

IN THE SUPREME COURT OF OHIO

In re: A.R.,

Supreme Court Case No. 09-0189

A Minor Child

Court of Appeals Case No. 2008 CA 00017

ON APPEAL FROM THE LICKING COUNTY COURT OF APPEALS,  
FIFTH APPELLATE DISTRICT OF OHIO

---

APPELLEE'S MEMORANDUM IN OPPOSITION TO JURISDICTION

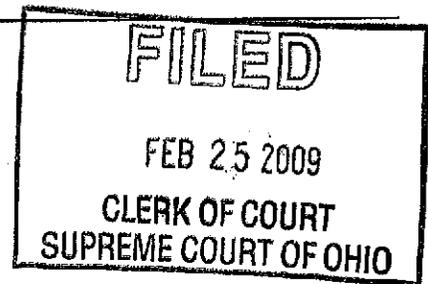
---

Appearances:

Kenneth W. Oswalt  
Licking County Prosecutor

By: Alice L. Bond  
Supreme Court #0025664  
Assistant Prosecuting Attorney  
20 S. Second Street, Fourth Floor  
Newark, OH 43055  
PH (740) 670-5243  
FX (740) 670-5241  
abond@lcounty.com  
Attorneys for Appellee, State of Ohio

Brooke M. Burns, Esq.  
Supreme Court #0080256  
Office of the Public Defender  
8 E. Long St., 11<sup>th</sup> Fl.  
Columbus, OH 43215  
PH (614) 466-5394  
FX (614) 752-5156  
brooke.burns@opd.ohio.gov  
Attorney for Appellant, A.R.



**TABLE OF CONTENTS**

	<u>PAGE</u>
STATEMENT OF APPELLEE’S POSITION AS TO WHETHER THE CASE IS OF PUBLIC OR GREAT GENERAL INTEREST OR INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION. . . . .	1
This Case Does Not Involve a Matter of Public or Great General Interest or a Substantial Constitutional Question. . . . .	1
ARGUMENTS IN SUPPORT OF APPELLEE’S POSITION. . . . .	3
Appellant’s Proposition of Law I . . . . .	3
Appellant’s Proposition of Law II . . . . .	7
Appellant’s Proposition of Law II . . . . .	10
CONCLUSION . . . . .	11
CERTIFICATE OF SERVICE . . . . .	12

**STATEMENT OF APPELLEE’S POSITION AS TO WHETHER THE  
CASE IS OF PUBLIC OR GREAT GENERAL INTEREST OR  
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION:**

**This Case Does Not Involve a Matter of Public or Great  
General Interest or a Substantial Constitutional Question**

Now comes the State of Ohio, and submits that this case involves neither a matter of public or great general interest, nor a substantial constitutional question. The Appellant waived his ability to argue constitutional issues by not raising them at the trial court. As such, the remaining issues involve plain error and the discretion of the trial court, and such general issues are not matters of public interest, matters of great general interest, or substantial constitutional questions.

The Appellant is asking this Court to take jurisdiction regarding juvenile sex offender registration, in relationship to: 1) a Fourteenth Amendment federal constitutional due process argument; 2) an Article I, Section 16 Ohio constitutional due process argument; 3) an Article I, Section 10 federal constitutional ex post facto argument; 4) an Article II, Section 29 Ohio constitutional retroactivity argument; and 5) an Eighth Amendment federal constitutional cruel and unusual punishment argument. As the Fifth District Court of Appeals noted in this case, “Appellant did not raise these issues in the trial court, and raises them for the first time on appeal.”

As this Court stated in *State v. Barnes*(2002), 94 Ohio St.3d 21, 759 N.E.2d 1240, 2002-Ohio-68:

Under Crim.R. 52(B), “[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” By its very terms, the rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial. First, there must be an error, *i.e.*, a deviation from a legal rule. \* \* \* Second, the error must be plain. To be “plain” within the meaning of Crim.R. 52(B), an error must be an “obvious” defect in the trial proceedings. \* \* \* Third, the error must have affected “substantial rights.” We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.

*Id.* at 27. Citations omitted.

