

IN THE SUPREME COURT OF OHIO

IN RE:

A.R.,

A MINOR CHILD.

Case No. **09-0189**

On Appeal from the Licking
County Court of Appeals
Fifth Appellate District

C.A. Case No. 08-CA-17

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF MINOR CHILD-APPELLANT A.R.**

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PROPOSITION OF LAW II: The retroactive application of Senate Bill 10 to juveniles whose offense was committed prior to the enactment of Senate Bill 10 violates the Ex Post Facto Clauses of the United States Constitution and the Retroactivity Clause of the Ohio Constitution. Article I, Section 10 of the United States Constitution; Article II, Section 28 of the Ohio Constitution.6

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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

Minor child-Appellant A.R.'s constitutional rights were violated when he was classified a Tier III juvenile sex offender registrant under Ohio's newly enacted Senate Bill 10 ("S.B. 10"). His right to due process was violated when he was classified based solely on his offense, and not according to the facts of his case and his future risk to the community. Further, his right to be protected from ex post facto and retroactive laws was violated as S.B. 10 is significantly different from the law in effect at the time of his offense and admission. Moreover, the application of S.B. 10 to A.R. violated the United States Constitution's prohibition against cruel and unusual punishments. This Court has not yet considered the constitutionality of Ohio's newly enacted version of the federal Adam Walsh Act. See *State v. Cook*, 83 Ohio St.3d 404, 409, 1998-Ohio-291; *State v. Williams*, 88 Ohio St.3d 513, 2000-Ohio-428; *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824. However, this Court has accepted jurisdiction of *In the Matter of [D.S.]*, pending as Case No. 2008-1624, which also addresses whether S.B. 10 is constitutional when applied to juveniles.

The Fifth District Court of Appeals relied primarily on this Court's decisions in *Cook* and *Williams* in affirming A.R.'s classification as a Tier III juvenile sex offender registrant, finding that S.B. 10 is non-punitive and thus, constitutional. *In re [A.R.]*, Licking App. No. 08-CA-17, 2008-Ohio-6581, ¶28-35. The Fifth District also cited to the Third District Court of Appeals decision in *In the Matter of [D.S.]*, Allen App. No. 2007-058, 2008-Ohio-3234, to support its findings. However, Ohio's sex offender registration laws have been substantially revised on more than one occasion in the years since *Cook* was released. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶ 45; and *State v. Ferguson*, 120 Ohio St. 3d 7, 2008-Ohio-4824, ¶46-

47 (Justice Lanzinger dissenting, writing that Ohio's sex offender registration and notification law can no longer be seen as civil in nature).

This Court should accept jurisdiction of A.R.'s appeal, as it has already accepted jurisdiction of *In the Matter of [D.S.]*, which presents the same propositions of law. However, as A.R.'s appeal also raises one additional constitutional consideration, this Court should accept jurisdiction of A.R.'s first proposition of law in order to give further guidance to Ohio's courts in applying the provisions of S.B. 10. Finally, as the Ninth District Court of Appeals has found that S.B. 10 vests juvenile courts with full discretion to determine tier level under S.B. 10,¹ this Court should accept jurisdiction of A.R.'s appeal to give Ohio courts a uniform system of applying the new sex offender registration and notification provisions.

STATEMENT OF THE CASE AND FACTS

On February 8, 2006, then fifteen-year-old A.R. admitted to and was found delinquent of two counts of rape, violations of R.C. 2907.02, felonies of the first degree if committed by an adult. A.R. was committed to the Ohio Department of Youth Services ("DYS") for a minimum term of one year on each count, maximum to the age of twenty-one, with each commitment set to run concurrently with one another. While A.R. was serving his commitment in DYS, the Ohio General Assembly passed S.B. 10, which drastically changed the law affecting juveniles like A.R., who have been adjudicated delinquent of a sexually oriented offense.

On January 14, 2008, A.R. was released from DYS and afforded a sex-offender-classification hearing under R.C. 2152.83(B)(1). A.R. appealed his classification to the Fifth District Court of Appeals, raising six assignments of error, four of which asserted challenges to

¹ See *In re G.E.S.*, Summit App. No. 24079, 2008-Ohio-4076, ¶37 (AWA vests juvenile courts with full discretion to determine whether to classify a delinquent child as a Tier I, Tier II, or Tier III offender).

the constitutionality of S.B. 10. In an opinion journalized on December 11, 2008, the Fifth District Court of Appeals affirmed A.R.'s classification. A.R.'s timely appeal follows.

PROPOSITION OF LAW I

The retroactive application of Senate Bill 10 to juveniles whose offense was committed prior to the enactment of Senate Bill 10 violates the juvenile's right to Due Process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution.

The guarantees of the Due Process Clause apply to juveniles and adults alike. *Kent v. U.S.* (1966), 383 U.S. 541; *In re Gault* (1967), 387 U.S. 1; *In re Winship* (1970), 397 U.S. 358. In *Gault*, the Supreme Court of the United States explicitly extended federal constitutional protections to children in juvenile delinquency proceedings. *Id.* at 13-14. The Court has since established that the applicable due process standard in juvenile proceedings is fundamental fairness. *McKeiver v. Pennsylvania* (1971), 403 U.S. 528, 543.

