

IN THE SUPREME COURT OF OHIO

09-0355

Larry A. Randlett, :
: Appellant, : On Appeal from the
: : Ross County Court of Appeals,
v. : : Fourth Appellate District
: :
State of Ohio, : Court of Appeals
: : Case No. 08CA003046
Appellee. : :

MEMORANDUM IN SUPPORT OF JURISDICTION OF
APPELLANT, LARRY A. RANDLETT

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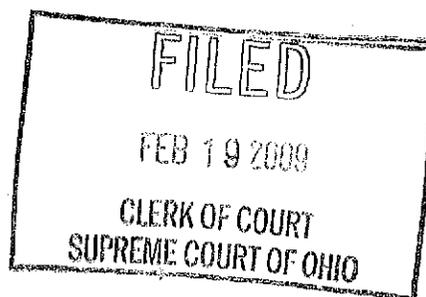


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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

This case is an appeal from the Fourth Appellate District with regard to the constitutionality of the provisions of S.B. 10 whereby the Defendant challenged not only the constitutionality of S.B. 10 as it applied to him but also argued that, in fact, the retroactive change in his classification pursuant to S.B. 10 violated a contract with regard to his relationship with the State as it changed the terms with regard to his reporting requirement.

This court is fully aware of the fact that there have been multiple cases throughout the State where the issue as to the constitutional validity of S.B. 10 has been argued. Trial judges in some counties have found the statute unconstitutional while trial judges in other counties have found the statute is a valid exercise of the Legislature's authority.

The case presents substantial constitutional issues as it is the Appellant's position that the statute violates basic state and federal constitutional rights, including the statute being in violation of the prohibition against retroactive laws of the Ohio Constitution and the *ex post facto* clauses of the United States Constitution. There is an issue as to whether or not the Legislature has the authority to change retroactively a judge's Decision and Judgment Entry essentially violating the separation of powers given the scope and the severity of the sanctions imposed, whether or not there is a violation of the double jeopardy clause based on the additional penalties imposed subsequent to the defendant having been convicted and sentenced.

It thus becomes apparent that it is appropriate for this court to admit this case for determination on the merits that the critical issues raised by application of this statute to this

defendant and to all others similarly situated may be determined.

Counsel is aware that, in fact, on December 31, 2008, a Notice of Appeal and Memorandum in Support of Jurisdiction in Case No. 2008-2502 parallels the same issues (*State of Ohio v. Christian N. Bodyke, David A. Schwab and Gerald E. Phillips*) brought before this court. The *amicus*, etc. in that case are urging the court to accept that case on its merits to make the critical determinations with regard to S.B. 10 that need to be made by this court.

It is respectfully submitted that, in fact, this case should also be admitted in order that the issues as argued in the Court of Appeals of Ross County by the Appellant be determined.

STATEMENT OF THE CASE AND FACTS

Defendant was convicted on his guilty plea and incarcerated in the State Penal System for sexually oriented offenses, the most serious of which were F3 sexual battery. After the statutory changes to O.R.C. §2950 et seq. (aka Adam Walsh Act) Mr. Randlett was served with a notice with regard to proposed reclassification. He then file an action in the Ross County Common Pleas Court challenging the constitutionality of the statute as amended.

The matter came on for hearing before the Honorable Scott W. Nusbaum, Judge of the Ross County Common Pleas Court. The matter was submitted based on undisputed documentation and the Memoranda of Counsel. The Judge rendered a decision by a Judgment Entry filed June 3, 2008, finding that the statute in question was constitutional and should be applied to the Defendant.

Defendant timely filed his Notice of Appeal to the Fourth Appellate District Court of

Appeals for Ross County and on January 9, 2009, the Court of Appeals rendered a Judgment affirming the judgment of the trial court.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: THE AMENDED STATUTORY SECTION OF O.R.C. §2950 (ALSO KNOWN AS THE ADAM WALSH ACT) ARE UNCONSTITUTIONAL AS APPLIED TO THIS APPELLANT VIOLATING THE APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS.

- A. The retroactive application of the Ohio Adam Walsh Act violates the prohibition against ex-post facto laws found in Article I, Section 10 of the United States Constitution.**

The Ex Post Facto Clause of Article I, Section 10 of the United States Constitution prohibits, among other things, 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 (quoting *Calder v. Bull* (1798), 3 Dall. 386, 390). The purpose of the *Ex Post Facto* Clause is to ensure that legislative acts “give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.” *Weaver v. Graham* (1981), 450 U.S. 24, 28-29.

In analyzing whether a challenged statute imposes retroactive punishment in violation of the federal prohibition on *ex post facto* laws, this Court must apply the intents-effect test. *State v. Cook* (1998), 83 Ohio St.3d 404, 415. If the express or implied intent of the General Assembly was to create criminal punishment rather than a civil penalty, that “ends the inquiry” and the retroactive application of the statute is unconstitutional. *Smith v. Doe* (2003), 538 U.S. 84, 92. If, however, the intention of the General Assembly was to enact a regulatory scheme that was civil and non-punitive, this Court must further consider whether the statutory scheme is “so

punitive in effect as to negate the State's intention to deem it civil." *Id.* (Citations and internal quotations omitted).