Plain error is determined at the time the trial court commits the alleged error. *Id.* at 28. By the date of the Appellant's registration, this Court, as well as federal and appellate courts, had been consistent in finding sex offender registration constitutional under both the Ohio and the federal constitutions.<sup>1</sup> Based upon the state of the law at the time the trial court addressed the sex offender registration matter (as well as the state of the law presently), the registration of the juvenile as a sex offender was not error, and would certainly not be "plain" error. Even if that were not the case, where appellate courts disagree and this Court has yet to make a decision on a legal issue, this Court is precluded from finding plain error. *Barnes* at 28.

Further, the Appellant's registration did not impact a substantial right. Sex offender registration has consistently been determined by this Court to be civil in nature. See *State v. Ferguson*(2008), 120 Ohio St.3d 7, ¶42, 2008-Ohio-4824, 896 N.E.2d 110; *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264; *Cook, id.* As in prior versions of the sex offender law, "the legislative history supports a finding that it is a remedial, regulatory scheme designed to protect the public rather to punish the offender. *Ferguson* at ¶36. These civil classifications are "collateral consequences of the offender's criminal acts rather than a form of punishment per se." *Id.* at ¶ 34. See also *Goodballet v. Mack*(N.D. Ohio 2003), 266 F.Supp. 2d 702:

---

<sup>1</sup> *Connecticut Dept. of Public Safety v. Doe*(2003), 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98; *Kansas v. Hendricks*(1996), 521 U.S. 346, 117 S.Ct. 2072, 138 L.E.2d 501; *State v. Cook*(1998), 83 Ohio St.3d 404, 700 N.E.2d 570; *State v. Hayden* (2002) 96 Ohio St. 3d 211, 2002-Ohio-4169, 773 N. E. 2d 502; *Doe v. Michigan Dept. of State Police*, (C.A. 6, 2007), 490 F3d 491; *State v. Eismon*(Aug. 6, 2007), 5<sup>th</sup> App. Dist., Fairfield Cty. Case 06-CA-15, 2007 WL 2298136, 2007-Ohio-4121; *State v. Furlong*(Feb. 6, 2001), 10<sup>th</sup> App. Dist., February 6, 2001, Franklin Cty. Case 00AP-637, 2001 W.L. 95870; *State v. Wenham*(March 20, 2000), 3<sup>rd</sup> App. Dist., Columbiana Cty. Case 97-CO-66, 2000 W.L. 288525; *State v. Melchoir*(March 18, 1999), 8<sup>th</sup> App. Dist., Cuyahoga Cty. Case 72695, 1999 W.L. 148464; *State v. Bair*(Feb. 1, 1999), 5<sup>th</sup> App. Dist., Stark Cty. Case 1997-CA-00232, 1999 W.L. 99032.

“Sexual predator adjudication is a remedial collateral consequence, rather than punitive.” As a civil collateral consequence, registration does not impact a substantial right of the Appellant.

Finally, even if the three prongs of *Barnes* [that an error was made; that it was obvious; and that it impacts substantial rights], had been met, this Court would still have discretion to decline to address the issue. This Court may or may not choose to notice and recognize plain error. This notice must be done “with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.” *State v. Long*(1978), 53 Ohio St.2d 91, 7 O.O.3d 178, 373 N.E.2d 804, paragraph three of the syllabus.

As the Appellant has waived his opportunity to argue constitutional matters, as the issues do not involve “plain error,” and as in using utmost caution no exceptional circumstances or a manifest miscarriage of justice has been established, the State submits that no matter of public interest, no matter of great general interest, and no substantial constitutional question is properly before this Court.

### **ARGUMENTS IN SUPPORT OF APPELLEE’S POSITION**

#### **Appellant’s Proposition of Law I:**

“The retroactive application of Senate Bill 10 to juveniles whose offense was committed prior to the enactment of Senate Bill 10 violates the juvenile’s right to Due Process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 165 of the Ohio Constitution.”

The Appellant argues that the application of S.B. 10 to juveniles is contrary to the due process standard of fundamental fairness, in that classifications are not made on a case-by-case basis. The State disagrees. A law is not violative of due process where those to whom it applies are given notice and hearing regarding the issues to be determined.

Initially, the State emphasizes that based upon the age of the juvenile at the time of the

delinquent rapes, this was a *discretionary* decision on the part of the lower court.<sup>2</sup> The major portion of the Appellant's argument is that a "yea or nay" determination of registration requirements, based solely upon the underlying rapes, is unfair and punitive. Counsel's argument is feckless, however, as the decision setting forth the juvenile's registration requirement was not mandatory on the part of the judge. Instead, O.R.C. 2152.83(D) required that the juvenile court consider a number of factors in making its determination. The individualized consideration of those factors flies in the face of the Appellant's argument.

