

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN THE MATTER OF
DARIAN J. SMITH,

Alleged Delinquent Child

: CASE NO. 2008-1624

:
: ON APPEAL FROM THE COURT
: OF APPEALS, THIRD
: APPELLATE DISTRICT, ALLEN
: COUNTY, OHIO

: C.A. CASE NO. 1-07-58

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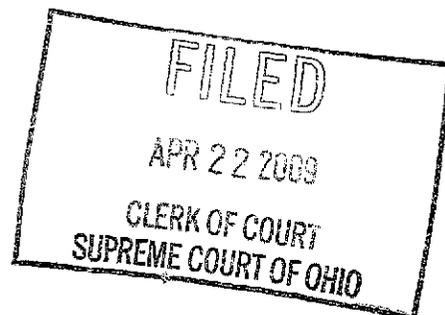


TABLE OF CONTENTS

	<u>PAGES</u>
Table of Contents.....	i
Table of Authorities	ii
Propositions of Law	1
Statement of the Case and Facts	2
Introduction.....	2
Conclusion	36
Proof of Service	37
Appendix.....	38

TABLE OF AUTHORITIES

	PAGES
 Cases	
<i>Furman v. Georgia</i> (1972), 408 U.S. 238, 239 (per curium).....	39
<i>In Re Darian J. Smith</i> , 2008 Ohio 3234; 2008 Ohio App. LEXIS 2755	41
<i>Louisiana ex rel Francis v. Resweber</i> (1947), 329 U.S. 459, 463	39
<i>Robinson v. California</i> (1962), 370 U.S. 660, 666-667	39
<i>Solem v. Helm</i> , (1983), 463 U.S. 277, 290, 77 l. Ed. 2d 637, 103 S. Ct. 3001	39
<i>State v. Agner</i> , 2003 Ohio 5458; 2003 Ohio App. LEXIS 4930.....	39
<i>State v. Chaffin</i> (1972), 30 Ohio St. 2d 13, 282 N.E.2d 46	39
<i>State v. Cook</i> , (1998) 83 Ohio St. 3d 404	passim
The United States Supreme Court, in <i>U.S. v. Ward</i>	35
 Statutes	
Ohio Revised Code Section 2950	34
Ohio Revised Code Section 2150.07(B)(2)(2008).....	27
Ohio Revised Code Section 2150.11	13, 16
Ohio Revised Code Section 2151.831(2008).....	18
Ohio Revised Code Section 2151.86	35
Ohio Revised Code Section 2152.82	14, 16, 26, 27, 29
Ohio Revised Code Section 2152.82(2007).....	9
Ohio Revised Code Section 2152.82(2008).....	24
Ohio Revised Code Section 2152.82(D)(2007).....	9
Ohio Revised Code Section 2152.83	35, 38

Ohio Revised Code Section 2152.83(2008).....	18, 23
Ohio Revised Code Section 2152.83(A).....	passim
Ohio Revised Code Section 2152.83(A)(2).....	35
Ohio Revised Code Section 2152.83(A)(2007).....	9
Ohio Revised Code Section 2152.83(B).....	passim
Ohio Revised Code Section 2152.83(B)(2)(2007).....	9
Ohio Revised Code Section 2152.83(B)(2007).....	8, 38
Ohio Revised Code Section 2152.83(B)(2008).....	18
Ohio Revised Code Section 2152.83(C)(2007).....	8
Ohio Revised Code Section 2152.83(D).....	26
Ohio Revised Code Section 2152.83(D)(2008).....	35
Ohio Revised Code Section 2152.83(D)(4)(2007).....	18
Ohio Revised Code Section 2152.83(E).....	passim
Ohio Revised Code Section 2152.83(E)(2007).....	8
Ohio Revised Code Section 2152.83(G)(2007).....	8, 9
Ohio Revised Code Section 2152.831.....	30, 32
Ohio Revised Code Section 2152.831(2008).....	23, 32
Ohio Revised Code Section 2152.84.....	11, 16, 32
Ohio Revised Code Section 2152.84 (2007).....	40
Ohio Revised Code Section 2152.84 (2008).....	27, 29, 36, 40
Ohio Revised Code Section 2152.84(A)(2)(2007).....	11, 14
Ohio Revised Code Section 2152.84(A)(2)(2008).....	26
Ohio Revised Code Section 2152.84(A)(2)(a)(2007).....	17

Ohio Revised Code Section 2152.84(A)(2)(b)(2007).....	17
Ohio Revised Code Section 2152.84(A)(2)(b)(2008).....	26, 27, 29
Ohio Revised Code Section 2152.84(A)(2)(c)(2008).....	26, 27, 29
Ohio Revised Code Section 2152.84(A)(2007).....	11, 14, 16
Ohio Revised Code Section 2152.84(A)(2008).....	26
Ohio Revised Code Section 2152.84(B)(2007).....	16
Ohio Revised Code Section 2152.84(D)(2007).....	11
Ohio Revised Code Section 2152.85.....	32
Ohio Revised Code Section 2152.85(2007).....	40
Ohio Revised Code Section 2152.85(2008).....	28, 29, 36, 40
Ohio Revised Code Section 2152.85(A)(1)(2007).....	17
Ohio Revised Code Section 2152.85(A)(2)(2007).....	14
Ohio Revised Code Section 2152.85(A)(2007).....	11, 14, 17
Ohio Revised Code Section 2152.85(A)(3)(2008).....	26
Ohio Revised Code Section 2152.85(B)(2007).....	11, 14, 17
Ohio Revised Code Section 2152.85(B)(2008).....	26
Ohio Revised Code Section 2152.85(C)(2007).....	11, 14, 17
Ohio Revised Code Section 2152.85(C)(2008).....	26
Ohio Revised Code Section 2152.85(D)(2007).....	17
Ohio Revised Code Section 2152.86.....	35
Ohio Revised Code Section 2152.86(2008).....	24
Ohio Revised Code Section 2903.01.....	13, 16
Ohio Revised Code Section 2903.03.....	13, 16

