

IN THE SUPREME COURT OF OHIO

Case No. 09-0273

State of Ohio, :  
Appellee, :  
v. :  
Barry A. Mentser, :  
Appellant. :

On Appeal from the  
Warren County Court  
of Appeals, Twelfth  
Appellate District  
  
Court of Appeals  
Case Nos. CA2008-06-075  
CA2008-06-076

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**MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT BARRY A. MENTSER**

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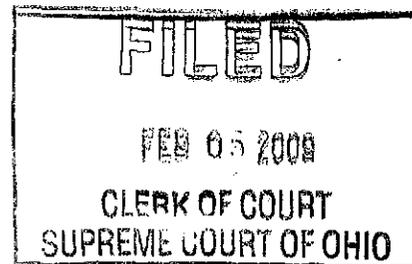
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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

In 1996, H.B. 180, Ohio's version of Megan's Law, was enacted. It was designed to provide for a program of classification, registration, and notification for different types of sexually oriented offenses. This law was specifically made retroactive and this Court determined in *State v. Cook* (1998), 83 Ohio St. 3d 404, 414-423, 700 N.E.2d 570, that the provisions of the law were remedial and hence were civil in nature and beyond the reach of the Ex Post Facto Clause, which applies only to punishment.

In 2003, the legislature adopted major changes to Meagan's Law and this Court also upheld the constitutionality of the changes in *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4828, 896 N.E.2d 110. However three justices dissented, indicating that burdens under the changed law were onerous enough to be recognized as punishment and therefore the changes could not be applied in an ex post facto fashion or retroactively. See also, *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, 865 N.E.2d 1264. (Three dissenting justices noted that the change in the law rendered it punitive and subject to the criminal law standard of review)

In 2007, the legislature responded to a federal attempt to enact state laws that contained sweeping changes to the existing laws that made the burdens upon people convicted of sex offenses far more onerous and punitive than the prior obligations. S.B. 10, the Adam Walsh Act, replaced the existing laws with sweeping new classification and registration requirements far in excess of the burdens that narrowly passed constitutional muster in *State v. Ferguson* and *State v. Wilson, supra*.

As a result of the radical new changes to the law, ten of thousands of people have been reclassified and their lives have been dramatically impacted. Thousands of

these people have mounted legal challenges to their new classifications and the constitutionality of the changed law in order to preserve their legal rights. In Franklin County alone, 620 such cases have been filed and most are currently waiting legal resolution. Thus the legal issues presented herein are issues that the lower courts need resolved in order to properly rule on the thousands of cases before them.

This Court has already accepted an appeal in *In re Smith*, Case No. 2008-1624, a juvenile case, with the following propositions of law:

**PropLaw I:** The application of SB 10 to persons who committed their offenses prior to the enactment of SB 10 violates the Ex Post Facto Clause of the United States Constitution.

**PropLaw II:** The application of SB 10 to persons who committed their offenses prior to the enactment of SB 10 violates the Retroactivity Clause of the Ohio Constitution.

**PropLaw III:** The application of SB 10 violates the United States Constitution's prohibitions against cruel and unusual punishments.

**PropLaw IV:** A juvenile court has no authority to classify a juvenile, adjudicated delinquent for a sex offense, as a juvenile sex offender registrant when the statutory provisions governing such a hearing were repealed at the time the hearing was conducted.

Additionally, there are other cases where notices of appeal have been filed with this Court and are currently waiting on rulings by this Court. There are at three other juvenile cases (*In re G.E.S.*, 2008-1926, *In re M.G.*, 2008-2257, *In re R.C.*, 2008-2392) Additionally, there are at least two adult cases. The consolidated cases of State of Ohio v. Christian N. Bodyke, David A. Schwab and Gerald E. Phillips, Case No. 2008-2502, raise many of the same issue as does the appellant herein and *State v. Williams*, Case No. 2009-0088, raises issues regarding the ex post facto and retroactive application of the new laws.

Because of the public and great general interest in resolving the questions and constitutional issues presented herein, this court should accept this appeal. Briefing could be stayed until the resolution of the issues presented in the other cases if this court elects to hear *Bodyke*.

