

IN THE SUPREME COURT OF OHIO  
Case No. 07-1427

STATE OF OHIO :  
Appellee :  
-vs- :  
ANDREW J. FERGUSON :  
Appellant :  
On Appeal from the  
Cuyahoga County Court  
of Appeals, Eighth  
Appellate District Court  
of Appeals  
CA: 88450

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**MERITS BRIEF OF APPELLANT ANDREW J. FERGUSON**

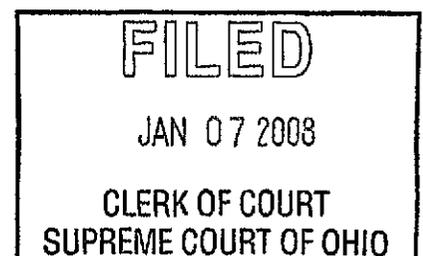
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## SUMMARY OF ARGUMENT

Mr. Ferguson was found to be a sexual predator. At the time of his offenses, Mr. Ferguson had the opportunity to have this finding revisited, and thus at the time of his hearing Mr. Fleming was not subject to punishment. However, since the offense conduct was completed, Ohio's 125<sup>th</sup> General Assembly passed Senate Bill 5, effective July 31, 2003. S.B. 5 repealed Mr. Ferguson's right to have his sexual predator classification revisited and also imposed residency restrictions on all registered sexual offenders.

These two changes in the law -- inability to revisit a predator classification and restrictions on residency -- are punitive, both as a matter of legislative intent and as a matter of practical effect. Accordingly, application of Ohio's Megan's Law as amended via S.B. 5 constitutes ex post facto punishment in violation of the United States Constitution and the Ohio Constitution.

## STATEMENT OF THE CASE AND FACTS

This is an appeal of a sexual predator determination. Defendant-Appellant Andrew Ferguson was convicted in 1990 of rape. He was sentenced to a term of imprisonment of fifteen to twenty-five years. (Docket, entry of September 17, 1990). He was adjudicated a sexual predator following a hearing conducted on June 12, 2006.

On timely appeal, the Eighth District Court of Appeals affirmed his adjudication as a sexual predator.

On timely appeal, this Court accepted for plenary review Mr. Ferguson's first proposition of law, which is set forth in argument below.

## ARGUMENT

### *Proposition of Law I:*

**R.C. §2950.01 et seq., as applied to persons who committed their sexually oriented offenses prior to July 31, 2003, violates Art. I, Sec. 10, of the United States Constitution as ex post facto legislation, and violates Art. II, Sec. 28 of the Ohio Constitution as retroactive legislation.**

#### **A. Sexual Registration in Ohio Prior to July 31, 2003**

Ohio's version of "Megan's Law," enacted as Amended Substitute House Bill 180 ("H.B. 180") in 1996, and codified at R.C. 2950.01 et seq., was part of a national movement by state legislatures to require persons convicted of sexual crimes to be subject to law enforcement scrutiny and registration following the service of their judicially prescribed sentence. Under Ohio's Megan's Law, trial courts must determine whether sex offenders fall into one of the following three classifications: 1) sexually oriented offender; 2) habitual sex offender (with or without notification); or 3) sexual predator.<sup>1</sup> *State v. Cook* (1998), 83 Ohio St. 3d 404, 407. These three classifications carry with them increasingly severe restrictions. While the registration provisions of R.C. 2904.04 apply to all three classifications, the duration of the registration requirement varies: sexually oriented offenders must periodically verify their address for 10 years; habitual sex offenders must verify their address annually for 20 years; and sexual predators must verify their address every ninety days for life. *Id.* at 408. Moreover, the community notification requirements of Chapter 2950 *do not* apply to sexually oriented offenders, *may or may not* apply to habitual sex offenders, and *always* apply to sexual predators. *Id.* at 408-409. As enacted via H.B. 180, Ohio's Megan's Law placed no residential restrictions on sexual registrants.

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<sup>1</sup> With the passage of the Adam Walsh Act in 2007, Amended Substitute Senate Bill 10 (AWA), the General Assembly has replaced the three classifications promulgated by H.B. 180 with a new three-tier system. The versions of Ohio's sexual registration law that are germane to this appeal precede the recently-enacted AWA.