1. Intent of Legislation

In determining the General Assembly's objective, this Court must examine the statute's text and structure. *Smith*, 538 U.S. at 92. To do so, courts must first "ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." *Hudson v. United States* (1997), 522 U.S. 93, 99. In concluding that Ohio's Megan's Law, as originally enacted in 1997, was not intended to be criminal punishment, the Ohio Supreme Court emphasized the statutory scheme's "narrowly tailored attack on th[e] problem" of protecting the community from sex offenders. *Cook*, 83 Ohio St.3d at 417. Under the original Megan's Law, an individual's classification and registration requirements was tied directly to an ongoing threat to the community. That is no longer the case. Under the Adam Walsh Act, an individual's classification and obligations under the statute flow directly from the offense of conviction. Thus, the statutory scheme has been transformed from a narrowly tailored attempt to address a problem to a categorical one indicative of punitive statutory scheme.¹

The formal attributes of a legislative enactment, such as the manner of its codification and/or the enforcement procedures it established are also probative of legislative intent. *Smith*, 538 U.S. at 94. In this case, the legislature elected to place Ohio's Adam Walsh Act squarely

¹ The punitive intent of the General Assembly is also evidenced by certain changes made to the statute in 2003 (e.g. residency restrictions and removal of ability to reconsider classification) by Senate Bill 5 and retained by the Adam Walsh Act.

within Title 29, Ohio's Criminal Code. Furthermore, the enforcement mechanisms established by the statute are criminal in nature. The failure of an individual to comply with the registration, verification, or notification requirements of the statute subjects him or her to criminal prosecution and criminal penalties. *See generally*, R.C. §2950.99.

Considering Chapter 2950 as amended by SB 5 in 2003 and SB 10 in 2007, it is now apparent that the General Assembly's intent with regard to Chapter 2950 is punitive, not civil.

2. **Effect of Legislation**

Even if this Court were to determine that the General Assembly intended Ohio's Adam Walsh Act to operate as a remedial statute, it has a "punitive effect so as to negate a declared remedial intention." *Allen v. Illinois* (1985), 478 U.S. 364, 369. In assessing the punitive effects of a particular statute, this Court should consider whether the obligations imposed by Chapter 2950 were historically regarded as punishment; whether they operate as a disability or restraint; whether they further traditional notions of punishment, bear a rational connection to non-punitive purpose, and/or are excessive in relation to the alternative purposes assigned. *Smith v. Doe* (2003), 538 U.S. 84, 97 (citing *Kennedy v. Mendoza-Martinez* (1963), 373 U.S. 144, 168-169).

Ohio's Adam Walsh Act imposes burdens on defendants that are historically regarded as punishment and which operate as affirmative disabilities or restraints. While registration may cause adverse consequences on the defendant "running from mild personal embarrassment to social ostracism," the further limitation on where an offender can live causes Chapter 2950 to resemble colonial punishments of "public shaming, humiliation, and banishment." *Smith*, 538 U.S. at 98. Unlike the law considered by the United States Supreme Court in *Smith*, Ohio's Adam Walsh Act does more than disseminate truthful information, it subjects offenders to

significant restraints on their liberty not shared by the general citizenry akin to parole and probation. Moreover, because the restraints are direct consequences of criminal conduct they further the traditional notions of punishment and deterrence and are no longer “narrowly tailored to comport with the respective danger and recidivism levels of the different classification of sex offenders.” *Cook*, 83 Ohio St.3d at 421-22. The imposition of obligations or burdens regardless of whether they are necessary in a particular case is clearly excessive, smacks of punishment, and is retribution for past conduct.

B. The retroactive application of the Ohio Adam Walsh Act violates the prohibition against retroactive laws found in Article II, Section 28, of the Ohio Constitution.

Even if the Court concludes that Ohio’s Adam Walsh Act does not constitute an *ex post facto* law as applied to Appellant, Article II, Section 28 of the Ohio Constitution prohibits the retroactive application of the Adam Walsh Act to Appellant.

Article II, Section 28 of the Ohio Constitution expressly forbids the enactment of retroactive laws.² *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 106. With this guarantee, the Ohio Constitution affords its citizens greater protection against retroactive laws than does the Ex Post Facto Clause of the United States Constitution. *Van Fossen*, 36 Ohio St.3d at 105. This constitutional bar on retroactive laws has been interpreted to apply to laws affecting substantive rights but not to procedural or remedial aspects of such laws. *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 137. A statute is substantive if it

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Article II, Section 28 provides: “The general assembly shall have no power to pass retroactive laws... or laws impairing the obligation of contracts.”

“impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation or liabilities as to a past transaction, or creates a new right.”
Cook, 83 Ohio St.3d at 411.

Ohio’s Adam Walsh Act is a substantive law which, among other things, eliminates the pre-existing right of citizens to reside where they wish and imposes new obligations and burdens which did not exist at the time petitioner committed his offense. See *Nasal v. Dover*, Miami App. No. 2006-CA-9, 2006 Ohio 5584, ¶23 (concluding that R.C. §2950.031 constitutes an unconstitutional retroactive law as applied to an individual who owned and occupied real estate prior to the enactment of the statute and whose predicate offense occurred prior to the enactment of the statute). Thus, it cannot be retroactively applied.

At least two Common Pleas Courts in Ohio have found that the Adam Walsh Act is unconstitutional because it violates the prohibition of both State and Federal Constitutions against *ex post facto* laws and the retroactive application of laws.