In addressing this issue, it is helpful to look at what "fundamental fairness" and "due process" mean. Recently, this Court analyzed those concepts in a case regarding the appeal of a life sentence imposed upon an adult sex offender who had committed a crime years before, as a juvenile. In finding that the life sentence did not violate the offender's right of fundamental fairness, this Court noted:

For all its consequence, due process has never been, and perhaps can never be, precisely defined. \* \* \* Due process is not a technical conception with a fixed content unrelated to time, place and circumstances. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

*State v. Warren*(2008), 118 Ohio St. 3d 200, 887 N.E.2d 1145, 2008 WL 2002015, 2008-Ohio-2011.

*(Citations and punctuation omitted).*

In considering the relevant precedents, we find that the due process issue of sex offender

---

<sup>2</sup> Although the Appellant's Memorandum in Support of Jurisdiction states that the juvenile court did not understand it had discretionary powers regarding registration, the Fifth District found otherwise. That determination is now the law of the case, as it is not part of the within request for jurisdiction.

registration requirements sans an individualized analysis has already been decided. In *State v. Hayden*(2002), 96 Ohio St.3d 211, 2002-Ohio-4169, 773 N.E.2d 502, this Court held:

The Due Process Clauses of the Fourteenth Amendment to the United States Constitution and of Section 16, Article I of the Ohio Constitution do not require a trial court to conduct a hearing to determine whether a defendant is a sexually oriented offender. Instead, according to R.C. Chapter 2950, if a defendant has been convicted of a sexually oriented offense as defined in R.C. 2950.01(D) and is neither a habitual sex offender nor a sexual predator, the sexually oriented offender designation attaches as a matter of law.

*Id.* at 215, 2002-Ohio-4169 at 15, 773 N.E.2d at 506. The current version of the sex offender registration law does nothing to change this holding, and its terms represent a distinction without a difference.

A federal judge has recently analyzed this issue as well. *Doe I et al v. Dann et al*,(June 9, 2008), N.D. Ohio No.1:08-cv-00220-PAG, Document 146, 2008 W.L. 2390778 noted that the United States Supreme Court has held that no due process violation occurs “where the law required an offender to be registered based on the fact of the conviction alone.” (Citing to *Connecticut Dept. of Public Safety v. Doe*(2003), 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98). In deciding to lift a temporary restraining order, the federal district judge further cited to *Doe v. Michigan Dept. of State Police*, (C.A. 6, 2007), 490 F3d 491, 502: “\* \* \* due process does not entitle an individual convicted of a sex offense to a hearing to determine whether he or she is sufficiently dangerous to be included in the state’s convicted sex-offender registry. \* \* \*”

As to the interests that are at stake, *Cook* determined that “(p)romulgating laws to guard society's health and safety is among those legitimate police powers inherent in government,” and that sex offender registrations are civil and regulatory in nature, not criminal. *Id* at 417. *Cook* found that sex offender registration does not promote the traditional aims of punishment, does not impose any

new affirmative disability or restraint, bears a rational relationship to a remedial purpose, and is not excessive in relation to that purpose. *Id.*, at 418-423. This Court has “held consistently that R.C. Chapter 2950 is a remedial statute. *Ferguson, id* at ¶29. As such, the purpose of sex offender registration is to inform and protect the citizens of the State of Ohio. S.B. 10 amendments do not change this analysis.

Although S.B. 10 presents a version of sex offender registration that is different from that which was examined in *Cook*, the considerations are the same, and the remedial nature of sex offender registration is not altered in this new version. In *Cook*, the number of sex offender classifications, the length of the registration periods and the frequency of address verification were increased from that which had gone on before, and the concept of community notification was first introduced. *Cook*, at 411. In *Ferguson*, registration requirement increased in location to include the counties where an offender works and goes to school, increased in time to a lifetime designation for predators, and increased the information maintained on the Attorney General’s secure law enforcement database. As this Court found that those changes did not alter the constitutional analysis from the version preceding it, so this current version also does not alter that analysis as well.