Consistent with this graduated scheme of restrictions, Ohio's Megan's Law adopted an articulated process, pursuant to R.C. 2950.09, by which trial courts determine which classification is appropriate. *State v. Williams* (2000), 88 Ohio St. 3d 513, 518 ("Under R.C. 2950.09, a sentencing court must determine whether a sex offender is a habitual sex offender, a sexual predator, or a sexually oriented offender."). The sexually oriented offender classification, the "least restrictive designation," attaches as a matter of law once the defendant has been convicted of a sexually oriented offense as defined in R.C. 2950.01(D). *State v. Hayden* (2002), 96 Ohio St. 3d 211, 215. While the sexually oriented offender classification attaches as a matter of law with the conviction, the trial court must, pursuant to R.C. 2950.09(E)(1), make an affirmative determination, prior to sentencing, of whether or not the individual meets the statutory requirements to be a habitual sex offender. Finally, having determined whether an offender is a sexually oriented offender and/or habitual sex offender, the trial court must conduct an HB 180 hearing to determine whether the offender is a sexual predator. R.C. 2950.09(B).

In order to classify a defendant as a sexual predator, the State must prove by clear and convincing evidence "that the offender has been convicted of a sexually oriented offense *and* that the offender is likely to engage in the future in one or more sexually oriented offenses." *State v. Eppinger* (2001), 91 Ohio St. 3d 158, 163. Clear and convincing evidence is "that measure of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *Id.* at 164.

In Ohio, as elsewhere, Megan's laws were subject to constitutional challenges relating to their retroactive application. In Ohio, this challenge claimed that the new notification and registration requirements violated the prohibition against retroactive/ ex post facto laws in the Ohio and United States Constitutions. Ohio Const. Art. II, Sec. 28; U.S. Const. Art. I, Sec. 10.

Eventually, these challenges were rejected because this Court concluded that the laws were not “punishment” and therefore did not implicate the prohibition. See, *State v. Cook* (1998), 83 Ohio St. 3d 404.

In *Cook*, this Court relied upon the “intent-effects” test utilized by several courts (including the United States Supreme Court) in evaluating whether subsequent legislation amounts to punishment. *Cook* at 415. Within this analysis this Court concluded that the “narrowly tailored” version of the law passed by the Ohio Legislature was not intended to constitute punishment and, as a practical matter, did not effectively constitute punishment. One reason cited by this Court in reaching these conclusions was that offenders who were designated as sexual predators (the most serious offender class, whose members are required to register every ninety days and are subject to community notification whereby neighbors are contacted by the local sheriff with notice of the offender’s residence) “have the opportunity to submit evidence to prove that their label is no longer justified and thereby have the label and its obligations removed.”*Id.* at 421-422.

#### **B. Amendments to Megan’s Law**

Effective July 31, 2003, Amended Substitute Senate Bill 5 (“S.B. 5”) was enacted. S.B. 5 changed Ohio’s sexual registration laws in several ways that are significant to this appeal. First, a sexual predator designation can no longer be revisited – once a person is designated a predator, the person remains a predator for life. Compare, R.C. 2950.07(B)(1) (S.B. 5 version, eff. 7-31-03) with R.C. 2950.09(D) (H.B. 180 version: 146 Ohio Laws, Part II, 2560, 2621-2623). Second, all sexual registrants, whether sexually oriented offenders, habitual sexual offenders or sexual predators, were prohibited from living within 1000 feet of a school.<sup>2</sup> R.C. 2950.031 (S.B. 5

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<sup>2</sup> Recently, as a result of the Adam Walsh Act (AWA), the 1000 foot residency restriction now also applies to various other child care facilities that are not “schools.” R.C. 2950.034 (enacted in 2007 via S.B. 10).

version). Third, sex offenders were required to register not only in their county of residence but also in counties where they worked or attended school. R.C. 2950.04(A) (S.B. 5 version); for sexual predators, such as Mr. Ferguson, this can mean registering with potentially three different sheriffs every ninety days. R.C. 2950.06(B)(1) (S.B. 5 version). Fourth., S.B. 5 amplified upon an amendment passed in 2001 via Amended Substitute Senate Bill 3 (S.B. 3) to provide that community notification included a sex-offender Internet database to be maintained by the Attorney General. R.C. 2950.081 (S.B. 5 version). This expanded the information about sexual registrants from that provided by H.B. 180 and reviewed in *Cook*, 83 Ohio St.3d at 422. See generally, *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202 (Lanzinger, J., concurring in part and dissenting in part (chronicling changes in Megan's Law since *Cook*)).

### **C. Principles of Ex Post Facto**

Article I, Section. 10 of the United States Constitution prohibits States from passing ex post facto laws. The comparative provision in the Ohio Constitution provides that "[t]he general assembly shall have no power to pass retroactive laws[.]" Art. II, Sec. 28.

In *Calder v. Bull* (1798), 3 U.S. 386, 390, the Supreme Court offered an enduring definition of the ex post facto provision: States cannot retroactively criminalize acts and they cannot pass a law which "changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed."

"Critical to relief under the [federal] Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver v. Graham* (1980), 450 U.S. 24, 30.