In *Sigler v. State of Ohio*, Decided August 11, 2008, by Judge DeWeese of Richland County, the Judge concluded that the statutory structure violated the Ohio Constitution prohibition against retroactive statutes. He further found that, in fact, under the circumstances it violated the prohibition against *ex post facto* laws. A copy of this Decision is included in the Appendix to this Brief.

In a similar fashion, Judge Suster of the Cuyahoga County Common Pleas Court in *Tremaine Evans v. State of Ohio*, Case No. CV-08-646797, also found that the Adam Walsh Act was an *ex post facto* law and held it to be unconstitutional, and also that it was in violation of the Ohio Constitution. A copy of this Decision is also included in the Appendix of this Brief for

purposes of review by this Court.

In addition, the Supreme Court of Alaska in John Doe v. State of Alaska, Supreme Court No. S-12150 _____P(3d) _____ (2008), ruled that the Alaska statute, which is not identical to but in many ways similar to the Ohio statute, violated the Alaska Constitution's prohibition against *ex post facto* laws. A copy of this Decision is also included in the Appendix. This case is significant in that it was the Alaskan statute that the United States Supreme Court in Smith v. Doe, 538 U.S. 84, 92 (2003) found that the registration of sexual offender's statute was not unconstitutional under the Federal *ex post facto* law, subject, however, to a stinging dissent by a number of the justices of the court. The Alaskan Supreme Court has, in essence, said in applying its State *ex post facto* standard which it deemed to be slightly broader than that espoused by the United States Supreme Court and that the statute was unconstitutional under the Alaskan Constitutional.

C. The reclassification of Appellant violates the Separation of Powers Doctrine.

The legislative and executive branches' attempt to reclassify Appellant under Ohio's Adam Walsh Act violates the Separation of Powers Doctrine by interfering with a prior judicial adjudication regarding Appellant's sex offender status.

A statute that violates the Doctrine of Separation of Powers is unconstitutional. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 475. This doctrine is embedded in the very framework of the Ohio Constitution which defines "the nature of scope of powers designated to the three branches of government." *Id.* (Quoting *State v. Hochhauser* (1996), 76 Ohio St.3d 455, 463. As a part of this doctrine, courts "possess all powers necessary to secure and safeguard the free and untrammelled exercise of their judicial functions and cannot

be directed, controlled or impeded therein by other branches of the government.” *Zangerle v. Court of Common Pleas* (1943), 141 Ohio St. 70, Paragraph two of the syllabus. Courts must “zealously guard the judicial power against encroachment from the other two branches of government” in order “to avoid the evils that would flow from legislative encroachments on our independence.” *City of Norwood v. Horney* (2006), 110 Ohio St.3d 353, 387.

Prior to enactment of the Adam Walsh Act, the determination of whether and how an offender had to register as a sexual offender was specifically reserved to the judiciary. *Cf. State v. Eppinger* (2001), 91 Ohio St.3d 158, 166. Indeed, the trial court had the responsibility to determine whether an individual was a sexual predator and/or habitual sex offender or simply a sexually oriented offender. *See* R.C. §2950.09 (pre-Adam Walsh Act). As such, the trial court makes a judicial determination regarding classification which the General Assembly seeks to unsettle with the retroactive application of the Adam Walsh Act. Such interference with previous judicial adjudications impermissibly encroaches on judicial authority and violates the Separation of Powers Doctrine.

D. The reclassification of Appellant constitutes impermissible multiple punishments under the Double Jeopardy Clauses of the United States and Ohio Constitutions.

Reclassification of Appellant under Ohio’s Adam Walsh Act constitutes successive punishment and, therefore, a double jeopardy violation under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution. These constitutional provisions forbid the imposition of multiple criminal punishments for the same offense in successive proceedings. *Hudson v. United States* (1997), 522 U.S. 93, 98-99;

State v. Martello (2002), 97 Ohio St.3d 398, 399-400.

As explained in Section A above, the obligations and burdens imposed by Ohio's Adam Walsh Act are punitive in both intent and effect and, therefore, constitute additional punishment. If the State is permitted to reclassify Appellant under Ohio's Adam Walsh Act, Appellant will have been punished twice in successive proceedings in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution. Appellant was first punished when he was sentenced for his criminal conduct and classified under Ohio's prior sex offender law. Now, several years later, the State seeks to enhance his punishment by subjecting him to the new sex offender's law more onerous requirements. Because petitioner's reclassification under the Adam Walsh Act adds punishment at a successive proceeding, it is unconstitutional and, therefore, impermissible.

E. The residency restrictions of the Adam Walsh Act violate Appellant's Due Process rights under the United States and Ohio Constitutions.

Although Appellant maintains that the application of the Adam Walsh Act in its entirety cannot be applied to him, he also maintains that the residency restrictions added by Senate Bill 5 in 2003 and enhanced by Ohio's Adam Walsh Act violate the substantive component of the Due Process Clause in the Fourteenth Amendment of the United States Constitution and in Section 16, Article I of the Ohio Constitution, as well as, the right to privacy guaranteed by Section 1, Article I of the Ohio 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 (emphasis in original); *State v. Burnett* (2002), 93 Ohio St.3d 419, 428. Even when a fundamental liberty interest is not implicated, the Due Process Clause requires state legislation to “rationally advance[] some legitimate governmental purpose.” *Reno*, 507 U.S. at 306; see also *Fabrey v. McDonald Village Police Dep’t* (1994), 70 Ohio St.3d 351, 354.

