

IN THE SUPREME COURT OF OHIO

IN RE SMITH,  
A Delinquent Child

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Case No. 2008-1624  
  
On Appeal from the  
Allen County Court of Appeals  
Third Appellate District  
  
C.A. Case No. 1-07-58

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**MERIT BRIEF OF APPELLANT SMITH**

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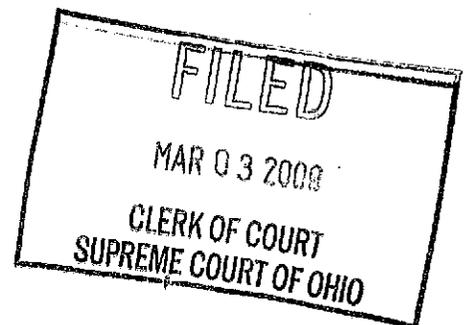
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**TABLE OF CONTENTS**

**Page No.**

<b>TABLE OF AUTHORITIES .....</b>	<b>iii</b>
<b>STATEMENT OF THE CASE AND FACTS .....</b>	<b>1</b>
<b>ARGUMENT .....</b>	<b>14</b>
<b><u>PROPOSITION OF LAW I:</u></b>	
<b>The application of S.B. 10 to persons who committed their offenses prior to the enactment of the Senate Bill violates the Ex Post Facto Clauses of the United States Constitution. Article I, Section 10 of the United States Constitution.....</b>	<b>14</b>
<b><u>PROPOSITION OF LAW II:</u></b>	
<b>The application of S.B. 10 to persons who committed their offense prior to the enactment of S.B. 10 violates the Retroactivity Clause of the Ohio Constitution. Article II, Section 28 of the Ohio Constitution. ....</b>	<b>23</b>
<b><u>PROPOSITION OF LAW III:</u></b>	
<b>The application of S.B. 10 violates the United States Constitution’s prohibition against cruel and unusual punishments. Eighth Amendment to the United States Constitution.....</b>	<b>28</b>
<b><u>PROPOSITION OF LAW IV:</u></b>	
<b>A juvenile court has no authority to classify a juvenile, adjudicated delinquent for a sex offense, as a juvenile sex offender registrant when the statutory provisions governing such a hearing were repealed at the time in which the hearing was conducted.....</b>	<b>35</b>
<b>CONCLUSION .....</b>	<b>41</b>
<b>CERTIFICATE OF SERVICE .....</b>	<b>42</b>
<b>APPENDIX</b>	
<b>Notice of Appeal to the Ohio Supreme Court (Aug. 14, 2008).....</b>	<b>A-1</b>

Decision of the Court of Appeals, Third Appellate District of Ohio (June 30, 2008).....	A-4
Decision of Allen County Juvenile Court (June 30, 2008).....	A-5
Judgment Entry of the Allen County Juvenile Court (Aug. 6, 2007).....	A-26
Eighth Amendment, United States Constitution.....	A-29
Fourteenth Amendment, United States Constitution.....	A-30
Article I, Section 10, United States Constitution.....	A-31
Article II, Section 28, Ohio Constitution.....	A-32

## TABLE OF AUTHORITIES

Page No.

### **CASES:**

<i>Allen v. Illinois</i> (1985), 478 U.S. 364, 368, 106 S. Ct. 2988 .....	15,18
<i>Atkins v. Virginia</i> (2002), 536 U.S. 304, 122 S. Ct. 2242 .....	28
<i>California v. Brown</i> (1987), 479 U.S. 538, 545, 107 S. Ct. 837.....	31
<i>California Dept. of Corrections v. Morales</i> (1995), 514 U.S. 499, 115 S. Ct. 1597.....	15,35
<i>Children's Home of Marion City v. Fetter</i> (1914), 90 Ohio St. 110, 127, 106 N.E. 761.....	29
<i>Collins v. Youngblood</i> (1990), 497 U.S. 37, 43, 110 S. Ct. 2715 .....	15
<i>Columbus City School District Bd. Of Edn. v. Wilkins</i> , 101 Ohio St.3d 112, 2004 Ohio 296; 802 N.E.2d 637 .....	37
<i>Cox v. Ohio Dep't of Transp.</i> (1981), 67 Ohio St.2d 501, 507, 424 N.E.2d 597 .....	38,40
<i>Doe v. Pataki</i> (2 <sup>nd</sup> Cir. 1997), 120 F.3d 1263, 1274-1276.....	15
<i>Furman v. Georgia</i> (1972), 408 U.S. 238, 239, 92 S. Ct. 2726.....	28
<i>Helvering v. Mitchell</i> (1938), 303 U.S. 391, 399, 58 S. Ct. 630.....	15
<i>Hyle v. Porter</i> , 117 Ohio St.3d 165, 2008-Ohio-542.....	7
<i>In re Anderson</i> , 92 Ohio St.3d 63, 2001-Ohio-131, 748 N.E.2d 67 .....	30
<i>In re A.R.</i> , 12 <sup>th</sup> Dist. No. CA2008-03-036, 2008-Ohio-6566 .....	13,14,27
<i>In re Adrian R.</i> , 5 <sup>th</sup> Dist. No. 08-CA-17, 2008-Ohio-6581 .....	12,13,27
<i>In re Caldwell</i> , 76 Ohio St. 3d 156, 157 1996 Ohio 410, 666 N.E.2d 1367.....	30,35
<i>In re Carr</i> , 5 <sup>th</sup> Dist. No. 08CA19, 2008-Ohio-5689 .....	40
<i>In re C.S.</i> , 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177.....	29,30
<i>In re E.L.</i> , 8 <sup>th</sup> Dist. No. 90848, 2008-Ohio-5094.....	40

<i>In re Gault</i> (1966), 387 U.S. 1, 87 S. Ct. 1428.....	17,30
<i>In re G.E.S.</i> , 9 <sup>th</sup> Dist. No. 24079, 2008-Ohio-4076 .....	<i>passim</i>
<i>In re Kirby</i> (2004), 101 Ohio St.3d 312, 2004 Ohio 970, 804 N.E.2d 476 .....	20
<i>In re Lamuel F.</i> , 5 <sup>th</sup> Dist. No. 2007CA00333, 2008-Ohio-6669.....	40
<i>In re Marcio A.</i> , 5 <sup>th</sup> Dist. No. 2007CA00149, 2008-Ohio-4523.....	40
<i>In re Smith</i> , 3 <sup>rd</sup> Dist. No. 1-07-58, 2008-Ohio-3234.....	2
<i>In re Smith</i> , 120 Ohio St.3d 1416, 2008-Ohio-6166.....	<i>passim</i>
<i>In re S.R.P.</i> , 12 <sup>th</sup> Dist. No. CA2007-11-027, 2009-Ohio-11 .....	<i>passim</i>
<i>In re T.C.H.</i> , 9 <sup>th</sup> Dist. Nos. 24130 & 24131, 2008-Ohio-6614 .....	40
<i>In re T.R.</i> (1990), 52 Ohio St.3d 5, 15, 556 N.E.2d 439.....	29
<i>In re Winship</i> (1970), 397 U.S. 358, 90 S. Ct. 1068.....	30
<i>Kansas v. Hendricks</i> (1997), 521 U.S. 346, 117 S. Ct. 2072.....	15
<i>Kent v. United States</i> (1966), 383 U.S. 541, 554, 865 S. Ct. 1045.....	29,30
<i>Kennedy v. Mednoza-Martinez</i> (1963) 372 U.S. 144, 83 S.Ct. 554.....	18
<i>Kiser v. Coleman</i> (1986), 28 Ohio St.3d 259, 262, 503 N.E.2d 753 .....	24
<i>Kunkler v. Goodyear Tire &amp; Rubber Co.</i> (1988), 36 Ohio St.3d 135, 522 N.E.2d 477 .....	24
<i>Louisiana ex rel. Francis v. Resweber</i> (1947), 329 U.S. 459, 463, 67 S. Ct. 374.....	28
<i>Massillon City School Dist. Bd. of Edn. v. Massillon</i> , 104 Ohio St.3d 518, 2004- Ohio-6775, 820 N.E.2d 874.....	37
<i>Miller v. Florida</i> (1987), 482 U.S. 423, 429, 107 S. Ct. 2446.....	14,15,21
<i>Myers v. City of Toledo</i> , 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176.....	38
<i>Provident Bank v. Wood</i> (1973), 36 Ohio St.2d 101, 105, 304 N.E.2d 378.....	16,37
<i>Rex Trailer Co. v. United States</i> (1956) 350 U.S. 148, 154, 76 S. Ct. 219.....	17

<i>Roe v. Office of Adult Probation</i> (2 <sup>nd</sup> Cir. 1997), 125 F.3d 47, 53-55.....	15
<i>Robinson v. California</i> (1962), 370 U.S. 660, 666-667, 82 S. Ct. 1417.....	28
<i>Roper v. Simmons</i> (2005), 543 U.S. 551, 571-572, 125 S. Ct. 1183 .....	<i>passim</i>
<i>Russell v. Gregoire</i> (9 <sup>th</sup> Cir. 1997), 124 F.3d 1079 .....	15
<i>Sears v. Weimer</i> (1944), 143 Ohio St. 312 .....	37,38,39
<i>Smith v. Doe</i> (2003), 538 U.S. 84, 94, 123 S. Ct. 1140 .....	<i>passim</i>
<i>Spitzer v. Stillings</i> (1924), 109 Ohio St.297, 142 N.E. 365 .....	26
<i>State v. Agler</i> (1969), 19 Ohio St.2d 70, 71, 249 N.E.2d 808.....	30
<i>State v. Brewer</i> , 86 Ohio St.3d 160, 163, 1999-Ohio-146, 712 N.E.2d 736.....	21
<i>State v. Consilio</i> , 114 Ohio St. 3d 295, 2007-Ohio-4163, 871 N.E.2d 1167.....	24,26
<i>State v. Cook</i> , 83 Ohio St.3d 404, 409, 1998-Ohio-291, 700 N.E.2d 570.....	<i>passim</i>
<i>State ex rel. Francis v. Sours</i> (1944), 143 Ohio St. 120, 124, 53 N.E.2d 1021 .....	37
<i>State ex rel. Matz v. Brown</i> (1988), 37 Ohio St.3d 279, 282, 525 N.E. 2d 805.....	26
<i>State v. Ferguson</i> , 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110 .....	<i>passim</i>
<i>State v. Jordan</i> , 89 Ohio St.3d 488, 491, 2000-Ohio-225, 733 N.E.2d 601 .....	37
<i>State v. LaSalle</i> , 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172 .....	24,28
<i>State v. Longnecker</i> , 4 <sup>th</sup> Dist. No. 02CA76, 2003-Ohio-6208 .....	6
<i>State v. Merriweather</i> (1980), 64 Ohio St.2d 57, 59, 413 N.E.2d 790 .....	39
<i>State v. S.R.</i> (1992), 63 Ohio St.3d 590, 594-595, 589 N.E.2d 1319.....	16
<i>State v. Walls</i> , 96 Ohio St.3d 437, 2002-Ohio-5059.....	30
<i>State v. Williams</i> , 88 Ohio St.3d 513, 2000-Ohio-428, 728 N.E.2d 342 .....	<i>passim</i>
<i>State v. Wilson</i> , 113 Ohio St.3d 382, 2007-Ohio-2202.....	16,18,21
<i>Storer Communications, Inc. v. Limbach</i> (1988), 37 Ohio St.3d 193.....	37,39

<i>Thompson v. Oklahoma</i> (1988), 487 U.S. 815, 835, 108 S. Ct. 2687.....	31,32
<i>Tison v. Arizona</i> (1987), 481 U.S. 137, 180-181, 107 S. Ct. 1676.....	20
<i>Trop v. Dulles</i> (1958), 356 U.S. 86, 10101, 78 S. Ct. 590.....	29
<i>United States v. Ward</i> (1980), 448 U.S. 242, 248-249, 100 S. Ct. 2636 .....	16,17
<i>Van Fossen v. Babcock &amp; Wilcox Co.</i> (1988), 36 Ohio St.3d 100, 106, 522 N.E.2d 489 .....	23,24,28
<i>Weaver v. Graham</i> (1981), 450 U.S. 24, 28-29, 101 S. Ct. 960 .....	14,21
<i>Weems v. United States</i> (1910), 217 U.S. 349, 367, 30 S. Ct. 544 .....	28

**CONSTITUTIONAL PROVISIONS:**

Eighth Amendment, United States Constitution.....	28,29,32
Fourteenth Amendment, United States Constitution .....	28
Article I, Section 10, United States Constitution.....	14,21,23
Article II, Section 28, Ohio Constitution.....	14,23,24
Article VIII, Section 16, 1802 Ohio Constitution.....	23

**STATUTES:**

R.C. 2151.23 .....	39
R.C. 2151.357 .....	30
R.C. 2152.82 .....	9,17
R.C. 2152.83 .....	<i>passim</i>
R.C. 2152.84 .....	17
R.C. 2152.85 .....	17
R.C. 2152.86 .....	9
Former R.C. 2950.01 .....	5,6
R.C. 2950.01 .....	<i>passim</i>

Former R.C. 2950.02 .....	16
Former R.C. 2950.03 .....	2
R.C. 2950.03 .....	6
R.C. 2950.031 .....	<i>passim</i>
R.C. 2950.032 .....	8,13
Former 2950.04 .....	<i>passim</i>
Former 2950.041 .....	2,3
R.C. 2950.041 .....	<i>passim</i>
Former 2950.05 .....	2,4
R.C. 2950.05 .....	11,36,39
Former 2950.06 .....	2,4,6
R.C. 2950.06 .....	<i>passim</i>
Former R.C. 2950.07 .....	7,8
R.C. 2950.07 .....	22,24,26
R.C. 2950.081 .....	6
Former R.C. 2950.09 .....	<i>passim</i>
R.C. 2950.09 .....	6,11
Former R.C. 2950.10 .....	4
Former R.C. 2950.11 .....	4
R.C. 2950.11 .....	6,19
Former R.C. 2950.13 .....	7
Former R.C. 2950.99 .....	<i>passim</i>

**MISCELLANEOUS:**

127<sup>th</sup> General Assembly Regular Session, Sub S.B. No. 10, As reported by the  
Senate Judiciary – Criminal Justice Committee ..... *passim*

Office of the Attorney General; The National Guidelines for Sex Offender  
Registration and Notification; Notice. 73 Fed. Reg. 128 (July 2, 2008) (Codified  
as 42 U.S.C. 16912 .....7

Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. Chi. L. Rev. 733,  
739 (1998) (“Punishments widely described as ‘shaming’ penalties thus come in  
two basic but very different forms: those that rely on public exposure and aim at  
shaming; and those that do not rely on public exposure and aim at educating.”).....19

Paul Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76  
B.U.L. Rev. 201, 202 (1996) (noting that “criminal sanctions signal  
condemnation”).....20

Ohio Association of Behavioral Health Authorities *Juvenile Sex Offenders*,  
BEHAVIORAL HEALTH: DEVELOPING A BETTER UNDERSTANDING, 3;1 (2006). .....34

*The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40  
Akron L. Rev. 339, 340 (2007).....34

Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of  
Punishment*, 35 Am. Crim. L. Rev. 1261, 1267 (Summer, 1998) .....35

## STATEMENT OF THE CASE AND FACTS

On August 5, 2005, a complaint was filed in the Allen County Juvenile Court, alleging that on or about July 25, 2004, then-fourteen-year-old Darian Smith committed three counts of rape, each a felony of the first degree if committed by an adult. On January 23, 2006, the court adjudicated Darian delinquent as charged. On February 16, 2006, for disposition, the court committed Darian to the Ohio Department of Youth Services (“DYS”) for a minimum term of one year on each count, maximum to his twenty-first birthday. The commitments were to run concurrently with one another. The court suspended Darian’s commitments to DHS, provided that he be enrolled in, and successfully complete programming at the Juvenile Residential Treatment Center of Northwest Ohio, and that he comply with the additional terms ordered by the court. But on March 31, 2006, the court imposed Darian’s commitment to DHS, as the Northwest Juvenile Residential Center did not have a bed available for him. On September 13, 2006, the juvenile court, sua sponte, granted Darian an early release from DHS and ordered that he be transferred to the Juvenile Residential Treatment Center of Northwest Ohio to complete treatment. On December 21, 2006, Darian successfully completed his treatment and was discharged from the treatment center.