In analyzing whether a challenged statute imposes retroactive punishment in violation of

the federal prohibition on *ex post facto* laws, this Court must apply the intents-effect test. *Cook*, 83 Ohio St.3d at 415. If the express or implied intent of the General Assembly was to create criminal punishment, that “ends the inquiry” and the retroactive application of the statute is unconstitutional. *Smith v. Doe* (2003), 538 U.S. 84, 92. If, however, the intention of the General Assembly was to enact a regulatory scheme that was civil and non-punitive, this Court must further consider whether the statutory scheme is “so punitive in effect as to negate the State’s intention to deem it civil.” *Id.* (citations and internal quotations omitted).

### 1. Intent of Legislation

In determining the General Assembly’s objective, this Court must examine the statute’s text and structure. *Smith*, 538 U.S. at 92. To do so, courts must first “ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.” *Hudson v. United States* (1997), 522 U.S. 93, 99. In *Cook*, this Court looked to R.C. 2950.02(A) and determined that the express purpose of the legislation was to “promote public safety and bolster the public’s confidence in Ohio’s criminal and mental health systems.” 83 Ohio St. 3d at 417. In ascertaining this remedial purpose, this Court emphasized the legislature’s express statement that the exchange and release of information about sex offenders is “not punitive” and the statutory scheme’s “narrowly tailored attack on th[e] problem” of protecting the community for sex offenders. *Id.*

With the changes promulgated by S.B. 5, see *supra*, the punitive intent of the legislature is now apparent. Although R.C. 2950.02 contains an express declaration of non-punitive purpose regarding the exchange of information, it contains no such provision about residency restrictions. Moreover, R.C. 2950.02 was last amended in 2001 and thus does not reflect the S.B. 5 changes to the statutory structure. These significant changes have altered the statute from a narrowly

tailored attempt to address a problem to a categorical one indicative of punitive statutory scheme.

A sexual predator suffers the disabilities and restraints of the statute for life whether or not he or she continues to actually present a threat to the community. Moreover, as will be discussed in greater detail below, the residency restrictions operate as punishment and do not reflect the narrow tailoring emphasized in *Cook*.

The formal attributes of a legislative enactment, such as the manner of its codification and or the enforcement procedures it establishes are also probative of legislative intent. *Smith*, 538 U.S. at 94. In this case, the legislature elected to place Ohio's Megan's Law squarely with Title 29, Ohio's Criminal Code. Furthermore, the enforcement mechanisms established by the statute are criminal in nature. The failure of an individual to comply with the registration, verification, or notification requirements of the statute subjects him or her to criminal prosecution and criminal penalties. *See generally*, R.C. 2950.99 Although the enforcement mechanism for violations of the residency restrictions is a civil suit for injunctive relief, the individuals empowered to bring such suits include the very same individuals entrusted with the enforcement of the criminal laws – the prosecuting attorneys and other chief legal officers in their respective communities. R.C. 2950.031.

Recently, the United States District Court for the Northern District of Ohio, indicated that S.B. 5 was punitive in its intent and thus could not be applied to persons who committed their offenses prior to its enactment. *Mikaloff v. Walsh*, Case No. 5:06-CV-96, 2007 U.S. Dist. LEXIS 65076 (Gwyn, J.). While *Mikaloff* focused on the residency restrictions in S.B. 5, its analysis is all the more compelling in light of the significant other changes brought about by S.B. 5.

Considering Chapter 2950 as amended by SB 5, it is now apparent that the General Assembly's intent with regard to Chapter 2950 is punitive, not remedial.

## 2. Effect of Legislation

Even if this Court were to determine that the General Assembly intended Chapter 2950 to operate as a remedial statute, Chapter 2950 has a “punitive effect so as to negate a declared remedial intention.” *Allen v. Illinois* (1985), 478 U.S. 364, 369. In assessing the punitive effects of a particular statute, this Court should consider the following five “useful guideposts.” *Smith*, 538 U.S. at 97 (citing *Kennedy v. Mendoza-Martinez* (1963), 373 U.S. 144, 168-69).

### a. *Historically Regarded as Punishment*

Even if the registration requirements of Chapter 2950 are more consistent with remedial purposes than punishment, as concluded by the United States Supreme Court in *Smith*, the community notification requirements and the residency restrictions resemble historical punishments. With its community notification provisions, Ohio has developed a process which is less like a “visit to an official archive of criminal records” and more like the punitive measure of “forcing an offender to appear in public with some visible badge of past criminality.” *Smith*, 538 U.S. at 99. In *Smith*, the United States Supreme Court emphasized the non-punitive nature of the Alaska statute by noting that an individual seeking the information must take affirmative steps of going to the website and looking for the desired information. *Id.* Under Ohio’s law, information on sexual predators is provided automatically and directly to their neighbors.