Under former R.C. 2152.83(B)(2)(b), if a juvenile court found that a child who had been adjudicated delinquent of a sex offense was to be classified as a juvenile offender registrant, the court then determined whether that juvenile was also a sexual predator or a habitual sex offender. The court considered a number of factors relevant for making such a determination, including: 1) the nature of the sexually oriented offense; 2) whether the child has shown any genuine remorse; 3) public interest and safety; 4) the factors set forth in division (B)(3) of R.C. 2950.09 or 2950.12; 5) the factors set forth in divisions (B) and (C) of R.C. 2929.12 as applicable to delinquent children, the offense, and the victim; and 6) the results of any treatment provided to the child and any follow-up professional assessment of the child. Former R.C. 2152.83(E)(1)-(5). A court could only make a determination that a juvenile offender registrant was also a

sexual predator or habitual offender with the support of clear and convincing evidence. Former R.C. 2152.83(C).

The procedures set forth in former R.C. 2152.83 provided juvenile sex offenders with due process protections that ensured their classification would be determined on a case-by-case basis. However, the Licking County Juvenile Court applied S.B. 10 to A.R. without the protection of the procedure previously required by the law before S.B. 10's enactment. The juvenile court in the present case did not consider A.R.'s dangerousness or likelihood to re-offend, rather, the court simply noted the offense committed and assigned A.R. to Tier III, based on its understanding of the new law. R.C. 2152.83(B)(2)(b), 2152.02(Y), and 2950.01(E),(F), and (G). This completely eradicated the previous mechanism of providing A.R. with the due process protection that he clearly had in the law prior to S.B. 10's enactment. Further, the new registration requirements, which are indiscriminately applicable to juveniles, have imposed criminal punishments on members of society who have historically been shielded from criminal prosecution.

The Civil Nature of Juvenile Adjudications.

This Court has long recognized the fundamental differences between children in the juvenile delinquency system and adults in the criminal justice system:

The Juvenile Court stands as a monument to the enlightened conviction that wayward boys may become good men and that society should make every effort to avoid their being attained as criminal before growing to the full measure of adult responsibility. Its existence, together *** with the substantive provisions of the Juvenile Code, reflects the considered opinion of society that childish pranks and other youthful indiscretions, as well as graver offenses, should seldom warrant adult sanctions and that the decided emphasis should be upon individual, corrective treatment.

State v. Agler (1969), 19 Ohio St.2d 70, 71. A child is not a criminal by reason of any juvenile court adjudication; and civil disabilities, ordinarily following convictions, do not attach to

children. *Id.* at 73. The very purpose of the juvenile code is to avoid treating children as criminals and insulating them from the reputation and answerability of criminals. *Id.* at 80. Further, under current precedent, the law is clear: “juvenile court proceedings are civil, rather than criminal, in nature.” *In re Anderson* (2001), 92 Ohio St.3d 63.

While juvenile court proceedings have not been held to be “criminal prosecutions,” such proceedings also have not been regarded as devoid of criminal aspects merely because they are given a civil label. *McKeiver*, 403 U.S. at 541 (citing *Kent v. U.S.*, 383 U.S. at 554; *In re Gault*, 387 U.S. at 17; *In re Winship*, 397 U.S. at 365-66). Those criminal aspects have been highlighted with the advent of S.B. 10 and the resulting effects on juvenile offender registrants, whose initial classification procedure has been conducted the same way as adult sex offenders. Despite the inherent differences between adults in the criminal justice system and juveniles in the juvenile delinquency system, S.B. 10 has imposed the same offense-based classification scheme on juvenile offenders and adult offenders.

Senate Bill 10, as it has been applied to juveniles throughout the state, goes against the history of the juvenile court, its intent, and its purposes. Applying S.B. 10 to juveniles in the same way that it has been applied to adults erases the line between juvenile and criminal offenders. There is no constitutional right to be treated as a juvenile; however, because Ohio has created a system of juvenile justice in which adult treatment and sentencing is reserved for exceptional circumstances, and in which procedural rights are afforded to similarly situated juveniles, A.R. has a substantial liberty interest in freedom from arbitrary sentencing schemes as well as the protections afforded juveniles before they are sentenced as an adult. *See Kent v. U.S.*, *supra*.

The Ninth District Court of Appeals, in *In re G.E.S.*, Summit App. No. 24079, 2008-Ohio-4076, was the first appellate court in the state to find that S.B. 10 was to be applied to juveniles in a manner dissimilar to the way the law is applied to adults. *Id.* at ¶37. The Ninth District found that under a plain reading of the applicable statutes, S.B. 10 still vests juvenile courts with discretion in placing a juvenile sex offender into a classification and registration tier. *Id.* This was not the way that the Licking County Juvenile Court applied S.B. 10 to A.R. In fact, A.R. proposes that if this Court adopts the reasoning applied by the Ninth District in *In re G.E.S.*, A.R.'s constitutional challenges would be rendered moot, and this Court could remand his case for a new classification hearing consistent with the Ninth District's application of S.B. 10.

PROPOSITION OF LAW II

The retroactive application of Senate Bill 10 to juveniles whose offense was committed prior to the enactment of Senate Bill 10 violates the Ex Post Facto Clauses of the United States Constitution and the Retroactivity Clause of the Ohio Constitution. Article I, Section 10 of the United States Constitution; Article II, Section 28 of the Ohio Constitution.

The retroactive application of Senate Bill 10 to offenses that occurred before January 1, 2008 violates the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution. Article II, Section 28 of the Ohio Constitution provides that "the general assembly shall have no power to pass retroactive laws." Additionally, Article I, Section 10 of the United States Constitution prohibits any legislation that "changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed." *Miller v. Florida* (1987), 482 U.S. 423, 429. Ex post facto laws are prohibited in order to ensure that legislative acts "give fair warning to their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham* (1981), 450 U.S. 24, 28-29.