As a reclassified sex offender under Ohio’s Adam Walsh Act, Appellant would be categorically barred from residing within 1000 feet of a school, preschool, or child daycare center. R.C. §295.034. Moreover, these restrictions “loom[]” over any residence selected by Appellant because of “the possibility of being repeatedly uprooted and forced to abandon homes” if a preschool or daycare center opens near his residence. See *Mann v. Georgia Dept. Of Corr* (Nov. 21, 2007), Georgia Sup.Ct. No. SO7A1043. These restrictions operate as direct restraint on a Appellant’s liberty and infringe his fundamental right to live where he wishes, as well as, his right to privacy. 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 (quoting *Foucha v. Louisiana* (1992), 504 U.S. 71, 80); see also *Youngberg v. Romeo* (1982), 457 U.S. 307, 316. 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 (explaining that parole constitutes such a restraint); *Hensley v. Municipal Court, San Jose Milpitas Judicial Dist.* (1973), 411 U.S. 345, 351 (explaining that an individual released on “his own recognizance” is subject to such restraints). Like a paroled or a convicted offender released on his own recognizance, 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.

Even if Ohio's residency restrictions do not constitute a direct restraint on Appellant's liberty, these restrictions nonetheless implicate other fundamental rights and liberty interests for which the Due Process Clause "provides heightened protection against government interference." *Glucksberg* (1997), 521 U.S. at 720-721. One such fundamental right, protected by the Due Process Clause and implicated by the residency restriction, is the right to "live and work where he [or she] will" and establish a residence of his or her own choosing. *Meyer v. Nebraska* (1923), 262 U.S. 390, 399; *Kramer v. United States* (C.A. 6 1945), 147 F.2d 756, 759; *Valentyne v. Ceccacci*, Cuyahoga No. 83725, 2004 Ohio 4240, ¶47. By restricting sexually oriented offenders to residences that are not located within 1000 feet of any school, preschool, or daycare facility, R.C. §2950.034 clearly infringes an individual's constitutional right to establish the residence of their own choosing.

Whether conceived as a component of the right to privacy³ or as a liberty interest in its own right, the fundamental right to decide where to live is protected by the substantive component of the Due Process Clause of both the United States Constitution and of the Ohio Constitution. Accordingly, infringement of that right is unconstitutionally permissible only if the legislative action is narrowly tailored to serve a compelling state interest.

³

An individual's right to privacy under Section 1, Article I of the Ohio Constitution "runs parallel to those rights of privacy guaranteed by the Fourteenth Amendment of the United States Constitution," *Williams*, 88 Ohio St.3d at 525, and is, therefore, also implicated in this case.

Given that residency restrictions impair a fundamental liberty interest, they must be struck down unless they are narrowly tailored to serve a compelling state interest. “A statute is narrowly tailored if it targets and eliminates the exact source of the ‘evil’ it seeks to remedy.” *State v. Burnett* (2002), 93 Ohio St.3d 419, 429 (quoting *Frisby v. Schultz* (1998), 487 U.S. 474, 485).

Assuming that the residency restrictions on sex offenders in R.C. §2950.034 were designed to promote the safety of children and that this constitutes a compelling state interest, the State cannot meet its high burden of demonstrating narrow tailoring. The residency restrictions are not rationally related, let alone narrowly tailored, to serve the interest of protecting school children from sex offenders. By imposing the restrictions on all sex offenders even though whose sole crime involved an adult, the statute fails to discriminate between offenders who actually present an ongoing risk to children and those who do not. Finally, empirical research indicates that the residency restrictions are wholly ineffective as a mechanism for protecting children and may actually be counterproductive by destabilizing the lives of offenders and undermining the public safety aims of the statute. See e.g. *Minn. Dep’t of Corrections, Level Three Sex Offenders Residential Placement Issues, 2003 Report of the Legislature*, 9 (2003) (“Enhanced safety due to proximity restrictions may be a comfort factor for the general public, but it does not have any basis in fact;” “[N]o evidence points to *any effect* on offense rates of school proximity residential restrictions;” “[B]lanket proximity restrictions on *residential* locations of [sex offenders] do not enhance community safety”).

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 as unconstitutional.

- F. The statutory changes in the Adam Walsh Act removing the opportunity for Appellant to be freed from the reporting requirement in essence changes the legal contractual relationship that existed between the Defendant and the State at the time of his conviction. This impairs the obligation of contract between the Appellant and the State in violation of Article II, Section 28, of the Ohio Constitution. (Journal Entry filed June 3, 2008)**

As indicated above, the Ohio Constitution Article II, Section 28, provides in part as follows: “The general assembly should have no power to pass retroactive laws or laws impairing the obligations of contracts.”

In the instant case, the statutory framework that existed at the time the Defendant entered his plea and was sentenced set the outer limits of that which would be required of him as an individual convicted of sexually oriented offenses and then classified pursuant to the prior statutory structure. It must be reemphasized that that structure had as an important component: the issue of the likelihood of re-offending; and in fact, contained certain procedures whereby a person could demonstrate after his release from incarceration that he did not present a risk of re-offending, thus reducing or limiting the reporting requirements in terms of frequency and duration, etc..