### **STATEMENT OF THE CASE AND FACTS**

The defendant appeared before the trial court under two indictments. He entered guilty pleas to importuning, a fifth-degree felony violation of R.C. 2907.07(D)(2), and to attempted unlawful sexual conduct, a fourth-degree felony violation under R.C. 2923.02 and R.C. 2907.04. The trial court classified the defendant as a Tier II sexual offender under the new Senate Bill 10 (Adam Walsh Act) requirements pursuant to R.C. 2950.01(F), which requires a Tier II classification for attempted unlawful sexual conduct.

The defendant objected to the defendant's Tier II classification on the grounds that the offenses had predated the effective date of the Adam Walsh Act (January 1, 2008). The defendant objected on the grounds that it violated Ohio's constitutional prohibition against the retroactive application of laws and, because of the punitive nature of the requirements and restrictions imposed, it also violated the ex post facto prohibitions under the Ohio and United States Constitutions. The trial court overruled these objections and the appellate court affirmed the rulings of the trial court.

### **ARGUMENT IN SUPPORT OF THE PROPOSITIONS OF LAW**

#### **PROPOSITION OF LAW NUMBER ONE**

The application of S.B. 10, Ohio's version of the Adam Walsh Act, to those convicted of offenses committed before its effective date, violates the ex post facto prohibition of Article I, Section 10 of the United States Constitution.

Under the law as it existed at the time the defendant committed the offenses, he would have been automatically classified as a sexually oriented offender by virtue of his conviction for attempted unlawful sexual conduct. See former R.C. 2950.01(D)(1)(b)(i). A sexually oriented offender was obligated to register every year for ten years. Under the new law, which did not become effective until January 1, 2008, the registration requirements, restrictions, and obligations are far more substantial and last for twenty-five years. The trial court noted some of the onerous obligations that the new law subjected the defendant to as follows:

(T.p. 3-5)

Mr. Mentser, you have been convicted of or pleaded guilty to a sexually oriented offense and you are going to be designated as a Tier II sexual offender.

You're going to be required to register in person with the sheriff of the county in which you establish residency within three days of coming into that county or temporarily domiciled for more than three days.

You are also required to register in person with the sheriff of the county in which you establish a place of education immediately upon coming into that county. If you establish a place of education in another state but maintain a residence or temporary domicile here, you are also required to register in person with the sheriff or other appropriate official in that other state immediately upon coming into that state.

You are also required to register in person with the sheriff of the county in which you establish a place of employment if you have been employed more than three days or for an aggregate of 14 days in the calendar year.

If you establish a place of employment in another state but maintain a residence or temporary domicile here you are also required to register in person with the sheriff or the appropriate person or official in that other state if you have been employed for more than three days or for an aggregate of 14 days in a calendar year. Employment includes volunteer services.

You are required to provide to the sheriff temporary lodging information including address and length of stay if your absence would be for seven days or more.

After the date of initial registration you are required to periodically verify your residence address, place of employment and/or place of education in person at the county sheriff's office no earlier than ten days prior to your verification date.

If you change your residence address, place of employment and/or place of education you shall provide written notice of that change to the sheriff with whom you most recently registered and to the sheriff in the county in which you intend to reside or establish a place of employment and/or place of education at least 20 days prior to any change and no later than three days after change of employment.

If the residence address change is not to be a fixed address you shall include a detailed description of the place or places you intend to stay no later than the end of the first business day immediately following the date you obtain a fixed address. You must register with the sheriff that fixed address.

You shall provide written notice within three days of any change of vehicle information, e-mail addresses, internet identifiers or telephone numbers registered to or used by you to the sheriff with whom you have most recently registered.

As a Tier II offender you're going to be required to do this for 25 years in person, verification every 180 days.

Under the S.B. 10 version of Chapter 2950, the defendant may not live within 1,000 feet of preschools or child daycare centers, as well as traditional school facilities. R.C. 2950.034. He must divulge personal information not previously required, much of which will be posted on the Internet, and be made available for public viewing at the sheriff's office. See R.C. 2950.04(C). The defendant must provide copies of travel and immigration documents; license plate numbers for each vehicle owned, driven, or regularly available to the offender; description of where all vehicles are stored; description of professional and occupational licenses, permits, or registrations; e-mail addresses, past and present; Internet identifiers such as screen names; telephone

numbers registered to or used by the offender; certain mental health treatment while in custody; community supervision status; fingerprints and palm prints; and a DNA specimen. See R.C. 2950.04 and 2950.13. The defendant's personal information is to be posted on the Internet and made readily accessible to the public.

