

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

v.

GEORGE WILLIAMS

Appellant.

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* Case No. 09-0088
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MEMORANDUM IN RESPONSE ON JURISDICTION

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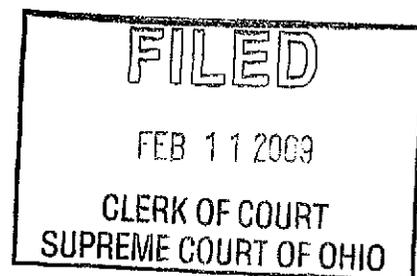


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STATEMENT OF THE APPELLEE'S POSITION

Appellee, the State of Ohio, herein responds to Appellant, George Williams, on the issue of jurisdiction, pursuant to S. Ct. Prac. R. 3, Sec. 2 (B). This Court should not accept jurisdiction over this appeal because the Appellant has not presented a substantial constitutional question, nor an issue of public or great general interest. This Court has previously ruled on the merits of these Constitutional issues pertaining to Ohio's version of the Adam Walsh Act in several decisions, and has sent a resounding message that this legislation is Constitutional. *State v. Cook* (1998), 83 Ohio St.3d 404; *State v. Ferguson* (2008), 120 Ohio St.3d 7, 15; *State v. Hayden* (2002), 96 Ohio St.3d 211. Thus, no substantial Constitutional question remains to be addressed.

Moreover, this Court should not grant leave to appeal this felony case, because each of the claims alleged by the Appellant are meritless. Senate Bill 10 is not a violation of the Ex Post Facto clause in the United States Constitution, or of the Retroactivity Clause in the Ohio Constitution, because it is expressly remedial and the Appellant has failed to provide clear evidence that overrides the civil legislative intent. Likewise, Senate Bill 10 is not a violation of the Appellant's due process rights because he has not been deprived by the State of a protected liberty or property interest.

STATEMENT OF THE CASE AND THE FACTS

The State stipulates to the statement of the case and facts as written in the Memorandum in Support of Jurisdiction written by the Appellant.

ARGUMENT

Senate Bill 10 does not violate the Ex Post Facto clause of the United States Constitution.

Senate Bill 10 does not violate the Ex Post Facto Clause because it is a remedial measure, not a punitive one. The Ex Post Facto Clause of the United States Constitution provides that

individuals should not be punished for crimes committed prior to the enactment of the criminal statutes prohibiting such conduct. The United States Supreme Court has provided a test to determine when legislation has violated the Ex Post Facto Clause. *Smith v. Doe*, 538 U.S. 84 (2003). First, the reviewing court must evaluate whether the legislative body expressly intended to create a civil remedial proceeding or a criminal punitive measure. *Id.* If the bill was expressly intended as punishment, then the analysis ends, and the statute is deemed to have violated the Ex Post Facto Clause. *Id.* However, if the law was expressly intended to be civil in nature, then only “the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.” *Id.*

First looking to the intent, both the statutory text, as well as binding Ohio case law, have firmly established that Senate Bill 10 is not intended to be punitive in nature.

The general assembly further declares that it is the policy of this state to require the exchange in accordance with this chapter of relevant information about sex offenders and child-victim offenders among public agencies and officials and to authorize the release in accordance with this chapter of necessary and relevant information about sex offenders and child-victim offenders to members of the general public as a means of assuring public protection and that *the exchange or release of that information is not punitive.* (italicized for emphasis)
R.C. 2950.02 (B)

Clearly, the Ohio General Assembly intended the provisions of R.C. 2950 to ensure public safety, not to further punish the sex offender. Numerous courts, including the Ohio Supreme Court agree with that principle. *State v. Ferguson* (2008), 120 Ohio St.3d 7, 15; *State v. Hayden* (2002), 96 Ohio St.3d 211; citing *State v. Eppinger* (2001), 91 Ohio St.3d 158, 165; see also *State v. Brown* (1998), 1998 Ohio App. Lexis 4904, unreported; *State v. Clark* (2006), 2006 Ohio App. LEXIS 4138, unreported; *State v. Cook* (1998), 83 Ohio St.3d 404, 417; *State v. Desbiens* (2008), 2008 Ohio App. Lexis 2887, unreported; *State v. King* (2008), 2008 Ohio App.

LEXIS 2174, unreported; *State v. Longpre* (2008), 2008 Ohio App. Lexis 3252, unreported; *State v. Williams* (2000), 88 Ohio St.3d 513, 527.