On June 20, 2007, July 12, 2007, and August 1, 2007, the Allen County Juvenile Court conducted a three-part juvenile sex offender classification hearing in Darian’s case. (June 20, 2007, T.pp. 1-70); (July 12, 2007, T.pp 1-14); (Aug. 1, 2007, T.pp. 1-12). After considering the factors enumerated in former R.C. 2950.09(B)(3)(a)-(j), the court found that Darian was not a sexual predator, but that he “should be classified as a Juvenile Sex Offender Registrant,” with the duty to fulfill registration requirements “for a period of ten years with annual residence verifications on the anniversary of the initial registration.” (Aug. 1, 2007, T.pp. 2-4); (A-26).

See R.C. 2152.83(B). The court explained to Darian his duties to register under Ohio's current juvenile sex offender registration and notification statutes ("JSORN"). Former R.C. 2950.03(B)(2)(c), 2950.04, 2950.041, 2950.05, and 2950.06. (Repealed July 1, 2007); (Aug. 1, 2007, T.p. 1-12); (A-26). Immediately thereafter, however, the court informed Darian that, as of January 1, 2008, he would receive a new classification under Ohio's newly enacted version of the federal Adam Walsh Act (hereinafter referenced as "S.B. 10"). (Aug. 1, 2007, T.p. 5); (A-26). The court informed Darian that,

[c]onsistent with what the new law will require January 1, 2008, you would have been adjudicated a delinquent for committing a sexually oriented offense or child victim offense as defined in Ohio Revised Code 2950.01 and you are one of the following: In this case, since the offenses are all rape offenses, you will be classified as a Tier III sex offender.<sup>1</sup>

(Aug. 1, 2007, T.p. 5); (A-26). This changed Darian's registration duties from once a year for ten years, to once every 90 days for the rest of his life. R.C. 2950.06(A), and (B)(3).

Darian filed a timely appeal of his sex offender classification, raising six assignments of error. *In re Smith*, 3<sup>rd</sup> Dist. No. 1-07-58, 2008-Ohio-3234. Of those six errors, four challenged the constitutionality of S.B. 10. *Id.* at ¶8. In his appeal, Darian argued, *inter alia*, that the retroactive application of S.B. 10 to him violated his right to be protected from ex post facto and retroactive laws, and cruel and unusual punishments. *Id.* He also argued that, as the provisions governing sex offender classification hearings had been repealed on the date on which he was classified, the juvenile court had no statutory authority to conduct such a hearing; thus, his classification was void. *Id.*

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<sup>1</sup> The Allen County Juvenile Court's application of the definitions contained in R.C. 2950.01(E)(1), (F)(1), and (G)(1), is consistent with the offense-based classification scheme to which adults are subject under S.B. 10.

The Third District Court of Appeals interpreted the provisions of S.B. 10 in the same way as the Allen County Juvenile Court. *Id.* at ¶31. After reciting the definition of “Tier I” offender contained in R.C. 2950.01(E)(1), the Third District held that the juvenile court had no discretion in determining tier level. *Id.* Specifically, the court found that,

[t]he section also provides similar definitions of Tier II and Tier III sex offenders, and leaves little, if any discretion in classification to the court that sentenced the offender. R.C. 2950.01(F), (G). Prior to Senate Bill 10, in those cases where an offender is convicted of a violent sexually oriented offense and also of a specification alleging that he or she is a sexually violent predator, the sexual predator label attaches automatically. R.C. 2950.09(A). However, in all other cases of sexually oriented offenders, only the trial court may designate the offender as a predator, and it may do so only after holding a hearing where the offender is entitled to be represented by counsel, testify, and call and cross-examine witnesses. R.C. 2950.09(B)(1) and (C)(2). *Cook*, 83 Ohio St. 3d at 407. Now, that discretion is more limited. The new law severely limits the discretion of the trial court in imposing a certain classification on offenders. Instead, the new law requires trial courts to merely place the offender into a category based on their offense.

*Id.* The court affirmed Darian’s classification, citing to this Court’s decisions in *State v. Cook*, 83 Ohio St.3d 404, 409, 1998-Ohio-291, 700 N.E.2d 570, and *State v. Williams*, 88 Ohio St.3d 513, 2000-Ohio-428, 728 N.E.2d 342. Relying on the express holding in *Cook*, the Third District found that it was “not persuaded that the Ohio Supreme Court would view the issues of criminality and punishment as applied to R.C. 2950 et. seq. in the *Cook* and *Williams* decisions any different with regard to the provisions of S.B. 10.” *Id.* at ¶40. Thus, the court of appeals overruled each of Darian’s assignments of error. *Id.* at ¶40.

Darian filed a timely memorandum in support of jurisdiction in this Court, urging this Court to consider the constitutionality of the application of S.B. 10 to juveniles whose offenses were committed prior to S.B. 10’s enactment. Darian asked this Court to consider whether the law as applied violates federal ex post facto prohibitions, the federal prohibition against cruel and unusual punishments, and Ohio’s prohibition against retroactive laws. Further, Darian

asked this Court to address the jurisdictional problem presented by the General Assembly's express language in S.B. 10, which created a six-month gap between the time when Ohio's former sex offender registration and notification provisions were repealed, and the new version enacted. This Court accepted each of Darian's propositions of law. *In re Smith*, 120 Ohio St.3d 1416, 2008-Ohio-6166. Darian's merit brief timely follows.

## INTRODUCTION

### **I. A Brief History of Ohio's Sex Offender Registration and Notification Law.**

#### **A. Megan's Law – House Bill 180.**

Ohio's sex offender registration statute was enacted in 1963. *Cook*, at 406. In 1996, however, the General Assembly amended Ohio's sex offender registration law as part of Am.Sub.H.B. 180, 146 Ohio Laws, Part II, 2560 (Hereinafter referenced as "H.B. 180"). *Id.* The amendments to Ohio's sex offender registration provisions were made in response to the ratification of the Jacob Wetterling Act,<sup>2</sup> which required that states adopt sex offender registration laws comporting with federal regulations, or lose funding under the Public Health and Welfare Code. *Williams*, at 516.

Under H.B. 180, sentencing courts were required to consider a number of factors in determining whether offenders, who had been convicted of or pleaded guilty to sexually oriented offenses, were sexually oriented offenders, habitual sex offenders, or sexual predators. *Cook*, at 407; Former R.C. 2950.09(B)(2)(a)–(j) (Effective January 1, 1997). H.B. 180 also introduced a provision of community notification for certain offenders, which required that the residents of a community be alerted when a registered sex offender moved into their neighborhood. *Id.* at 516–517; Former R.C. 2950.04, 2950.05, 2950.06, 2950.10, and 2950.11 (Effective July 1, 1997).

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<sup>2</sup> The 1994 enactment of the Jacob Wetterling Act was prompted by the advent of Megan's Law, a sex offender registration codified by the New Jersey Legislature. *Williams*, at 516.

Overall, H.B. 180 imposed more stringent classification, registration, and notification provisions under R.C. Chapter 2950. *Id.* at 515.

Under H.B. 180, sexually oriented offenders were individuals who had been convicted of or pleaded guilty to a sexually oriented offense, but who did not fit the description of either a habitual sex offender or a sexual predator. Former R.C. 2950.01(D) (Effective January 1, 1997). Habitual sex offenders were individuals who were convicted of or pleaded guilty to a sexually oriented offense, and who had previously been convicted of or pleaded guilty to one or more sexually oriented offenses. Former R.C. 2950.01(B) (Effective January 1, 1997). The designation of an offender as a sexual predator was reserved for individuals who had been convicted of or pleaded guilty to a sexually oriented offense, and were likely to engage in the future in one or more sexually oriented offenses. Former R.C. 2950.01(E) (Effective January 1, 1997). Individuals who were charged with and convicted of a specification alleging that he or she was a sexually violent predator were automatically classified as sexual predators. Former R.C. 2950.09(A) (Effective January 1, 1997). For all other individuals eligible to be classified as a sexual predator, that determination had to be made after the court held a classification hearing at which the offender was entitled to representation by counsel, to testify on his or her own behalf, and to call and cross-examine witnesses. *Williams*, at 519. A finding that an offender was a sexual predator had to be supported by clear and convincing evidence. *Id.*

The frequency and duration of the registration requirements for sexually oriented offenders under H. B. 180 was annually, for ten years. *Id.* at 520. For habitual sex offenders, individuals were required to register with their local sheriff annually for twenty years. *Id.* For sexual predators, the registration requirements were to be completed every 90 days until death, or until after the offender was no longer classified as a sexual predator. *Id.* Failure to adhere to the

registration and verification provisions resulted in criminal penalties for the offender. Id. See Former R.C. 2950.06(G)(1) and 2950.99 (Effective January 1, 1997).

**B. The Enactment of Senate Bill 3 – JSORN.**

On January 1, 2002, the Ohio General Assembly enacted Am.Sub.S.B. 3, which governed sex offender registration and notification for juveniles who had been adjudicated delinquent of sexually oriented offenses. *State v. Longnecker*, 4<sup>th</sup> Dist. No. 02CA76, 2003-Ohio-6208, fn5. Senate Bill 3 (hereinafter referenced as “JSORN”) classified children into the same three categories of sexually oriented offenders that existed for adults under H.B. 180. Former R.C. 2950.01(B), (E), and (J) (Enacted January 1, 2002; Repealed July 1, 2007). In fact, many of the substantive provisions containing a juvenile’s registration duties were incorporated directly into the code sections that contained the adult sex offender registration regulations. R.C. 2950.03–2950.11 (Enacted January 1, 2002). Similar to the classification scheme for adult offenders classified under H.B. 180, JSORN also directed that a court consider a number of factors before making a determination as to whether a juvenile was a sexually oriented offender, habitual offender, or sexual predator. R.C. 2950.09 (Enacted January 1, 2002). However, unlike adult offenders under H.B. 180 the personal information of a youth, which was obtained by law enforcement as a result of that youth’s classification under JSORN, was not subject to public dissemination. R.C. 2950.081 (Enacted January 1, 2002). This was consistent with the anonymity that has historically been reserved for juveniles who have been adjudicated delinquent.

**C. The Enactment of Senate Bill 5.**

In 2003, the Ohio General Assembly amended Ohio’s adult sex offender registration statutes to what is now known as Ohio’s Sex Offender Registration and Notification Law

("SORN"). See Am.Sub.S.B. No. 5 (Hereinafter referenced as "S.B. 5"). *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, ¶1. S.B. 5 did not alter the requirement that a court consider various factors prior to classifying a convicted offender to a particular classification level. Former R.C. 2950.09 (Effective July 31, 2003). However, in addition to making the personal information of adult sex offender registrants public record, increasing the frequency of registration duties for habitual sex offenders, and increasing the number of counties where a registered offender was required to register, S.B. 5 made the sexual predator label more permanent, with limited chance, if any at all, to have that classification removed.<sup>3</sup> *Id.* at ¶4. See Former R.C. 2950.07(B)(1), 150 Ohio Laws, Part IV, 6558, 6657. Under S.B. 5, juveniles with a sexual predator label retained the opportunity to have that classification removed at a later date, by either the judge who made the initial classification, or by that judge's successor. *Id.*

#### **D. The Enactment of Senate Bill 10.**

On July 27, 2006, the United States Congress enacted the Adam Walsh Act (hereinafter referenced as "AWA"), which tightened federal guidelines and requirements for sexually oriented offenders. And, similar to the directive in the Jacob Wetterling Act, all 50 states were required to enact similar legislation by July 27, 2009, or risk losing a portion of a federal law enforcement grant. Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification; Notice. 73 Fed. Reg. 128 (July 2, 2008) (Codified as 42 U.S.C. 16912). In response to the enactment of AWA, the 127<sup>th</sup> Session of the Ohio General Assembly enacted Ohio's version of AWA—Am.Sub.S.B. 10 (hereinafter referenced as "S.B. 10")—to

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<sup>3</sup> S.B. 5 had also imposed residency restrictions on individuals who had been convicted of sexually oriented offenses; however, this Court found that the residency restrictions in Former R.C. 2950.13 were not to apply retroactively. See, generally, *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, syllabus.

comply with the federal guidelines. The amended provisions of S.B. 10 took effect on January 1, 2008. *Ferguson*, at fn1.

S.B. 10 drastically changed the landscape of Ohio's SORN and JSORN provisions. Most notably was the creation of a three-tiered, offense-based classification scheme, which eliminated the requirement that classification levels be determined after a full hearing. R.C. 2950.01(E), (F), and (G); Former R.C. 2950.09 (Repealed July 1, 2007). The amendments in S.B. 10 increased the length of time that adult offenders in any classification level must register with county law enforcement. R.C. 2950.07(B). S.B. 10 also requires that adults and children who were previously registering as sexually oriented offenders, habitual sex offenders, and sexual predators be re-classified into the new tier levels, based solely on their offense. R.C. 2950.031 and 2950.032.

The amendments in S.B. 10 increased the amount of information that registrants are required to give to local law enforcement officers. R.C. 2950.041(B) and (C). Specifically, S.B. 10 expanded Ohio's registration requirements to include: 1) any aliases used by the offender; 2) the offender's social security number, birth certificate and any other government issued identification; 3) if applicable, a statement including whether the offender is incarcerated; 4) the name, school, or institution of higher learning where that offender attends; 5) license plates issued to that offender for vehicles the offender is authorized to operate; 6) the number of identification cards issued to the offender from Ohio or other states; 7) DNA specimens if the offender was convicted of or adjudicated delinquent in another jurisdiction, along with a certified copy of information detailing that offense; 8) any other employment information for the offender; 9) copies of travel and immigration documents; 10) a description of each professional and occupational license, permit, or registration held by the offender; 11) any email address,

internet identifiers, or telephone numbers registered to or used by the offender. R.C. 2950.041(B) and (C).

Furthermore, one of the most drastic of the amendments in the Bill, S.B. 10 has created a new class of juvenile sex offender registrants, known as public registry-qualified juvenile offender registrants (hereinafter referenced as "PRQJOR"). A PRQJOR is a juvenile who has been adjudicated delinquent of a sexually oriented offense, and who was found to be a serious youthful offender in relation to that offense. R.C. 2152.86. For such youth, their classification as a Tier III registrant, community notification, and their inclusion on the Ohio Attorney General's electronic sex offender registration and notification database (hereinafter referenced as "eSORN") is automatic. R.C. 2152.82 and 2152.86.

An early version of the proposed amendments to Ohio's JSORN provisions initially classified juveniles to the new tier scheme the same way that adults were classified into the new tier scheme:

- (G) "Tier III sex offender/child-victim offender" means any of the following:
  - (1) A sex offender who is convicted of, pleads guilty to, has been convicted of, has pleaded guilty to, is adjudicated a delinquent child for committing, or has been adjudicated a delinquent child for committing any of the following sexually oriented offenses: (a) A violation of section 2907.02, or 2907.03 of the Revised Code; [\* \* \*]

See Proposed Amendment to R.C. 2950.01(G)(1)(a) LSC 127 0370-5, 203. Definitions for Tier I and II offenders were similarly stated. *Id.* at 200-203. However, prior to its enactment, the General Assembly revised that same language in the proposed bill by removing the language "is adjudicated a delinquent child" to state the following:

- (G) "Tier III sex offender/child-victim offender" means any of the following:
  - (1) A sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any of the following sexually oriented offenses:
    - (a) A violation of section 2907.02, or 2907.03 of the Revised Code; [\* \* \*]

See Proposed Amendment to R.C. 2950.01(G)(1)(a) LSC 127 0370-11, 226. Definitions for Tier I and II offenders were similarly stated. *Id.* at 222-226. That same amended version separated juvenile offenders who met the definition of a Tier III offender in the proposed amendment to R.C. 2950.01(G)(3):

(3) A sex offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any offense listed in division (G)(1)(a), (b), (c), (d), (e), (f), (g), (h), or (i) of this section and who a juvenile court, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier III sex offender/child-victim offender relative to that offense.

*Id.* at 228. Definitions for Tier I and III juvenile offenders were similarly stated. *Id.* at 222-226. And, the final amended version, as reported by the Senate Judiciary Criminal Justice Committee, removed juveniles from offense-based classifications altogether when it defined a Tier III juvenile offender registrant as:

(3) A sex offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any sexually oriented offense and who a juvenile court, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier III sex offender/child-victim offender relative to the offense.