The new scheme applies retroactively to those whose obligations were more limited under former law. See R.C. 2950.033. To hold a defendant subject to more onerous sentencing provisions effective after the commission of an offense is a violation of the Ex Post Facto Clause of the United States Constitution. *State v. Ahedo* (1984), 14 Ohio App. 3d 254, 256-258, 470 N.E.2d 904. Chapter 2950, as revised by Senate Bill 10, subjects those charged with offenses committed before its effective date to new and burdensome obligations that amount to additional punishment. Ex post facto challenges to the 1997 revision of Chapter 2950 failed because the Supreme Court declared the provisions remedial, hence civil in nature and beyond the reach of the Ex Post Facto Clause. *State v. Cook* (1998), 83 Ohio St. 3d 404, 414-423, 700 N.E.2d 570. That conclusion is no valid.

Retrospective application of increased penalties violates the ban on ex post facto laws set forth in Article I, Section Sec. 10 of the United States Constitution. The Supreme Court in *State v. Cook, supra*, held that the classification system was not punitive. However, changes were made to the classification system that now render it punitive in nature.

In *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the immediate issue was what standard of review should apply upon appellate review of the sufficiency of the evidence in sex offender classification proceedings. Three justices

concurrent in the reversal, but dissented from the majority continuing to label sexual offender classification hearings as civil in nature. The three justices held:

{¶ 46} While protection of the public is the avowed goal of R.C. Chapter 2950, we cannot deny that severe obligations are imposed upon those classified as sex offenders. All sexual predators and most habitual sex offenders are expected, for the remainder of their lives, to register their residences and their employment with local sheriffs. Moreover, this information will be accessible to all. The stigma attached to sex offenders is significant, and the potential exists for ostracism and harassment, as the Cook court recognized. *Id.*, 83 Ohio St.3d at 418, 700 N.E.2d 570. Therefore, I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions.

Although the ex post facto issue was not before them, at least three justices seemed poised to recognize that the more onerous requirements passed by the legislature since *Cook* had rendered the holding in *Cook* obsolete. Now the law imposes even far more onerous obligations upon the defendant and others and it is punitive in nature and effect. In reviewing the punitive nature of the changes in the law, it is unlikely that the changes can be considered remedial and not punitive in nature.

A well reasoned decision was recently issued in *Sigler v. State* (Aug. 11, 2008) Richland C.P. No. 07 CV 1863, unreported where the court addressed the issue raised herein in an action seeking declaratory judgment on whether the ex post facto application of the Adam Walsh Act was constitutional. The court determined that the Adam Walsh Act violated the prohibition on ex post facto laws found in Section 10, Article I of the U.S. Constitution. (*Id.* at 5) The court stated:

An observer who visits a courtroom when sex offenders are sentenced will see that sex offenders usually view the sex offender

labeling, registration and community notification requirements as the most punitive and most odious part of their sentences. It has sometimes been an invitation to vigilante action. Except for those who receive the longest prison terms, it is the aspect of the sentence which will restrict where they live and work the rest of their lives.

**Only a person protected by legal training from the way ordinary people think** could say, with a straight face, that this terrible consequence of a sex offender's conviction is not punishment. To say it only protects the public and is not punitive is misleading. It protects the public in the same way that probation conditions protect the public. Probation conditions also restrict the ability of offenders to re-offend by requiring them to report regularly and restricting where they live and work. But no one contends that probation is therefore not punishment or that someone sentenced to community control has not been punished. [Id. 6-7, bold emphasis added]

The court then concluded that the act was punitive and that its retroactive application violated the Ex Post Facto Clause of the Constitution.

The court in *Sigler v. State, supra*, was honest in its assessment that additional punishment of a substantial nature is being inflicted retroactively upon individuals by the Adam Walsh Act. If courts are honest and sincere in evaluating the additional terrible burdens that are being retroactively inflicted by the Adam Walsh Act, no other conclusion can be reached.

#### PROPOSITION OF LAW NUMBER TWO

The application of S.B. 10, Ohio's version of the Adam Walsh Act, to those convicted of offenses committed before its effective date, violates the ban on retroactive laws set forth in Article II, Section 28, of the Ohio Constitution.