As the clear intent of Senate Bill 10 is to be remedial in nature, the next step is determine if Appellant has supplied enough evidence to show that the effect of Senate Bill 10 is punitive. To prove the effect Senate Bill 10 is punitive, the Appellant must provide evidence that is “the clearest proof [that] will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.” *State v. Holloman-Cross* (2008), 2008 Ohio App. LEXIS 1868, unreported.

Appellant argues the effect of Senate Bill 10 is similar to the act of shaming used as a punitive measure in colonial times. *Smith v. Doe* (2003), 538 U.S. 84, 97. However, the Supreme Court of the United States has held that dissemination of truthful information, already available to the public, does not have the effect of punishment. *Doe*, 538 U.S. at 99. Even though publicity may have the effect of anything between mild embarrassment to social ostracism, this effect is not an integral part of the objective of the regulatory scheme. *Id.* As a result, publicity is different than shaming and not punitive in nature. *Id.*

Moreover, the Ohio Supreme Court has found that “the registration and address verification provisions of R.C. Chapter 2950 are not punitive in nature because they are *de minimis* procedural requirements that are necessary to achieve the goals of R.C. Chapter 2950”. *State v. Cook* (1998), 83 Ohio St.3d 404, 412. The Appellant argues that Senate Bill 10 has added new and onerous requirements pertaining to residency restrictions. R.C. §2950.034 prevents a sex offender from “living within one thousand feet of any school premises,” and this requirement was also required under the previous version of the Adam Walsh Act. Thus, these restrictions are not new or altered, so there are not any new issues with that provision.

In light of the aforementioned arguments, the Appellant has failed to provide clear evidence that overrides the civil legislative intent and transforms a civil penalty into a punitive one. Senate Bill 10's intent is explicitly remedial, and the effect of the bill is remedial. In fact, relevant case law suggests that, in Ohio, this principle of law is well established. Therefore, Senate Bill 10 is not punitive, and this Court should find that the Appellant's claim under the Ex Post Facto clause cannot prevail.

Senate Bill 10 does not violate the Retroactivity Clause of the Ohio Constitution.

The Ohio Constitution states that, "the general assembly shall have no power to pass retroactive laws." Article II, Section 28, Ohio Constitution. The Appellant argues that because Senate Bill 10 required a new classification in his case, that it is retroactive. In order for this claim to prevail, the Appellant must show that the statute "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." *Van Fossen v. Babcock Wilcox Co.* (1998), 36 Ohio St.3d 100, 106. If this showing is made, then the statute is deemed substantive and not merely remedial. *Id.* *State v. Cook* (1998), 83 Ohio St.3d 404, 410-411. However, it is important to note, that "[t]he Ohio Supreme Court has 'found that it is generally true that laws that relate to procedures are ordinarily remedial in nature.'" *Id.*; *citing Van Fossen*, 36 Ohio St.3d at 107-108.

In the case at hand, the Appellant's claim cannot prevail because Senate Bill 10 is not a substantive statute. Ohio Revised Code § 2950 et seq. primarily deals with procedural technicalities like registration requirements and address verification. Furthermore, the community notification provisions are remedial measures because they address the public safety crisis of recidivism. In fact, "[t]he General Assembly struck a balance between the privacy

expectations of the offender and the paramount governmental interest in protecting members of the public from sex offenders.” *Cook*, 83 Ohio St.3d at 413. Moreover, felony convictions are part of the public record, and therefore there is no vested right which would protect convicted sex offenders from these notification provisions.

Therefore, for the foregoing reasons, this Court should find that Senate Bill 10 does not violate the Retroactivity Clause of the Ohio Constitution.

Senate Bill 10’s residency restrictions do not violate the Due Process Clause in either the United States Constitution or Section 16, Article I of the Ohio Constitution.

The right to procedural due process is guaranteed by both the United States Constitution and the Ohio Constitution, and traditionally protects individuals subjected to government investigation and prosecution. *State v. Hayden* (2002), 96 Ohio St.3d 211, 212. The protections provided by due process include both notice, and the opportunity to be heard. *Id.*; citing *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 459. In order to show that procedural due process rights have been violated, the affected party bears the burden to prove that she was “deprived of a protected liberty or property interest.” *Hayden*, 96 Ohio St.3d at 214. The United States Supreme Court has defined this protected interest as “freedom from bodily restraint and punishment.” *Ingram v. Wright* (1977), 430 U.S. 651, 673-674. There is no question, that the provisions included in Senate Bill 10 are not a form of bodily restraint. *Hayden*, 96 Ohio St.3d at 214; see also *State v. Johnson* (2006), 2006 Ohio App. Lexis 6910, unreported.