The residency restrictions resemble the “devices of banishment and exile [which] have throughout history been used as punishment.” *Kennedy*, 373 U.S. at 170, n.23. While registration may cause adverse consequences on the defendant “running from mild personal embarrassment to social ostracism,” the further limitation on where an offender can live causes Chapter 2950 to resemble colonial punishments of “public shaming, humiliation, and banishment.” *Smith*, 538 U.S. at 98. Unlike the law considered by the United States Supreme

Court in *Smith*, Ohio's Megan's Law does more than disseminate truthful information, it subjects offenders to significant restraints on their liberty not shared by the general citizenry.

*b. Operates as a Disability or Restraint*

In concluding that Alaska's Megan's Law does not create punitive restraints, the United States Supreme Court emphasized that the statute "does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences." *Id.* at 100. Though it conceded that analogies to parole, probation, or supervised release have "some force," the Supreme Court rejected that comparison because offenders subject to the Alaska statute do not need to make periodic updates in person and "are free to move where they wish and to live and work as other citizens, with no supervision." *Id.* at 101 (emphasis added). As offenders subject to the Ohio statute must make periodic updates in person and are not free to move where they wish and live as other citizens, the comparison to parole, probation, and supervised release is apt. Therefore, the residency restrictions operate as a disability and/or restraint on the liberty of sexually oriented offenders.

*c. Furthers Traditional Notions of Punishment; No Rational Connection to Non-Punitive Purpose; Excessive in Relation to the Alternative Purposes Assigned*

Because these three factors are inherently interrelated, Mr. Ferguson addresses them together. With the addition of the residency restrictions and elimination of any ability to challenge a sexual predator classification in the future, Chapter 2950 has lost its rational connection to its purported non-punitive purpose, is excessive in relation to that purpose, and promotes the traditional notions of punishment, including deterrence and retribution.

In analyzing the pre-SB 5 version of Ohio's Megan's Law, the Ohio Supreme Court explained that the law serves the purpose of "protecting the general public from released sex

offenders” and concluded that the law was “narrowly tailored to comport with the respective danger and recidivism levels of the different classifications of sex offenders.” *Cook*, 83 Ohio St. 3d at 421-22. In rejecting the claim that lifetime registration and notification requirements for sexual predators was excessive, the Court emphasized that sexual predators had “the opportunity to submit evidence to prove that their label is no longer justified and thereby have the label and its obligations removed.” *Id.* That is no longer the case as SB 5 repealed a defendant’s right to have his sexual predator classification revisited. The imposition of a lifetime classification with its attendant obligations and burdens which can *never* be revisited even if it no longer serves the intended remedial purpose is clearly excessive, smacks of punishment, and is retribution for past conduct.

The other key change to Ohio’s Megan’s Law worked by SB 5—residency restrictions on sex offenders—illustrates the punitive effect of the statute even more clearly. R.C. 2950.031 operates as a permanent restriction on the freedom of certain sexually oriented offenders’ freedom to establish and maintain a residence and to acquire property within 1000 feet of any school. Specifically, it provides that:

No person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to either a sexually oriented offense that is not a registration-exempt oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises.

2950.031(A). The definition of school premises is quite expansive and includes any piece of real property on which any school is situated so long as the school is operated by a board of education. R.C. 2950.01(R) and 2925.01(R); *see also State v. Brown* (1993), 85 Ohio App. 3d 716, 724. R.C. 2950.031’s categorical residency restriction is permanent and does not provide for the possibility of relief for any reason. Pursuant to 2950.031(B), a municipality or landlord may obtain injunctive relief against any sexually oriented offender residing within 1000 feet of any school premises. Although the nature of the injunctive relief is not explicitly delineated, the

statute clearly contemplates the forcible removal of sexually oriented offenders from property, whether or not they rent or own and even if their residence pre-dated the passage of the statute.

Assuming the State's alternative remedial purpose for the residency restrictions in R.C. 2950.031's is to promote the safety of school children, this legislation is not rationally related to serve that purpose and is, at the very least, excessive in relation to that purpose. In casting a wide and indiscriminate net, the Ohio General Assembly made no attempt to narrowly tailor the residency restrictions in Ohio's Megan's Law to promote the safety of children. There is no evidence that residential proximity to schools increases the likelihood of reoffending, and no rational, let alone compelling, reason to believe that children are safer if a sex offender lives 1001 feet away from a school rather than 1000. Indeed, empirical research suggests that such restrictions do nothing to promote public safety. *See* MINN. DEP'T OF CORRECTIONS, LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES, 2003 REPORT TO THE LEGISLATURE, 9 (2003) ("Enhanced safety due to proximity restrictions may be a comfort factor for the general public, but it does not have any basis in fact;" "[N]o evidence points to *any effect* on offense rates of school proximity residential restrictions;" "[B]lanket proximity restrictions on *residential* locations of [sex offenders] do not enhance community safety"); COLO. DEP'T OF PUBLIC SAFETY, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY, 4 (2004) ("Placing restrictions on the location of correctionally supervised sex offender residences may not deter the sex offender from re-offending and should not be considered as a method to control sexual offending recidivism.")<sup>3</sup>