Ohio Revised Code Section 2905.01	13, 16
Ohio Revised Code Section 2907.02. R.C. 2950.11(E)(2007)	13
Ohio Revised Code Section 2929.12(B).....	8
Ohio Revised Code Section 2929.12(C).....	8
Ohio Revised Code Section 2950.01(A)(2008).....	18
Ohio Revised Code Section 2950.01(E).....	18, 32
Ohio Revised Code Section 2950.01(E)(2008)	31
Ohio Revised Code Section 2950.01(E)(3)(2008).....	31
Ohio Revised Code Section 2950.01(F)	32
Ohio Revised Code Section 2950.01(F)(1)(2008).....	31
Ohio Revised Code Section 2950.01(F)(3)(2008).....	31
Ohio Revised Code Section 2950.01(G).....	32
Ohio Revised Code Section 2950.01(G)(1)(2008)	31
Ohio Revised Code Section 2950.01(G)(3)(2008)	31
Ohio Revised Code Section 2950.02	34
Ohio Revised Code Section 2950.02(2007).....	34
Ohio Revised Code Section 2950.02(2008).....	34
Ohio Revised Code Section 2950.021(2007).....	7
Ohio Revised Code Section 2950.03(B)(2)(c)(2008)	40
Ohio Revised Code Section 2950.03(B)(2)(c)(ii)(2008)	38
Ohio Revised Code Section 2950.031(A).....	32
Ohio Revised Code Section 2950.04	passim
Ohio Revised Code Section 2950.04(A)(2)(2007)	10

Ohio Revised Code Section 2950.04(A)(3)(a)(2008).....	24, 26, 28
Ohio Revised Code Section 2950.04(B)(2008).....	25, 30
Ohio Revised Code Section 2950.04(C).....	25, 30
Ohio Revised Code Section 2950.04(C)(2007).....	10, 12, 15
Ohio Revised Code Section 2950.04(C)(2008).....	26, 28, 30
Ohio Revised Code Section 2950.04(G)(2007).....	12, 15
Ohio Revised Code Section 2950.04(G)(2008).....	28, 30, 38
Ohio Revised Code Section 2950.05.....	15, 25, 26, 28
Ohio Revised Code Section 2950.05(A)(2007).....	10
Ohio Revised Code Section 2950.05(G)(2007).....	10, 15
Ohio Revised Code Section 2950.05(H) (2008).....	25
Ohio Revised Code Section 2950.05(H)(2008).....	27, 28
Ohio Revised Code Section 2950.06.....	passim
Ohio Revised Code Section 2950.06(A)(2007).....	10, 15
Ohio Revised Code Section 2950.06(A)(2008).....	25, 27, 28
Ohio Revised Code Section 2950.06(B)(2007).....	10, 15
Ohio Revised Code Section 2950.06(B)(2008).....	25, 27, 28
Ohio Revised Code Section 2950.07(B)(1)(2007).....	15
Ohio Revised Code Section 2950.07(B)(1)(2008).....	28
Ohio Revised Code Section 2950.07(B)(2)(2008).....	27
Ohio Revised Code Section 2950.07(B)(3)(2007).....	10
Ohio Revised Code Section 2950.07(B)(3)(2008).....	25
Ohio Revised Code Section 2950.07(B)(3)(2007).....	10, 13, 30

Ohio Revised Code Section 2950.07(B)(3)(2008).....	25
Ohio Revised Code Section 2950.08	27, 29
Ohio Revised Code Section 2950.08(2007).....	11
Ohio Revised Code Section 2950.08(2008).....	25
Ohio Revised Code Section 2950.081	10, 25, 27, 29
Ohio Revised Code Section 2950.081(2007).....	13, 16
Ohio Revised Code Section 2950.09	18
Ohio Revised Code Section 2950.09(B).....	9
Ohio Revised Code Section 2950.09(B)(3)	8
Ohio Revised Code Section 2950.09(B)(3)(2008).....	18
Ohio Revised Code Section 2950.09(D).....	8
Ohio Revised Code Section 2950.09(D)(1)	16, 17
Ohio Revised Code Section 2950.09(E)	9
Ohio Revised Code Section 2950.11	passim
Ohio Revised Code Section 2950.11(B).....	29
Ohio Revised Code Section 2950.11(B)(10)(2008).....	29
Ohio Revised Code Section 2950.11(E)(2007)	11, 13, 16
Ohio Revised Code Section 2950.11(E)(2008)	25, 27, 29
Ohio Revised Code Section 2950.11(F)(2007).....	13, 16
Ohio Revised Code Section 2950.11(I)(2007).....	10, 13
Ohio Revised Code Section 2950.11(I)(2008).....	25, 27, 29
Ohio Revised Code Section 2950.11(K)(2008)	18
Ohio Revised Code Section 2907.02.	16

Ohio Revised Code Section 2950.01(D)(2)(2007) 7

Other Authorities

Cruel and Unusual Punishment Clause of the Eighth Amendments..... 42

Section 1 of Senate Bill 10..... 40

Senate Bill 10..... passim

Title 29 of Senate Bill 10..... 35

Constitutional Provisions

Eighth Amendment to the United States Constitution..... 38, 40

Article I, Section 10 of the United States Constitution..... 33, 34, 36, 41

Fourteenth Amendment of the United States of America..... 39

Retroactivity Clause of the Ohio Constitution..... 36, 38, 41

PROPOSITIONS OF LAW

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 CLASUSES OF THE UNITED STATES CONSITUTION. ARTICLE 1, SECTION 10 OF THE UNITED STATES CONSTITUTION

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.

PROPOSITION OF LAW III

THE APPLICATION OF S.B. 10 VIOLATES THE UNITED STATES CONSITUTION'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENTS. EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

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.

STATEMENT OF THE CASE AND FACTS

Appellee agrees with the Statement of the Case and Facts as supplied by Appellant.

INTRODUCTION

Due to the constitutional challenges raised by the Appellant, a summary is provided to aid in the comparison of prior law and Senate Bill 10 as it applies to Juveniles.

A. Prior Law

Under the old law, a juvenile first had to commit a sexually oriented offense that was not a registration exempt sexually oriented offense, as defined in R.C. 2950.01(D)(2)(2007). Generally, for juveniles, the offense had to be a felony of the fourth degree or higher in order to be classified. *Id.*

Certain offenses were considered registration-exempt sexually oriented offenses; however, a court in a hearing under R.C. 2950.021(2007) could make a determination that the offense would require registration.