The statute as amended removes the issue of likelihood or probability of re-offending totally from consideration and provides no safety valve to a Defendant. Thus to the extent the Defendant, at the time of his plea, entered into a relationship premised on the statutes which could and should well be considered “contractual”, the Legislature has interactively attempted to abrogate that relationship by the provisions of O.R.C. §2950 et seq.. It is submitted that, in fact, that action not only puts an individual such as the Defendant at a tremendous disadvantage as compared to that which was available to him to encourage him to do well while incarcerated to

get treatment, etc. The encouragement to remove risk of re-offense has now been removed because these issues are no longer a part of the criteria for the mandated reporting for up to a lifetime at every ninety days with tremendous criminal sanctions if, in fact, the Defendant fails to comply.

It is submitted that, in fact, this action by the legislature does constitute a law impairing the obligation of contracts between the State and the Defendant and, therefore, is in violation of the Ohio Constitution.

Respectfully submitted,

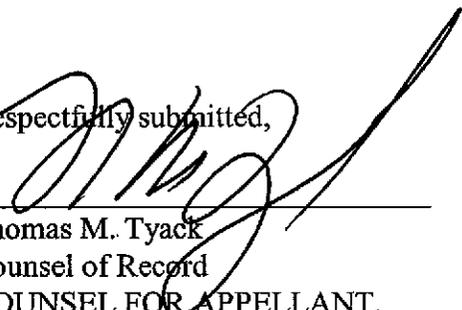


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CONCLUSION

Based on the foregoing it is respectfully requested that this court admit this matter for briefing and argument on the merits.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum In Support of Jurisdiction was sent by ordinary U.S. Mail to Counsel for Appellee, Michael M. Ater, Esq., Prosecuting Attorney, and Jeffrey Marks, Esq., Assistant Prosecuting Attorney and Counsel of Record, Ross County Prosecutor's Office, 72 N. Paint Street, Chillicothe, OH 45601, on February 19, 2009.



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we disagree. Randlett next contends that the residency restrictions contained in S.B. 10 violate his right to Due Process of law. Because Randlett has no standing to challenge the constitutionality of the residency restriction, we do not address his argument.

Finally, Randlett contends that S.B. 10 impairs a contract between himself and the state of Ohio. Because S.B. 10 does not impair any vested rights of Randlett, we disagree.

Accordingly, we affirm the judgment of the trial court.

I.

{¶2} In 2003, Randlett entered guilty pleas in the Franklin County Court of Common Pleas to two counts of sexual battery, third degree felonies, multiple counts of gross sexual imposition, third and fourth degree felonies, multiple counts of corruption of a minor, third and fourth degree felonies, and disseminating matter harmful to juveniles. The court sentenced Randlett accordingly and classified him as a sexual predator.

{¶3} On November 11, 2007, the Ohio Bureau of Criminal Identification and Investigation sent a NOTICE OF NEW CLASSIFICATION AND REGISTRATION DUTIES ("notice") to Randlett at the Ross Correctional Institution. The notice stated that pursuant to the Ohio Legislature's passage of S.B. 10, Randlett would be newly classified as a Tier III Sex Offender beginning January 1, 2008. On February 4, 2008, Randlett filed a petition to contest the application of S.B. 10 to him, pursuant to R.C. 2950.031(E). Randlett argued that: (1) the retroactive application of S.B. 10 violated the Ex Post Facto Clause of the United States Constitution; (2) the retroactive application of S.B. 10 violated the prohibition against retroactive laws; (3) his reclassification under S.B. 10 violated the prohibition against retroactive laws; (4) his reclassification under S.B. 10 violated the doctrine of separation of powers; (4) his reclassification was an

impermissible multiple punishment under the double jeopardy clause; (5) the residency restrictions under S.B. 10 violate due process; and (6) S.B. 10 impinges on his right to contract.

{¶14} On May 23, 2008, the trial court held a hearing on Randlett's petition. Neither Randlett nor the state presented any evidence during the hearing. On June 3, 2008, the court denied the petition and found that application of S.B. 10 to Randlett was constitutional. Randlett now appeals asserting the following assignment of error: "THE TRIAL COURT ERRED IN FINDING THAT THE AMENDED SECTIONS OF O.R.C. §2950 (AKA ADAM WALSH ACT) WERE CONSTITUTIONAL AND COULD BE APPLIED TO DEFENDANT. SAID STATUTE VIOLATE[S] DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS."

II.

{¶15} While Randlett presents a single assignment of error, he presents six separate constitutional challenges to S.B. 10. First, Randlett argues that S.B. 10's retroactive application is an unconstitutional ex post facto law in violation of Article I, Section 10 of the United States Constitution. Second, Randlett contends that S.B. 10's retroactive application violates Article II, Section 28 of the Ohio Constitution's prohibition against retroactive laws. Third, Randlett asserts that his reclassification under S.B. 10 violates the doctrine of separation of powers. Fourth, Randlett argues that his reclassification under S.B. 10 is an impermissible multiple punishment and a violation of the double jeopardy clauses of the United States and Ohio Constitutions. Fifth, Randlett contends that the residency restrictions contained in S.B. 10 violate his right to due

process. Finally, Randlett asserts that S.B. 10 impairs his alleged contract with the state of Ohio, in violation of Article II, Section 28 of the Ohio Constitution.