Article II, Section 28 of the Ohio Constitution; Article I, Section 10 of the United States Constitution.

1. Senate Bill 10 violates Article I, Section 10 of the United States Constitution.

The Ex Post Facto Clause of the United States Constitution prevents the legislature from abusing its authority by enacting arbitrary or vindictive legislation aimed at disfavored groups. See *Miller v. Florida*, 482 U.S. at 429. However, the Ex Post Facto Clause applies only to criminal statutes. *California Dept. of Corrections v. Morales* (1995), 514 U.S. 499, 504; *Collins v. Youngblood* (1990), 497 U.S. 37, 43. The United States Supreme Court has declined to set out a specific test for determining whether a statute is criminal or civil for purposes of applying the Ex Post Facto Clause. See *Morales*, 514 U.S. at 508-509. But the Court has recognized that determining whether a statute is civil or criminal is a matter of statutory interpretation. *Helvering v. Mitchell* (1938), 303 U.S. 391, 399; *Allen v. Illinois* (1986), 478 U.S. 364, 368.

This Court has used the “intent-effects test” to delineate between civil and criminal statutes for the purposes of an ex post facto analysis of sex-offender registration and notification statutes. *Cook*, 83 Ohio St.3d at 415-417. When applying the intent-effects test, a reviewing court must first determine whether the General Assembly, “in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.” *United States v. Ward* (1980), 448 U.S. 242, 248-249. But even if the General Assembly indicated an intention to establish a civil penalty, a statute will be determined to be criminal if “the statutory scheme [is] punitive either in purpose or effect as to negate that intention.” *Id.*

The Intent of Senate Bill 10.

In the intent-prong of the analysis, a reviewing court must determine whether the General Assembly’s objective in promulgating S.B. 10 was penal or remedial. A court must look to the

language and purpose of the statute in order to determine legislative intent. *State v. S.R.* (1992), 63 Ohio St.3d 590, 594-595; *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105. In *Cook*, this Court concluded that former R.C. Chapter 2950 was not intended to be punitive, in part by noting that the language “the exchange or release of [information required by this law] is *not punitive*,” was illustrative of the General Assembly’s intent. *Cook*, 83 Ohio St.3d at 417.

Although S.B. 10’s changes to former R.C. Chapter 2950 do not delete the language stating that “the exchange or release of [information required by the law] is not punitive,” the purpose of the new statute has changed. According to former R.C. Chapter 2950 and the provisions in R.C. 2152.82-85 of the Juvenile Code, an individual’s classification and registration requirements were tied directly to his or her ongoing threat to the community as determined by a court of law. But the way the new statutory scheme was applied in A.R.’s case, an individual’s registration and classification obligations depend only upon his or her offense of conviction or adjudication. Thus, transforming the statutory scheme from a “narrowly tailored” solution (*Cook*, 83 Ohio St.3d at 417) to a punitive statutory scheme that does not consider the offender’s risk to the community or likelihood of reoffending.

Additionally, the formal attributes of a legislative enactment—such as the manner of its codification and the enforcement procedures that it establishes—are probative of legislative intent. *Smith v. Doe*, 538 U.S. at 94. Because the legislature elected to place S.B. 10 squarely within Title 29, Ohio’s Criminal Code, the enforcement mechanisms established by S.B. 10 are criminal in nature. Furthermore, the failure of an individual to comply with the registration, verification, or notification requirements of Senate Bill 10 subjects the offender to criminal prosecution and criminal penalties. R.C. 2950.99. See, also, *State v. Williams*, 114 Ohio St.3d 103, at ¶10 (This Court determined that although “the registration requirements of [former] R.C.

Chapter 2950 may have been enacted generally as remedial measures, R.C. 2950.06 defines a crime: the offense of failure to verify current address.”). See, also, *State v. Wilson*, 113 Ohio St.3d 382, at ¶43-49, (Lanzinger, J., concurring in part and dissenting in part) (“I dissent from the majority’s labeling of sex-offender-classification proceedings as civil in nature.”)

The Effect of Senate Bill 10.

Senate Bill 10 has a punitive effect that negates its remedial purpose. When assessing the punitive effects of a particular statute, the United States Supreme Court has suggested that a reviewing court consider the following factors: whether the regulatory scheme is analogous to a historical form of punishment; whether it creates an affirmative disability or restraint; whether it promotes the traditional aims of punishment; whether it is rationally related to a non-punitive purpose; and whether it is excessive in relation to its allegedly non-punitive purpose. *Smith v. Doe* (2003), 538 U.S. 84, 97.

Senate Bill 10 imposes on defendants and juvenile offenders burdens that have historically been regarded as punishment and operate as affirmative disabilities and restraints. While registering as a sex offender may have adverse consequences to a defendant or juvenile offender, “running from mild personal embarrassment to social ostracism,” the notification of where that individual lives causes S.B. 10 to resemble colonial punishments of “public shaming, humiliation, and banishment.” *Smith v. Doe*, 538 U.S. at 98.

For example, for non public-registry-qualified-juvenile-offender-Tier III registrants, a judge may subject a juvenile offender registrant to the community and victim notification provisions in R.C. 2950.10 and 2950.11. R.C. 2152.83(C)(2). This would include forwarding the information to neighbors; school superintendents and principals; preschools; daycares; and all volunteer organizations where contact with minors may occur. R.C. 2950.11(A)-(F). All of

the various organizations in turn are authorized to disseminate the information; and the information is available to any member of the public upon request. R.C. 2950.11(A)-(F).