1. Age Distinctions

Once a child was found to be delinquent of a sexually oriented offense that was not a registration-exempt sexually oriented offense, the determination of whether he could be classified, and the classification procedure, depended in part on the age of the juvenile at the time of commission of the underlying offense.

- a. Juveniles who commit a sexually oriented offense that was not a registration-exempt sexually oriented offense under the age of 14.

Juveniles who are under the age of 14 were not classified under the prior law.

- b. Juveniles who commit a sexually oriented offense that was not a registration-exempt sexually oriented offense and who were 14 or 15 at the time of commission of the sexually oriented offense.

Generally, juveniles who fit this category were subject to a discretionary classification pursuant to former R.C. 2152.83(B) (2007). The court was required to have a hearing to determine if it was going to classify the juvenile, or if the court was going to decline to classify the juvenile. R.C. 2152.83(B)(2007). The hearing was required to be held at disposition if the child was not going to be held in a secured facility, or, if the child was going to a secure facility as part of his dispositional sentence, the court could have the hearing either at disposition or upon the child's release from the secure facility.

Id.

To determine if the Court was going to classify the child a juvenile offender registrant, the court was required to consider all relevant factors, including, but not limited to, the nature of the offense committed, whether the child showed genuine remorse or compunction for the offense, the public interest and safety, the factors set forth in R.C. 2950.09(B)(3), the factors in R.C. 2929.12(B) and R.C. 2929.12(C) as those factors apply to the child, the offense, and the victim, and the results of any treatment and any follow up professional assessment. R.C. 2152.83(B)(2007); R.C. 2152.83(E)(2007). The court could not base its determination solely on the adjudication of the underlying offense. R.C. 2152.83(G)(2007).

Once the court decided to classify the juvenile, he was a juvenile offender registrant unless the court made the findings under R.C. 2950.09(D) that the juvenile was a sexual predator. R.C. 2152.83(B)(2007); R.C. 2152.83(C)(2007).

- c. Juveniles who commit a sexually oriented offense that was not a registration-exempt sexually oriented offense and were 16 or 17 at the time of the offense.

A juvenile who fit this category was required to be classified. R.C. 2152.83(A)(2007). This classification was required to be done at disposition if the juvenile was not being placed in a secure facility, or if he was going to a secure facility, the classification could be done either at disposition or upon release. *Id.*

The Court was required to have a hearing to determine if the child was a sexual predator or a habitual sex offender. R.C. 2152.83(B)(2)(2007). The Court could find the child was a sexual predator only if it complied with R.C. 2950.09(B). *Id.* The Court could find the child was a habitual sex offender only if it complied with R.C. 2950.09(E). *Id.* The court could not base its determination solely on the adjudication of the underlying offense. R.C. 2152.83(G)(2007).

- d. Juveniles who were 14 or older at the time of commission of the offense who committed a sexually oriented offense that was not a registration-exempt sexually oriented offense and previously had committed any sexually oriented offense.

Juveniles who fell into this category had to be classified at disposition, and the Court was required to have a hearing to determine if the child was a sexual predator or a habitual sex offender. R.C. 2152.82(2007). The Court could find the child was a sexual predator only if it complied with R.C. 2950.09(B). *Id.* The Court could find the child was a habitual sex offender only if it complied with R.C. 2950.09(E). *Id.* The court could not base its determination solely on the adjudication of the underlying offense. R.C. 2152.82(D)(2007).

2. Classification as a Juvenile Offender Registrant

- a. Duty to Register

Pursuant to R.C. 2950.04, the child was required to register in person with the sheriff in the county he was to reside in, or was temporarily domiciled in the county for more

than five days, within five days of coming into the county. R.C. 2950.04(A)(2)(2007). At registration, the child was required to fill out a form, which required the child's current address, name and address of employer, and any other information required by the Bureau of Criminal Identification and Investigation (BCII). R.C. 2950.04(C)(2007). The child was also required to be fingerprinted and photographed. *Id.*

b. Notice of change of address

A juvenile was required to notify the sheriff in the county in which he most recently resided at least 20 days prior to changing his residence. R.C. 2950.05(A)(2007). A juvenile was required to notify the sheriff every time he changed his address for ten years. R.C. 2950.05(G)(2007); R.C. 2950.07(B)(3)(2007).

c. Verification of address

Pursuant to R.C. 2950.06, a juvenile offender registrant was required to verify his residence address with the sheriff that he most recently registered on the anniversary of his registration for ten years. R.C. 2950.06(A)(2007); R.C. 2950.06(B)(2007); R.C. 2950.07(B)(3) (2007).

d. Dissemination of Child's Registration Information

Under R.C. 2950.11, the sheriff was only required to send the registration information to the Executive Director of the Public Children Services Agency in the specified geographical notification area, since the child was not a predator or a habitual sex offender. R.C. 2950.11(I)(2007).

Additionally, under R.C. 2950.081, the juvenile's information was a public record. However, the child's information could not be included on the internet registry. R.C.

2950.11(E)(2007). The information was included in the law enforcement registry as provided in R.C. 2950.08(2007).

e. End of Disposition Review Hearing

Once the child completed his dispositional sentence, by completing either probation or parole and completing other court orders, the court was required to have a hearing under R.C. 2152.84 to determine if the child should be declassified or the classification could be terminated. R.C. 2152.84(A)(2007). The court was required to determine the effectiveness of the disposition and any treatment to determine the risks that the child may offend. *Id.* The court was required to consider the factors in R.C. 2152.83(E), which are the same factors used to determine if a fourteen or fifteen year old was required to be classified. R.C. 2152.84(D)(2007). The court could either continue the classification, or terminate the classification. R.C. 2152.84(A)(2)(2007).

f. Petition Requesting Declassification

If, after the end of disposition review, the court continued the prior classification, then three years after that determination, the juvenile could petition the court for declassification. R.C. 2152.85(A)(2007); R.C. 2152.85(B)(2007). The Court, in its discretion, could order the termination of the classification, and was again required to look at all relevant factors, including the factors in R.C. 2152.83(E). R.C. 2152.85(C)(2007).