{¶6} Randlett does not dispute the facts as applied to these constitutional provisions and S.B. 10. Instead, his arguments involve the interpretation of these constitutional provisions as they relate to S.B. 10. Hence, his arguments are all legal questions that we review de novo. See, e.g., *State v. Downing*, Franklin App. No. 08AP-48, 2008-Ohio-4463, ¶ 6, citing *Stuller v. Price*, Franklin App. No. 03AP-30, 2003-Ohio-6826, ¶ 14; *State v. Green*, Lawrence App. No. 07CA33, 2008-Ohio-2284, ¶ 7.

{¶7} Statutes enacted in Ohio are "presumed to be constitutional." *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, ¶12, citing *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.2d 159. This presumption remains until one challenging a statute's constitutionality shows, "beyond reasonable doubt, that the statute is unconstitutional." *Id.*, citing *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7.

A.

{¶8} We will address Randlett's first two constitutional challenges together. Randlett contends that S.B. 10's retroactive application is an unconstitutional ex post facto law in violation of Article I, Section 10 of the United States Constitution and violates the Ohio Constitution's prohibition on retroactive laws.

{¶9} "The general assembly shall have no power to pass retroactive laws * * *." Section 28, Article I of the Ohio Constitution. Retroactive statutes are "unconstitutional if it retroactively impairs vested substantive rights, but not if it is merely remedial in

nature." *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, ¶17, citing *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163. As noted by the Supreme Court of Ohio, "Ohio retroactivity analysis does not prohibit all increased burdens; it prohibits only increased punishment." *Ferguson* at ¶39.

{¶10} In determining whether a statute is unconstitutionally retroactive, courts must "first determine whether the General Assembly expressly made the statute retrospective[.]" and if so, courts must then determine "whether the statute restricts a substantive right or is remedial." *Id.* at ¶13. (Citations omitted.) In considering the first prong, we note that "[s]tatutes are presumed to apply only prospectively unless the General Assembly specifically indicates that a statute applies retrospectively." *Id.* at ¶15, citing R.C. 1.48; *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, ¶40. Typically, a statute must clearly state that it applies retroactively. *Id.*

{¶11} Here, the legislature intended to apply the tier classification set forth in S.B. 10 retroactively. *State v. Graves*, Ross App. No. 07CA3004, 2008-Ohio-5763, ¶¶9-10; see, also, *State v. Byers*, Columbiana App. No. 07CA39, 2008-Ohio-5051, ¶¶59-63 (concluding that "Senate Bill 10's tier classification system was intended to apply retroactively to all offenders[.]" but such conclusion "is not a determination that all of Senate Bill 10 applies retroactively, rather, it is only an opinion that the tier classification system is intended to apply retroactively"). As a result, we move to the second prong of the analysis.

{¶12} Next, we must determine if S.B. 10 "impairs vested substantive rights" or whether it is "merely remedial in nature[.]" *Ferguson* at ¶27. The Supreme Court of

Ohio has consistently held "that R.C. Chapter 2950 is a remedial statute." *Id.* at ¶29.

Randlett maintains that S.B. 10 "imposes burdens on defendants that are historically regarded as punishment and which operate as affirmative disabilities or restraints."

Specifically, Randlett contends that, aside from embarrassment and ostracism imposed by S.B. 10, the newly enacted statute also limits where offenders can live, akin to "colonial punishments of 'public shaming, humiliation, and banishment.'"

{¶13} In *Ferguson*, the dissenting opinion recognized the concern regarding the limitations on where sex offenders can reside and viewed S.B. 5's prohibition against sex offenders "residing within 1,000 feet of any school" as one of the number of newly amended portions of R.C. Chapter 2950 that transformed previous versions of the Chapter from remedial to punitive. *Ferguson* at ¶¶45-47 (Lanzinger, J., dissenting). While the dissenting opinion is persuasive, and despite the fact that the Supreme Court of Ohio has recently "been more divided in [their] conclusions about whether the statute has evolved from a remedial one into a punitive one, *State v. Wilson*, 113 Ohio St.3d 383, 2007-Ohio-2202, a majority of the [Ohio Supreme Court] ultimately held that the statute remained civil in nature * * *." *Id.* at ¶30.

{¶14} Based upon the reasoning in *Ferguson* concluding that R.C. Chapter 2950, as amended by S.B. 5, remains civil in nature, and not punitive in nature, we conclude that the S.B. 10 version of R.C. Chapter 2905 also remains civil in nature. This court has already reached such a conclusion. See *Graves* at ¶13; *State v. Longpre*, Ross App. No. 08CA3017, 2008-Ohio-3832, ¶15. We find no reason to reassess our determinations in *Graves* or *Longpre* at this time. Consequently, we find that Randlett

has not shown beyond a reasonable doubt that S.B. 10 is unconstitutional. *Ferguson*, supra, at ¶12, citing *Roosevelt Properties Co.*, supra.

¶15 Accordingly, we overrule Randlett's first two constitutional challenges.

B.

¶16 Next, Randlett contends that reclassification as a Tier III sex offender under S.B. 10 violates the separation of powers doctrine. Specifically, Randlett argues that “[t]he legislative and executive branches’ attempt to reclassify Appellant under Ohio’s Adam Walsh Act violates the Separation of Powers Doctrine by interfering with a prior judicial adjudication regarding Appellant’s sex offender status.”