This dissemination of information resembles shaming punishments, which are intended to inflict public disgrace. R.C. 2950.04(B); 2950.04(C). See Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. Chi. L. Rev. 733, 739 (1998) (“Punishments widely described as ‘shaming’ penalties thus come in two basic but very different forms: those that rely on public exposure and aim at shaming; and those that do not rely on public exposure and aim at educating.”). See, also, Paul Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U.L. Rev. 201, 202 (1996) (noting that “criminal sanctions signal condemnation”).

Senate Bill 10 also furthers the traditional aims of punishment: retribution and deterrence. *Smith v. Doe*, 538 U.S. at 102. The automatic placement of an offender into a tier without determining whether he or she is likely to reoffend is also a form of retribution, meant to prospectively deter the commission of sexually oriented offenses. *Tison v. Arizona* (1987), 481 U.S. 137, 180-181 (“Retribution has as its core logic the crude proportionality of “an eye for an eye.”); see, also, *Roper v. Simmons* (2005), 543 U.S. 551, 571-572 (found that the “penological justifications” for criminal sanctions do not apply to juveniles since juvenile offenders are less culpable than adult defendants and therefore are not amenable to retribution and deterrence).

Senate Bill 10 is Retrospective.

The General Assembly has mandated that S.B. 10 be applied retroactively. R.C. 2950.031(A)(1); R.C. 2950.07(C)(2). Accordingly, because S.B. 10 is criminal in nature and has a punitive effect, a reviewing court may determine whether S.B. 10’s retroactive application is constitutional under federal law. Article I, Section 10 of the United States Constitution. A law falls within the ex post facto prohibition if it meets two critical elements: first, the law must be

retrospective, applying to events occurring before its enactment; and second, the law must disadvantage the offender affected by it. *Miller v. Florida*, 482 U.S. at 430. A law is retrospective if it “changes the legal consequences of acts completed before its effective date.” *Id.* at 431, citing *Weaver v. Graham* (1981), 450 U.S. 24, 31. As to the second element, the United States Supreme Court explained that it is “axiomatic that for a law to be ex post facto it must be more onerous than the prior law.” *Id.* (internal citation omitted). See, also, *State v. Brewer* (1991), 86 Ohio St.3d 160, 163, 1999-Ohio-146, (requiring an offender to register every 90 days for life is “more onerous” than requiring an offender to register every year for a period of ten years.).

Senate Bill 10 Disadvantages A.R.

A.R. has argued that the Licking County Juvenile Court applied S.B. 10 to him without the same procedural protections that existed prior to S.B. 10’s enactment. A.R. hereby incorporates the arguments contained in Proposition of Law I, relating to the effect of S.B. 10 as though fully re-written here to illustrate how he has been disadvantaged.

2. Senate Bill 10 violates Article II, Section 28 of the Ohio Constitution.

Article II, Section 28 of the Ohio Constitution forbids the enactment of retroactive laws. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 106. Ohio’s 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, footnote 5 (“[Ohio’s Constitution of 1851 provides a] much stronger prohibition than the more narrowly constructed provision in Ohio’s Constitution of 1802. Article VIII, Section 16 of th[e 1802] Constitution stated: “No ex post facto law, nor any law impairing the validity of contracts, shall ever be

made,” merely reflecting the terms used in Article I, Section 10 of the United States Constitution.”).

In considering whether a particular law may be applied retrospectively, a reviewing court must first determine whether it should apply the rule of statutory construction or immediately engage in the constitutional review of the statute. *Id.* The issue of whether a statute may constitutionally be applied retrospectively does not arise unless there has been a prior determination that the General Assembly has specified that the statute so apply. *Id.* When “there is no clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment.” *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262. Because the General Assembly has mandated that S.B. 10 be applied retroactively, further review is necessary.

When the General Assembly has ordered that a new law be applied retroactively, a reviewing court must determine whether the new law affects a person’s substantive rights. *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 137. A statute is substantive—and therefore unconstitutional if applied retroactively—if the statute “impairs or takes away vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligation or liabilities as to a past transaction, or creates a new right.” *Cook*, 83 Ohio St.3d at 411.

Prior to the enactment of S.B. 10, there was no question as to the discretion afforded juvenile courts in determining what registration level A.R. would be classified to, if any at all. This allowed the court to consider A.R.’s progress in treatment and whether he was at risk for re-offending. However, the juvenile court in A.R.’s case either did not know it had discretion, or

believed it lacked discretion to make a determination as to tier level in A.R.'s case, thus inflicting a much harsher penalty that will affect A.R. for the rest of his life.

PROPOSITION OF LAW III

Applying Senate Bill 10 to juveniles in a way that classifies them based solely on their offense constitutes cruel and unusual punishment. Eighth Amendment to the United States Constitution.

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment. The right flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States* (1910), 217 U.S. 349, 367. Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons. *Simmons*, 543 U.S. at 560.

The prohibition against cruel and unusual punishments must be "interpreted according to its text by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design." *Id.* "To implement this framework [the Court] ha[s]... affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." *Id.* at 561, quoting *Trop v. Dulles* (1958), 356 U.S. 86, 100-101 (plurality opinion).