Furthermore, both the statutory text, as well as binding Ohio case law precedent, has firmly established that Senate Bill 10 is not punitive in nature.

The general assembly further declares that it is the policy of this state to require the exchange in accordance with this chapter of relevant information about sex offenders and child-victim offenders among public agencies and officials and to authorize the release in accordance with this chapter of necessary and relevant information about sex offenders and child-victim offenders to members of the

general public as a means of assuring public protection and that *the exchange or release of that information is not punitive*. R.C. 2950.02 (B)

Clearly, the Ohio Legislature explicitly intended Senate Bill 10 to ensure public safety, not to further punish the sex offender. Numerous courts, including the Ohio Supreme Court agree with that principle. *State v. Ferguson* (2008), 120 Ohio St.3d 7, 15; *State v. Hayden* (2002), 96 Ohio St.3d 211; *citing State v. Eppinger* (2001), 91 Ohio St.3d 158, 165; *see also State v. Brown* (1998), 1998 Ohio App. Lexis 4904, unreported; *State v. Clark* (2006), 2006 Ohio App. LEXIS 4138, unreported; *State v. Cook* (1998), 83 Ohio St.3d 404, 417; *State v. Desbiens* (2008), 2008 Ohio App. Lexis 2887, unreported; *State v. King* (2008), 2008 Ohio App. LEXIS 2174, unreported; *State v. Longpre* (2008), 2008 Ohio App. Lexis 3252, unreported; *State v. Williams* (2000), 88 Ohio St.3d 513, 527.

Moreover, the Ohio Supreme Court has found that “the registration and address verification provisions of R.C. Chapter 2950 are therefore not punitive in nature because they are *de minimis* procedural requirements that are necessary to achieve the goals of R.C. Chapter 2950”. *Cook*, 83 Ohio St.3d at 412.

In an evaluation of Senate Bill 10, an appellate court must begin with a presumption in favor of its constitutionality. *Hayden*, 96 Ohio St.3d at 213. In order to overcome this presumption, the Appellant must prove beyond a reasonable doubt that the statutory section and constitutional provisions are “clearly incompatible.” *Id.*; *citing State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142.

In *Hayden, supra*, the Ohio Supreme Court reviewed the constitutionality of Ohio’s sex offender classification, registration and notification laws, specifically R.C. 2950.04(A)(2), a provision which automatically classified the defendant based on the offense he committed. *Hayden*, 96 Ohio St.3d 211. There, the Appellant was convicted of rape, and was immediately,

and without a hearing, ordered by the trial court to register as a sex offender. *Id.* On appeal, the Court affirmed the trial court's ruling that no hearing was required, because it was not their duty to make an individual determination, as the statute provided for automatic classification. *Id.* at 215. The Court emphasized that because the registration and classification requirements were not punishment, due process was not in play. *Id.* at 214. Therefore, the statute was deemed Constitutional, and the Court ruled that it was proper to automatically classify the appellant. *Id.* at 215.

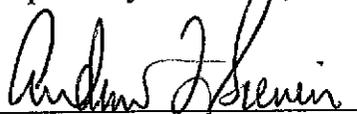
Similar to *Hayden*, the Appellant in our case does not allege a meritorious due process claim. The Appellant cannot sustain to any extent, certainly not beyond a reasonable doubt, that Senate Bill 10 is "clearly incompatible" with his Constitutional due process rights. To make a valid due process claim, the Appellant must prove that a deprivation of a liberty or property interest has occurred. Unquestionably, a claim of bodily restraint has not been alleged here. Thus, the Appellant must prove that the Adam Walsh Act and Senate Bill 10 are punitive in nature. However, the purpose expressly stated in the statute, Ohio Supreme Court precedent, as well as many appellate districts have all indicated that the Act is in fact not punitive in nature.

Therefore, for the foregoing reasons, this Court should find that Senate Bill 10 does not violate the Appellant's due process rights.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this court refuse jurisdiction, and deny the Appellant's memorandum in support of jurisdiction.

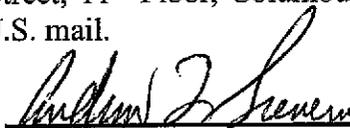
Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered upon Katherine A. Szudy (0076729), Assistant State Public Defender, at 8 East Long Street, 11th Floor, Columbus, Ohio, 43215 on this 11th day of February, 2009 by ordinary U.S. mail.



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