See Proposed Amendment to R.C. 2950.01(G)(1)(a) Sub.S.B.No. 10; 229-230. Tier I and II juvenile offenders were similarly defined. *Id.* at 212-229.

## **II. The Disparate Application of Senate Bill 10 throughout Ohio courts.**

The language of S.B. 10 has caused confusion throughout Ohio's juvenile courts. Specifically, the definitions in R.C. 2950.01 and other related statutes have contributed to the inconsistent classification of juveniles into the tier levels outlined in S.B. 10's provisions. Because Ohio courts are not applying the law in the same manner to all juveniles who are eligible to be classified as sexually oriented offenders, two distinctly different classification

schemes have emerged throughout Ohio's juvenile courts. See *In re Smith*, at ¶31, and *In re G.E.S.*, 9<sup>th</sup> Dist. No. 24079, 2008-Ohio-4076, ¶37. And the manner in which the Third District is applying the new law has resulted in the constitutional challenges raised in this present action.

At Darian's classification hearing, after considering the factors enumerated in former R.C. 2950.09, the court initially determined that Darian was not a sexual predator, but "should be classified as a Juvenile Sex Offender Registrant." (A-26). Despite this finding, however, the court explained that under the amendments to 2950.04, 2950.041, 2950.05, and 2950.06 in S.B. 10, the court had no choice in determining his tier level, and that therefore, he would automatically become a Tier III juvenile sex offender registrant on January 1, 2008. (Aug. 1, 2007, T.p. 5); (A-26). As a result, Darian is now required to register every 90 days for the rest of his life, just like an adult offender who has been convicted of rape. 2950.04, 2950.041, 2950.05, and 2950.06.

In affirming Darian's classification, the Third District Court of Appeals decision demonstrated that both the lower court and the appellate court were convinced that there exists no discretion in determining tier level for juvenile offenders. *In re Smith*, at ¶31. The court noted that,

Prior to Senate Bill 10, 'in those cases where an offender is convicted of a violent sexually oriented offense and also of a specification alleging that he or she is a sexually violent predator, the sexual predator label attaches automatically. R.C. 2950.90(A). However, in all other cases of sexually oriented offenders, only the trial court may designate the offender as a predator, and it may do so only after holding a hearing where the offender is entitled to be represented by counsel, testify, and call and cross-examine witnesses. RC. 2950.09(B)(1) and (C)(2).' *Cook*, 83 Ohio St.3d at 407. Now that discretion is more limited. The new law severely limits the discretion of the trial court in imposing a certain classification on offenders. Instead, the new law requires trial courts to merely place the offender into a category based on their offense.

Id. It appears as though the Third District read R.C. 2950.01(E)(1), (F)(1), and (G)(1) to apply not only to adults, but also to juveniles. Similarly, the Fifth District Court of Appeals has also applied this offense-based interpretation of the new classification levels under S.B. 10 to juveniles. *In re Adrian R.*, 5<sup>th</sup> Dist. No. 08-CA-17, 2008-Ohio-6581, ¶6 (found that rape is a Tier III offense for purposes of classifying a juvenile offender).

Conversely, the Ninth District Court of Appeals, in *In re G.E.S.*, found that S.B. 10 is to be applied to juveniles in a manner dissimilar to the way the law is applied to adults. *In re G.E.S.*, at ¶37. The Ninth District found that under a plain reading of the applicable statutes, S.B. 10 still vests juvenile courts with “full discretion” in placing a juvenile sex offender into a classification and registration tier. *Id.* at ¶37, citing R.C. 2950.01(E)(3),(4); (F)(3),(4); and (G)(3)(4):

G.E.S. misinterprets AWA. AWA vests a juvenile court with *full discretion* to determine whether to classify a delinquent child as a Tier I, Tier II, or Tier III offender. See R.C. 2950.01(E)-(G). R.C. 2950.01(E) defines a ‘Tier I sex offender’ as one of the following: ‘(3) A sex offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing *any sexually oriented offense and who a juvenile court*, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, *classifies a tier I sex offender/child-victim offender relative to the offense.*’

R.C. 2950.01(F) and R.C. 2950.01(G) contain the identical provision with the exception of substituting the terms ‘Tier II sex offender’ and ‘Tier III sex offender’ for the references to ‘Tier I sex offender.’ None of the other provisions in R.C. 2950.01(E) through R.C. 2950.01(G), which define the Tier I, Tier II, and Tier III categories for adult offenders, depend on a court classifying an offender relative to any sexually oriented offense. The adult provisions define AWA’s Tier levels solely by offense, such that the commission of one of the listed offenses results in a mandatory imposition of the applicable Tier level for that offense. Thus, our reading of AWA convinces us that the legislature intended to give juvenile courts the discretion to determine which Tier level to assign to a delinquent child, regardless of the sexually oriented offense that the child committed. AWA does not forbid a juvenile court from taking into consideration multiple factors, including a reduced likelihood of recidivism, when classifying a delinquent child. Accordingly, G.E.S.’s argument that in his case AWA is punitive

because it imposes classifications without regard to potential recidivism lacks merit.

Id. (Emphasis added.) Likewise, and relying on the Ninth District's reading of R.C. 2950.01(E),(F), and (G), the Twelfth District has also found that S.B. 10 vests juvenile courts with full discretion in determining tier level. *In re A.R.*, 12<sup>th</sup> Dist. No. CA2008-03-036, 2008-Ohio-6566, ¶36-37; see, also, *In re S.R.P.*, 12<sup>th</sup> Dist. No. CA2007-11-027, 2009-Ohio-11 ¶45.

Thus, it is evident that the various appellate districts throughout Ohio are not applying the classification provisions of S.B. 10 to juveniles in a consistent manner. And while the language defining Tier I, II, and III offenders may have contributed to the disparate application of S.B. 10's classification provisions, for prospective application, the authorization of the solely offense-based re-classification of juvenile offenders under R.C. 2950.031 and 2950.032 may have aided Ohio courts in applying an offense-based classification scheme for youth who did not previously have a classification, such as Darian. As such, while the issue of whether S.B. 10 is constitutional as it relates to juvenile offender is paramount in this appeal, it is also essential that this Court give guidance to Ohio's courts on how the statute is to be applied, so that there is a uniform system of classification.

If the Third and Fifth Districts are correct in finding that juvenile courts are without discretion in determining tier levels for juvenile sex offender registrants, then the statutory scheme violates the principles of ex post facto because the tier levels attach as a direct consequence of an adjudication, thus constituting punishment. *In re Smith*, at ¶31; *In re Adrian R.*, at ¶6. If, however, this Court follows the holding and the reasoning set forth by the Ninth District Court of Appeals in *G.E.S.*, and adopted by the Twelfth District Court of Appeals, and determines that juvenile courts retain discretion in determining tier levels for juveniles under S.B. 10, then Darian's arguments that S.B. 10 violates the federal Constitution's prohibition

against ex post facto laws and cruel and unusual punishments will fail, as his tier level and any corresponding duties and obligations that come along with that tier level will not attach solely by nature of his being adjudicated delinquent of a sexually oriented offense.<sup>4</sup> See *In re G.E.S.*, at ¶37; see, also, *In re A.R.*, at ¶36-37; and, *In re S.R.P.*, at ¶45. Likewise, Darian's claim that the application of S.B. 10 violates the Ohio Constitution's prohibition against retroactive laws fails as well. However, if this Court adopts the applications of the tier levels as interpreted by the Ninth District in *In re G.E.S.*, then this Court must reverse and remand Darian's case for a new classification hearing, in which the provisions of S.B. 10 are accurately applied to him.

## ARGUMENT

### PROPOSITION OF LAW I

**The application of S.B. 10 to persons who committed their offenses prior to the enactment of the Senate Bill violates the Ex Post Facto Clauses of the United States Constitution. Article I, Section 10 of the United States Constitution.**

#### **I. Principles of Ex Post Facto.**

Section 10, Article I of the United States Constitution prohibits any legislation that "changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed." *Miller v. Florida* (1987), 482 U.S. 423, 429, 107 S. Ct. 2446. Ex post facto laws are prohibited in order to ensure that legislative acts "give fair warning to their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham* (1981), 450 U.S. 24, 28-29, 101 S. Ct. 960. Section 28, Article II of the Ohio Constitution; Section 10, Article I of the United States Constitution.

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<sup>4</sup> See, also, Brief of Amicus Curiae, The Ohio American Civil Liberties Union, and the Juvenile Law Center, et. al.

The Ex Post Facto Clause of the United States Constitution prevents the legislature from abusing its authority by enacting arbitrary or vindictive legislation aimed at disfavored groups. See *Miller v. Florida*, at 429. However, the Ex Post Facto Clause applies only to criminal statutes. *California Dept. of Corrections v. Morales* (1995), 514 U.S. 499, 504, 115 S. Ct. 1597; *Collins v. Youngblood* (1990), 497 U.S. 37, 43, 110 S. Ct. 2715. The United States Supreme Court has declined to set out a specific test for determining whether a statute is criminal or civil for purposes of applying the Ex Post Facto Clause. See *Morales*, at 508-509. However, the Court has recognized that determining whether a statute is civil or criminal is a matter of statutory interpretation. *Helvering v. Mitchell* (1938), 303 U.S. 391, 399, 58 S. Ct. 630; *Allen v. Illinois* (1985), 478 U.S. 364, 368, 106 S. Ct. 2988.

Various courts, including this Court, have used the “intent-effects test” to delineate between civil and criminal statutes for the purposes of an ex post facto analysis of sex-offender registration and notification statutes. *Cook*, at 415-417 (the intent of the General Assembly in enacting former Revised Code Chapter 2950 was remedial, not punitive). See, also, *Roe v. Office of Adult Probation* (2<sup>nd</sup> Cir. 1997), 125 F.3d 47, 53-55; *Russell v. Gregoire* (9<sup>th</sup> Cir. 1997), 124 F.3d 1079; *Doe v. Pataki* (2<sup>nd</sup> Cir. 1997), 120 F.3d 1263, 1274-1276; *Kansas v. Hendricks* (1997), 521 U.S. 346, 117 S. Ct. 2072 (The intent-effects test was utilized by the United States Supreme Court in its ex post facto analysis of a Kansas statute permitting the state to institutionalize sexual predators with mental abnormalities or personality disorders that made it likely the defendant would reoffend.).

When applying the intent-effects test, a reviewing court must first determine whether the General Assembly, “in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.” *United States v. Ward* (1980), 448 U.S. 242,

248-249, 100 S. Ct. 2636; see, also, *Cook*, at 415. But even if the General Assembly indicated an intention to establish a civil penalty, a statute will be determined to be criminal if “the statutory scheme [is] punitive either in purpose or effect as to negate that intention.” *Id.*

**A. The Intent of Senate Bill 10.**

In the intent-prong of the analysis, a reviewing court must determine whether the General Assembly’s objective in promulgating S.B. 10 was penal or remedial. *Cook*, at 416. In making this determination, a court must look to the language and purpose of the statute in order to determine legislative intent. *Id.*, citing *State v. S.R.* (1992), 63 Ohio St.3d 590, 594-595, 589 N.E.2d 1319; *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105, 304 N.E.2d 378.

In *Cook*, this Court concluded that former R.C. Chapter 2950 was not intended to be punitive. *Cook*, at 417. After reviewing the specific language of former R.C. 2950.02(A), it stated that:

The purpose behind R.C. Chapter 2950 [was] to promote public safety and bolster the public’s confidence in Ohio’s criminal and mental health systems. The statute [was] absolutely devoid of any language indicating an intent to punish. In fact, the General Assembly specifically stated that “the exchange or release of [information required by this law] is *not punitive*.”

*Cook*, at 417. (Emphasis added.) It noted that the General Assembly’s narrowly tailored attack on the problem of how to keep the community safe from dangerous sex offenders was further evidence of the statute’s remedial purpose. *Id.* See, generally, *Williams*, *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, and *Ferguson*.

Senate Bill 10’s changes to former R.C. Chapter 2950 do not delete the language stating that “the exchange or release of [information required by the law] is not punitive,” however, that language alone is not sufficient to illustrate that the amendments pass constitutional scrutiny. Even where the language of a statute indicates an intention to impose a civil penalty, the United

States Supreme Court has inquired further into whether the statutory scheme was so punitive in either purpose or effect that its intention was nullified in the enactment's application. *Ward*, at 248-249. For in such a review, it is possible to determine whether the statute's application transformed what was initially intended to be a civil remedy into a punitive penalty. *Rex Trailer Co. v. United States* (1956) 350 U.S. 148, 154, 76 S. Ct. 219.

The Supreme Court has not hesitated to reject what was originally characterized as a "civil label of convenience" in order to find a punitive or criminal legislative intent. *In re Gault* (1966), 387 U.S. 1, 87 S. Ct. 1428 (The Court recognized that juvenile proceedings, though labeled as civil in nature, were in reality prosecutions that carried serious penalties and disabilities, the nature of such required protections typically reserved for the criminal defendant facing similar prosecution).

**1. The Removal of Discretion Denotes a Punitive Intent.**

According to former R.C. Chapter 2950 and the provisions provided in former R.C. 2152.82-85 of the Juvenile Code, a juvenile's classification and registration requirements were tied directly to his or her ongoing threat to the community as determined by a court of law. But the way that S.B. 10 was interpreted and applied to Darian in this case, under the new statutory scheme, a juvenile's registration and classification obligations depend only upon his or her offense of conviction or adjudication. *In re Smith*, at ¶31. This offense-based classification scheme has changed Ohio's "narrowly tailored" solution (*Cook*, at 417) to a punitive statutory scheme that does not consider the offender's risk to the community or likelihood of reoffending. Contrary to former R.C. Chapter 2950—which permitted a trial court to classify a juvenile defendant as a sexual predator, a habitual sexual offender, or a sexually oriented offender only

after conducting a hearing and considering numerous factors—courts throughout Ohio have assigned youth to one of three tiers based solely on the offense that the youth committed.

**2. The Location of the Provisions of Senate Bill 10, and the Penalties Associated with Failure to Comply with its Requirements, Indicates Punitive Intent.**

The formal attributes of a legislative enactment—such as the manner of its codification and the enforcement procedures that it establishes—are probative of legislative intent. *Smith v. Doe* (2003), 538 U.S. 84, 94, 123 S. Ct. 1140. Because the legislature elected to place S.B. 10 squarely within Title 29, Ohio’s Criminal Code, the enforcement mechanisms established by S.B. 10 are criminal in nature. And, as the Allen County Juvenile Court applied S.B. 10 to Darian solely based on his offense, the registration requirements accompanying his classification have attached purely as a result of his adjudication of rape. Furthermore, the failure of an individual to comply with the registration, verification, or notification requirements of S.B. 10 subjects the offender to criminal prosecution and criminal penalties. R.C. 2950.99. See, also, *Williams*, at ¶10 (The Ohio Supreme Court determined that although “the registration requirements of [former] R.C. Chapter 2950 may have been enacted generally as remedial measures, R.C. 2950.06 defined a crime: the offense of failure to verify current address.”). See, also, *Wilson*, at ¶43-49, (Lanzinger, J., concurring in part and dissenting in part) (“I dissent from the majority’s labeling of sex-offender-classification proceedings as civil in nature.”).

**B. The Effect of Senate Bill 10.**

Even if this Court were to determine that the General Assembly intended S.B. 10 to operate as a remedial statute, the statute has a “punitive effect so as to negate a declared remedial intention.” *Allen v. Illinois*, at 369. The effect of a statute can be measured in terms of a series of “guideposts,” which tend to indicate whether the statute will be punitive in its application.

*Kennedy v. Mednoza-Martinez* (1963) 372 U.S. 144, 83 S.Ct. 554. The United States Supreme Court has suggested that a reviewing court consider the following factors when assessing the punitive effects of a particular statute: whether the regulatory scheme is analogous to a historical form of punishment; whether it creates an affirmative disability or restraint; whether it promotes the traditional aims of punishment; whether it is rationally related to a non-punitive purpose; and whether it is excessive in relation to its allegedly non-punitive purpose. *Smith v. Doe*, at 97; see, also *Cook*, at 418 (quoting *Mendoza-Martinez*, at 186-69).