A.R. admitted to committing a sex offense when he was fifteen years old. This made him subject to discretionary classification. However, because his offense was rape, the juvenile court automatically placed A.R. into Tier III, which requires him to register every 90 days for the rest of his life. 2950.04, 2950.041, 2950.05, 2950.06. The directive that a boy, who was adjudicated delinquent for offenses he committed when he was fifteen, must register as a sex offender for the rest of his life, is not only excessive, but also cruel and unusual punishment. Had the juvenile

court classified A.R. based on the facts of his case, and not solely on his offense, the court could have considered A.R.'s future threat to the community and the effectiveness of the treatment that A.R. had completed. This would have allowed the court to classify him to a punishment that fit the facts of his case.

When it comes to laws that involve sex offenders, the passions of the majority must be tempered with reason. Joseph Lester, *The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 Akron L. Rev. 339, 340 (2007). "Overborne by a mob mentality for justice, officials at every level of government are enacting laws that effectively exile convicted sex offenders from their midst with little contemplation as to the appropriateness or constitutionality of their actions." *Id.* Politicians across the country have approved almost every measure that deals with sex offenders in order to appear strong on crime. *Id.* "Given that the sex-offender lobby is neither large nor vocal, it is up to the courts to protect the interests of this disenfranchised group." *Id.* at 340, citing *Cal. Dep't of Corr. v. Morales* (1995), 514 U.S. 499, 522 (Stevens, J., dissenting).

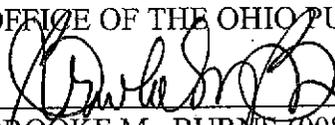
A lifetime registration period for a person who committed a sex offense as a fifteen-year-old boy is extreme and disproportionate to the crime, when a juvenile court has not found that the facts of that youth's case call for such a classification. Further, implementation of S.B. 10 to A.R.'s case is particularly cruel because juveniles have an inherent amenability to rehabilitation. "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." 40 Akron L. Rev. 339 at 570.

CONCLUSION

For the reasons argued above, and since this Court has already accepted *In the Matter of [D.S.]*, pending as Case No. 2008-1624, A.R. respectfully requests that this Court accept jurisdiction of this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing **MEMORANDUM IN SUPPORT OF JURISDICTION OF MINOR CHILD-APPELLANT A.R.** was served by ordinary U.S. Mail, postage-prepaid, this 26th day of January, 2009, to Chris Reamer, Assistant Licking County Prosecuting Attorney, Licking County Prosecutor's Office, 20 South Second Street, Newark, Ohio, 43055.



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IN THE SUPREME COURT OF OHIO

IN RE: A.R.,
A MINOR CHILD

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On Appeal from the
Licking County Court of Appeals
Fifth Appellate District

C.A. Case No. 08-CA-17

APPENDIX TO

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF MINOR CHILD-APPELLANT A.R.**

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

APR 11 2008
CLERK OF COURT
LICKING COUNTY, OHIO

IN RE: ADRIAN R.
DELINQUENT CHILD

JUDGES:

Hon. John W. Wise, P.J.
Hon. Julie A. Edwards
Hon. Patricia A. Delaney

Case No. 08-CA-17

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Juvenile
Court Case No. A2005-0984

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

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Delaney, J.

{¶1} Appellant Adrian R. appeals the January 14, 2008, Judgment Entry of the Licking County Court of Common Pleas, Juvenile Division, which adjudicated him a Tier III sexual offender subject to statutory registration requirements. The State of Ohio is the Plaintiff-Appellee.

STATEMENT OF THE CASE AND FACTS

{¶2} On December 22, 2005, Appellant, a juvenile, was charged with two counts of rape, in violation of R.C. 2907.02(A)(1)(b), both felonies of the first degree if committed by an adult. In Counts 1 and 2 of the complaint, he was charged with engaging in sexual conduct with K.R., who was eight years old at the time of the offenses in 2004. On February 6, 2006, Appellant admitted to both counts of the complaint. The court continued disposition and ordered a PSI and sex offender assessment. Following the dispositional hearing on April 6, 2006, the court committed Appellant to the Department of Youth Services for a minimum of two years and a maximum not to exceed Appellant's twenty-first birthday.

{¶3} On January 14, 2008, Appellant again appeared in court, prior to being released from the custody of the Department of Youth Services, for a sex offender classification hearing. At that hearing, the court determined that, based on Senate Bill 10, which went into effect on July 1, 2007, Appellant was a Tier III sex offender who was not subject to community notification provisions.

{¶4} Senate Bill 10 was passed as a result of the federal Adam Walsh Act, and it reorganized Ohio's sex offender classification and registration scheme. Instead of having three levels of offenders classified as "sexually oriented offenders," "habitual sex

offenders," and "sexual predators," the new law assigns offenders to a classification based on a tier system that relies on the offense of conviction and/or the number of convictions. See R.C. 2950.01 (E, F, and G).

{¶5} Effective January 1, 2008, Tier I offenders were required to register for fifteen years and must verify their residence with the sheriff on an annual basis. R.C. 2950.05(B)(3); R.C. 2950.06(B)(1). Tier II offenders must register for twenty-five years and periodically verify every 180 days. R.C. 2950.05(B)(2); R.C. 2950.06(B)(2). Tier III offenders must register for the rest of their life and periodically verify every 90 days. R.C. 2950.05(B)(1); R.C. 2950.06(B)(3). Adult Tier III offenders are also subject to automatic community notification, under which the sheriff is required to notify the offender's neighbors and certain other persons in the community of, the offender's residence, offense, and Tier III status.