If the Court continued the prior classification, the child could petition again after three years. R.C. 2152.85(B)(2007). If the Court again continued the prior classification, any subsequent petition could not be filed any earlier than five years after the last order continuing the classification. *Id.*

3. Classification as a Juvenile Offender Registrant with a Determination that the Child was a Habitual Sex Offender.
 - a. Duty to Register

Pursuant to R.C. 2950.04, the child's duties to register within five days of residing in a county, or being temporarily domiciled in the county were the same as for a juvenile offender registrant.

At registration, the child was required to fill out a form, which required the child's current address, name and address of his employer, specify that the child is a habitual sex offender, list the license plate number of each motor vehicle registered in the child's name, and any other information required by the BCII. R.C. 2950.04(C)(2007). The child was also required to be fingerprinted and photographed. *Id.*

In addition, if the child was subject to community notification, the child was required to send a notice of intent to reside at least twenty days prior to residing in the county, which included the following information: the child's name, the address where he intended to reside, the sexually oriented offense that he was adjudicated delinquent of, and a statement that he was a habitual sex offender. R.C. 2950.04(G)(2007).

- b. Notice of change of address

Pursuant to R.C. 2950.05, a juvenile was required to notify the sheriff in the county in which he most recently resided at least 20 days prior to changing his residence, the same as a juvenile offender registrant. A juvenile was required to notify the sheriff every time he changed his address for twenty years. R.C. 2950.05(G)(2007); R.C. 2950.07(B)(2)(2007).

- c. Verification of address

Pursuant to R.C. 2950.06, a juvenile offender registrant was required to verify his residence address with the sheriff that he most recently registered on the anniversary of his registration for twenty years. R.C. 2950.07(B)(3)(2007).

d. Dissemination of Child's Registration Information

Under R.C. 2150.11, the sheriff is only required to send the registration information to the Executive Director of the Public Children Services Agency in the specified geographical notification area, unless the court ordered that the child was subject to community notification. R.C. 2950.11(I)(2007). Additionally, if the child is not subject to community notification, the child is not included on the Internet Registry, but is included in the Law Enforcement Registry. R.C. 2950.11(E)(2007).

If the court did order the community notification, the sheriff was required to forward the child's name, address, sexually oriented offense, a photograph, and a notice that the child is a habitual sex offender to people residing within one thousand feet of the child; the Executive Director of the Public Children Services Agency, certain schools, preschools, institutions of higher learning, sheriffs and chiefs of police within the specified geographical notification area. R.C. 2950.11(F)(2007). The child's information was only contained in the Internet Registry if he was adjudicated of a violation of R.C. 2903.01, R.C. 2903.03 or R.C. 2905.01 with a purpose to gratify the sexual needs or desires of the child, or a violation of R.C. 2907.02. R.C. 2950.11(E)(2007).

The juvenile's registration information was a public record. R.C. 2950.081(2007).

5. End of Disposition Review Hearing

A juvenile was entitled to a hearing to determine the effectiveness of the disposition and any treatment to determine the risks that the child may offend. R.C. 2152.84(A)(2007). The court was required to consider the factors in R.C. 2152.83(E). *Id.*

If the child was classified under R.C. 2152.82 (which required the child to be classified, or under R.C. 2152.83(A) (which applied to 16 and 17 year olds), the court could remove the determination that the child was a habitual sex offender, or could continue the prior classification. R.C. 2152.84(A)(2)(2007).

If the child was classified under R.C. 2152.83(B) (which applied to 14 and 15 year olds), the court could remove the determination that the child was a habitual sex offender, could remove the determination and terminate the classification as a juvenile offender registrant, or could continue the prior classification. *Id.*

e. Petition Requesting Reclassification or Declassification

If, after the end of disposition review, the court continued the prior classification, then three years after that determination, the juvenile could petition the court for reclassification or declassification. R.C. 2152.85(A)(2007); R.C. 2152.85(B)(2007). The Court, in its discretion, could remove the determination that the child was a habitual sex offender, could remove the determination and terminate the classification as a juvenile offender registrant, or could continue the prior classification. R.C. 2152.85(A)(2)(2007). The Court, again, was required to look at all relevant factors, including the factors in R.C. 2152.83(E). R.C. 2152.85(C)(2007).

4. Classification as a Juvenile Offender Registrant with a Determination that the Child was a Sexual Predator.

a. Duty to Register

Pursuant to R.C. 2950.04, the child was required to register in person with the sheriff in the county within five days if he was to reside in the county or if he was temporarily domiciled in the county for five days. In addition, since the child was subject to community notification, the child was required to send a notice of intent to reside at least twenty days prior to residing in the county, which included the following information: the child's name, the address where he intended to reside, the sexually oriented offense that he was adjudicated delinquent of, and a statement that he was a sexual predator. R.C. 2950.04(G)(2007).

At registration, the child was required to fill out a form, which required the child's current address, name and address of employer, specify that the child is a habitual sex offender, list the license plate number of each motor vehicle in the child's name, and any other information required by the BCII. R.C. 2950.04(C)(2007). The child was also required to be fingerprinted and photographed. *Id.*

b. Notice of change of address

Pursuant to R.C. 2950.05, a juvenile was required to notify the sheriff in the county in which he most recently resided at least 20 days prior to changing his residence. A juvenile was required to notify the sheriff every time he changed his address for the rest of his life. R.C. 2950.05(G)(2007); R.C. 2950.07(B)(1)(2007).

c. Verification of address

Pursuant to R.C. 2950.06, a sexual predator was required to verify his residence address with the sheriff that he most recently registered every ninety days for life. R.C. 2950.06(A)(2007); R.C. 2950.06(B)(2007); R.C. 2950.07(B)(1)(2007).

d. Dissemination of Child's Registration Information

Under R.C. 2150.11, the sheriff was required to forward the child's name, address, sexually oriented offense, a photograph, and a notice that the child is a sexual predator to people residing within one thousand feet of the child; and the Executive Director of the Public Children Services Agency, certain schools, preschools, institutions of higher learning, sheriffs and chiefs of police within the specified geographical notification area. R.C. 2950.11(F)(2007). The child's information was only contained in the Internet Registry if he was adjudicated of a violation of R.C. 2903.01, R.C. 2903.03 or R.C. 2905.01 with a purpose to gratify the sexual needs or desires of the child, or a violation of R.C. 2907.02. R.C. 2950.11(E)(2007).