Ohio has afforded its citizens much broader protection than the limited remedy contained in the federal constitutional prohibition against the application of *ex post facto* laws. Section 28, Article II, Ohio Constitution states:

#### **Section 28 Retroactive laws**

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

*Ex post facto* laws relate to punitive provisions only. While the United States Constitution prohibits the states from passing any *ex post facto* laws it does not prohibit the passing of retroactive laws. The Ohio prohibition against the passing of retroactive laws applies to civil as well as criminal matters. In 17 Ohio Jurisprudence 3d, 70, Retroactive Legislation; Definitions, Nature, and Distinctions, Section 554, the law in this regard is set forth as follows:

One of the most popular definitions of retrospective or retroactive legislation is that of Judge Story, which is as follows: "Upon principle, every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective." This definition has met with judicial favor in Ohio. It is implied that if a statute does not come within the terms of the foregoing definition it is free from constitutional objection on the ground of retroactivity.

Cases applying particular parts of the foregoing definition have held laws to be retroactive. Thus, any statute that impairs or takes away a vested right, or which imposes a new or additional burden or duty, obligation, or liability, as to past transactions, or which creates a new right out of an act which gave rise to no right when it occurred, is retroactive and unconstitutional. [footnotes to citations omitted]

In *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 106-107 522 N.E. 2d 489, the Supreme Court noted the correctness of the above definition and noted that a statute is substantive, rather than procedural, and falls within the application on

the ban against retroactive legislation if it "imposes new or additional burdens, duties, obligations or liabilities as to a past transaction." *Id.* 36 Ohio St. 3d 107. In *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St. 3d 135, 522 N.E. 2d 477, the Supreme Court addressed the issue of whether a statute was one affecting a substantive right and therefore barred by the retroactive clause or was procedural or remedial and therefore not proscribed by the retroactive provision. The Court held that "[S]ubstantive law is that which creates duties, rights, and obligations, while procedural or remedial law prescribes methods of enforcement of rights or obtaining redress." *Id.* 36 Ohio St. 3d at 137.

The new law certainly imposes new and additional burdens, duties, obligations or liabilities that did not exist when the offense was committed. Plus it extended all of these obligations from ten years to twenty-five years. It is clear that the imposition of additional obligations, duties, burdens, and liabilities upon the defendant by application of a statute that was not in effect at the time of the offense, constitutes a violation of the ban against retroactive legislation.

### PROPOSITION OF LAW NUMBER THREE

The residency restrictions within Chapter 2950, as amended, violate the substantive due process provisions of the United States Constitution and Article I, Section 16 of the Ohio Constitution. Furthermore, such restrictions violate the privacy guarantee of Article I, Section 1 of the Ohio Constitution.

The initial residency restriction set forth in R.C. 2950.031, added to Chapter 2950 in 2003, and the broader restrictions now set forth in R.C. 2950.034, violate the substantive component of the Due Process Clause of the Fourteenth Amendment, and the comparable guarantee of Article 1, Section 16 of the Ohio Constitution. The broadly

stated restrictions as they now stand also violate the guarantee of privacy set forth in Article I, Section 1 of the state constitution.

In addition to procedural protections, the Due Process Clause contains a substantive component "which forbids the government to infringe certain 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores* (1993), 507 U.S. 292, 301-302, 113 S.Ct. 1439, 123 L.Ed.2d 1. Even when a fundamental liberty is not implicated, the Due Process Clause requires state legislation to "rationally advance some legitimate purpose." *Id.* at 306. Also see *Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St. 3d 351, 354, 639 N.E.2d 31.

According to Senate Bill 10's residency restrictions, offenders will be categorically barred from, "establish(ing) a residence or occupy(ing) residential premises within one thousand feet of any school premises or preschool or child day-care center premises." R.C. 2950.034(A). According to R.C. 2950.01(S) "school premises" has the same meaning as in R.C. 2925.01. No further definition is provided with respect to preschools and day-cares, permitting broad interpretation. This reaches a vast percentage of the available housing stock, and further creates, "the possibility of being repeatedly uprooted and forced to abandon his home" if a school, preschool, or day-care center opens near appellant's home. See *Mann v. Georgia Dept. of Corr.* (2007), 282 Ga. 754. Senate Bill 10's restrictions act as a direct restraint on appellant's liberty. They infringe upon his fundamental right to live where he wishes, as well as his right to privacy. This restriction on where an offender can live applies even if he does not impose any danger or threat to children or others. Offenders can be categorized as Tier III offenders for

committing sex offenses that did not involve any physical interaction with a live person, child or adult.

### Issue Number Two

Senate Bill 10 constitutes an unconstitutional restraint upon appellant's liberty interests.