{¶6} Revised Code 2152.83(B)(1) subjects juvenile sex offenders to registration requirements if a child is adjudicated a delinquent child for committing a sexually oriented offense or a child-victim oriented offense on or after January 1, 2002, and if the child offender is fourteen or fifteen years of age at the time of the offense. After conducting a hearing, the court may determine that the offender is a Tier I, II, or III offender and has the discretion to impose community notification provisions on the offender if the offender meets certain requirements. Rape is classified as a Tier III offense pursuant to R.C. 2950.01. The trial court memorialized its ruling classifying Appellant as a Tier III sex offender in a Judgment Entry filed on January 15, 2008.

{¶7} It is from this judgment entry Appellant appeals, raising the following six assignments of error:

{¶8} "I. THE TRIAL COURT ERRED WHEN IT CLASSIFIED ADRIAN R. AS A SEX OFFENDER REGISTRANT, WHEN THE RECORD ILLUSTRATES THAT NEITHER THE COURT NOR THE PARTIES WERE CLEAR ON THE SPECIFICS OF THE LAW GOVERNING THE CLASSIFICATION OF JUVENILES UNDER SENATE BILL 10."

{¶9} "II. ADRIAN R. WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE TRIAL COUNSEL FAILED TO EDUCATE HIMSELF ABOUT RELEVANT JUVENILE OFFENDER CLASSIFICATION PROCEDURES AND FAILED TO PRESENT TO THE COURT WITH AN ACCURATE STATEMENT OF LAW REGARDING HIS CLIENT'S DUTY TO REGISTER UNDER R.C. 2152.83, WHICH LEAD TO THE COURT TO CLASSIFY ADRIAN AS A TIER III JUVENILE OFFENDER REGISTRANT, UNDER THE MISTAKEN BELIEF THAT ADRIAN WAS A MANDATORY REGISTRANT AND THAT THE ONLY ISSUE WITHIN THE COURT'S DISCRETION WAS WHETHER ADRIAN WAS SUBJECT TO COMMUNITY NOTIFICATION."

{¶10} "III. THE TRIAL COURT ERRED WHEN IT APPLIED SENATE BILL 10 TO ADRIAN R., AS THE APPLICATION OF SENATE BILL TO ADRIAN VIOLATES HIS RIGHTS TO DUE PROCESS AS GUARANTTED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION." [SIC]

{¶11} "IV. THE TRIAL COURT ERRED WHEN IT APPLIED SENATE BILL 10 TO ADRIAN R., AS THE RETROACTIVE APPLICATION OF SENATE BILL 10 TO ADRIAN R., VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES

CONSTITUTION AND THE RETROACTIVITY CLAUSE OF OHIO CONSTITUTION.”
[SIC]

{¶12} “V. THE TRIAL COURT ERRED WHEN IT APPLIED SENATE BILL 10 TO ADRIAN R., AS THE APPLICATION OF SENATE BILL 10 TO ADRIAN VIOLATES THE SEPARATION OF POWERS DOCTRINE THAT IS INHERENT IN OHIO CONSTITUTION.”

{¶13} “VI. THE TRIAL COURT ERRED WHEN IT APPLIED SENATE BILL 10 TO ADRIAN R., AS THE APPLICATION OF SENATE BILL 10 TO ADRIAN VIOLATES THE UNITED STATES CONSITUTION’S PROHIBITION AGAINST CRUEL AND UNUSAL PUNISHMENTS. EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION.” [SIC]

I

{¶14} In Appellant’s first assignment of error, he contends that the trial court erred in classifying him as a juvenile sex offender because the parties and judge believed that Appellant was subject to mandatory classification. We find the record does not support this contention.

{¶15} When reviewing claims of whether a trial court erred in classifying a sex offender, Appellant suggests that we should apply a de novo standard of review. However, in his issue presented, he asks whether the trial court abused its discretion when it informed Appellant that he was a Tier III registrant. Appellee argues that the proper standard of review is an abuse of discretion standard. We agree with Appellee.

{¶16} A de novo standard of review is applied when an appellate court reviews the interpretation and application of a statute. *State v. Sufronko* (1995), 105 Ohio App.3d 504, 506, 664 N.E.2d 596, 597. No such review is warranted in this case.

{¶17} An abuse of discretion standard, on the other hand, is applied when an appellate court must give deference to a trial court's application of guidelines to facts. See *Buford v. U.S.* (2001), 532 U.S. 59, 121 S. Ct. 1276. Under R.C. 2152.83, a trial court is given discretion to determine whether to classify a juvenile offender as a Tier I, II, or III sex offender. Moreover, the trial court is given discretion to determine whether a juvenile sex offender should be subject to community notification requirements. The trial court is able to listen to the defendant's statement, should he choose to make one, listen to victim impact statements, listen to the evaluation of the Department of Youth Services and Parole representatives, and review other factual matters in making its determinations as to registration and classification. Because the trial court is in a position to weigh and evaluate these considerations, deference should be given to the trial court's decision and that decision should not be overturned absent an abuse of discretion.

{¶18} It cannot be said that the factual determinations made by the trial court in the present case did not guide the trial court's determination in this case. The victim in this case was eight years old at the time of the offenses and that fact alone supports the judge's finding that Appellant is a Tier III offender. Moreover, the court was aware that his determination was discretionary. While initially there appeared to be some confusion over the mandatory or discretionary nature of the classification, both parties clarified that the classification was in fact discretionary and the court recognized that

understanding. Additionally, the court, in addressing the concerns regarding community notification, was well aware of the standards related to that issue and did not subject Appellant to community notification. The court spent an extensive amount of time discussing with Appellant the requirements placed upon him by classification and advised Appellant of the consequences of failing to meet those requirements. Accordingly, we cannot say that the trial court was unaware of the nature of the proceedings and abused its discretion. Therefore, Appellant's first assignment of error is overruled.