**1. The Provisions of Senate Bill 10 have a Punitive Effect.**

S.B. 10 imposes burdens on defendants that have historically been regarded as punishment and operate as affirmative disabilities and restraints. While registering as a sex offender may have adverse consequences to a defendant, “running from mild personal embarrassment to social ostracism,” the further limitation regarding where an offender may live causes S.B. 10 to resemble colonial punishments of “public shaming, humiliation, and banishment.” *Smith v. Doe*, at 98. For example, each time a Tier III offender registers, the sheriff may forward the updated information to neighbors; school superintendents and principals; preschools; daycares; and all volunteer organizations where contact with minors may occur. R.C. 2950.11(A)-(F). All of the various organizations in turn are authorized to disseminate the information, and the information is available to any member of the public upon request. R.C. 2950.11(A)-(F).

The wide dissemination of offenders’ personal information, including photographs; addresses; e-mail addresses; travel documents; fingerprints; and DNA samples also resemble shaming punishments intended to inflict public disgrace. R.C. 2950.04(B); 2950.04(C). See Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. Chi. L. Rev. 733, 739 (1998)

“Punishments widely described as ‘shaming’ penalties thus come in two basic but very different forms: those that rely on public exposure and aim at shaming; and those that do not rely on public exposure and aim at educating.”). See, also, Paul Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U.L. Rev. 201, 202 (1996) (noting that “criminal sanctions signal condemnation”).

Along with being analogous to historical forms of punishment and placing additional restraints upon convicted sex offenders and juvenile sex offenders, S.B. 10 also furthers the traditional aims of punishment: retribution and deterrence. *Smith v. Doe*, at 102. By placing a defendant into a tier that is based on the offense that he or she committed, and without determining whether the defendant is likely to commit another sexual offense in the future, the General Assembly is attempting to prospectively deter the commission of sexually oriented offenses. See *Roper v. Simmons* (2005), 543 U.S. 551, 571-572, 125 S. Ct. 1183 (found that the “penological justifications” for criminal sanctions do not apply to juveniles since juvenile offenders are less culpable than adult defendants and therefore are not amenable to retribution and deterrence). The automatic placement of an offender into a tier without determining whether he or she is likely to reoffend is also a form of retribution. *Tison v. Arizona* (1987), 481 U.S. 137, 180-181, 107 S. Ct. 1676, (“Retribution...has as its core logic the crude proportionality of “an eye for an eye.”).

The gradual evolution of Ohio’s sex offender registration and notification law—from a purely civil and remedial measure to a punitive classification scheme—has not gone unnoticed by this Court. As Justice Lanzinger pointed out when she compared the then current version of the sex offender law to the one at issue in *Cook* and *Williams*, the current sex offender registration laws are more complicated and restrictive than those at issue in *Williams* and *Cook*,

and now *Ferguson. Wilson*, at ¶ 45 (internal citations omitted and emphasis added) (Donovan and O'Connor, JJ, concurring); see, also, *Ferguson*, at ¶46-47. Justice Lanzinger noted that, “while protection of the public is the avowed goal of R.C. Chapter 2950, we cannot deny that sever obligations are imposed upon these classified as sex offenders.” *Id.* at ¶46. Now sexual predators and habitual offenders must register their residences and employment for the rest of their lives, with this information being available to everyone. *Id.* Thus, the stigma attached to sex offenders is significant and the potential for ostracism and harassment is real. *Id.* Justice Lanzinger concluded that, “I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender’s actions.” *Id.* The *Wilson* opinion was released prior to the enactment of S.B. 10 which implemented even more onerous restrictions and obligations on sex offenders.<sup>5</sup>

Accordingly, because S.B. 10 is criminal in nature and has a punitive effect, a reviewing court may determine whether S.B. 10’s retroactive application is constitutional under federal law. Section 10, Article I of the United States Constitution. A law falls within the ex post facto prohibition if it meets two critical elements: first, the law must be retrospective, applying to events occurring before its enactment; and second, the law must disadvantage the offender affected by it. *Miller v. Florida*, at 430. A law is retrospective if it “changes the legal consequences of acts completed before its effective date.” *Id.* at 431, citing *Weaver v. Graham* (1981), 450 U.S. 24, 31, 101 S. Ct. 960. As to the second element, the United States Supreme Court explained that it is “axiomatic that for a law to be ex post facto it must be more onerous than the prior law.” *Id.* (internal citation omitted). See, also, *State v. Brewer*, 86 Ohio St.3d 160,

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<sup>5</sup> Justice Lanzinger’s dissent in *Wilson* was repeated in *Ferguson*, with Justices Pfeifer and Lundberg Stratton joining. *Ferguson*, at ¶44-62.

163, 1999-Ohio-146, 712 N.E.2d 736 (Requiring an offender to register every 90 days for life is “more onerous” than requiring an offender to register every year for a period of ten years.).

**C. Senate Bill 10 is Retrospective.**

The General Assembly mandated that S.B. 10 be applied retroactively:

At any time on or after July 1, 2007, and not later than December 1, 2007, the attorney general shall determine for each offender or delinquent child who prior to December 1, 2007, has registered a residence, school, institution of higher education, or place of employment address pursuant to section 2950.04, 2950.041, or 2950.05 of the Revised Code the offender's or delinquent child's new classification as a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender under Chapter 2950 of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008, the offender's or delinquent child's duties under Chapter 2950. of the Revised Code as so changed, and, regarding a delinquent child, whether the child is a public registry-qualified juvenile offender registrant.

R.C. 2950.031(A)(1). See, also, R.C. 2950.07(C)(2).

**D. Senate Bill 10 Disadvantages Darian Smith.**

On July 26, 2007, the Allen County Juvenile Court specifically declined to classify Darian as a sexual predator. (A-26). Instead, the juvenile court determined that Darian was a “Juvenile Sex Offender” with a duty to register once a year for ten years. (Aug. 1, 2007, T.p. 4.); (A-26). However, the court informed Darian that as of January 1, 2008, the new law required that Darian be automatically placed into “Tier III” and comply with the registration requirements of S.B. 10 every 90 days for the rest of his life. (Aug. 1, 2007, T.pp. 6-9); (A-26). This new classification puts Darian at a significant disadvantage, by not only increasing the length of time and frequency to register, but also mandating that if he fails to register, he may be charged with felony-level offenses and given adult prison time, for the rest of his life. R.C. 2950.99. Further, given the confusion that has already been exhibited by Ohio’s courts, there is no telling the types of difficulties that Darian will have as a Tier III juvenile sex offender.

Because the Allen County Juvenile Court applied S.B. 10 to Darian under an offense-based classification scheme, Darian's new classification as a Tier III juvenile offender registrant attached as a direct result of his adjudication for sexually oriented offenses. Thus, his classification was punitive and is a direct violation of the United States Constitution's prohibition against ex post facto laws.

### **PROPOSITION OF LAW II**

**The application of S.B. 10 to persons who committed their offense prior to the enactment of S.B. 10 violates the Retroactivity Clause of the Ohio Constitution. Article II, Section 28 of the Ohio Constitution.**

Article II, Section 28 of the Ohio Constitution provides that "the General Assembly shall have no power to pass retroactive laws." *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 106, 522 N.E.2d 489. Ohio's Constitution affords its citizens greater protection against retroactive laws than does the Ex Post Facto Clause of the United States Constitution. *Van Fossen*, at 105, fn. 5 ("[Ohio's Constitution of 1851 provides a] much stronger prohibition than the more narrowly constructed provision in Ohio's Constitution of 1802. Article VIII, Section 16 of th[e 1802] Constitution stated: "No ex post facto law, nor any law impairing the validity of contracts, shall ever be made," merely reflecting the terms used in Article I, Section 10 of the United States Constitution."). This Court has held that the question of whether a statute violates Ohio's prohibition on retroactive laws is answered by determining whether the law creates new duties, rights and obligations. *Cook*, at 411. This is a qualitatively different inquiry than whether S.B. 10 violates the federal prohibition against ex post facto laws. Thus, the analysis required to answer whether the question of whether S.B. 10 violates the Ohio Constitution's Retroactivity Clause is distinct from the analysis required to determine whether S.B. 10 violates the principles of ex post facto.

The analysis of whether a statute violates Ohio’s prohibition against retroactive laws “is guided by a binary test.” *Ferguson*, at ¶13, citing *State v. Consilio*, 114 Ohio St. 3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶10. The first inquiry is whether the General Assembly expressly made the statute retrospective. *Id.* When “there is no clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment.” *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262, 503 N.E.2d 753. As previously noted (See Proposition of Law I), the General Assembly has mandated that S.B. 10 be applied retroactively. R.C. 2950.031(A)(1); see, also, R.C. 2950.07(C)(2). Therefore, in light of the legislature’s express directive, further review is necessary.

Once a reviewing court determines that the legislature intended the statute to be applied retroactively, the second inquiry becomes whether the statute affects a person’s substantive rights, or is merely remedial. *Id.* See, also, *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 137, 522 N.E.2d 477. A statute is substantive—and therefore unconstitutional if applied retroactively—if the statute “impairs or takes away vested rights, affects an accrued substantive right, or *imposes new or additional burdens, duties, obligations or liabilities as to a past transaction*, or creates a new right.” *Cook*, at 411. (Emphasis added.) If a statute affects a substantive right, it offends Ohio’s Constitution. *Van Fossen*, at 106; *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, ¶13. Remedial laws—those affecting only the remedy provided—do not violate Article II, Section 28 of the Ohio Constitution, even if applied retroactively. *Id.*

This Court used this two-step inquiry in its recent decision in *Ferguson*, in which Andrew Ferguson, an adult who was classified as a sexual predator, challenged the constitutionality of S.B. 5. *Id.* at ¶1. *Ferguson* made three challenges to Ohio’s SORN provisions. *Id.* at ¶8-10.

First, Ferguson disputed the permanency of his sexual predator classification, arguing that the previous version of Ohio's sex offender registration law permitted a court to review a sexual-predator classification for possible removal. *Id.* at ¶8. Second, Ferguson challenged the expansion of the law's registration requirements to include registering not only in the offender's county of residence, but also in the counties where the offender worked and attended school. *Id.* at ¶9. Third, Ferguson opposed the extension of the law's community notification requirements, which permitted an offender's personal information to be posted on the internet database maintained by the Ohio Attorney General's office. *Id.* at ¶10.

In analyzing whether S.B. 5 was unconstitutionally retroactive, this Court pointed to its decision in *Cook*, where it had examined the community notification provisions in R.C. 2950, to see whether those newly enacted regulations violated Ohio's prohibition against retroactive laws.<sup>6</sup> *Cook*, at 413. In *Cook*, this Court found that the community notification provisions of H.B. 180 recognized that the risk of recidivism is higher among sex offenders than any other type of criminal, and the corresponding high risk that sexual predators and habitual sex offenders pose to society. *Id.* at 413. Thus, the registration and verification provisions of R.C. 2950 were de minimis procedural requirements that were necessary to achieve the goals of R.C. 2950. *Id.* at 412. Ultimately, it determined that the community notification provisions in H.B. 180 were remedial in nature and did not violate the ban on retroactive laws as set forth in Ohio's Constitution. *Id.* at 413. Therefore, in *Ferguson*, this Court gave deference to the retrospective directives included in the General Assembly's amendments and pointed out that the amendments enacted in S.B. 5 were consistent with its decision in *Cook*. *Ferguson*, at ¶24. It found the fact

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<sup>6</sup> This Court addressed the community notification provisions, as those were the newest revisions to Ohio's sex offender registration and notification statute. *Cook*, at 413.

that the legislature did not limit the retrospective application of S.B. 5 solely to the provisions that were found to be constitutional under H.B. 180 in *Cook*, to be significant.<sup>7</sup> *Id.*

This Court then analyzed whether S.B. 5 impaired vested, substantive rights. *Id.*, citing *Consilio*, at ¶9. It first noted that it has remained consistent in its previous opinions that Ohio’s registration statutes have historically been civil in nature, and are part of a remedial regulatory scheme which was designed to protect the public rather than punish the offender. *Id.* at ¶29-36. It then addressed each of Ferguson’s challenges. As to whether the elimination of the provision that permitted judges to remove a sexual-predator classification, this Court found that classification as a sexual predator was a collateral consequence of an offender’s criminal acts, rather than form of punishment. *Id.* at ¶34. Further, without a showing that Ferguson had a reasonable expectation of finality in a collateral consequence (i.e., no support that Ferguson was likely to have his sexual predator classification removed), his first challenge failed. *Id.* at ¶34, citing *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 282, 525 N.E. 2d 805 (A law that attaches a new disability to a past transaction or consideration is not a prohibited retroactive law unless the past transaction or consideration created at least a reasonable expectation of finality). This Court also found that since the legislature enacted the lifetime sexual-predator classification as a way to protect the public from the risk of recidivist offenders—with alarmingly high rates of recidivism—the lifetime classification was not driven by a punitive or retributive intent. *Id.* As to Ferguson’s second and third challenges, it found again that the provisions in S.B. 5 were

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<sup>7</sup> *Ferguson*, at ¶24, citing *Spitzer v. Stillings* (1924), 109 Ohio St.297, 142 N.E. 365, syllabus (“Where a statute is construed by a court of law resort having jurisdiction, and such statute is thereafter amended in certain particulars, but remains unchanged so far as the same has been construed and defined by the court, it will be presumed that the Legislature was familiar with such interpretation at the time of such amendment, and that such interpretation was intended to be adopted by such amendment as part of the law, unless express provision is made for a different construction.”).

necessary to protect public health and safety, and that as such, the statutory scheme was regulatory, and not punitive. *Id.* at ¶37. Further, it noted that “[w]idespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.” *Id.* at ¶38, citing *Smith v. Doe*, at 99. Thus, this Court concluded that the amended provisions of R.C. 2950 did not violate the Retroactivity Clause of the Ohio Constitution. *Id.* at ¶40.

While this Court may follow the same analysis it used in *Cook* and *Ferguson*, to determine whether S.B. 10 is unconstitutional as applied to juveniles, the result in this case is drastically different, as the registration process and notification procedures and requirements of S.B. 10 are drastically different those considered in *Cook*, *Williams*, and *Ferguson*. First, where courts previously had discretion in determining classification levels, offenders are now being placed into respective tiers based solely on their offense. R.C. 2950.01(E),(F), and (G). And contrary to what the Ninth and Twelfth District Courts of Appeals have held,<sup>8</sup> this offense-based classification has been applied to juveniles as well as adults. *In re of Smith*, at ¶31; see, also, *In re Adrian R.*, at ¶6. Thus, children like Darian who were determined to be sexually oriented offenders under the old law have had the length and frequency of their registration increased from once a year for ten years to every 90 days for life. R.C. 2950.07(B).

Further, movement restrictions in S.B. 10 are much more stringent than those in S.B. 5. Now, if Darian wants to leave his county of residence for any reason, and stay in another county for three days or more, he must provide the sheriff in his county of residence with notice of his intent to leave the county twenty days prior to his leaving. R.C. 2950.041. Upon his arrival in a different county, he must then register with the sheriff of that county. *Id.* When he returns to his

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<sup>8</sup> *In re G.E.S.*, at ¶37; *In re A.R.*, at ¶36-37; and *In re S.R.P.*, at ¶45.

home county, he must then register again. *Id.* As a child, who is not always in control of how and when he is transported somewhere, this requirement puts a substantial burden on him, especially when Darian's failure to comply with these requirements will result in his being charged with a felony-level offense. R.C. 2950.99.

Senate Bill 10 has imposed new and additional burdens, duties, obligations, and liabilities to Darian's past adjudication for sexually oriented offenses. *Cook*, at 411. As such, the provisions of S.B. 10 are substantive and therefore, violate Ohio's prohibition against retroactive laws. *Van Fossen*, at 106; and *LaSalle*, at ¶13.

### **PROPOSITION OF LAW III**

**The application of S.B. 10 violates the United States Constitution's prohibition against cruel and unusual punishments. Eighth Amendment to the United States Constitution.**

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment. The provision is applicable to the states through the Fourteenth Amendment. *Furman v. Georgia* (1972), 408 U.S. 238, 239, 92 S. Ct. 2726 (per curiam); *Robinson v. California* (1962), 370 U.S. 660, 666-667, 82 S. Ct. 1417; *Louisiana ex rel. Francis v. Resweber* (1947), 329 U.S. 459, 463, 67 S. Ct. 374 (plurality opinion). The Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. *Atkins v. Virginia* (2002), 536 U.S. 304, 122 S. Ct. 2242. This right flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States* (1910), 217 U.S. 349, 367, 30 S. Ct. 544. By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons. *Roper v. Simmons* (2005), 543 U.S. 551, 560, 125 S. Ct. 1183.