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<sup>3</sup> A statewide association of prosecuting attorneys in Iowa recently issued a statement urging Iowa's General Assembly to eliminate its residency restrictions on sex offenders because they do "not provide the protection that was originally intended" and have had "unintended effects on families of offenders." IOWA COUNTY ATTORNEYS ASSOCIATION, STATEMENT ON SEX OFFENDER RESIDENCY RESTRICTIONS IN IOWA, 1 and 5 (Feb. 14, 2006). In its exhaustive list of 14 reasons

Even more problematic is the General Assembly's wholesale failure to limit the residency restriction to those sexually oriented offenders who represent an ongoing risk to children. The statute indiscriminately sweeps within its purview individuals who do not represent a risk to children and those that do. As there is no individualized determination of whether a particular sexually oriented offender represents a risk to children and no opportunity for an offender to ever demonstrate that he or she is no longer a risk, the lifetime residency ban is excessive in relation to its purpose.

Also indicative of the statute's inadequate tailoring of the restrictions to the risk an offender presents is its failure to reflect the different types of sex offenders. While the registration, verification, and notification requirements in Chapter 2950 increase in duration and frequency depending on the classification of the offender, the residency restrictions apply indefinitely and indiscriminately to all classified sex offenders so long as the underlying offense is not registration-exempt. For sexually oriented offenders or habitual sex offenders, the residency restrictions continue unabated even after the expiration of the offender's registration and verification obligations. If a particular offender's risk has diminished such that he need not report his residence, it is irrational to continue to impose restrictions on where the offender can reside.

### 3. Summary

In summary, substantial changes to Ohio's Megan's Law enacted *after* the Ohio Supreme Court decided *Cook* leave no doubt that the General Assembly intended the statute to serve as a criminal sanction or, at the very least, that the statute –with lifetime residency restrictions and

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such legislation should be repealed, the ICCA noted that “[r]esearch shows that there is no correlation between residency restrictions and reducing sex offenses against children.” *Id.* at 1.

without the ability to revisit a lifetime classification as a sexual predator—is so punitive in effect as to negate any remedial intent. As such, the Ex Post Facto Clause of the United States Constitutions forbids its application to individuals, like Mr. Ferguson, whose criminal conduct pre-dates its passage.

#### **D. Retroactive Legislation**

Even if this Court concludes that Ohio's Megan's Law, as amended by Senate Bill 5, does not constitute an ex post facto law as applied to Mr. Ferguson, Article II, Section 28 of the Ohio Constitution prohibits the retroactive application of the residency restrictions to Mr. Ferguson.

Article II, Section 28 of the Ohio Constitution expressly forbids the enactment of retroactive laws.<sup>4</sup> *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 106. Because statutes are presumed to apply only prospectively, the issue of whether a particular law can constitutionally be applied retroactively only arises if General Assembly specifically intended it to operate retroactively. *Cook*, 83 Ohio St. 3d at 410. If the General Assembly intended retroactive application, then this Court must evaluate whether the statute is substantive (and therefore cannot apply retroactively) or merely remedial. *Id.* at 410-11. A statute is substantive if it “impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation or liabilities as to a past transaction, or creates a new right.” *Id.* at 411.

##### **1. General Assembly Did Not Intend All of S.B. 5 To Apply Retroactively**

Absent a “clear pronouncement by the General Assembly” that a particular statute is to be applied retroactively, the statute may be applied prospectively only. *State v. Lasalle* (2002), 96 Ohio St. 3d 178, 181; *see also State ex rel. Coyne v. Cingle*, Cuyahoga App. No. 82279, 2003

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<sup>4</sup> Article II, Section 28 provides: “The general assembly shall have no power to pass retroactive

Ohio 5383, ¶ 13.

For example, in enacting the residency restrictions in R.C. 2950.031 and the irrevocability of the predator classification in R.C. 2950.07, the General Assembly did not expressly state that these provisions were to be applied retroactively to offenders convicted for a sexually oriented offense prior to its effective date. R.C. 2950.031 provided that the residency restrictions apply to any person “who has been convicted, is convicted of, has pleaded guilty to, or pleads guilty” to a non-registration exempt sexually oriented offense. Although one could interpret the phrases “has been convicted” and “has pleaded guilty” as indicative of retroactive intent, this ambiguous phraseology does not amount to a clear pronouncement of retroactive intent.