The juvenile's registration information was a public record. R.C. 2950.081(2007).

5. End of Disposition Review Hearing

Once the child completed his dispositional sentence, by completing either probation or parole and completing other court order, the court was required to have a hearing under R.C. 2152.84 to determine if the child should be declassified or the classification could be terminated. The court was required to determine the effectiveness of the disposition and any treatment to determine the risks that the child may offend. R.C. 2152.84(A)(2007). In addition, the Court had to comply with R.C. 2950.09(D)(1), and find, by clear and convincing evidence, that the child is unlikely to commit a sexually oriented offense in the future. R.C. 2152.84(B)(2007). The court was also required to consider the factors in R.C. 2152.83(E). R.C. 2152.84(B)(2007).

If the child was classified under R.C. 2152.82 (which required the child to be classified) or was classified under R.C. 2152.83(A) (which applied to 16 or 17 year olds),

the court could remove the determination that the child was a sexual predator, could determine that the child was a habitual sex offender, could determine that the child was a sex offender registrant, or could continue the prior classification. R.C. 2152.84(A)(2)(b)(2007).

If the child was classified under R.C. 2152.83(B) (which applied to 14 and 15 year olds), the court could remove the determination that the child was a sexual predator, remove the determination and determine that the child was a habitual sex offender, terminate the determination and the classification as a juvenile offender registrant, or could continue the prior classification and determination. R.C. 2152.84(A)(2)(a)(2007).

e. Petition Requesting Declassification

If, after the end of disposition review, the court continued the prior classification, then three years after that determination, the juvenile could petition the court for declassification. R.C. 2152.85(A)(2007); R.C. 2152.85(B)(2007). The Court, in its discretion, could remove the determination that the child was a sexual predator, could remove the determination and determine that the child was a habitual sex offender, or terminate the determination and determine that the child is a juvenile offender registrant. R.C. 2152.85(A)(1)(2007). The Court, again, was required to look at all relevant factors, including the factors in R.C. 2152.83(E), and required to comply with R.C. 2950.09(D)(1). R.C. 2152.85(C)(2007); R.C. 2152.85(D)(2007).

If the Court continued the prior classification, the child could petition again after three years. R.C. 2152.85(B)(2007). If the Court again continued the prior classification, any subsequent petition could not be filed any earlier than five years after the last order continuing the classification. *Id.*

B. Senate Bill 10, the Adam Walsh Act

The new law took out the requirement that the sexually oriented offense had to be a registration exempt sexually oriented offense.

1. Age Distinctions

The new law has a different definition of sexually oriented offense. R.C. 2950.01(A)(2008). Senate Bill 10 did continue the old distinctions based on age.

- a. Juveniles who commit a sexually oriented offense under the age of 14.

Juveniles who are under the age of 14 are not classified under the new law.

- b. Juveniles who commit a sexually oriented offense and who are 14 or 15 at the time of commission of the sexually oriented offense.

Generally, juveniles who fit this category are subject to a discretionary classification pursuant to R.C. 2152.83(B). This procedure has remained unchanged under the new law, with the following exceptions. First, the restriction on classifying the child based solely on offense is no longer contained in the statute. R.C. 2152.83(2008). Second, the factors the court is required to consider has been renumbered to subsection (D) instead of subsection (E) R.C. 2152.83(B)(2008). Third, in the old law there were factors listed under R.C. 2950.09(B)(3)(2008). R.C. 2152.83(D)(4)(2007). R.C. 2950.09 has been repealed. However, the factors in the old law are identical to those contained in R.C. 2950.11(K)(2008).

Once the court determined that the child would be classified, the Court is required to have a hearing to determine the Tier classification pursuant to R.C. 2151.831(2008). The definitions of a Tier I, pursuant to R.C. 2950.01(E) is as follows:

- (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 [2907.32.3] of the Revised Code;

(e) A violation of division (A)(3) of section 2903.211 [2903.21.1], 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.

The definition of a Tier II, pursuant to R.C. 2950.01(F) is as follows:

(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 2907.21, 2907.321 [2907.32.1], or 2907.322 [2907.32.2] of the Revised Code;

(b) A violation of section 2907.04 of the Revised Code when the offender is at least four years older than the other person with whom the offender engaged in sexual conduct, or when the offender is less than four years older than the other person with whom the offender engaged in sexual conduct and the offender previously has been convicted of or pleaded guilty to a violation of section 2907.02, 2907.03, or 2907.04 of the Revised Code or former section 2907.12 of the Revised Code;

(c) A violation of division (A)(4) of section 2907.05 or of division (A)(1) or (2) of section 2907.323 [2907.32.3] of the Revised Code;

(d) A violation of division (A)(1), (2), (3), or (5) of section 2905.01 of the Revised Code when the offense is committed with a sexual motivation;

(e) A violation of division (A)(4) of section 2905.01 of the Revised Code when the victim of the offense is eighteen years of age or older;

(f) A violation of division (B) of section 2905.02 or of division (B)(5) of section 2919.22 of the Revised Code;

(g) 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 (F)(1)(a), (b), (c), (d), (e), or (f) of this section;

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

(i) Any sexually oriented offense that is committed after the sex offender previously has been convicted of, pleaded guilty to, or has been adjudicated a delinquent child for committing any sexually oriented offense or child-victim oriented offense for which the offender was classified a tier I sex offender/child-victim offender.

(2) A child-victim offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any child-victim oriented offense when the child-victim oriented offense is committed after the child-victim offender previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for committing any sexually oriented offense or child-victim oriented offense for which the offender was classified a tier I sex offender/child-victim offender.

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

(5) A sex offender or child-victim offender who is not in any category of tier II sex offender/child-victim offender set forth in division (F)(1), (2), (3), or (4) of this section, who prior to January 1, 2008, was adjudicated a delinquent child for committing a sexually oriented offense or child-victim oriented offense, and who prior to that date was determined to be a habitual sex offender or determined to be a habitual child-victim offender, unless either of the following applies:

(a) The sex offender or child-victim offender is reclassified pursuant to section 2950.031 [2950.03.1] or 2950.032 [2950.03.2] of the Revised Code as a tier I sex offender/child-victim offender or a tier III sex offender/child-victim offender relative to the offense.