The changes in sex offender registration made by S.B. 10 as they relate to this juvenile were not drastic or dramatic, and do not alter the nature of registration from one with a remedial and civil purpose to one with a punitive purpose. In the present matter, S.B. 10 has simply decreased the number of sex offender classifications and increased registration periods. *See* R.C. Chapter 2950. The current iteration of sex offender registration as presented by S.B. 10, like the versions previously reviewed by *Cook* and *Ferguson*, is intended to be a civil regulation, and is not punitive in effect. It is for these reasons that sex offender registration does not violate due process, and the Appellant

cannot prevail on the merits of this issue.

**Appellant's Proposition of Law II:**

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

**A. Ex post facto analysis.**

The Appellant argues that S.B. 10 as applied violates the Ex Post Facto clause of the United States Constitution. The State disagrees, as sex offender registration is civil in nature and non-punitive. The Appellant's position is contrary to clearly established case law from both the United States Supreme Court, and this Court.

To determine whether a law violates the United States Constitution's prohibition against ex post facto laws, a court must apply the “intent-effects” analysis set forth in *Smith v. Doe, id.* First, it must be determined whether the law has a retroactive effect. If it does, then the court must determine whether the retroactive law under consideration was intended to be civil or criminal. If it is criminal, the analysis ends, as the law does violate the Constitutional provision. If, however, the law was intended to be civil, the court must determine whether the law is so punitive in purpose or effect as to negate the non-punitive intent behind the law's enactment. *Id.*

In the instant matter, the new law does have a retroactive effect. The General Assembly specifically provided that it is to apply to offenders who have been previously convicted or adjudicated, and specifically requires the Attorney General to apply the law to those convicted or adjudicated prior to the effective date of the statute. The issue then is whether registration law was intended to be a civil or a criminal enactment.

Upon examining this issue, it is clear that the General Assembly intended the law to be a civil regulation to provide public safety, and not a punitive criminal enactment to penalize the registrant. “Registration with the sheriff’s office allows law enforcement officials to remain vigilant against possible recidivism by offenders. Thus, registration objectively serves the remedial purpose of protecting the local community.” *Cook*, at 417. “Registration allows local law enforcement to collect and maintain a bank of information on offenders. This enables law enforcement to monitor offenders, thereby lowering recidivism.” *Id.* at 421. “Registration has long been a valid regulatory technique with a remedial purpose.” *Id.* at 418. “R.C. Chapter 2950 has the remedial purpose of providing law enforcement officials access to a sex offender’s registered information in order to better protect the public.” *Id.* at 419.<sup>3</sup>

Further, in O.R.C. Section 2950.02, (“Legislative determinations and intent to provide information to protection public safety,”) the Ohio General Assembly affirmatively sets forth that the purpose of sex offender registration is to protect the safety and general welfare of the citizens of Ohio, and that the release of information about sex offenders is not punitive.

This language reveals that the General Assembly's purpose behind R.C. Chapter 2950 is to promote public safety and bolster the public's confidence in Ohio's criminal and mental health systems. The statute is absolutely devoid of any language indicating an intent to punish.

*Cook*, at 417.

Although a civil label is not always dispositive, a court may reject it only when the clearest proof of punitive effect is found. *Kansas v. Hendricks*, *id.* Thus, the issue which remains to be determined is whether the registration law is clearly so punitive in effect as to negate the legislative

---

<sup>3</sup> The Appellant spends a portion of his Memorandum in Support of Jurisdiction discussing community notification. This issue is not properly before this Court, as the trial judge did not impose such notification responsibilities upon the Appellant.

branch's non-punitive intent. To make this determination, one reviews the statute under the multi-factored *Smith v. Doe* test, *supra*.

Those factors are whether in operation “\* \* \* the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or, is excessive with respect to this purpose.” *Id* at 97.

As previously set forth in the State's due process argument, this Court in *Cook* and *Ferguson* determined that sex offender registration does not promote the traditional aims of punishment, does not impose any new affirmative disability or restraint, bears a rational relationship to a remedial purpose, and is not excessive in relation to that purpose. *Cook*, at 418-423, *Ferguson* at ¶36-38. As the current registration law, like the versions reviewed in *Cook* and *Ferguson*, is intended to be a civil regulation and is not punitive in effect, it does not violate the United States Constitution's Ex Post Facto clause, and the Appellant cannot prevail on the merits of this issue. The juvenile sex offender registration law is a civil, remedial statute, and “a civil remedial statute \* \* \* cannot be deemed unconstitutional on ex post facto grounds.” *Ferguson* at ¶43.