The prohibition against cruel and unusual punishments must be “interpreted according to its text by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design.” Id. “To implement this framework [the Court] ha[s]... affirmed the necessity of referring to ‘the evolving standards of decency that mark the progress of a maturing society’ to determine which punishments are so disproportionate as to be cruel and unusual.” Id. at 561, quoting *Trop v. Dulles* (1958), 356 U.S. 86, 10101, 78 S. Ct. 590 (plurality opinion). Given the history and tradition of the principals inherent in juvenile justice, it is imperative that the provisions of S.B. 10 be scrutinized against this standard to determine whether its application to juveniles comports with the basic concept of human dignity that lies at the core of the Eighth Amendment. Id. at 180.

This Court has long recognized the fundamental differences between children in the juvenile delinquency system and adults in the criminal justice system. *In re C.S.*, 115 Ohio St.3d 267, 2007-Ohio-4919, 874 N.E.2d 1177, ¶66. The philosophy driving juvenile justice has been rooted in social welfare, rather than in the body of the law. Id., citing *Kent v. United States* (1966), 383 U.S. 541, 554, 865 S. Ct. 1045. The objective of the juvenile court, from its inception, has been that courts would protect a wayward child from evil influences, save him from criminal prosecution, and provide him social and rehabilitative services. *In re T.R.* (1990), 52 Ohio St.3d 5, 15, 556 N.E.2d 439; *Children's Home of Marion City v. Fetter* (1914), 90 Ohio St. 110, 127, 106 N.E. 761, 11. This Court has found that,

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

*State v. Agler* (1969), 19 Ohio St.2d 70, 71, 249 N.E.2d 808. Still today, juvenile courts are to remain centrally concerned with the care, protection, development, treatment, and rehabilitation of youthful offenders who remain in the juvenile justice system. *In re Caldwell*, 76 Ohio St. 3d 156, 157 1996 Ohio 410, 666 N.E.2d 1367; *In re Kirby* (2004), 101 Ohio St.3d 312, 2004 Ohio 970, 804 N.E.2d 476. Thus, it is firmly established that a child is not a criminal by reason of any juvenile court adjudication; and civil disabilities, ordinarily following convictions, do not attach to children.<sup>9</sup> *Id.* at 73; R.C. 2151.357(H). The very purpose of the juvenile code was to avoid treating children as criminals and insulating them from the reputation and answerability of criminals. *Id.* at 80. Under current precedent, the law is clear: “juvenile court proceedings are civil, rather than criminal, in nature.” *In re Anderson*, 92 Ohio St.3d 63, 2001-Ohio-131, 748 N.E.2d 67.

While juvenile court proceedings have not been held to be “criminal prosecutions,” such proceedings also have not been regarded as devoid of criminal aspects merely because they are given a civil label. *Kent*, at 554; *In re Winship*, at 365-66. See, also, *In re Gault*, at 17 (noting that the term “delinquent” offers only slightly less stigma than the term “criminal” and that a “commitment” is an incarceration regardless of what it is labeled). Further, juvenile delinquency laws feature inherently criminal aspects and the state’s goals in prosecuting a criminal action and in adjudicating a juvenile delinquency case are the same: to vindicate a vital interest in the enforcement of *criminal* laws. *In re C.S.*, at ¶76, citing *State v. Walls*, 96 Ohio St.3d 437, 2002-

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<sup>9</sup> Many of the holdings enforcing this philosophy were based on the language contained in various versions of what is now R.C. 2151.357(H), which provides: “The judgment rendered by the court under this chapter shall not impose any of the civil disabilities ordinarily imposed by conviction of a crime in that *the child is not a criminal by reason of the adjudication*, and no child shall be charged with or convicted of a crime in any court except as provided by this chapter.” (Emphasis added.)

Ohio-5059, ¶26. (Emphasis sic). Notwithstanding the criminal aspects in juvenile delinquency proceedings, however, the unique characteristics of juveniles must be considered in determining dispositions and penalties that are associated with a finding of delinquency.

The United States Supreme Court has explained how the fundamental differences between adult and juvenile offenders begs for greater protection of juveniles when it comes to the penalties associated with that youth's actions. *Thompson v. Oklahoma* (1988), 487 U.S. 815, 835, 108 S. Ct. 2687. Juvenile justice jurisprudence is replete with the recognition that there are major distinctions between the rights and duties of juveniles as compared with those of adults. *Thompson*, at 823. The age-based restrictions that control when a child may lawfully vote, drive, sit on a jury, marry without parental consent, and purchase tobacco and alcohol have clearly illustrated the value in lawmakers taking into consideration the mental capacity of a child to handle these responsibilities. *Id.* The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult. *Roper*, at 561-562, citing *Thompson*, at 835.

And, as it is generally agreed that punishment should be directly related to the personal culpability of a criminal defendant, since adolescents are less mature and responsible than adults, less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. *Thompson*, at 834-835, citing *California v. Brown* (1987), 479 U.S. 538, 545, 107 S. Ct. 837.

In *Roper*, the Supreme Court recognized that, “[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.” *Roper*, at 570. For example, a juvenile’s susceptibility to immature and irresponsible behavior means “their irresponsible conduct is not as

morally reprehensible as that of an adult.” *Roper*, at 553 (citing *Thompson*, at 853). A juvenile’s vulnerability and comparative lack of control over his or her immediate surroundings mean that juveniles have a greater claim than adults, to be forgiven for failing to escape negative influences in their whole environment. *Roper*, at 553. “The reality that juveniles still struggle to define their identity means that it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character.” *Id.* In addition, “[r]etribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.” *Id.* at 571. The fact that juveniles are categorically less culpable highlights the unfairness of automatic and lifetime registration and illustrates the devastating consequences that result when the law is used to secure an adult consequence against a youthful defendant.

The Supreme Court’s acknowledgment of the unique characteristics of juveniles came when the Court abolished the death penalty for all juvenile offenders under the age of eighteen. *Roper*, at 570-571. See, also, *Brief of the American Medical Association, et. al. as Amici Curiae* for Respondent Simmons, (which argued adolescent offenders at sixteen and seventeen do not have adult levels of judgment, impulse control, or ability to assess risks).<sup>10</sup> And in *Thompson*, the Court found that the reduced culpability of juvenile offenders, coupled with the fact that the application of the death penalty did not measurably contribute to the essential purposes underlying its enforcement, supported the conclusion that the imposition of the death penalty to persons under the age of sixteen violates the Eighth Amendment’s prohibition against cruel and unusual punishments. *Thompson*, at 835. Although *Roper* and *Thompson* were both death penalty cases, the scientific and developmental research supporting those decisions applies to the

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<sup>10</sup> *Roper v. Simmons Amici* Briefs available at <http://www.abanet.org/crimjust/juvjus/simmons/simmonsamicus/>

circumstances in this case as well. Given the Supreme Court's understanding of juvenile development, there is no rational justification for juveniles to be automatically subjected to the highest level of registration and classification.<sup>11</sup>

The Supreme Court in *Roper* recognized that, as capital punishment was to be reserved for a narrow category of the most serious crimes, and imposed against only those who were the most deserving of execution, juveniles could not be reliably classified among the worst offenders. *Roper*, at 569. Furthermore, the Court found that the penological justifications for the death penalty—namely retribution and deterrence—apply to children with less force than to adults. *Id.* at 571. The Court in *Roper* found that retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished by reason of youth and immaturity. *Id.* Likewise, it is unclear that deterrence is a proper justification for punishing a juvenile offender, because the likelihood that a teenage offender has made the type of cost-benefit analysis that attaches the weight to the possibility of the death penalty is so remote as to be virtually nonexistent. *Id.* at 572.

The criminal aspects of juvenile delinquency have been highlighted with the advent of S.B. 10, which has drastically changed the penalties associated with delinquency adjudications for sexually oriented juvenile offenders in Ohio. As argued above, S.B. 10 can no longer be seen as a purely civil remedy with no criminal implications. (See Proposition of Law I). And, the new duties, obligations, restrictions, and penalties associated with failure to comply with S.B. 10 has drastically altered the provisions of Ohio's SORN law such that its application to juveniles violates Ohio's prohibition against retroactive laws. (See Proposition of Law II). But perhaps

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<sup>11</sup> See, also, Brief of Amicus Curiae, The Justice for Children Project, et. al, which highlights scientific and developmental research as to why S.B. 10 is unconstitutional as applied to juveniles.

one of the most disturbing concerns about the new law is that it is being applied to juveniles in the same way as it is to adults—solely based on the offense—thereby conferring adult penalties on juvenile offenders, who are less culpable than their adult counterparts. See *Roper*, at 571-572. Just as juveniles cannot be subjected to capital punishment because that punishment is to be reserved for those who are the most culpable of the most serious crimes, so to the adult penalties associated with a criminal conviction for a sexually oriented offense should not be so haphazardly applied to Ohio’s children.

Implementation of S.B. 10 to juvenile cases is particularly cruel because juveniles have an inherent amenability to rehabilitation. See *Roper*, at 570. According to the Ohio Association of County Behavioral Health Authorities, the recidivism rates for Ohio juveniles who commit a sexual offense, with treatment, supervision, and support, are lower than any other group of offenders, at 4% - 10%.<sup>12</sup> That means 90-96% of the juvenile offenders who are receiving appropriate treatment are not a danger to the public. Thus, the government’s interest in protecting the public surely cannot be met by requiring juveniles to be subjected to the same application of S.B. 10 as adults. *Cook*, at 406.

When it comes to laws that involve sex offenders, the passions of the majority must be tempered with reason. Joseph Lester, *The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 Akron L. Rev. 339, 340 (2007). “Overborne by a mob mentality for justice, officials at every level of government are enacting laws that effectively exile convicted sex offenders from their midst with little contemplation as to the appropriateness or constitutionality of their actions.” *Id.* Politicians across the country have approved almost every measure that deals with sex offenders in order to appear strong on crime. *Id.* “Given that the

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<sup>12</sup> Ohio Association of Behavioral Health Authorities *Juvenile Sex Offenders*, BEHAVIORAL HEALTH: DEVELOPING A BETTER UNDERSTANDING, 3;1 (2006).

sex-offender lobby is neither large nor vocal, it is up to the courts to protect the interests of this disenfranchised group.” Id. at 340, citing *Cal. Dep’t of Corr. v. Morales* (1995), 514 U.S. 499, 522 (Stevens, J., dissenting). (“The danger of legislative overreaching...is particularly acute when the target of the legislation is a narrow group as unpopular (to put it mildly) as multiple murderers [or sex offenders]. There is obviously little legislative hay to be made in cultivating the multiple-murderer [or sex-offender] vote.”). See, also, Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261, 1267 (Summer, 1998) (“That sex offenders are deserving of disdain is not the issue, for they surely are. The issue, rather, is whether they deserve the protection of the Constitution, which they surely do.”). This protection is perhaps no more urgently necessary than when it comes to the case of legislating penalties for juveniles who have been adjudicated delinquent of a sexually oriented offense.

Ohio has created a system of juvenile justice in which adult treatment and sentencing is reserved for exceptional circumstances, and in which procedural rights are afforded to similarly situated juveniles. However, S.B. 10 has gone against the principles of juvenile jurisprudence, set forth by this Court’s long-established history of effectively applying Ohio’s criminal statutes to juvenile offenders. See, generally, *Agler*, at 71; *In re Caldwell*, 157. A lifetime registration period for a person who committed juvenile sex offenses as a fourteen-year-old boy, with no regard to his likelihood to reoffend, is excessive and grossly disproportionate to the crime.

#### **PROPOSITION OF LAW IV**

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

On June 20, 2007, July 12, 2007, and August 1, 2007, the Allen County Juvenile Court conducted a three-part juvenile sex offender classification hearing in Darian's case. (June 20, 2007, T.pp. 1-70); (July 12, 2007, T.pp 1-14); (Aug. 1, 2007, T.pp. 1-12). The court initially determined that Darian was not a sexual predator, but that he "should be classified as a Juvenile Sex Offender Registrant." (Aug. 1, 2007; T.pp. 2-3). However, after reviewing its previous finding, the court informed Darian that, due to the new law, his classification would automatically be changed to a Tier III juvenile offender registrant, with a duty to register every 90 days for the rest of his life. (Aug. 1, 2007, T.p. 5).

But beginning July 1, 2007, the juvenile court was without jurisdiction to conduct a hearing pursuant to R.C. 2152.83, and was without statutory authority to find Darian to be a Juvenile Sex Offender Registrant with a duty to comply with R.C. 2950.04, 2950.041, 2950.05, and 2950.06, because those code sections did not exist as of July 1, 2007. S.B. 10, 127<sup>th</sup> General Assembly, Sections 2, 3, and 4 (2007). Section 2 mandates that:

*Existing sections 109.42, 109.57, 311.171, 1923.01, 1923.02, 2151.23, 2151.357, 2152.02, 2152.19, 2152.191, 2152.22, 2152.82, 2152.821, **2152.83**, 2152.84, 2152.85, 2152.851, 2743.191, 2901.07, 2903.211, 2905.01, 2905.02, 2905.03, 2905.05, 2907.01, 2907.02, 2907.05, 2921.34, 2929.01, 2929.02, 2929.022, 2929.03, 2929.06, 2929.13, 2929.14, 2929.19, 2929.23, 2930.16, 2941.148, 2950.01, 2950.02, 2950.03, 2950.031, **2950.04**, **2950.041**, **2950.05**, **2950.06**, 2950.07, 2950.08, 2950.081, 2950.10, 2950.11, 2950.12, 2950.13, 2950.14, 2953.32, 2967.12, 2967.121, 2971.01, 2971.03, 2971.04, 2971.05, 2971.06, 2971.07, 5120.49, 5120.61, 5120.66, 5139.13, 5149.10, 5321.01, 5321.03, and 5321.051 and sections 2152.811, 2950.021, 2950.09, and 2950.091 of the Revised Code are hereby repealed.*

(Emphasis added.) And, Section 3 provides:

*The amendments to sections [ \* \* \* ] 2152.83 [ \* \* \* ] 2950.04, 2950.041, 2950.05, 2950.06, [ \* \* \* ] of the Revised Code that are made by Sections 1 and 2 of this act, [ \* \* \* ] shall take effect on January 1, 2008.*

(Emphasis added.) Section 4 provides that “Sections 1 to 3 of this act shall take effect on July 1, 2007.” S.B. 10, 127<sup>th</sup> General Assembly, Section 4 (2007). Therefore, as of July 1, 2007, Section 2 of S.B. 10—which repeals the former code sections that provide the court jurisdiction to conduct a juvenile sex offender classification hearing and the code sections that provide the duties of a juvenile sex offender registrant—was in effect, and the repealed sections were not. S.B. 10, 127<sup>th</sup> General Assembly, Section 2 (2007). And the General Assembly ordered that the new version of R.C. 2950.01 was not to take effect until January 1, 2008. S.B. 10, 127<sup>th</sup> General Assembly, Section 3 (2007). Therefore, on August 1, 2007, the juvenile court could not have determined that Darian was a juvenile sex offender registrant because there was no such law in effect at that time.

It is well established that the cornerstone of statutory construction and interpretation is legislative intention. *State v. Jordan*, 89 Ohio St.3d 488, 491, 2000-Ohio-225, 733 N.E.2d 601, citing *State ex rel. Francis v. Sours* (1944), 143 Ohio St. 120, 124, 53 N.E.2d 1021. In order to determine statutory construction, a court must first look to the language of the statute itself. *Columbus City School District Bd. Of Edn. v. Wilkins*, 101 Ohio St.3d 112, 2004 Ohio 296; 802 N.E.2d 637, ¶26; *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105, 304 N.E.2d 378. A court must examine a statute in its entirety rather than focus on an isolated phrase to determine legislative intent. *Massillon City School Dist. Bd. of Edn. v. Massillon*, 104 Ohio St.3d 518, 2004-Ohio-6775, 820 N.E.2d 874. But, if the statutory language is clear and unambiguous, the court need not resort to the rules of statutory construction, because “[a]n unambiguous statute is to be applied, not interpreted.” *Storer Communications, Inc. v. Limbach* (1988), 37 Ohio St.3d 193, at 194; *Sears v. Weimer* (1944), 143 Ohio St. 312, paragraph five of the syllabus. To

interpret language that is already plain is to legislate, which is not a function of the court. *Sears*, at 316.