Freedom from physical restraint has always been recognized "as the core of the liberty protected by the Due Process Clause." *Kansas v. Hendricks* (1997), 521 U.S. 346, 356, 117 S.Ct. 2072, 138 L.Ed.2d 501. Although the residency restrictions may constitute a less intrusive restraint than incarceration, civil commitment, or other types of physical custody, they nonetheless constitute, "other restraints on a man's liberty, restraints not shared by the public generally." See *Jones v. Cunningham* (1963), 371 U.S. 236, 240, 83 S.Ct. 373, 9 L.Ed.2d 285, (explaining that parole constitutes such a personal restraint); Like a parolee, a sex offender subject to Ohio's residency restrictions labors under a significant and tangible restraint on his liberty which is not suffered by the general public. Therefore, the residency restrictions impose a direct restraint on the liberty of sex offenders.

### Issue Number Three

Senate Bill 10 infringes upon appellant's fundamental right to live where he chooses.

Senate Bill 10's residency restrictions unconstitutionally limit appellant's right to "live and work where he (chooses)." *Meyer v. Nebraska* (1923), 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042; *Kramer v. United States* (6th Cir. 1945), 147 F.2d 756, 759; *Vanentyne v. Ceccacci*, Cuyahoga App. No 83725, 2004-Ohio-4240, ¶47. R.C. 2950.34's restriction of sex offenders to residences more than 1,000 feet from schools,

preschools and day cares infringes upon an individual's constitutional right to establish a residence of his or her own choosing. Whether conceived as a component of the right to privacy under Article I, Section 1, or as a liberty interest in its own right, the fundamental right to decide where to live is protected by the substantive due process guarantees of the state and federal constitutions. Infringement of that right is constitutionally permissible only if the legislation is narrowly tailored to serve a compelling state interest.

#### Issue Number Four

Senate Bill 10's residency restrictions do not advance a legitimate state interest.

Given that residency restrictions impair a fundamental liberty interest, the question becomes whether they are properly drawn. "A statute is narrowly tailored if it targets and eliminates the exact source of 'evil' it seeks to remedy." *Frisby v. Schultz* (1988), 487 U.S. 474, 485, 108 S.Ct. 2495, 101 L.Ed.2d 420, approved *State v. Burnett* (2001), 93 Ohio St. 3d 419, 429, 2001-Ohio-1581.

Empirical research indicates that residency restrictions are wholly ineffective as a mechanism for actually protecting children, and may actually be counterproductive, as they destabilize the lives of offenders and undermine the public safety aims of the statute. See e.g., Minn. Dept. of Corrections, Level Three Sex Offenders Residential Placement Issues, 2003 Report to the Legislative, 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."). Accordingly, because R.C.

2950.034 burdens fundamental liberty interests and is not narrowly tailored to serve a compelling state interest, it must be struck down.

#### PROPOSITION OF LAW NUMBER FOUR

Retroactive application of S.B. 10 violates the Double Jeopardy Clauses of the United States Constitution's Fifth Amendment and Article I, Section 10 of the Ohio Constitution.

As previously noted Chapter 2950 as amended by S.B. 10 is punitive in both intent and effect. Thus Senate Bill 10 violates the double jeopardy clauses of the state and federal constitutions by exposing appellant to an additional punishment beyond those applicable to his crime at the time it was committed.

#### PROPOSITION OF LAW NUMBER FIVE

Senate Bill 10 as applied to appellant constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

The Eighth Amendment provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." 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." *Roper v. Simmons*, supra, at 561, quoting *Trop v. Dulles* (1958), 356 U.S. 86, 100-101 (plurality opinion).

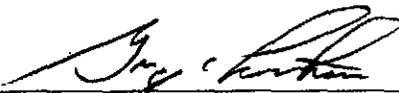
When it comes to laws that involve sex offenders, the passions of the majority must be tempered with reason. Joseph Lester, *The Legitimacy of Sex Offender*

Residence and Employment Restrictions, 40 Akron L.Rev. 339, 340 (2007). Automatic classification of sex offenders in tiers, coupled with registration and dissemination of information provisions, and an expansive residency ban, amounts to cruel and unusual punishment inflicted without any regard to the necessity for such a classification. There will be instances of great tragedy inflicted upon individuals because their lives will be ruined forever because of the mandatory classification that judges have no power or discretion to ignore.