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

The definition of a Tier III, pursuant to R.C. 2950.01(G) is as follows:

(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;

(b) A violation of division (B) of section 2907.05 of the Revised Code;

(c) A violation of section 2903.01, 2903.02, or 2903.11 of the Revised Code when the violation was committed with a sexual motivation;

(d) A violation of division (A) of section 2903.04 of the Revised Code when the offender committed or attempted to commit the felony that is the basis of the violation with a sexual motivation;

(e) A violation of division (A)(4) of section 2905.01 of the Revised Code when the victim of the offense is under eighteen years of age;

(f) A violation of division (B) of section 2905.01 of the Revised Code when the victim of the offense is under eighteen years of age and the offender is not a parent of the victim of the offense;

(g) 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 (G)(1)(a), (b), (c), (d), (e), or (f) of this section;

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

(i) Any sexually oriented offense that is committed after the sex offender previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for committing any sexually oriented offense or child-victim oriented offense for which the offender was classified a tier II sex offender/child-victim offender or a tier III sex offender/child-victim offender.

(2) A child-victim offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any child-victim oriented offense when the child-victim oriented offense is committed after the child-victim offender previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for committing any sexually oriented offense or child-victim oriented offense for which the offender was classified a tier II sex offender/child-victim offender or a tier III sex offender/child-victim offender.

(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.

(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 whom 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 current offense.

(5) A sex offender or child-victim offender who is not in any category of tier III sex offender/child-victim offender set forth in division (G)(1), (2), (3), or (4) of this section, who prior to January 1, 2008, was convicted of or pleaded guilty to a sexually oriented offense or child-victim oriented offense or was adjudicated a delinquent child for committing a sexually oriented offense or child-victim oriented offense and classified a juvenile offender registrant, and who prior to that date was adjudicated a sexual predator or adjudicated a child-victim predator, unless either of the following applies:

(a) The sex offender or child-victim offender is reclassified pursuant to section 2950.031 [2950.03.1] or 2950.032 [2950.03.2] of the Revised Code as a tier I sex offender/child-victim offender or a tier II sex offender/child-victim offender relative to the offense.

(b) The sex offender or child-victim offender is a delinquent

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

(6) A sex offender who is convicted of, pleads guilty to, was convicted of, or pleaded guilty to a sexually oriented offense, if the sexually oriented offense and the circumstances in which it was committed are such that division (F) of section 2971.03 of the Revised Code automatically classifies the offender as a tier III sex offender/child-victim offender;

(7) A sex offender or child-victim offender who is convicted of, pleads guilty to, was convicted of, pleaded guilty to, is adjudicated a delinquent child for committing, or was adjudicated a delinquent child for committing a sexually oriented offense or child-victim offense in another state, in a federal court, military court, or Indian tribal court, or in a court in any nation other than the United States if both of the following apply:

(a) Under the law of the jurisdiction in which the offender was convicted or pleaded guilty or the delinquent child was adjudicated, the offender or delinquent child is in a category substantially equivalent to a category of tier III sex offender/child-victim offender described in division (G)(1), (2), (3), (4), (5), or (6) of this section.

(b) Subsequent to the conviction, plea of guilty, or adjudication in the other jurisdiction, the offender or delinquent child resides, has temporary domicile, attends school or an institution of higher education, is employed, or intends to reside in this state in any manner and for any period of time that subjects the offender or delinquent child to a duty to register or provide notice of intent to reside under section 2950.04 or 2950.041 [2950.04.1] of the Revised Code.

c. Juveniles who commit a sexually oriented offense and are 16 or 17 at the time of committing the offense.

The procedure for this class of juveniles has not changed, except that the court no longer has a hearing to determine if the child is a sexual predator or a habitual sex offender. Instead, the Court is required to have a hearing to determine the child's Tier Level as provided in R.C. 2152.831(2008). R.C. 2152.83(A). The definitions of the Tiers are detailed above. The restriction that a court could not classify a juvenile based solely on offense adjudicated has been deleted. R.C. 2152.83(2008).

- d. Juveniles over 14 at the time of commission of the offense who committed a sexually oriented offense and previously had committed any sexually oriented offense.

As required under the old law, these juveniles were required to be classified, however, the court no longer has a hearing to determine if the child was a habitual sex offender or a sexual predator. R.C. 2152.82(2008). Instead the Court has a hearing to determine which Tier the child will be placed in, as described above. *Id.* Also, the restriction prohibiting classifying a juvenile based solely on offense has been deleted. *Id.*

- e. Child is over 14 at the time of commission of the offense, is a serious youthful offender, and has committed certain sexually oriented offenses.

This is a new category of juveniles, which does not apply to this Defendant, since he was adjudicated a delinquent child and not a serious youthful offender. R.C. 2152.86(2008). Therefore, for purposes of this appeal, it will not be discussed.

2. Tier I Sex Offender Registrant.

a. Duty to Register

Pursuant to R.C. 2950.04, the child now has three days instead of five to register in person with the sheriff in the county he was to reside in, or, if he is temporarily domiciled in the county for more than three days, within three days of coming into the county. R.C. 2950.04(A)(3)(a)(2008). At registration, the child is required to fill out a form, which requires the child's current address, social security number, date of birth, if child is in secure confinement, license plate number of each vehicle the child owns, registers, or which is readily available, along with where the vehicle is commonly parked (along with a picture, if required by BCII), name and address of his employer, drivers license number, a DNA sample if the offender is registering pursuant to an adjudication in another jurisdiction, professional licenses held by the offender, email address, internet identifiers,

telephone numbers, and any other information required by BCII. R.C. 2950.04(C). The child is also required to be photographed, and give a copy of the following to the sheriff: copies of travel and immigration documents, and any other required material. R.C. 2950.04(B)(2008).

b. Notice of change of address

Pursuant to R.C. 2950.05, a juvenile is required to notify the sheriff in the county in which he most recently resided and the sheriff in the new county at least 20 days prior to changing his residence. A juvenile is required to notify the sheriff every time he changed his address for ten years. R.C. 2950.05(H) (2008); R.C. 2950.07(B)(3) (2008).

c. Verification of address

Pursuant to R.C. 2950.06, a juvenile offender registrant is required to verify his residence address with the sheriff that he most recently registered on the anniversary of his registration for ten years. R.C. 2950.06(A)(2008); R.C. 2950.06(B)(2008); R.C. 2950.07(B)(3)(2008).

d. Dissemination of Child's Registration Information

Under R.C. 2950.11, the sheriff is only required to send the registration information to the Executive Director of the Public Children Services Agency in the specified geographical notification area, since the child is not Tier III sex offender registrant subject to community notification. R.C. 2950.11(I)(2008).