While this Court has found that as a general rule “a repealing clause of a statute which is to take effect in the future will not be effective until the statute itself is in operation,” this Court has also announced an exception to that rule: “Modern commentators have endorsed the proposition that a repealer and the amendatory enactment take effect simultaneously *unless the legislature expresses a contrary intention.*” *Cox v. Ohio Dep’t of Transp.* (1981), 67 Ohio St.2d 501, 507, 424 N.E.2d 597. (Emphasis added.)

In S.B. 10, the Ohio General Assembly illustrated its contrary intention to the general rule that code sections’ repeal and amendments take place simultaneously in sections 2, 3, and 4. Section 2 of S.B. 10 provides that 74 enumerated code sections are “hereby repealed.” Section 4 provides that Sections 1 to 3 of this act shall take effect on July 1, 2007.” And Section 3 provides that “[t]he amendments to [the 74 sections contained in Section 2] that are made by Sections 1 and 2 of this act, the enactment of [5 enumerated sections] of the Revised Code by Section 1 of the act, and the repeal of [4 enumerated sections] of the Revised Code by Section 2 of this act *shall take effect on January 1, 2008.*” (Emphasis added.) Section 3 also provides that the “amendments to [8 enumerated sections] of the Revised Code that are made by Sections 1 and 2 of this act and the enactment of [5 enumerated sections and 1 new section] of the Revised Code by Section 1 of this act shall take effect on July 1, 2007.”

The canon, *expressio unius est exclusio alterius*, (expression of one thing suggests the exclusions of others) is relevant here, and supports that the General Assembly specified—in direct and express terms—which code sections were to be repealed on July 1, 2007. See *Myers v. City of Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, 852 N.E.2d 1176, ¶24. These specific

provisions are limiting; thus, the direct and express terms provide that the legislature intended what it plainly enacted: that the 74 Revised Code sections were repealed on July 1, 2007, and that the amendments to those sections were effective on January 1, 2008. *Why* the legislature provided the hiatus was not for the court of appeals to decide, because “[t]o interpret language that is already plan is to legislate, which is not a function of the court.” *Weimer*, 143 Ohio St. 312 at 316. See, also, *Storer Communications*, at 194.

The legislature mandated that former R.C. 2151.23, 2152.83, 2950.04, 2950.041, 2950.05, 2950.06, and 71 other code sections, which are not at issue here, be repealed on July 1, 2007. And the legislature intended those sections to take effect on January 1, 2008. As such, on the date that the court found Darian to be a juvenile sex offender registrant, the juvenile court had no jurisdiction to conduct the hearing. Therefore, the court’s finding that D.S. is a juvenile sex offender registrant is void and must be vacated. Accordingly, S.B. 10 may not be applied to Darian. See *State v. Merriweather* (1980), 64 Ohio St.2d 57, 59, 413 N.E.2d 790 (sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused); *Williams*, at 910. (“R.C. 2901.04 requires that statutes defining offenses or penalties shall be strictly construed against the state and liberally in favor of the defendant. Therefore, this section of the law is subject to strict interpretation against the state, and must be liberally interpreted in favor of the accused.”).

In addition to the Third District in the present case, several other Courts of Appeals throughout Ohio have addressed this issue and found that the General Assembly did not intend for there to be a gap or hiatus in the law, such that juvenile courts lacked jurisdiction to conduct sex offender classification hearings between July 1, 2007 and December 31, 2007. However, there exists no consensus among the appellate courts as to why each has reached this conclusion.

See, generally, *In re Marcio A.*, 5<sup>th</sup> Dist. No. 2007CA00149, 2008-Ohio-4523; *In re Carr*, 5<sup>th</sup> Dist. No. 08CA19, 2008-Ohio-5689; *In re Lamuel F.*, 5<sup>th</sup> Dist. No. 2007CA00333, 2008-Ohio-6669; *In re E.L.*, 8<sup>th</sup> Dist. No. 90848, 2008-Ohio-5094; *In re S.R.P.*, 12<sup>th</sup> Dist. No. CA2007-11-027, 2009-Ohio-11; and *In re T.C.H.*, 9<sup>th</sup> Dist. Nos. 24130 & 24131, 2008-Ohio-6614.

The Fifth District held that, since appellate courts throughout Ohio have consistently found that the repealing clause of a statute does not take effect until the other provisions of the repealing act come into operation, juvenile courts had jurisdiction to conduct delinquency hearings between July 1, 2007 and December 31, 2007. *In re Lamuel F.*, at ¶18-21.

Conversely, the Eighth District determined that Section 4 of S.B. 10 creates ambiguity regarding the effective dates of the old versus the new laws; that the General Assembly would not have intended to make substantive changes to criminal offenses; and to avoid an unreasonable result, the General Assembly could not have meant to divest juvenile courts of jurisdiction between the time in which portions of S.B. 5 were repealed, and S.B. 10 was enacted. *In re E.L.*, at ¶11. The Twelfth District agreed with the Eighth District's holding in *In re E.L.*, and found that the ambiguity created by the language in Section 4 of S.B. 10 is contrary to the strong language in Section 5 of S.B. 10 and the general background of the new law; thus, the legislature could not have intended for there to be no authority to conduct a classification hearing during the six months immediately preceding S.B. 10's effective date. *In re S.R.P.*, at ¶17-18.

Finally, the Ninth District declined to agree with any of the preceding courts, as it believed statutory construction arguments were unnecessary. *In re T.C.H.*, at ¶14-15. Instead, the Ninth District found that in the absence of express language creating a hiatus in the statutory law, a legislative act presumptively maintains a statutory framework that prevented juvenile

courts from being divested of their authority to conduct sex offender classification hearing between the date that S.B. 5 was repealed and S.B. 10 gone into effect. *Id.* at 15, citing *Cox*,

Given the lack of uniformity among Ohio's appellate courts, Darian urges this Court to find that, in the absence of any language justifying why the General Assembly wrote a hiatus into the provisions of S.B. 10 between the dates of July 1, 2007 and December 31, 2007, juvenile courts throughout Ohio were without jurisdiction to conduct sex offender classification hearings, or any other juvenile delinquency proceedings for that matter during that time. In the absence of that finding, Darian requests this Court to provide guidance to Ohio courts as to the proper way of making a determination as to the statutory authority that existed for juvenile courts from July 1, 2007 through December 31, 2007.

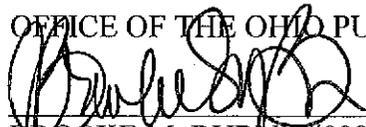
### CONCLUSION

Darian was classified as a juvenile sex offender registrant under S.B.10, based solely on his offense, in part because the Allen County Juvenile Court was under the impression that S.B. 10 removed its discretion to determine what level Darian should be classified, if at all. This offense-based application of Ohio's new JSORN law violates the United States Constitution's prohibitions against ex post facto laws and cruel and unusual punishments. Further, this offense-based classification scheme violates Ohio's prohibition against retroactive laws. Therefore, Darian asks this Court to find S.B. 10 unconstitutional. However, if this Court adopts the reasoning and holding of the Ninth District Court of Appeals in *In re G.E.S.*, this Court may find that S.B. 10's provisions are constitutional, as applied to juveniles, as they preserve a juvenile court's ability to use discretion in determining what tier level a juvenile offender registrant should be subject. Regardless, Darian's classification must be vacated and his case remanded so

that the Allen County Juvenile Court may issue a valid order in his case. Moreover, since many juvenile courts throughout Ohio have been classifying youth under this same offense-based application of S.B. 10, Darian would also ask that this Court issue a directive to Ohio's lower courts, that youth who were classified under this offense-based application of S.B. 10 should receive new classification hearings.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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COUNSEL FOR MINOR CHILD-APPELLANT,  
SMITH

#### CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded by regular U.S. Mail this 3<sup>rd</sup> day of March, 2009 has been sent by regular U.S. mail, postage prepaid, to the office of Christina L. Steffan, Assistant Allen County Prosecutor, 204 N. Main Street, Suite 302, Court of Appeals Building, Lima, OH 45801.



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BROOKE M. BURNS #0080256  
Assistant State Public Defender

COUNSEL FOR MINOR CHILD-  
APPELLANT, SMITH

IN THE SUPREME COURT OF OHIO

IN RE SMITH,  
A Delinquent Child

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Case No. 2008-1624  
  
On Appeal from the  
Allen County Court of Appeals  
Third Appellate District  
  
C.A. Case No. 1-07-58

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**APPENDIX TO MERIT BRIEF OF APPELLANT SMITH**

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IN THE SUPREME COURT OF OHIO

IN THE MATTER OF:

DARIAN J. S.,

Appellant.

Case No. **08-1624**

On Appeal from the Allen  
County Court of Appeals  
Third Appellate District

C.A. Case No. 1-07-58

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**NOTICE OF APPEAL OF MINOR CHILD-APPELLANT D.S.**

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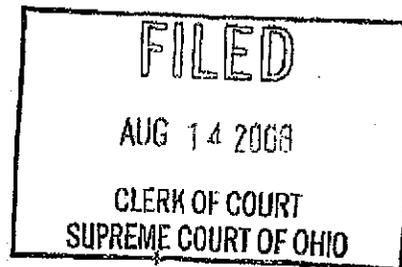
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COUNSEL FOR MINOR  
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**NOTICE OF APPEAL OF MINOR CHILD-APPELLANT D.S.**

Appellant Darian S. hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Allen County Court of Appeals, Third Appellate District, entered in Court of Appeals Case No. 1-07-58 on June 30, 2008.

This case raises a substantial constitutional question, involves a felony, and is of public or great general interest.

Respectfully submitted,

OFFICE OF THE  
OHIO PUBLIC DEFENDER



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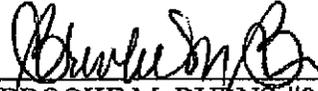
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing NOTICE OF APPEAL was forwarded by regular U.S. Mail to Juergen Waldick, Allen County Prosecuting Attorney, Allen County Prosecutor's Office, 204 N. Main Street, Suite 302, Court of Appeals Building, Lima, Ohio 45801, this 14<sup>th</sup> day of August, 2008.



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BROOKE M. BURNS #0080256  
Assistant State Public Defender

COUNSEL FOR MINOR CHILD-  
APPELLANT D.S.

COURT OF APPEALS  
FILED

2008 JUN 30 PM 12:51

IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

ALLEN COUNTY

GINA C. STALEY-BURLEY  
CLERK OF COURTS  
ALLEN COUNTY, OHIO

IN THE MATTER OF:

CASE NUMBER 1-07-58

DARIAN J. SMITH,

JOURNAL

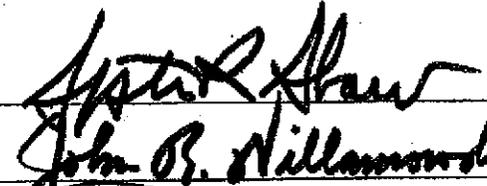
ALLEGED DELINQUENT CHILD,

ENTRY

APPELLANT.

For the reasons stated in the opinion of this Court rendered herein, the assignments of error are overruled, and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs to appellant for which judgment is rendered and the cause is remanded to that court for execution.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.

  
\_\_\_\_\_  
John B. Williamson  
\_\_\_\_\_  
  
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JUDGES

DATED: June 30, 2008

**COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
ALLEN COUNTY**

**COURT OF APPEALS  
FILED  
2008 JUN 30 PM 12:51**

**GINA C. STALEY-BURLEY  
CLERK OF COURTS  
ALLEN COUNTY, OHIO**

**IN THE MATTER OF:**

**CASE NUMBER 1-07-58**

**DARIAN J. SMITH,**

**ALLEGED DELINQUENT CHILD,**

**OPINION**

**APPELLANT.**

---

**CHARACTER OF PROCEEDINGS: Appeal from Common Pleas Court,  
Juvenile Division.**

**JUDGMENT: Judgment affirmed.**

**DATE OF JUDGMENT ENTRY: June 30, 2008**

---

**ATTORNEYS:**

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For Appellee.**

A-5  
~~AS~~

**Shaw, P.J.**

{¶1} Delinquent-Appellant Darian J. Smith (“Darian”) appeals from the July 26, 2007 Judgment Entry of the Court of Common Pleas, Allen County, Ohio, Juvenile Division classifying Darian as a Juvenile Sex Offender Registrant and Tier III Sex Offender.

{¶2} This matter stems from Darian’s adjudication as delinquent for three counts of Rape, in violation of R.C. 2907.02(A)(1)(b) on January 18, 2006. Disposition occurred on February 16, 2006. The juvenile court ordered Darian committed to the legal care and custody of the Ohio Department of Youth Services (“DYS”) for an indefinite term consisting of a minimum period of one year to a maximum period not to exceed his twenty-first birthday.

{¶3} Darian’s commitment to DYS was stayed, however, pending successful treatment at the Juvenile Residential Treatment Center of Northwest Ohio. However, the juvenile court subsequently determined that there was not room for Darian at the Juvenile Residential Treatment Center of Northwest Ohio and committed him to DYS. On September 13, 2006 Darian was granted early release from DYS and placed at the Juvenile Residential Treatment Center of Northwest Ohio.

{¶4} On December 21, 2006 Darian was released from treatment. Two weeks prior to Darian’s release, the juvenile court scheduled a juvenile sexual

offender classification pre-trial for January 24, 2007. The pre-trial conference on Darian's sex offender status was held on January 24, 2007. A second pre-trial conference was scheduled for April 4, 2007 in order to give Darian time to file a motion for a sexual offender classification evaluation. Darian failed to appear for the April 4, 2007 pre-trial and a bench warrant was issued for his arrest.

{¶5} Darian was subsequently arrested and his sexual offender classification examination was scheduled for May 3, 2007. A sexual offender classification hearing was held in three parts, on June 20, 2007, July 12, 2007 and August 1, 2007.

{¶6} We also note that during this time, Darian committed a violation of the terms of his parole, and admitted that violation on April 19, 2007. Based on this violation, Darian's parole was revoked and he was committed to DYS for a minimum period of thirty days to a maximum period not to exceed his attainment of twenty-one years of age.

{¶7} On July 26, 2007 the juvenile court found that Darian should be classified as a Juvenile Sex Offender Registrant. The matter was subsequently scheduled for a hearing on August 1, 2007 so that the Court could explain Darian's duties to register. At the August 1, 2007 hearing, Darian was again determined to be a Juvenile Sex Offender. Moreover, Darian was designated a Tier III Sex Offender under the new version of R.C. 2150.01.

{¶8} Darian now appeals asserting six assignments of error.

**ASSIGNMENT OF ERROR I**

THE TRIAL COURT ERRED WHEN IT CLASSIFIED DARIAN S. AS A JUVENILE OFFENDER REGISTRANT BECAUSE IT DID NOT MAKE THAT DETERMINATION UPON HIS RELEASE FROM A SECURE FACILITY, IN VIOLATION OF R.C. 2152.83(B)(1). (JUNE 20, 2007, T.PP 1-70); (JULY 12, 2007, T.PP 1-14); (AUG. 1, 2007, T.PP. 1-12). (A-13)-(A-17).

**ASSIGNMENT OF ERROR II**

THE ALLEN COUNTY JUVENILE COURT ERRED WHEN IT CLASSIFIED DARIAN S. AS A JUVENILE OFFENDER REGISTRANT BECAUSE AS OF JULY 1, 2007, THERE EXISTED NO STATUTORY AUTHORITY TO CONDUCT A JUVENILE SEX OFFENDER CLASSIFICATION HEARING. (JULY 12, 2007, T.PP 1-14); (AUG. 1, 2007, T.PP. 1-12). (A-13)-(A-17).

**ASSIGNMENT OF ERROR III**

THE RETROACTIVE APPLICATION OF SENATE BILL 10 VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION AND THE RETROACTIVITY CLAUSE OF SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION. SECTION 10, ARTICLE I OF THE UNITED STATES CONSTITUTION AND SECTION 28, AND ARTICLE II OF THE OHIO CONSTITUTION. (AUG. 1, 2007, T.PP. 1-12). (A-13)-(A-18).

**ASSIGNMENT OF ERROR IV**

THE RETROACTIVE APPLICATION OF SENATE BILL 10 VIOLATES THE SEPARATION OF POWERS DOCTRINE THAT IS INHERENT IN OHIO'S CONSTITUTION. (AUG. 1, 2007, T.PP. 1-12). (A-13)-(A-18).

