

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

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

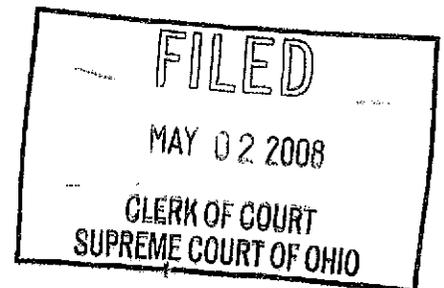
APPELLANT'S RESPONSE TO APPELLEE'S MOTION TO REVERSE AND
REMAND WITHOUT HEARING

ROBERT L. TOBIK
Cuyahoga County Public Defender
BY: JOHN T. MARTIN, ESQ.
0020606
CULLEN SWEENEY, ESQ.
0077187
Assistant Public Defenders
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113-1569
(216) 443-7583; fax (216) 443-3632

COUNSEL FOR APPELLANT, ANDREW FERGUSON

WILLIAM D. MASON
Cuyahoga County Prosecutor
BY: PAMELA BOLTON
The Justice Center - 9th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7800

COUNSEL FOR APPELLEE, THE STATE OF OHIO



IN THE SUPREME COURT OF OHIO
Case No. 05-1780

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

**APPELLANT’S RESPONSE TO APPELLEE’S MOTION TO REVERSE
AND REMAND WITHOUT HEARING**

The State of Ohio has moved this Court to summarily reverse this case prior to oral argument, which is scheduled for May 6, 2008. Mr. Ferguson respectfully opposes this motion.

The State acknowledges, on the basis of *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, that the retroactive application of the amendments to Ohio’s Megan’s Law that were enacted via S.B. 5 in 2003 cannot apply to Mr. Ferguson, whose offense conduct precedes the enactment of S.B. 5. The State suggests that, because this Court will reverse this case on statutory construction grounds, this Court will never reach the ex post facto/retroactive legislation issues presented in Mr. Ferguson’s proposition of law. Finally, the State claims that the Eighth District Court of Appeals never addressed whether the amended Megan’s Law violated Ohio Constitution Article II, Section 28. Mr. Ferguson addresses each facet of the State’s argument in turn.

Mr. Ferguson agrees with the State that the Eighth District’s decision must be reversed.

This Court should hold that:

R.C. 2950.01 et seq., as effective prior to July 31, 2003, applies to those persons whose sexually oriented offenses preceded that date. Those amendments to R.C.

2950.01 et seq. contained within S.B. 5, eff. July 31, 2003, may not be applied retroactively to pre-S.B. 5 offenders insofar as those amendments affect an offender's rights, privileges, duties or obligations, including the offender's right to seek relief from a sexual predator classification and the right to be free from residency restrictions.

The problem with the State's argument is that *Hyle* does not state this holding. This case is important as a statutory-construction complement to *Hyle*, because this case addresses the amendment of existing statutory provisions by S.B.5, as opposed to the enactment of a new statutory provision. Compare R.C. 1.48 (prospective application of new law; cited by *Hyle*) with R.C. 1.58 (prospective application of amendments to already-existing law; not cited by *Hyle*). Thus, even if this Court decides this case consistently with *Hyle*, this Court's decision will still substantively add to Ohio's jurisprudence on these critical statutes.

Second, while this Court normally will not address constitutional issues in cases that can be decided on statutory grounds, this rule of judicial restraint is one of practice and is not constitutionally imposed. This Court may well find that the constitutional issues that prompted this Court to accept this case in the first instance need to be addressed (for example, if the Court disagrees with the parties' statutory analysis). And this Court surely has the authority to address these issues.

Finally, the State is incorrect in suggesting that the Eighth District did not address the Ohio Constitutional issue regarding application of Art. II, Sec. 28. Mr. Ferguson's assignment of error below specifically invoked Art. II, Sec. 28. More importantly, the Eighth District premised its decision on *State v. Baron*, 156 Ohio App.3d 241, 2004-Ohio-747, which, in turn, specifically addressed both the Ex Post Facto Clause of the federal Constitution and Art. II, Sec. 28. Thus, the opinion below did consider the Ohio Constitutional ramifications, even if it placed consideration of the Ohio Constitution within a discussion of the Ex Post Facto Clause.

In the end, this case has been fully briefed and stands on the verge of argument. To abort the process at this point will deprive the Court of the opportunity to address issues that remain as important today as they were when this case was accepted.

Respectfully submitted,



JOHN T. MARTIN, ESQ.

0020606

CULLEN SWEENEY, ESQ.

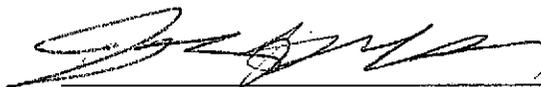
0077187

Assistant Public Defenders

Counsel for Appellant, Andrew Ferguson

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered to Pamela Bolton, Assistant Prosecuting Attorney, Cuyahoga County, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113 on May 2, 2008.



JOHN T. MARTIN, ESQ.

Assistant Public Defender