¶17 Initially, it must be noted that a statute violating “the doctrine of separation of powers is unconstitutional.” *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 475, 1999-Ohio-123. “The separation-of-powers doctrine implicitly arises from our tripartite democratic form of government and recognizes that the executive, legislative, and judicial branches of our government have their own unique powers and duties that are separate and apart from the others.” *State v. Thompson*, 92 Ohio St.3d 584, 586, 2001-Ohio-1288, citing *Zanesville v. Zanesville Tel. & Telegraph Co.* (1900), 63 Ohio St. 442. The doctrine’s purpose “is to create a system of checks and balances so that each branch maintains its integrity and independence.” *Id.*, citing *State v. Hochhausler* (1996), 76 Ohio St.3d 455; *S. Euclid v. Jemison* (1986), 28 Ohio St.3d 157.

¶18 Pursuant to the Ohio Constitution, “the General Assembly is vested with the power to make laws.” *Id.*, citing Section 1, Article II, Ohio Constitution. The Ohio

General Assembly is prohibited "from exercising 'any judicial power, not herein expressly conferred.'" *Id.*, citing Section 32, Article II, Ohio Constitution. Courts, on the other hand, "possess all powers necessary to secure and safeguard the free and untrammelled exercise of their judicial functions and cannot be directed, controlled or impeded therein by other branches of the government." *Id.* (Citations omitted.)

{¶19} Here, Randlett essentially contends that S.B. 10 legislatively requires the Attorney General, an executive official, to vacate an existing court judgment regarding his sex offender classification that was judicially determined in his underlying case. Ohio courts have rejected such a contention and conclude that S.B. 10 does not violate the doctrine of separation of powers by abrogating final court judgments. *In re Smith*, Allen App. No. 1-07-58, 2008-Ohio-3234; *Byers*, *supra*; *Slagle v. State*, 145 Ohio Misc.2d 98, 2008-Ohio-593. One Ohio court noted, "[t]he classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts" and "[w]ithout the legislature's creation of sex offender classifications, no such classification would be warranted." *In re Smith* at ¶39, citing *Slagle*. Thus, sex offender classification is nothing more "than a creation of the legislature, and therefore, the power to classify is properly expanded or limited by the legislature." *Id.*

{¶20} Another Ohio court similarly determined that S.B. 10 "is not an encroachment on the power of the judicial branch of Ohio's government." *Slagle* at ¶21. In *Slagle*, the court concluded that S.B. 10 does not abrogate "final judicial decisions without amending the underlying applicable law" or "order the courts to reopen a final judgment." *Id.* Instead, S.B. 10 "changes the different sexual offender classifications

and time spans for registration requirements, among other things, and [requires] that the new procedures be applied to offenders currently registering under the old law or offenders currently incarcerated for committing a sexually oriented offense." *Id.*

{¶21} Here, we agree with the foregoing conclusions finding that S.B. 10 does not abrogate final judicial determinations. We further add that Randlett's sex offender classification is nothing more than a collateral consequence arising from his criminal conduct. See *Ferguson* at ¶34. Further, following his sex offense convictions, Randlett "had no reasonable right to expect that [his] conduct [would] never thereafter be made the subject of legislation." *State v. Cook* (1998), 83 Ohio St.3d 404, 412, citing *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281-282; see, also, *State v. King*, Miami App. No. 08-CA02, 2008-Ohio-2594, ¶33 (finding that convicted sex offenders "have no reasonable expectation that [their] criminal conduct would not be subject to future versions of R.C. Chapter 2950"). Based on the Supreme Court of Ohio's decision in *Cook*, Ohio courts conclude that "convicted sex offenders have no reasonable 'settled expectations' or vested rights concerning the registration obligations imposed on them." *King* at ¶33.

{¶22} Because Randlett has no reasonable expectation that his sex offenses would never be subject to future sex offender legislation, it cannot be said that S.B. 10 abrogates a final judicial determination in violation of the doctrine of separation of powers. Consequently, we find that Randlett has not shown beyond a reasonable doubt that S.B. 10 is unconstitutional. *Ferguson* at ¶12.

{¶23} Accordingly, we overrule Randlett's constitutional challenge in this regard.

C.

{¶24} In his fourth challenge to the constitutionality of S.B. 10, Randlett contends that his reclassification as a Tier III sex offender constitutes multiple punishment in violation of the double jeopardy clauses of the United States and Ohio Constitutions.

{¶25} “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.’” *State v. Williams*, 88 Ohio St.3d 513, 527-528, 2000-Ohio-428, citing the Fifth Amendment to the United States Constitution; see, also, Section 10, Article I, Ohio Constitution. The double jeopardy clauses prevent states “from punishing twice, or from attempting a second time to criminally punish for the same offense.” *Id.* at 528, citing *Kansas v. Hendricks*, 521 U.S. 346; *Witte v. United States* (1995), 515 U.S. 389. As a result, “[t]he threshold question in a double jeopardy analysis, therefore, is whether the government’s conduct involves criminal punishment.” *Id.*, citing *Hudson v. United States* (1997), 522 U.S. 93.

{¶26} As set forth in our analysis above, R.C. Chapter 2950 remains civil in nature, and not punitive, following the enactment of S.B. 10. Thus, we find Randlett’s contention in this regard meritless. See *Ferguson*, *supra*; *Williams*, *supra*. Consequently, we find that Randlett has not shown beyond a reasonable doubt that S.B. 10 is unconstitutional. *Ferguson* at ¶12.

{¶27} Accordingly, we overrule Randlett’s fourth constitutional challenge.