**ASSIGNMENT OF ERROR V**

THE APPLICATION OF SENATE BILL 10 VIOLATES THE UNITED STATE'S [SIC] CONSTITUTION'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISMENTS [SIC].

**EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION. (AUG. 1, 2007, T.PP. 1-12). (A-13)-(A-18).**

**ASSIGNMENT OF ERROR VI**

**THE RETROACTIVE APPLICATION OF SENATE BILL 10 VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION AND THE RETROACTIVITY CLAUSE OF SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION, FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION; SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION. (AUG. 1, 2007, T.PP. 1-12). (A-13)-(A-18).**

*First Assignment of Error*

{¶9} In his first assignment of error, Darian argues that the trial court erred because his classification as a sexual offender did not occur at disposition or upon his release from a secure facility.

{¶10} If a delinquent is not classified as a juvenile sex offender registrant pursuant to R.C. 2152.82 at the time of disposition, he may be classified pursuant to the procedures articulated in R.C. 2152.83. R.C. 2152.83 provides in pertinent part as follows:

**(B)(1) The court that adjudicates a child a delinquent child, on the judge's own motion, may conduct at the time of disposition of the child or, if the court commits the child for the delinquent act to the custody of a secure facility, may conduct at the time of the child's release from the secure facility, a hearing for the purposes described in division (B)(2) of this section if all of the following apply:**

**(a) The act for which the child is adjudicated a delinquent child is a sexually oriented offense \*\*\***

**(b) The child was fourteen or fifteen years of age at the time of committing the offense.**

**(c) The court was not required to classify the child a juvenile sex offender registrant under section 2152.82 of the Revised Code\*\*\*.**

{¶11} As an initial matter, we note that the meaning of “at the time of \*\*\* release” as utilized in R.C. 2152.83(B)(1) has not been addressed frequently by the Ohio courts, nor is it specifically defined in the Ohio Revised Code.

{¶12} The appellate courts that have addressed the requirements of R.C. 2152.83(B)(1) have frequently addressed cases dissimilar to the case at bar. See *In re Murdick*, 5<sup>th</sup> Dist. No. 2007CA00038, 2007-Ohio-6800 (the appellate court agreed with the trial court that it was without jurisdiction to conduct a juvenile sex offender hearing pursuant to R.C. 2152.83(B)(1) some eighteen months after the offender was released from a secure facility and almost a year after disposition. This determination, however, hinged on the fact that the offender had spent eighteen months in a treatment facility that did not qualify as a secure facility.<sup>1</sup>); *In re McAllister*, 5th Dist. No. 2006CA00073, 2006-Ohio-5554 (finding that a classification hearing held thirteen months after the juvenile was released from the secure facility did not meet the definition of “at the time of \*\*\* release”).

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<sup>1</sup> There appears to be no disagreement that the Juvenile Residential Treatment Center of Northwest Ohio qualifies as a secure facility.

{¶13} However, in *In re B.W.*, 2<sup>nd</sup> Dist. No. 1702, 2007-Ohio-2096, the Second District Court of Appeals addressed a situation similar to the present case. In *In re B.W.* the juvenile's classification hearing was held a little more than two months after his release from a secure facility, while the juvenile was still under DYS supervision on parole. The Second District held that the hearing was proper, holding as follows:

**We cannot say that the trial court was unreasonable in holding the hearing in July. In other words, "at the time of the child's release from the secure facility" necessarily incorporates a short interval of time (here, two and a half months, and not thirteen) before jurisdiction is lost. Clearly, the legislature did not intend to mandate a classification simultaneous with release, but merely within a reasonable time given docket constraints and appropriate time for evaluations appurtenant to classification.**

*Id.* at ¶14.

{¶14} This court is inclined to adopt the analysis articulated in *In re B.W.* In the present case, Darian was released from the Juvenile Residential Treatment Center of Northwest Ohio on December 21, 2006. The initial pre-trial conference, docketed prior to his release on December 8, 2006, occurred on January 24, 2007, approximately one month after Darian's release from a secure facility. Between the initial pre-trial and the final order adjudicating Darian to be a Juvenile Sex Offender on July 26, 2007, six months elapsed. Slightly more than seven months elapsed between Darian's release from the Juvenile Residential Treatment Center of Northwest Ohio and his adjudication as a juvenile sex offender registrant.

{¶15} At the initial pre-trial conference, Darian requested time to have a sex offender classification evaluation completed. The juvenile court ordered a sexual classification evaluation at State expense, to be performed before the next pre-trial, scheduled for April 4, 2007. This evaluation was not completed prior to the April 4, 2007 pre-trial because Darian violated his parole by not attending counseling, going home, or attending school. In addition to violating his parole, Darian also did not show up for the April 4, 2007 pre-trial nor did he make himself available during that time frame for the sex offender classification evaluation.

{¶16} A bench warrant issued; and Darian was arrested on April 8, 2007. The juvenile court scheduled the sex offender classification examination for May 3, 2007. After the evaluation, the Classification Hearing was scheduled for June 20, 2007. Prior to the hearing, Darian subpoenaed seven different witnesses to testify on his behalf.

{¶17} The hearing was conducted, as scheduled, on June 20, 2003. A second hearing was set for July 3, 2007, but was continued at the request of the State. The hearing was rescheduled for July 12, 2007, which was conducted as scheduled. As noted earlier, the trial court entered a Judgment Entry on July 26, 2007 classifying Darian as a Juvenile Sex Offender Registrant.

{¶18} In this case, the majority of the delays in holding the classification hearing resulted from Darian's parole violation and failure to appear. Further

delay resulted from his motion for a sex offender classification examination. Once the examination was completed and Darian was detained, the matter proceeded quickly. As a result, in this case, we cannot say that the length of time after release was unreasonable under R.C. 2152.83. Moreover, we find that the matter was promptly commenced and concluded upon Darian's release from a secure facility. Accordingly, Darian's first assignment of error is overruled.

*Second Assignment of Error*

{¶19} In his second assignment of error, Darian argues that there was no sex offender registration law in effect at the time he was adjudicated a Juvenile Sex Offender Registrant because Senate Bill 10 of the 127<sup>th</sup> General Assembly had repealed the old version of the sex offender statutes before enacting the new versions.

{¶20} However, we find this interpretation is not supported by the plain language of Senate Bill 10. Senate Bill 10, Section 2 repeals the older versions of the law as follows:

**That existing sections 109.42, 109.57, 311.171, 1923.01, 1923.02, 2151.23, 2151.357, 2152.02, 2152.19, 2152.191, 2152.22, 2152.82, 2152.821, 2152.83, 2152.84, 2152.85, 2152.851, 2743.191, 2901.07, 2903.211, 2905.01, 2905.02, 2905.03, 2905.05, 2907.01, 2907.02, 2907.05, 2921.34, 2929.01, 2929.02, 2929.022, 2929.03, 2929.06, 2929.13, 2929.14, 2929.19, 2929.23, 2930.16, 2941.148, 2950.01, 2950.02, 2950.03, 2950.031, 2950.04, 2950.041, 2950.05, 2950.06, 2950.07, 2950.08, 2950.081, 2950.10, 2950.11, 2950.12, 2950.13, 2950.14, 2953.32, 2967.12, 2967.121, 2971.01, 2971.03, 2971.04, 2971.05, 2971.06, 2971.07, 5120.49, 5120.61, 5120.66, 5139.13,**

Case Number 1-07-58

**5149.10, 5321.01, 5321.03, and 5321.051 and sections 2152.811, 2950.021, 2950.09, and 2950.091 of the Revised Code are hereby repealed.**

{¶21} Section 2, as cited above, is deemed effective January 1, 2008 by

Section 3 as follows:

**The amendments to sections 109.42, 109.57, 311.171, 2151.23, 2152.02, 2152.19, 2152.191, 2152.22, 2152.82, 2152.821, 2152.83, 2152.84, 2152.85, 2152.851, 2743.191, 2901.07, 2903.211, 2905.01, 2905.02, 2905.03, 2905.05, 2907.01, 2907.02, 2907.05, 2921.34, 2929.01, 2929.02, 2929.022, 2929.03, 2929.06, 2929.13, 2929.14, 2929.19, 2929.23, 2930.16, 2941.148, 2950.01, 2950.02, 2950.03, 2950.04, 2950.041, 2950.05, 2950.06, 2950.07, 2950.08, 2950.081, 2950.10, 2950.11, 2950.12, 2950.13, 2950.14, 2967.12, 2967.121, 2971.01, 2971.03, 2971.04, 2971.05, 2971.06, 2971.07, 5120.49, 5120.61, 5120.66, 5139.13, and 5149.10 of the Revised Code that are made by *Sections 1 and 2* of this act, the enactment of sections 2152.831, 2152.86, 2950.011, 2950.15, and 2950.16 of the Revised Code by Section 1 of the act, and the repeal of sections 2152.811, 2950.021, 2950.09, and 2950.091 of the Revised Code by Section 2 of this act shall take effect on January 1, 2008.**

(emphasis added).

{¶22} Furthermore, we note that although Section 4 makes Sections 1-3 effective on July 1, 2007, this does not change the effective dates contained in each individual section for the enactment and repeal of individual provisions.

{¶23} Therefore, all of the Ohio Revised Code portions repealed in Section 2 were repealed effective January 1, 2008, the same date that the new laws, as articulated in Section 1, became effective. The plain statutory language must

control. *Storer Communications, Inc. v. Limbach* (1988), 37 Ohio St.3d 193, 194.

Accordingly, Darian's second assignment of error is overruled.

*Third, Fourth, Fifth, and Sixth Assignments of Error*

{¶24} For ease of discussion, we choose to address Darian's final four assignments of error together. In those assignments of error, Darian argues that the application of Senate Bill 10 violates various constitutional provisions, specifically 1) the retroactive application violates the ex post facto clause; 2) the retroactive application violates the separation of powers doctrine; 3) the application amounts to cruel and unusual punishment; and 4) the retroactive application amounts to double jeopardy.

{¶25} As an initial matter, with respect to the constitutionality of an enactment of the General Assembly, we note that the Ohio Supreme Court has previously held that

**"[a]n enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus. "A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality." *Id.* at 147, 57 O.O. at 137, 128 N.E.2d at 63. "That presumption of validity of such legislative enactment cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution." *Xenia v. Schmidt* (1920), 101 Ohio St. 437, 130**

**N.E. 24, paragraph two of the syllabus; *State ex rel. Durbin v. Smith* (1921), 102 Ohio St. 591, 600, 133 N.E. 457, 460; *Dickman*, 164 Ohio St. at 147, 57 O.O. at 137, 128 N.E.2d at 63.**

*State v. Cook*, 83 Ohio St. 3d 404, 409, 700 N.E. 2d 570, 1998-Ohio-291.

{¶26} In *State v. Cook*, 83 Ohio St. 3d 404, the Ohio Supreme Court addressed whether Ohio's newly enacted sex offender statutes violated the retroactivity clause of the Ohio Constitution or the ex post fact clause of the United States Constitution as applied to previously convicted defendants. The court found that they did not. In *State v. Williams*, 88 Ohio St.3d 513, 728 N.E.2d 342, 2000-Ohio-428 the Ohio Supreme Court further held that those sex offender statutes did not violate double jeopardy or equal protection provisions of the United States Constitution.

{¶27} To determine whether the *Cook* and *Williams* decisions are controlling here, we first address how Senate Bill 10 changed the sex offender registration statutes. Perhaps the most fundamental changes occur in R.C. 2950.01, which not only renames Ohio's sex offender classifications, but imposes different criteria for the imposition of the sex offender label.

{¶28} Prior to the imposition of Senate Bill 10, a sentencing court was required to determine whether sex offenders fell into one of the following classifications: (1) sexually oriented offender; (2) habitual sex offender; or (3) sexual predator. R.C. 2950.09; *State v. Cook*, 83 Ohio St. 3d at 407. When the

trial court made the determination that an offender should be classified as a sexual predator, the judge was to consider all relevant factors, including, but not limited to, all of the following enumerated in R.C. 2950.09(B)(3):

- (a) the offender's . . . age;
- (b) The offender's . . . prior criminal or delinquency record regarding all offenses, including, but not limited to, all sexual offenses;
- (c) The age of the victim of the sexually oriented offense for which sentence is to be imposed . . .;
- (d) Whether the sexually oriented offense for which sentence is to be imposed . . . involved multiple victims;
- (e) Whether the offender . . . used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;
- (f) If the offender . . . previously has been convicted of or pleaded guilty to, or been adjudicated a delinquent child for committing an act that if committed by an adult would be, a criminal offense, whether the offender . . . completed any sentence or dispositional order imposed for the prior offense or act and, if the prior offense or act was a sex offense or a sexually oriented offense, whether the offender . . . participated in available programs for sexual offenders;
- (g) Any mental illness or mental disability of the offender. . .;
- (h) The nature of the offender's . . . sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;
- (i) Whether the offender . . . during the commission of the

**sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made, displayed cruelty or made one or more threats of cruelty;**

**(j) Any additional behavioral characteristics that contribute to the offender's . . . conduct.**

R.C. 2950.09(B)(3)(a)-(j).

{¶29} "In classifying an offender as a sexual predator, the Revised Code requires the trial court to make this finding only when the evidence is clear and convincing that the offender is a sexual predator." *State v. Naugle*, 3<sup>rd</sup> Dist. No. 2-03-32, 2004-Ohio-1944 at ¶ 5 citing R.C. 2950.09(B)(4).

{¶30} Senate Bill 10 abolished the prior classifications contained in R.C. 2950.01, substituting new classifications. An example is the definition of a Tier 1 Sex Offender/ Child-Victim Offender, as follows:

**(E) "Tier I sex offender/child-victim offender" means any of the following:**

**(1) A sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any of the following sexually oriented offenses:**

**(a) A violation of section 2907.06, 2907.07, 2907.08, or 2907.32 of the Revised Code;**

**(b) A violation of section 2907.04 of the Revised Code when the offender is less than four years older than the other person with whom the offender engaged in sexual conduct, the other person did not consent to the sexual conduct, and the offender previously has not been convicted of or pleaded guilty to a violation of section 2907.02, 2907.03, or 2907.04 of the Revised Code or a violation of former section 2907.12 of the Revised**

**Code;**

**(c) A violation of division (A)(1), (2), (3), or (5) of section 2907.05 of the Revised Code;**

**(d) A violation of division (A)(3) of section 2907.323 of the Revised Code;**

**(e) A violation of division (A)(3) of section 2903.211, of division (B) of section 2905.03, or of division (B) of section 2905.05 of the Revised Code;**

**(f) A violation of any former law of this state, any existing or former municipal ordinance or law of another state or the United States, any existing or former law applicable in a military court or in an Indian tribal court, or any existing or former law of any nation other than the United States, that is or was substantially equivalent to any offense listed in division (E)(1)(a), (b), (c), (d), or (e) of this section;**

**(g) Any attempt to commit, conspiracy to commit, or complicity in committing any offense listed in division (E)(1)(a), (b), (c), (d), (e), or (f) of this section.**

**(2) A child-victim offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a child-victim oriented offense and who is not within either category of child-victim offender described in division (F)(2) or (G)(2) of this section.**

**(3) A sex offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any sexually oriented offense and who a juvenile court, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier I sex offender/child-victim offender relative to the offense.**

**(4) A child-victim offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any child-victim oriented offense and who a**

**juvenile court, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier I sex offender/child-victim offender relative to the offense.**

R.C. 2950.01.

{¶31} The section also provides similar definitions of Tier II and Tier III sex offenders, and leaves little, if any discretion in classification to the court that sentenced the offender. R.C. 2950.01(F), (G). Prior to Senate Bill 10, "in those cases where an offender is convicted of a violent sexually oriented offense and also of a specification alleging that he or she is a sexually violent predator, the sexual predator label attaches automatically. R.C. 2950.09(A). However, in all other cases of sexually oriented offenders, only the trial court may designate the offender as a predator, and it may do so only after holding a hearing where the offender is entitled to be represented by counsel, testify, and call and cross-examine witnesses. R.C. 2950.09(B)(1) and (C)(2)." *Cook*, 83 Ohio St. 3d at 407. Now, that discretion is more limited. The new law severely limits the discretion of the trial court in imposing a certain classification on offenders. Instead, the new law requires trial courts to merely place the offender into a category based on their offense.