.II

{¶19} In Appellant's second assignment of error, he argues that trial counsel was ineffective for failing to educate himself about relevant juvenile offender classification procedures and failed to present the court with an accurate statement of the law as it related to Appellant's duty to register under R.C. 2152.83. We disagree.

{¶20} To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that his trial counsel acted incompetently. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164.

{¶21} "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in

the same way.” *Strickland*, 466 U.S. at 689. The question is whether counsel acted “outside the wide range of professionally competent assistance.” *Id.* at 690.

{¶22} Even if a defendant shows that his counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this “actual prejudice” prong, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694.

{¶23} When counsel’s alleged ineffectiveness involves the failure to pursue a motion or legal defense, this actual prejudice prong of *Strickland* breaks down into two components. First, the defendant must show that the motion or defense “is meritorious,” and, second, the defendant must show that there is a reasonable probability that the outcome would have been different if the motion had been granted or the defense pursued. See *Kimmelman v. Morrison* (1986), 477 U.S. 365, 375, 106 S.Ct. 2574, 2583; see, also, *State v. Santana* (2001), 90 Ohio St.3d 513, 739 N.E.2d 798 citing *State v. Lott* (1990), 51 Ohio St.3d 160, 555 N.E.2d 293.

{¶24} Appellant argues that counsel was ineffective because counsel did not know about the offender classification procedures and failed to present the court with an accurate statement of the law regarding Appellant’s duty to register. While trial counsel initially stated that he believed the registration provision to be mandatory, he did clarify during the hearing that the classification was discretionary. Counsel went on to advocate zealously for his client, informing the court of Appellant’s accomplishments while in the custody of the Department of Youth Services, including graduating from high school with a 4.0 grade point average, being a mentor to other youths in DYS, and

completing sex offender programming and demonstrating remorse for his actions. Moreover, even if we concluded that counsel's representation was outside the wide range of professionally competent assistance, which we do not, given the fact that the trial court was aware of the discretionary nature of the proceedings, Appellant suffered no prejudice. Appellant's second assignment of error is therefore overruled.

III, IV, V, VI

{¶25} In Appellant's third through sixth assignments of error, he challenges the constitutionality of Senate Bill 10, claiming that Senate Bill 10 violates the Due Process clause, the Ex Post Facto clause, and violates the Eighth Amendment of the United States Constitution, as well as the Separation of Powers doctrine. Appellant did not raise these issues in the trial court, and raises them for the first time on appeal.

{¶26} "Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus, 489 N.E.2d 277. The waiver doctrine announced in *Awan* is discretionary. *In re M.D.* (1988), 38 Ohio St.3d 149, 151, 527 N.E.2d 286, 288. See also *State v. Longpre*, Ross Co. App. No. 08CA3017, 2008-Ohio-3832 (applying waiver doctrine to Senate Bill 10).

{¶27} Because Appellant failed to raise these issues in the trial court, he has waived his right to raise them on appeal. We will, however, address his claims under a plain error standard of review. A reviewing court may review claims of defects affecting

substantial rights even if they were not brought to the attention of the court. Ohio Crim. R. 52(B).

{¶28} Generally, an enactment of the General Assembly is presumed to be constitutional absent proof beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible. *State v. Cook* (1998), 83 Ohio St.3d 404, 409, 700 N.E.2d 570, 1998-Ohio-291 quoting *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St.2d 142, paragraph one of the syllabus. "A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality." *Id.* at 147.

{¶29} The Supreme Court of the United States has already stated, "[t]he 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 [.]" *Smith v. Doe* (2003), 538 U.S. 84, 104, 123 S.Ct. 1140, 1153. In *Smith v. Doe*, Alaska's system of lifetime, quarterly registration and its internet registry were upheld as valid non-punitive measures to protect the public. Community notification also constitutes a valid non-punitive measure, as found by the Ohio Supreme Court. *Cook, supra*; *State v. Williams* (2000), 88 Ohio St.3d 513, 728 N.E.2d 342, 2000-Ohio-428. In *State v. Williams*, the Court further held that R.C. 2950 did not violate double jeopardy or equal protection provisions of the United States Constitution.

{¶30} Moreover, in *State v. Cook* (1998), 83 Ohio St.3d 404, *supra*, the Ohio Supreme Court found the former version of R.C. 2950 constitutional. Senate Bill 10 amended R.C. 2950 so that classification is no longer based on an individualized

analysis. Instead, classification is now based on the type of crime committed. In addition, Senate Bill 10 increased the reporting requirements.

{¶31} In *Cook*, the Ohio Supreme Court determined that the old system effective in 1997 was “retroactive” because it looked to the prior conviction as a starting point for regulation. *Cook*, 83 Ohio St.3d at 410. Even so, the Court upheld the old system because it had a valid remedial and non-punitive purpose. The *Cook* court determined that Ohio’s sex offender statutes did not violate the Ex Post Facto clause of the United States Constitution, finding:

R.C. Chapter 2950 serves the solely remedial purpose of protecting the public. Thus, there is no clear proof that R.C. Chapter 2950 is punitive in its effect. We do not deny that the notification requirements may be a detriment to registrants, but the sting of public censure does not convert a remedial statute into a punitive one. *Kurth Ranch*, 511 U.S. at 777, 114 S.Ct. at 1945, 128 L.Ed.2d at 777, fn. 14. Accordingly, we find that the registration and notification provisions of R.C. Chapter 2950 do not violate the Ex Post Facto Clause because its provisions serve the remedial purpose of protecting the public.