An eighteen-year-old can legally have consensual sex with his seventeen-year-old partner but if he takes a nude photograph of her he will violate R.C. 2907.323(A)(1) and be classified as a Tier II offender and face all of these onerous obligations for twenty-five years even if they were married at the time. No individual discretion is allowed by the courts, the classification is automatic. Onerous registration requirements without reference to the need for such can constitute cruel and unusual punishment.

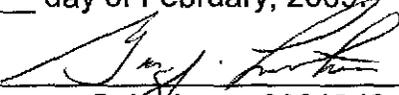
### CONCLUSION

This case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this court grant jurisdiction so that the important issues raised herein can be reviewed on the merits.

  
\_\_\_\_\_  
George C. Luther, Counsel of Record

## PROOF OF SERVICE

I certify that a copy of this memorandum in support of jurisdiction was sent by regular U.S. mail to Mary K. Martin, Assistant Warren County Prosecutor, 500 Justice Drive, Lebanon, OH 45036, on the 2 day of February, 2009.

  
George C. Luther 0031940  
Counsel for Defendant-Appellant

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
WARREN COUNTY

COURT OF APPEALS  
WARREN COUNTY  
FILED

DEC 22 2008

James L. Spaeth, Clerk  
LEBANON OHIO

STATE OF OHIO, :

Plaintiff-Appellee, :

- vs - :

BARRY A. MENTSER, :

Defendant-Appellant. :

CASE NOS. CA2008-06-075  
CA2008-06-076  
(Accelerated Calendar)

JUDGMENT ENTRY

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS  
Case Nos. 07CR24636 and 08CR24893

{¶1} This is an accelerated appeal in which defendant-appellant, Barry A. Mentser, appeals the decision of the Warren County Court of Common Pleas classifying him as a Tier II Sex Offender under Senate Bill 10 following his convictions for importuning and attempted unlawful sexual conduct with a minor.<sup>1</sup> This appeal challenges the constitutionality of Senate Bill 10 which implemented the federal Adam Walsh Act Child Protection and Safety Act of 2006.

{¶2} In his first and second assignments of error, appellant argues that the trial court erred when it held that Senate Bill 10 does not violate (1) the Ex Post Facto Clause of the United States Constitution, and (2) the Ohio Constitution's prohibition on

1. Pursuant to Loc.R. 6(A), we have sua sponte assigned this appeal to the accelerated calendar.



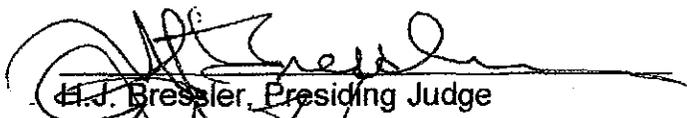
retroactive laws. Both assignments of error are overruled on the basis of *State v. Williams*, Warren App. No. CA2008-02-029, 2008-Ohio-6195, ¶36, 75.

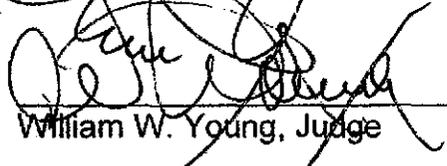
{¶13} In his third assignment of error, appellant argues that Senate Bill 10's residency provision violates his due process rights. In his fourth and fifth assignments of error, appellant argues that Senate Bill 10 (1) amounts to double jeopardy, and (2) violates the prohibition against cruel and unusual punishment. Appellant never raised those constitutional arguments in the trial court, and as a result, they are waived on appeal. See *State v. Awan* (1986), 22 Ohio St.3d 120; *State v. Swank*, Lake App. No. 2008-L-019, 2008-Ohio-6059. Even if they were not waived, based on our decision in *Williams*, they would lack merit. See *Williams* at ¶94, 106, and 111. Appellant's third, fourth, and fifth assignments of error are overruled.

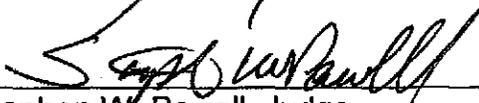
{¶14} Judgment affirmed.

{¶15} Pursuant to App.R. 11.1(E), this entry shall not be relied upon as authority and will not be published in any form. A certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

{¶16} Costs to be taxed in compliance with App.R. 24.

  
H.J. Bressler, Presiding Judge

  
William W. Young, Judge

  
Stephen W. Powell, Judge