{¶32} Senate Bill 10 also provides for the reclassification of all offenders who were classified prior to its enactment. R.C. 2950.031; R.C. 2950.032. This reclassification process affords no deference to the prior classification given by the

trial court. Rather, offenders are reclassified based solely on the new statutes as articulated in Senate Bill 10 which classify offenders based on the offense they committed.

{¶33} In *State v. Cook* (August 7, 1997), 3<sup>rd</sup> Dist. No. 1-97-21 this Court found Ohio's sex offender classification statutes to be unconstitutional. Specifically, this Court found that with respect to Cook, who committed his crimes before new sex offender legislation was effective, but was sentenced after, that sex offender statutes violated the Ohio Constitutional protection against retroactive laws.

**To the extent it imposes additional duties and attaches new disabilities to past transactions, the statute is retroactive and violates the Ohio Constitution. Thus, as applied to Cook, R.C. 2950.09 is a retroactive application of a legislative enactment and Cook cannot be required to register as a sexual predator. However, Cook can be required to register as a sexual offender, pursuant to the law in force at the time of his offense. Since R.C. 2950.09, if applied to Cook, violates the Ohio Constitution, we need not address the issue of whether it violates the ex post facto clause of the United States Constitution. Cook's second assignment of error is sustained.**

*State v. Cook*, supra, at \*4.

{¶34} The Ohio Supreme Court reversed the decision of this Court, in *Cook*. In essence, the Ohio Supreme Court found that the sex offender registration statutes were remedial in nature and therefore, did not violate the ban on

retroactive laws as set forth in Section 28, Article II of the Ohio Constitution. The court reasoned as follows:

**This court has held 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." *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281, 525 N.E.2d 805, 807-808.**

\*\*\*

**Under *Van Fossen* and *Matz*, we conclude that the registration and address verification provisions of R.C. Chapter 2950 are *de minimis* procedural requirements that are necessary to achieve the goals of R.C. Chapter 2950. As stated by the New Jersey Supreme Court in *Doe v. Poritz* (1995), 142 N.J. 1, 662 A.2d 367, "if the law did not apply to previously-convicted offenders, notification would provide practically no protection now, and relatively little in the near future. The Legislature reached the irresistible conclusion that if community safety was its objective, there was no justification for applying these laws only to those who offend or who are convicted in the future, and not applying them to previously-convicted offenders. Had the Legislature chosen to exempt previously-convicted offenders, the notification provision of the law would have provided absolutely no protection whatsoever on the day it became law, for it would have applied to no one. The Legislature concluded that there was no justification for protecting only children of the future from the risk of reoffense by future offenders, and not today's children from the risk of reoffense by previously-convicted offenders, when the nature of those risks were identical and presently arose almost exclusively from previously-convicted offenders, their numbers now and for a fair number of years obviously vastly exceeding the number of those who, after passage of these laws, will be convicted and released and only then, for the first time, potentially subject to community notification." *Id.* at 13-14, 662 A.2d at 373.**

**Consequently, we find that the registration and verification provisions are remedial in nature and do not violate the ban on retroactive laws set forth in Section 28, Article II of the Ohio Constitution.**

*Cook*, 83 Ohio St. 3d at 412-413.

{¶35} The *Cook* Court also determined that Ohio's sex offender statutes did not violate the ex post facto clause of the United States Constitution, finding, after significant analysis, as follows:

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

*Cook*, 83 Ohio St. 3d at 423.

{¶36} In *Williams*, the Ohio Supreme Court addressed whether Ohio's sex offender statutes violated the double jeopardy clause. Relying on their holding in *Cook*, the court found that it did not, holding that

**The Double Jeopardy Clause states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." Fifth Amendment to the United States Constitution; see, also, Section 10, Article I, Ohio Constitution. Although the Double Jeopardy Clause was commonly understood to prevent a second prosecution for the same offense, the United States Supreme Court has applied the clause to prevent a state from punishing twice, or from attempting a second time to criminally**

punish for the same offense. See *Kansas v. Hendricks*, 521 U.S. at 369, 117 S.Ct. at 2085, 138 L.Ed.2d at 519; *Witte v. United States* (1995), 515 U.S. 389, 396, 115 S.Ct. 2199, 2204, 132 L.Ed.2d 351, 361. The threshold question in a double jeopardy analysis, therefore, is whether the government's conduct involves criminal punishment. *Hudson v. United States* (1997), 522 U.S. 93, 101, 118 S.Ct. 488, 494, 139 L.Ed.2d 450, 460.

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

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

{¶37} Moreover, this Court has followed the *Cook* holding, determining that Ohio's sex offender statutes did not amount to cruel and unusual punishment.

The Eighth Amendment to the United States Constitution and Section 9, Article I of the Ohio Constitution prohibit the imposition of cruel and unusual punishment. The Ohio Supreme Court, in *Cook*, 83 Ohio St.3d at 423, 700 N.E.2d 570, concluded that the registration and notification provisions of R.C. Chapter 2950 are not punishment or punitive in nature but, rather, are remedial measures designed to ensure the public safety. Thus, the protections against cruel and unusual punishments are not implicated.

*State v. Keiber*, 3<sup>rd</sup> Dist. No. 2-99-51, 2000-Ohio-1666.

{¶38} We are not persuaded that the Ohio Supreme Court would view the issues of criminality and punishment as applied to R.C. 2950 et. seq. in the *Cook*

Case Number 1-07-58

and *Williams* decisions any differently with regard to the provisions of Senate Bill 10.

{¶39} Finally, Darian argues that the law as enacted in Senate Bill 10 violates the separation of powers doctrine by limiting the discretion of the judiciary in classifying sex offenders. However, we note that the classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts. *Slagle v. State*, 145 Ohio Misc.2d 98, 884 N.E.2d 109, 2008-Ohio-593. Without the legislature's creation of sex offender classifications, no such classification would be warranted. Therefore, with respect to this argument, we cannot find that sex offender classification is anything other than a creation of the legislature, and therefore, the power to classify is properly expanded or limited by the legislature.

{¶40} For the foregoing reasons, Darian's third, fourth, fifth, and sixth assignments of error are overruled. The July 26, 2007 Judgment Entry of the Court of Common Pleas, Allen County, Ohio, Juvenile Division classifying Darian as a Juvenile Sex Offender Registrant and Tier III Sex Offender is affirmed.

*Judgment affirmed.*

**WILLAMOWSKI and ROGERS, JJ., concur.**

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FILED

IN THE COURT OF COMMON PLEAS, ALLEN COUNTY, JUVENILE DIVISION

2007 AUG -6 PM 1:00

CASE NO. 05 JG 22185

IN THE MATTER OF:

DARIAN J. SMITH

ALLEGED DELINQUENT CHILD

DAVID R. KINWORTHY, JUDGE  
JUVENILE DIVISION  
COURT OF COMMON PLEAS  
ALLEN COUNTY, OHIO

AUGUST 1, 2007  
JUDGMENT ENTRY

On this 1<sup>st</sup> day of August, 2007, this cause came on for Hearing to determine whether the Defendant should be classified a Juvenile Sex Offender Registrant. Present in court were Defendant and his mother, Katy McLeod, Attorney; Jeffrey Routson, Prosecuting Attorney; Andrew OBERDIER, ODYS.

The Court finds that Defendant was adjudicated Delinquent by reason of RAPE, and was 14 years of age at the time of committing the offense.

The Court further finds that by stipulation and agreement of the parties that Defendant should be and hereby is determined to be a Juvenile Sex Offender.

The Court finds that Defendant and his mother have been informed of his duties as required by Ohio Revised Code Section 2950.03; that such duties have been explained to both Defendant and his mother; and further that Defendant has been provided with Sex Offender Registration Fingerprint Card and Instruction Form with instructions as to completion and return to this Court.

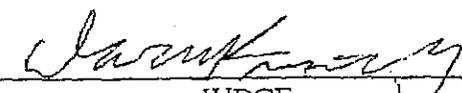
Further, the Court finds that Defendant and his mother have been informed of his duties as required by Ohio Revised Code Section 2950.032 commencing on or after January 1, 2008, and that Defendant is designated a Tier III offender requiring lifetime in-person verification every 90 days.

The child and the parent/guardian/custodian were admonished that a violation of the Court's orders set forth hereinabove can result in the child's placement in secure detention.

IT IS ORDERED, THEREFORE, that Defendant be designated as a Juvenile Sex Offender Registrant, that he comply with the duties required of Ohio Revised Code Section 2950.03, and that he be fingerprinted as required and return to this Court the Sex Offender Registration Fingerprint Card for further processing.

Defendant ORDERED to pay court costs.  
IT IS SO ORDERED.

Where any part of the proceedings was contested, parties have a right to appeal.  
Judgment for court costs.

  
\_\_\_\_\_  
JUDGE

CC - CASEBINDER  
RCH  
DEFENDANT/KATY MCLEOD ✓  
PARENTS (2)  
PROSECUTOR  
ODYS  
BCI&I

Explanation of Duties to Register as a Juvenile Offender Registrant or Child Victim Offender
Provided after July 1, 2007 and before December 31, 2007, for Duties commencing on or after January 1, 2008
(ORC 2950.032)

DYS # 212407 e-SORN # SSN 273-92-2736
County of Adjudication Allen Court Case Number 2005 JG 22185
Adjudication O.R.C.#(s) 2907.02A1b (3 Counts)
Name Smith Darlan J.
Expected Residence Address 815 Hope Street Lima, OH 45804
Telephone (419) 227-1059

- 1. You have been adjudicated delinquent for committing a sexually oriented offense or child-victim offense as defined in ORC 2950.01 and you are one of the following (CHECK BOX, CIRCLE EITHER SEX OFFENDER OR CHILD VICTIM OFFENDER):
TIER I Sex Offender/Child Victim Offender Registrant
TIER II Sex Offender/Child Victim Offender Registrant
[X] TIER III Sex Offender/ Child Victim Offender Registrant,
not a Public Registry Qualified Juvenile Offender Registrant, not subject to community notification provisions
not a Public Registry Qualified Juvenile Offender Registrant, but subject to community notification provisions
Public Registry Qualified Juvenile Offender Registrant, subject to community notification provisions

- 2. You are required to register in person with the sheriff of the county in which you establish residency within 3 days of coming into that county.
3. After the date of initial registration, you are required to periodically verify, in person, your residence address, and if you are a Public Registry Qualified Juvenile Offender Registrant, your place of employment and/or place of education, at the county sheriff's office no earlier than 10 days prior to your verification date.
4. If you change residence address, you shall provide written notice in person of that residence change to the sheriff with whom you most recently registered, and to the sheriff in the county in which you intend to reside at least 20 days prior to any change of residence address.
5. If you are a Public Registry Qualified Juvenile Offender Registrant, you shall provide written notice in person, within 3 days, of any change in vehicle information, email addresses, internet identifiers or telephone numbers registered to or used by you, to the sheriff with whom you have most recently registered.

- 6. DEPENDING UPON YOUR DESIGNATION, YOU ARE REQUIRED TO COMPLY WITH ALL OF THE ABOVE-DESCRIBED REQUIREMENTS FOR THE FOLLOWING PERIOD OF TIME AND FREQUENCY (CHECK ONE):
TIER I- requirements for a period of 10 years with in-person verification annually.
TIER II- for a period of 20 years with in-person verification every 180 days.
[X] TIER III -for your lifetime with in-person verification every 90 days.

7. Since your expected residence address as stated above is located in Allen County you shall register in person no later than 8/14/07 (Date) (3 days after release) with that County Sheriff's Office located at:
333 N. Main Street Lima, OH 45801
(Street Address) (City/State) (Zip)

8. Failure to register, failure to verify residence at the specified times or failure to provide notice of a change in residence address or other required information, as described above, will result in criminal prosecution. If the failure occurs while you are under 18 years of age, you will be subject to proceedings under Ohio Revised Code Chapter 2152 and your parent(s), guardian(s), or custodian(s) may be subject to prosecution for a violation of Ohio Revised Code section 2919.24.

9. I understand that as a Juvenile Offender Registrant, my attainment of 18 or 21 years of age does not affect or terminate this order.

10. I acknowledge that the above requirements have been explained to me and that I must abide by all of the provisions of the Ohio Revised Code Chapter 2950.

A-27

-2-

- TIER I Sex Offender/Child Victim Offender Registrant
- TIER II Sex Offender/Child Victim Offender Registrant
- TIER III Sex Offender/ Child Victim Offender Registrant,
  - not a Public Registry Qualified Juvenile Offender Registrant, not subject to community notification provisions
  - not a Public Registry Qualified Juvenile Offender Registrant, but subject to community notification provisions
  - Public Registry Qualified Juvenile Offender Registrant, subject to community notification provisions

You are required to register in person with the sheriff of the county in which you establish residency within 3 days of coming into that county. If you are a Public Registry Qualified Juvenile Offender Registrant, you are also required to register in person with the sheriff of the county in which you establish a place of education and/or employment immediately upon coming into that county.

After the date of initial registration, you are required to periodically verify, in person, your residence address, and if you are a Public Registry Qualified Juvenile Offender Registrant, your place of employment and/or place of education, at the county sheriff's office no earlier than 10 days prior to your verification date.

If you change residence address, you shall provide written notice in person of that residence change to the sheriff with whom you most recently registered, and to the sheriff in the county in which you intend to reside at least 20 days prior to any change of residence address. If you are a Public Registry Qualified Juvenile Offender Registrant, you also shall provide written notice in person of a change of address for your place of employment and/or place of education at least 20 days prior to any change and no later than 3 days after the change in employment.

If you are a Public Registry Qualified Juvenile Offender Registrant, you shall provide written notice in person, within 3 days, of any change in vehicle information, email addresses, internet identifiers or telephone numbers registered to or used by you, to the sheriff with whom you have most recently registered.

DEPENDING UPON YOUR DESIGNATION, YOU ARE REQUIRED TO COMPLY WITH ALL OF THE ABOVE-DESCRIBED REQUIREMENTS FOR THE FOLLOWING PERIOD OF TIME AND FREQUENCY (CHECK ONE):

- TIER I- requirements for a period of 10 years with in-person verification annually.
- TIER II- for a period of 20 years with in-person verification every 180 days.
- TIER III -for your lifetime with in-person verification every 90 days.

Since your expected residence address as stated above is located in Allen County you shall register in person no later than 8/14/07 (3 days after release) with that County Sheriff's Office located at:

<u>333 N. Main Street</u>	<u>Lima, OH</u>	<u>45801</u>
(Street Address)	(City/State)	(Zip)

Failure to register, failure to verify residence at the specified times or failure to provide notice of a change in residence address or other required information, as described above, will result in criminal prosecution. If the failure occurs while you are under 18 years of age, you will be subject to proceedings under Ohio Revised Code Chapter 2152 and your parent(s), guardian(s), or custodian(s) may be subject to prosecution for a violation of Ohio Revised Code section 2919.24.

I understand that as a Juvenile Offender Registrant, my attainment of 18 or 21 years of age does not affect or terminate this order.

0. I acknowledge that the above requirements have been explained to me and that I must abide by all of the provisions of the Ohio Revised Code Chapter 2950.

<u>David Smith</u>	<u>8-1-07</u>	<u>Jambra Smith</u>	<u>8-1-07</u>
Juvenile's Signature	Date	Parent/Guardian/Custodian's Signature	Date

1. I certify that I specifically informed the juvenile and the juvenile's parent, guardian and custodian of their duties as set forth above and they indicated to me an understanding of those duties.

<u>David Kinworthy</u>	<u>Judge, Allen Co Juvenile Court</u>	<u>8/1/07</u>
Signature of Official	Title & Agency	Date
<u>David R. Kinworthy</u>	<u>Judge, Allen Co Juvenile Court</u>	
Print Official's Name	Print Title & Agency	

**AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES**

**AMENDMENT VIII**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

### AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim or the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

A-30

# CONSTITUTION OF THE STATE OF OHIO

## ARTICLE I: BILL OF RIGHTS

### § 10 [Trial of accused persons and their rights; depositions by state and comment on failure to testify in criminal cases.]

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense. (As amended September 3, 1912.)

**CONSTITUTION OF THE STATE OF OHIO**

**ARTICLE II: LEGISLATIVE**

**§ 28 Retroactive laws**

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