Cook, 83 Ohio St.3d at 423.

{¶32} Moreover, in *Williams*, the Court determined that Ohio’s sex offender statutes did not violate the Double Jeopardy Clause, stating:

The Double Jeopardy Clause states that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” Fifth Amendment to the United States Constitution; see, also, Section 10, Article I, Ohio Constitution. Although the Double Jeopardy Clause was commonly understood to prevent a second prosecution for the same offense, the United States Supreme Court has applied the clause to prevent a state from punishing twice, or from attempting a second time to criminally punish for the same offense. See *Kansas v. Hendricks*, 521 U.S. at 369, 117 S.Ct. at 2085, 138 L.Ed.2d at 519; *Witte v. United States* (1995), 515 U.S. 389, 396, 115 S.Ct. 2199, 2204, 132

L.Ed.2d 351, 361. The threshold question in a double jeopardy analysis, therefore, is whether the government's conduct involves criminal punishment. *Hudson v. United States* (1997), 522 U.S. 93, 101, 118 S.Ct. 488, 494, 139 L.Ed.2d 450, 460.

This court, in *Cook*, addressed whether R.C. Chapter 2950 is a "criminal" statute, and whether the registration and notification provisions involved "punishment." Because *Cook* held that R.C. Chapter 2950 is neither "criminal," nor a statute that inflicts punishment, R.C. Chapter 2950 does not violate the Double Jeopardy Clauses of the United States and Ohio Constitutions. We dispose of the defendants' argument here with the holding and rationale stated in *Cook*.

Williams, 88 Ohio St.3d at 527-528.

{¶33} Furthermore, the court in *Williams* stated that "stigma" or "favorable reputation" are not liberty or property interests protected by due process. *Williams*, 88 Ohio St.3d at 527, citing *Paul v. Davis* (1976), 424 U.S. 693, 96 S.Ct. 1155. An allegation that defamation has caused or will cause anguish or stigma "does not in itself state a cause of action for violating a constitutional right." *Id.* at 527, quoting *Cook*, 83 Ohio St.3d at 413. No due process violation occurs where "the law required an offender to be registered based on the fact of the conviction alone." *Doe I v. Dann et al.*, (June 9, 2008), N.D. Ohio No. 1:08-CV-00220-PAG, Document 146, 2008 WL 2390778. Moreover, "public disclosure of a state's sex offender registry without a hearing as to whether an offender is 'currently dangerous' does not offend due process where the law required an offender to be registered based on the fact of his conviction alone." *Doe I v. Dann et al.*, citing *Connecticut Dept. of Public Safety v. Doe* (2003), 538 U.S. 1, 123 S.Ct. 1160. Therefore, we conclude that due process is not implicated by Senate Bill 10.

{¶34} As to whether Senate Bill 10 violates the Separation of Powers doctrine, we hold that it does not. As the Third District recently stated in *In Re Smith*, in striking down a similar challenge:

[W]e note that the classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts. *Slagle v. State*, 145 Ohio Misc.2d 98, 884 N.E.2d 109, 2008-Ohio-593. Without the legislature's creation of sex offender classifications, no such classification would be warranted. Therefore, with respect to this argument, we cannot find that sex offender classification is anything other than a creation of the legislature, and therefore, the power to classify is properly expanded or limited by the legislature.

In Re Smith, Allen App. No. 1-07-58, 2008-Ohio-3234, ¶39.

{¶35} We also find that Senate Bill 10 does not amount to cruel and unusual punishment. In *Cook*, supra, the Supreme Court concluded that sexual offender notification and registration requirements are not punitive in nature; rather, they are remedial measures designed to protect the public. Therefore, such measures do not implicate the protections against cruel and unusual punishment. *Cook*, at 423. See also, *State v. Keibler*, Auglaize App. No. 2-99-51, 2000-Ohio-1666.

{¶36} For the foregoing reasons, we overrule Appellant's third, fourth, fifth, and sixth assignments of error and affirm the January 14, 2008, Judgment Entry of the trial court finding Appellant to be a Tier III sex offender.

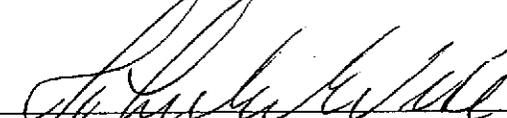
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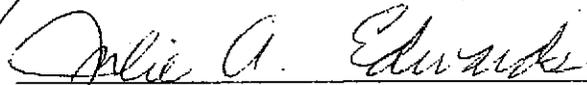
Edwards, J. concur.



HON. PATRICIA A. DELANEY



HON. JOHN W. WISE



HON. JULIE A. EDWARDS

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IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

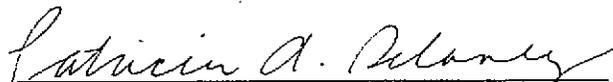
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LICKING COUNTY, OHIO

IN RE: ADRIAN R.
DELINQUENT CHILD

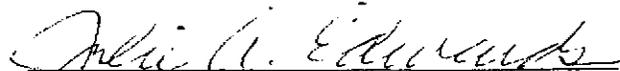
JUDGMENT ENTRY

Case No. 08-CA-17

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Licking County Court of Common Pleas is affirmed. Costs assessed to appellant.


HON. PATRICIA A. DELANEY


HON. JOHN W. WISE


HON. JULIE A. EDWARDS