**B. Retroactivity analysis.**

The Appellant also contends that S.B. 10 as applied violates the Ohio constitutional prohibition against retroactive laws. Again, this proposition ignores well-settled law. In order to determine whether a law violates the Ohio Constitution's bar against retroactive laws, a court must make a two-step analysis. First, it must be determined whether the law was intended to be applied retroactively, and, if it is, the court must then consider whether the law is substantive, or remedial. If the law is to be applied retroactively, and it is expressly substantive, the law violates the Ohio

Constitution. If, instead, it is remedial, the law is constitutional. As previously set forth above, sex offender registration is civil and remedial, and not punitive. “Ohio retroactivity analysis does not prohibit all increased burdens; it prohibits only increased punishment.” *Ferguson* at ¶39. As sex offender registration is regulatory and not punishment, it cannot not violate the Ohio Constitution’s prohibition against retroactive laws.

As the sex offender registration law was intended to apply to past transactions, the next step is to determine whether the application of the law affects a substantive or remedial right. *Van Fossen v. Babcock & Wilcox Co.*(1988), 36 Ohio St.3d 100, 106, 522 N.E.2d 489. Further, unless one has a reasonable expectation of finality, a change in a law does not render it retroactively violative. *Ferguson* at ¶34. Under the old law, the Appellant was a discretionary sex offender registrant. He had no reasonable expectation of finality as to collateral consequences of his adjudication. Under the new law, he is still a discretionary sex offender registrant. Only the duration and frequency of reporting has changed. This Court in *Cook* at 410 – 414 has previously determined that additional or lengthened sex offender registrations, as well as new community notification requirements, do not violate Section 28, Article II of the Ohio Constitution. The argument expressed by the Appellant is the exact one espoused in *Cook*. As such, the answer to such argument is also the same: the Appellant cannot prevail on the merits of this issue.

### **Appellant’s Proposition of Law III:**

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

Finally, the Appellant argues that the registration law is cruel and unusual punishment. This argument is also without merit. As set forth in the State’s response to the First Proposition of Law,

sex offender registration proceedings are remedial and civil in nature, not criminal or punitive. See *Cook, supra*. “If a legislative restriction is an incident of the state’s power to protect the health and safety of its citizens, it should be considered as evidencing an intent to exercise that regulatory power rather than as an intent to punish.” *Ferguson* at ¶37. As the law is remedial and not punitive, it is constitutionally valid under the Cruel and Unusual Punishment clause of the Eighth Amendment to the United States Constitution. A law cannot constitute cruel and unusual punishment if it is not, in fact, punishment.

The Appellant is concerned that the Court could only look to the underlying delinquent acts of rape in classifying him. That argument is factually inaccurate, and legally inappropriate as applied to this juvenile. This was not a mandatory classification, but a discretionary one. As such, the lower court could, and did, consider a number of factors in imposing registration duties upon the juvenile. Further, the Appellant puts much weight on the “lifetime” registration requirement. However, this is misleading. Every three years, a juvenile registrant has an opportunity to seek reclassification, or indeed, declassification. R.C. 2152.85.

Upon examining the issues, as the registration law is not punishment, *ipso facto*, it cannot be cruel and unusual punishment, and on this point the Appellant’s argument must fall as well.

### **CONCLUSION**

For the foregoing reasons, Appellee respectfully submits that this case does not involve a substantial constitutional question, a matter of public interest, or a matter of great general interest.

Appellee respectfully requests that this Court decline to accept jurisdiction of this case.

Respectfully submitted,



---

Alice L. Bond, Supreme Court #0025664  
Attorney for Appellee  
Assistant Licking County Prosecutor  
20 S. Second St., 4<sup>th</sup> Fl.  
Newark, OH 43055  
PH (740) 670-5243  
FX (740) 670-5255  
[abond@lcounty.com](mailto:abond@lcounty.com)

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing was duly served upon Brooke M. Burns, Esq., Office of the Public Defender, 8 E. Long St., 11<sup>th</sup> Fl., Columbus, OH 43215, attorney for Appellant, by ordinary U.S. Mail, this 25<sup>th</sup> day of February, 2009.



---

Alice L. Bond, Supreme Court #0025664  
Attorney for Appellee