This stands in stark contrast to certain other provisions in Ohio's Megan's Law where the General Assembly's intent of retroactive application is plain. In *Cook* and *State v. Champion* (2005), 106 Ohio St. 3d 120, the Ohio Supreme Court identified several express indications that HB 180's registration, verification, and notification provisions were intended to apply retroactively. For instance, R.C. 2950.09(C)(1) indicates that sexual predator classification hearings apply retroactively to sex offenders who were convicted and sentenced prior to January 1, 1997 but remained incarcerated after that date. 83 Ohio St.3d at 410. Similarly, R.C. 2950.04(A)(1) indicates that registration and verification requirements apply retroactively to sex offenders who were convicted and sentenced prior to July 1, 1997 and remained incarcerated for that sexually oriented offense after July 1, 1997. *Champion*, 106 Ohio St. 3d at 121-22. As illustrated by HB 180, the General Assembly, in prior legislative enactments and amendments, “certainly has demonstrated its ability to include retrospective language when it so desires.” *LaSalle*, 96 Ohio St. 3d at 182.

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laws. . . .”

In short, S.B. 5's lacks a "clear pronouncement" of the General Assembly's intent to apply all of its restrictions retroactively. To the extent that ambiguous language in the statute could be assigned alternate interpretations, this Court should construe it so as to avoid the constitutional problem discussed below. *See State ex rel. Steffen v. Kraft* (1993), 67 Ohio St. 3d 439, 440 ("Where possible, a court will construe a statute so as to avoid potential conflict between the statute and the Constitution."). In so doing, this Court will have to conclude that the residency restrictions and the non-revocability of the sexual predator classification only apply to persons who committed their crimes after July 31, 2003.

**2. If All of S.B. 5 Is Applied Retroactively, It Violates Article II, Section 28 of the Ohio Constitution.**

Assuming, arguendo, that the General Assembly intended the residency restrictions and the non-revocability provision to apply retroactively, such retroactive application is prohibited by Article II, Section 28 of the Ohio Constitution. Moreover, the other provisions of S.B. 5 identified above, relating to reporting and notification, also violate Article II, Section 28 if applied to Mr. Ferguson.

Article II, Section 28 provides in pertinent part: "The general assembly shall have no power to pass retroactive laws. . . ." With this guarantee, the Ohio Constitution affords its citizens greater protection against retroactive laws than does the Ex Post Facto Clause of the United States Constitution. *Van Fossen*, 36 Ohio St.3d at 105. This constitutional bar on retroactive laws has been interpreted to apply to laws affecting substantive rights but not to procedural or remedial aspects of such laws. *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 137. Substantive laws create "duties, rights, and obligations" whereas procedural or remedial laws merely prescribe methods of enforcement of pre-existing duties, rights, and/or obligations. *Id.*; *see also State ex rel. Holdridge v. Indus. Comm'n of Ohio* (1967),

11 Ohio St. 2d 175, 179.

R.C. 2950.031 is a substantive law. It eliminates the pre-existing right of citizens to reside where they wish and imposes a new obligation which did not exist prior to its enactment. See *Nasal v. Dover*, Miami App. No. 2006-CA-9, 2006 Ohio 5584, ¶ 23 (concluding that R.C. 2950.031 constitutes an unconstitutional retroactive law as applied to an individual who owned and occupied real estate prior to the enactment of the statute and whose predicate offense occurred prior to the enactment of the statute) (appeal accepted and briefing stayed, S. Ct. No. 2006-2220 and 2006-2311). The residency restrictions imposed by R.C. 2950.031 are therefore quite unlike registration and verification provisions, which existed in previous versions of Chapter 2950, and notification requirements, which merely constituted a procedural change to how previously public information was disseminated. See *Cook*, 83 Ohio St. 3d at 412-14. In *Cook*, the Ohio Supreme Court emphasized that the duty to notify “imposes no burden on the defendant” as it “applies only to the sheriff with whom the defendant has most recently registered.” *Id.* at 414. The residency restrictions in R.C. 2950.031 clearly impose new burdens on Mr. Ferguson. Prior to the enactment of S.B. 5, Mr. Ferguson, like all other Ohio citizens, had the right to choose a residence regardless of its proximity to schools. After R.C. 2950.031, Mr. Ferguson’s freedom to reside where he wishes has been significantly curtailed by residency restrictions which prevent him from living within 1000 feet of any school.