Additionally, under R.C. 2950.081, the juvenile's information is a public record. However, the child's information cannot be included on the internet registry. R.C. 2950.11(E)(2008). The information is included in the law enforcement registry as provided in R.C. 2950.08(2008).

e. End of Disposition Review Hearing

The child is still entitled to a review hearing. R.C. 2152.84(A)(2008). The standard has remained unchanged under the prior law. *Id.* The court is required to consider the identical factors as the old law, although slightly renumbered as discussed in the discretionary classification under 14 and 15 year olds. R.C. 2152.84(A)(2)(2008). If the child was classified under R.C. 2152.83(B), the court can continue or terminate the classification. R.C. 2152.84(A)(2)(b)(2008). If the child was classified under R.C. 2152.82 or R.C. 2152.83(A), the court can continue the Tier classification, or modify the Tier classification. R.C. 2152.84(A)(2)(c)(2008).

f. Petition Requesting Declassification

The right and procedure for requesting declassification has remained unchanged. R.C. 2152.85(A)(3)(2008); R.C. 2152.85(B)(2008). The Court, in its discretion, could order the termination of the classification, and was again required to look at all relevant factors, including the factors in R.C. 2152.83(D). R.C. 2152.85(C)(2008).

3. Tier II Juvenile Offender Registrant

a. Duty to Register

Pursuant to R.C. 2950.04, the child is required to register in person with the sheriff in the county he is to reside in, or is temporarily domiciled in the county for more than three days, within three days of coming into the county. R.C. 2950.04(A)(3)(a)(2008). The information required is the same as a Tier I. R.C. 2950.04(C)(2008).

b. Notice of change of address

Pursuant to R.C. 2950.05, a juvenile is required to notify the sheriff in the county in which he most recently resided and the sheriff in the new county at least 20 days prior

to changing his residence. A juvenile is required to notify the sheriff every time he changed his address for twenty years. R.C. 2950.05(H)(2008); R.C. 2150.07(B)(2)(2008).

c. Verification of address

Pursuant to R.C. 2950.06, a juvenile offender registrant is required to verify his residence address with the sheriff that he most recently registered on the anniversary of his registration for twenty years. R.C. 2950.06(A)(2008); R.C. 2950.06(B)(2008); R.C. 2950.07(B)(2)(2008).

d. Dissemination of Child's Registration Information

Under R.C. 2950.11, the sheriff is only required to send the registration information to the Executive Director of the Public Children Services Agency in the specified geographical notification area, since the child is not Tier III sex offender registrant subject to community notification. R.C. 2950.11(I)(2008).

Additionally, under R.C. 2950.081, the juvenile's information is a public record. However, the child's information cannot be included on the internet registry. R.C. 2950.11(E)(2008). The information is included in the law enforcement registry as provided in R.C. 2950.08.

e. End of Disposition Review Hearing

As discussed under Tier I, the dispositional review hearing has remained largely unchanged. R.C. 2152.84 (2008). If the child was classified under R.C. 2152.83(B), the court can continue or terminate the classification. R.C. 2152.84(A)(2)(b)(2008). If the child was classified under R.C. 2152.82 or R.C. 2152.83(A), the court can continue the Tier classification, or modify the Tier classification. R.C. 2152.84(A)(2)(c)(2008).

f. Petition Requesting Declassification

The procedure for requesting declassification or reclassification is the same as for Tier I offenders. R.C. 2152.85 (2008).

4. Tier III Juvenile Offender Registrants

a. Duty to Register

Pursuant to R.C. 2950.04, the child is required to register in person with the sheriff in the county he was to reside in, or was temporarily domiciled in the county for more than three days, within three days of coming into the county. R.C. 2950.04(A)(3)(a)(2008). The information required is the same under Tier I. R.C. 2950.04(C)(2008). The child must provide written notice to the sheriff of the county in which he intends to reside at least twenty days prior to the change of address. R.C. 2950.04(G)(2008).

b. Notice of change of address

Pursuant to R.C. 2950.05, a juvenile is required to notify the sheriff in the county in which he most recently resided and the sheriff in the new county at least 20 days prior to changing his residence. A juvenile is required to notify the sheriff every time he changed his address for life. R.C. 2950.05(H)(2008); R.C. 2950.07(B)(1)(2008).

c. Verification of address

Pursuant to R.C. 2950.06, a juvenile offender registrant was required to verify his residence address with the sheriff that he most recently registered on the anniversary of his registration for life. R.C. 2950.06(A)(2008); R.C. 2950.06(B)(2008); R.C. 2950.07(B)(1)(2008).

d. Dissemination of Child's Registration Information

Under R.C. 2950.11, the sheriff is only required to send the registration information to the Executive Director of the Public Children Services Agency in the specified geographical notification area, if the child is not subject to community notification. R.C. 2950.11(I)(2008). If a juvenile is subject to community notification, the sheriff is required to notify the people listed in R.C. 2950.11(B). This list adds volunteer organizations to the group. R.C. 2950.11(B)(10)(2008).