D.

{¶28} In his fifth constitutional challenge to S.B. 10, Randlett contends that the residency restrictions set forth in S.B. 10 violate his right to due process. Randlett

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claims that such restrictions "operate as a direct restraint on [his] liberty and infringe [upon] his fundamental right to live where he wishes, as well as, his right to privacy."

{¶29} Here, Randlett is currently incarcerated. As a result, he must establish that his contention is ripe for review. However, he fails to do so.

{¶30} Pursuant to R.C. 2950.034(A), as amended by S.B. 10, "[n]o person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises or preschool or child day-care center premises." This statutory section was at issue in *Hyle*, wherein the Supreme Court of Ohio held that such statute "was not expressly made retrospective," and thus, "does not apply to an offender who bought his home and committed his offense before the effective date of the statute." *Hyle* at syllabus. Here, however, there is no evidence that Randlett owns a home at all, or if he does, whether it falls within 1,000 feet of a school, preschool or day-care center. Instead, the only information known by this court regarding Randlett's current residence is that he is incarcerated by the state of Ohio.

{¶31} The Eighth Appellate district has held that, where the offender does not presently claim to reside "within 1,000 feet of a school, or that he was forced to move from an area because of his proximity to a school[.]" the offender "lacks standing to challenge the constitutionality" of the residency restrictions. *State v. Peak*, Cuyahoga App. No. 90255, 2008-Ohio-3448, ¶¶8-9; see, also, *State v. Pierce*, Cuyahoga App. No. 88470, 2007-Ohio-3665, ¶33; *State v. Amos*, Cuyahoga App. No. 89855, 2008-Ohio-

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1834. The United States District for the Southern District of Ohio has concluded the same. *Coston v. Petro* (S.D. Ohio 2005), 398 F.Supp.2d 878, 882-883. "The constitutionality of a state statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied and who has not been injured by its alleged unconstitutional provision." *Pierce* at ¶33, citing *State v. Brown*, Cuyahoga App. No. 86577, 2006-Ohio-4584, quoting *Palazzi v. Estate of Gardner* (1987), 32 Ohio St.3d 169, syllabus.

{¶32} The Eighth Appellate District has also held that where an offender "is currently in prison," that offender is not presently subject to the residency restrictions, resulting in no present harm being inflicted on the offender. *State v. Freer*, Cuyahoga App. No. 89392, 2008-Ohio-1257, ¶¶29-30. As a result, the court dismissed a due process challenge to the residency restrictions on the grounds that such issue was not ripe for review. *Id.* at ¶30.

{¶33} For the above reasons, we agree that Randlett has failed to show standing to challenge the constitutionality of the residency restriction contained in R.C. 2950.034. Consequently, we find that Randlett has not shown beyond a reasonable doubt that S.B. 10 is unconstitutional. *Ferguson* at ¶12.

{¶34} Accordingly, we overrule Randlett's fifth constitutional challenge to S.B. 10.

E.

{¶35} In his sixth and final constitutional challenge, Randlett contends that S.B. 10 impairs a contract between himself and the state of Ohio established at the time of his conviction. Unfortunately, however, Randlett has not provided this court with the

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contract, i.e., a plea agreement. Instead, Randlett's argument is essentially that, at the time of his conviction and original classification, he had an expectation of what would be required of him under that sex offender classification scheme. Based on such expectation, Randlett now maintains that his efforts to rehabilitate himself while incarcerated are now for naught since he is required under S.B. 10 to register for life.

{¶36} Article II, Section 28 of the Ohio Constitution provides that "[t]he general assembly shall have no power to pass * * * laws impairing the obligation of contracts * * *." Ohio courts have rejected similar arguments as that set forth by Randlett, notably *In re Gant*, Allen App. No. 1-08-11, 2008-Ohio-5198, ¶¶22-24; *State v. Desbiens*, Montgomery App. No. 22489, 2008-Ohio-3375, ¶¶31; see, also, *State v. Taylor*, Geauga App. No. 2002-G-2442, 2003-Ohio-6963, ¶28; *State v. Paris*, Auglaize App. No. 2-2000-04, 2000-Ohio-1886; *State v. Harley* (May 16, 2000), Franklin App. No. 99AP-374.

{¶37} In *State v. Cook* (1998), 83 Ohio St.3d 404, the Supreme Court of Ohio noted that "where no vested right has been created, 'a later enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, unless the past transaction or consideration * * * created at least a reasonable expectation of finality.'" *Cook* at 412, citing *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279. Here, Randlett acknowledges that he had no vested right in the removal of his sexual predator classification. As a result, S.B. 10 does not interfere with any vested contractual right, even assuming such a contract existed. Consequently, we find that Randlett has not shown beyond a reasonable doubt that S.B. 10 is unconstitutional. *Ferguson* at ¶12.

{¶38} Accordingly, we overrule Randlett's sixth constitutional challenge.

III.

{¶39} Having overruled all of Randlett's constitutional challenges, we overrule his sole assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

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JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

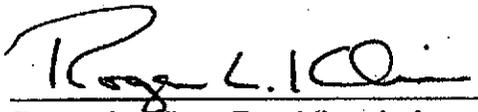
If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of proceedings in that court. The stay as herein continued will terminate in any event at the expiration of the sixty-day period.

The stay shall terminate earlier if the appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal period pursuant to Rule II, Sec.2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: 
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

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