Similarly, the other changes brought about by S.B. 5 further burden Mr. Ferguson. He previously enjoyed the right to be able to have a trial court revisit his status as a sexual predator; that right has been taken away. While, previously, he knew that his neighbors would know of his predator status, he now has been subjected to the increased burdens and publicity attendant to having to register wherever he lives, works or studies, and with state-wide internet dissemination

that is mandated by law, not simply permitted.

Because S.B. 5 is a substantive law, it is unconstitutional as applied to Mr. Ferguson, whose criminal conduct and conviction preceded the effective date of the statute.

#### **E. The Adam Walsh Act Has Not Alleviated the Constitutional Violations**

Finally, the AWA, Ohio's newest codification of sexual registration, has not alleviated the problem for Mr. Ferguson. As discussed above, the AWA has increased the residency restrictions. The other problems brought about by S.B. 5 continue unabated by the AWA. In making these observations about the AWA, Mr. Ferguson is not asking this Court to determine the constitutionality of the AWA. The Court's acceptance of jurisdiction in this case was understandably directed toward the pre-AWA Megan's Law. Nonetheless, Mr. Ferguson raises this final argument in order to avoid even the suggestion that he has forfeited his right to challenge the retroactive application of the AWA, which he intends to do in either the Cuyahoga County Common Pleas Court or his current county of residence.

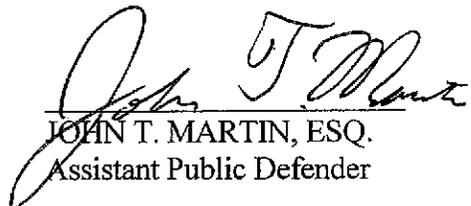
#### **F. Remedy**

This Court can remedy the constitutional violations discussed herein by merely holding that the amendments promulgated by S.B. 5 cannot be applied to Mr. Ferguson. This was precisely how the *Mikaloff* court treated the problem created by S.B. 5's residency restrictions – the restrictions were simply vacated.

**CONCLUSION**

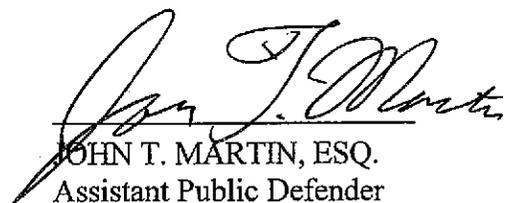
Wherefore, this Court should hold that Mr. Ferguson is subject to the provision of R.C. 2950.01 et seq. as effective prior to July 31, 2003.

Respectfully submitted,

  
JOHN T. MARTIN, ESQ.  
Assistant Public Defender  
ASPH  
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**SERVICE**

A copy of the foregoing Appellant's Merits Brief was served via U.S. mail upon William D. Mason, Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, 9th Floor, Cleveland, Ohio 44113 on this 7<sup>th</sup> day of January, 2008.

  
JOHN T. MARTIN, ESQ.  
Assistant Public Defender  
ASPH  
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IN THE SUPREME COURT OF OHIO

STATE OF OHIO :

**07 - 1427**

Appellee :

-vs- :

ANDREW J. FERGUSON :

Appellant :

On Appeal from the  
Cuyahoga County Court  
of Appeals, Eighth  
Appellate District Court  
of Appeals  
CA: 88450

**NOTICE OF APPEAL OF APPELLANT ANDREW J. FERGUSON**

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**FILED**  
AUG 02 2007  
CLERK OF COURT  
SUPREME COURT OF OHIO

*Judge Friedland*

JUN 18 2007

# Court of Appeals of Ohio

**FILED**

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

*m(GCI)*

GERALD E. FUERST  
CLERK OF COURTS  
CUYAHOGA COUNTY

JOURNAL ENTRY AND OPINION  
No. 88450

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.



**ANDREW J. FERGUSON**

*A224002*

DEFENDANT-APPELLANT

**JUDGMENT:  
AFFIRMED**

Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-254450

BEFORE: Rocco, J., Gallagher, P.J., Calabrese, J.

RELEASED: June 7, 2007

JOURNALIZED: JUN 18 2007 CA0608450 46071712

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**FILED AND JOURNALIZED  
PER APP. R. 22(E)**

**JUN 18 2007**

**GERALD E. FUERTZ  
CLERK OF THE COURT OF APPEALS  
BY: [Signature] DEP.**

**ANNOUNCEMENT OF DECISION  
PER APP. R. 22(B), 22(D) AND 26(A)  
RECEIVED**

**JUN -7 2007**

**GERALD E. FUERTZ  
CLERK OF THE COURT OF APPEALS  
BY: [Signature] DEP.**

CA06088450 45826284



N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL  
FOR ALL PARTIES-COSTS TAXED

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KENNETH A. ROCCO, J.:

Defendant-appellant, Andrew J. Ferguson, appeals from a common pleas court order finding him to be a sexual predator. He argues that the court erred by failing to specifically address all of the statutory factors as required, the court erred by failing to find he was an habitual sexual offender, and Ohio's sexual predator statutes are unconstitutional ex post facto legislation. We find no error in the proceedings below. We also find that R.C. 2950.01 et seq. is not an unconstitutional ex post facto law. Accordingly, we affirm.

