planning services for minors.⁵ *Id.* at 518.

⁵ Similarly, Ohio has a statute whereby a child who is under eighteen and unemancipated from her parents may seek from a judge an order permitting her to obtain an abortion without the consent of her parents. R.C. 2151.85. The statute contains no minimum age for applicability. In order to obtain permission for the abortion, the court must conduct a hearing where the youth may demonstrate that she is "sufficiently mature and well enough informed to intelligently decide whether or not to have an abortion without the notification of her parents, guardian, or custodian," and that it is in her best interest not to notify her parents of her abortion. R.C. 2151.85.

Second, the court noted that the state's strict-liability-for-all approach raised "serious concerns about whether the resulting prosecutions are consistent with equal protection of the law." *Id.* at 514. Similar to the case at bar, the prosecutor in *G.T.* believed that G.T. had committed rape without the victim's consent. *Id.* As such, he could have charged G.T. under the subsection that provided for forcible rape as the offense. *Id.* Instead, it appeared as though the prosecutor chose to file it under the strict liability subsection, because "it was easier to prove." *Id.* The Vermont Supreme Court in *G.T.* emphasized the same problem presented here: "the selective enforcement of the underlying statute has the hallmarks that other courts have relied on to find discriminatory prosecution." *Id.*, citing *People v. Acme Markets, Inc.* (1975), 37 N.Y.2d 326, 334 N.E.2d 555, 558 (discriminatory enforcement found where Sunday sales law was unenforced, except upon complaint). The court stressed that in so stating, it was not suggesting that it was imposing limits on prosecutorial discretion:

[W]e are questioning instead a statutory interpretation that necessarily results in this kind of enforcement administration. It is one thing to give discretion in enforcing a legislatively defined crime; it is quite another to give prosecutor's the power to *define the crime*.

Id., citing *In re P.M.* (1991), 156 Vt. 303, 315, 592 A.2d 862. (Emphasis added.) Thus, the court found that the statute allowed for discriminatory enforcement. *In re G.T.*, at 518.

Finally, the court determined that the prosecution of children for consensual sexual acts raised "important privacy concerns that implicate constitutional rights." *Id.* at 515. Thus, the court held:

[I]n order to make §3252(a)(3) consistent with the child abuse reporting statute and the legislatively-approved family planning services for minors, and to avoid the real possibility of discriminatory enforcement and interference with the privacy rights of defendant and the asserted victim, we construe subsection (a)(3) as inapplicable to cases where the alleged perpetrator is also a victim under the age of consent.

Id. at 518. Further, the court noted that, as a policy concern, statutory rape provisions were intended to be a shield for minors, not a sword against them. Id. at 518.

A review of the legislative history of R.C. 2907.02(A)(1)(b) indicates that the General Assembly did not anticipate that this statute would be used to prosecute children who were also under the age of thirteen. Instead, the statute was enacted to protect them from sexual victimization at the hand of adults and older teenagers. According to the Committee Comment to Am.Sub.H.B. No. 511 (134 Ohio Laws, Part II, 1866), (“H.B. 511”), the General Assembly’s purpose in enacting R.C. 2907.02(A)(1)(b) was “to protect a pre-pubescent child from the sexual advances of another, presumably older person, because ‘engaging in sexual conduct with such a person indicates vicious behavior on the part of the offender.’” *In re Frederick* (1993), 63 Ohio Misc.2d 229, 231 622 N.E.2d 762, citing H.B. 511.

The General Assembly’s intention to make this provision a strict liability offense is based on its conclusion that the “lack of physical development of a child under thirteen is not easily mistaken, and therefore an offender should not be able to claim a defense of consent or lack of knowledge when the victim is under that age.” Id. at 231-232. Further, “the General Assembly’s conclusion “seems to assume that the other party to the consensual sexual conduct is old enough to recognize the physical and psychological immaturity of a person under thirteen.” Id. These conclusions assume that the actor is significantly older than the thirteen-year-old child. Thus, the same logic cannot simply be imposed on an actor who is also under the age of thirteen.

Unlike an adult accused of violating the terms of R.C. 2907.02(A)(1)(b), D.B. and M.G.’s behavior demonstrated their youth and immaturity. For instance, all three boys referred to their conduct as “butt rape,” yet the record gave no indication that they grasped the gravity of the word “rape.” Further, by bartering for video games or turns swimming in the family pool, D.B.

and M.G. engaged in exchanges that illustrated their diminished capacity for appreciating their choices and their physical and physiological limitations. *Graham v. Florida* (2010), 560 U.S. ___, 2026, 130 S.Ct. 2011; 176 L. Ed. 2d 825 (juveniles have a “lack of maturity and an underdeveloped sense of responsibility”), citing *Roper v. Simmons* (2005), 543 U.S. 551, 569-570, 125 S.Ct. 1183. No testimony was elicited at trial that would indicate that D.B. himself was old enough to recognize the physical and physiological immaturity of M.G. or that he sought to exploit it. Nor was any evidence presented at trial to demonstrate that, at twelve years of age, D.B. was physiologically more advanced than M.G. so as to serve a legitimate government interest.

While this Court has held that a child under the age of fourteen is *capable* of committing rape (see *In re Washington*, 75 Ohio St. 3d 390, 394, 1996-Ohio-186), there is a distinct difference in being capable of committing rape and being found delinquent for committing statutory rape even though you are a member of the class the statute has deemed incapable of consenting. The Ohio Revised Code provides the government the opportunity to protect underage children from forcible sexual conduct from other underage children under R.C. 2907.02(A)(2). But, when the elements of force or threat of force are not proven, there is no legitimate governmental interest being served by finding that child delinquent of statutory rape for consenting behavior under R.C. 2907.02(A)(1)(b). As such, this Court must vacate D.B.’s adjudication, as it was obtained in violation of the Equal Protection Clauses of the United States and Ohio Constitution.

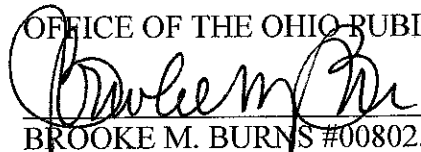
CONCLUSION

For the reasons argued above, D.B. respectfully requests that this Court find R.C. 2907.02(A)(1)(b) unconstitutional as applied to children under the age of thirteen. Further, D.B.

requests that this Court vacate his adjudication as it is in violation of the Due Process and Equal Protection Clauses of the United States and Ohio Constitutions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing MERIT BRIEF OF APPELLANT D.B. and the APPENDIX TO THE MERIT BRIEF OF APPELLANT D.B. FILED UNDER SEAL was forwarded by regular U.S. Mail this 24th day of August, 2010, has been sent by regular U.S. mail, postage prepaid, to the office of Christopher Reamer, Assistant Licking County Prosecutor, 20 South Second Street, Newark, Ohio 43055.


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APPENDIX TO MERIT BRIEF OF
APPELLANT D.B. FILED UNDER SEAL