Appellant was convicted of three counts of rape and one count of kidnapping in August 1990, and was sentenced to a prison term of fifteen to twenty-five years. His conviction was affirmed on appeal.

On July 3, 2000, the state moved the court to adjudicate appellant to be a sexual predator. On February 22, 2006, the court instructed the warden of the Grafton Correctional Institution to send a House Bill 180 packet to the court, and ordered appellant returned to the court for hearing. After the hearing, the court determined that appellant was a sexual predator. In its order entered June 15, 2006, the court found that the defendant "is by clear and convincing evidence, likely to engage in one or more sexually oriented offenses in the future \*\*\* for the following reasons: among other things a prior rape conviction in 1980

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and the fact that defendant presents in the moderate to high risk category for reoffending." Appellant appeals from this order.

In his first assignment of error, appellant complains that the court did not individually assess each of the statutory factors it was required to consider under R.C. 2950.09(B)(2). In concluding that the court was required to do so, appellant misreads the Ohio Supreme Court's decision in *State v. Eppinger*, 91 Ohio St.3d 158, 2001-Ohio-247. *Eppinger* does not dictate that the trial court must individually assess each of the statutory factors on the record. Rather, *Eppinger* holds that "the trial court *should consider* the statutory factors listed in R.C. 2950.09(B)(2), and *should discuss on the record the particular evidence and factors upon which it relies* in making its determination regarding the likelihood of recidivism." *Id.* at 889 (emphasis added); also see *State v. Thompson*, 92 Ohio St.3d 584, 587-88, 2001-Ohio-1288. Thus, while it might be the better practice for the court to assess each of the statutory factors expressly, *Eppinger* only suggests that the court should discuss the factors it actually relied upon in reaching its decision.

At the sexual predator hearing, the state presented evidence of appellant's conviction and sentence in this case, as well as appellant's prior convictions for rape and robbery in 1980 and grand theft in 1976. The state further presented a copy of the court of appeals' decision in this case, which set forth the evidence

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upon which these convictions were based, and a copy of the police report, the victim's statement and the appellant's statement to the police regarding the 1980 rape. The state also presented a court psychiatric report regarding appellant, and the results of a STATIC-99 test which placed him in a high risk category for reoffending. Appellant also testified at the hearing. The court stated that "based on all of the evidence presented, and the testimony of Mr. Ferguson, and particularly in light of the evaluation of the Court Psychiatric Clinic, the defendant is assessed to be in the high risk category for recidivism." Therefore, the court found, appellant was a sexual predator. In its judgment entry, the court specifically included appellant's prior rape conviction as a basis for its sexual predator finding, as well as the psychiatric assessment that appellant was at a moderate to high risk for reoffending. The basis for the court's decision was clear on the record. There is some competent credible evidence in the record to support the court's decision that the state proved appellant was a sexual predator by clear and convincing evidence. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶41. Therefore, we overrule the first assignment of error.

Second, appellant contends that the court erred by failing to find that he was an habitual sexual offender. We disagree. Because appellant was convicted before January 1, 1997, the court was required to make a determination whether

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appellant was an habitual sexual offender only if it found that he was not a sexual predator. Compare R.C. 2950.09(C)(2)(c) and (E)(1). Therefore, we overrule the second assignment of error. *State v. Twiggs*, Cuyahoga App. No. 88142, 2007-Ohio-1302, ¶28.

Finally, appellant contends that R.C. 2950.09 as amended by Senate Bill 5 (which repealed an offender's ability to seek removal of the sexual predator label and imposed residency restrictions on offenders) imposes *ex post facto* punishment. Again, we must disagree. In fact, the United States Supreme Court has "upheld against *ex post facto* challenges laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment. See *De Veau* [v. *Braisted* (1960)], 368 U.S. [144], at 160; *Hawker* [v. *New York* (1898)], 170 U.S. [189], at 197. As stated in *Hawker*: 'Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application . . . .' *Ibid*. The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause." *Smith v. Doe* (2003), 538 U.S. 84, 104. If the lack of individualized risk assessment does not make a regulatory burden punitive, we fail to see how the lack of individualized

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risk re-assessment could do so. See *State v. Baron*, 156 Ohio App.3d 241, 2004-Ohio-747, ¶ 11. Accordingly, we overrule the third assignment of error.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.



KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, P.J., and  
ANTHONY O. CALABRESE, JR., J., CONCUR