Additionally, under R.C. 2950.081, the juvenile's information is a public record. However, the child's information cannot be included on the internet registry, unless he is a public registry qualified juvenile offender registrant, or if under the prior law he was required to be on the public registry. R.C. 2950.11(E)(2008). The information is included in the law enforcement registry as provided in R.C. 2950.08.

e. End of Disposition Review Hearing

As discussed under Tier I, the dispositional review hearing has remained largely unchanged. R.C. 2152.84 (2008). If the child was classified under R.C. 2152.83(B), the court can continue the classification or terminate the classification. R.C. 2152.84(A)(2)(b)(2008). If the child was classified under R.C. 2152.82 or R.C. 2152.83(A), the court can continue the Tier classification, or modify the Tier classification down. R.C. 2152.84(A)(2)(c)(2008).

f. Petition Requesting Declassification

The procedure for requesting declassification or reclassification is the same as for Tier I offenders. R.C. 2152.85(2008).

C. Comparison of prior law and Senate Bill 10

1. As applied to Defendant

Under the prior law, Appellant was classified a juvenile offender registrant, required to register once a year. R.C. 2950.07(B)(3)(2007). He was required to provide his current address, name and address of employer, and any other information that was required by BCII. R.C. 2950.04(C).

Under the new law, Appellant is a Tier III juvenile offender registrant, required to register every ninety days for life, but not subject to community notification. He is required to provide his current address, social security number, date of birth, if he is in secure confinement, license plate number of each vehicle he owns or is registered to him, along with a description of where the vehicle is normally parked (and a picture if required by BCII), the name and address of his employer, a drivers license number, any professional licenses, his email address, his internet identifiers, his telephone number and any other information required by BCII. R.C. 2950.04(C)(2008). He is also required to give a copy of his travel and immigration documents. R.C. 2950.04(B)(2008). He is required to provide a notice of intent to reside. R.C. 2950.04(G)(2008).

2. Problems with Senate Bill 10

Appellant has raised constitutional challenges and an argument that there was no sex offender laws for six months both at the Appellate Court level and at the Supreme Court. However, Appellant did not file any appeal regarding the trial court misapplying the Adam Walsh Act. However, Appellee would note that there appears to be a few missing links in Senate Bill 10.

R.C. 2152.831 provides:

(A) If, on or after January 1, 2008, a juvenile court adjudicates a child a delinquent child and classifies the child a juvenile offender registrant pursuant to section 2152.82 or 2152.83 of the Revised Code, before issuing the order that classifies the child a juvenile offender registrant the

court shall conduct a hearing to determine whether to classify the child 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.

(B) When a judge issues an order under section 2152.82 or 2152.83 of the Revised Code that classifies a delinquent child a juvenile offender registrant, in addition to the other statements and information required by the section under which the order is issued, the judge shall include in the order its determination made under division (A) of this section as to whether the child is 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. When a judge issues an order under section 2152.84 or 2152.85 of the Revised Code that reclassifies a delinquent child from one tier of sex offender/child-victim offender to a different tier of sex offender/child-victim offender, in addition to the other statements and information required by the section under which the order is issued, the judge shall include in the order its determination as to the reclassification of the child and the tier to which the child is reclassified.

(C) The provisions of this section do not apply to a delinquent child if the court is required to classify the child as both a juvenile offender registrant and a public registry-qualified juvenile offender registrant pursuant to section 2152.86 of the Revised Code.

The definitions of the different Tiers is noted in Section (B)(1)(b) above. A Tier I offender is 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." R.C. 2950.01(E) (2008). There is no language regarding being found delinquent of any of those offenses. Pursuant to the definitions, a Tier I offender is an offender that the juvenile judge says is a Tier I offender. R.C. 2950.01(E)(3)(2008). The other Tiers have similar definitions. R.C. 2950.01(F)(1)(2008); R.C. 2950.01(F)(3)(2008); R.C. 2950.01(G)(1)(2008); R.C. 2950.01(G)(3)(2008).

The Appellant has accurately stated that in a prior draft, the delinquency language was in the statute, along with a cross-reference. This was not in Senate Bill 10 as enacted.

Appellant argues that this gives the court complete discretion to determine which Tier to place a juvenile in. However, looking at the plain language of R.C. 2152.831, there is no statement that it is in the court's discretion as to what Tier to place the child in, or any standards on how to determine which Tier a child should be placed in. R.C. 2152.831(2008).

Additionally, without the offense based definitions, it is unclear under R.C. 2950.031(A) how the attorney general is to determine the new classification under Senate Bill 10. By looking at the definitions in R.C. 2950.01(E), R.C. 2950.01(F), and R.C. 2950.01(G), it appears only a court can put a juvenile into a Tier, which clearly was not the intent of the statute.

Clearly, the legislature took out the language in the final form. However, the definitions in the prior draft would be too broad in the definition under subsection one, since it would include juveniles under the age of 14 who are not able to be classified under any section of Chapter 2152. Additionally, the definition under subsection three would not allow for reclassification or declassification as provided in R.C. 2152.84 or R.C. 2152.85.

Even though there is a problem with the statutes as applied to juveniles under Senate Bill 10, Appellant never raised this as an issue on appeal.

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 CLASUSES OF THE UNITED STATES CONSITUTION. ARTICLE 1, SECTION 10 OF THE UNITED STATES CONSTITUTION

Appellant argues that because of a change in the frequency and period of his registration, and the additional information that is now required, the Senate Bill 10 violates the *Ex Post Facto* clause of the United States Constitution.

Appellee argues that changes in this case is less restrictive than the statutes at issue in *State v. Cook*, (1998) 83 Ohio St. 3d 404, and therefore Senate Bill 10 does not violate the *Ex Post Facto Clause* of the United States Constitution.

In *Cook*, this Court found that subjecting the defendant to community notification did not violate the *Ex Post Facto* provision of the United States Constitution. *Id.* at 424. Here, Appellant is not being subjected to community notification. Additionally, this Court found that the increase in frequency and notification requirements did not violate the *Ex Post Facto* clause because those provisions served a remedial purpose. *Id.* Therefore, the provisions in this case are less restrictive than the requirements in *Cook*.

Initially, there is a presumption of constitutionality of a statute, and 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 Ohio Op. 134, 128 N.E.2d 59, paragraph one of the syllabus. The state has the benefit of every presumption in favor of its constitutionality. *Id.* at 147, 57 Ohio Op. at 137, 128 N.E.2d at 63. That presumption of validity of such legislative enactment cannot be overcome unless it appears that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution. *Xenia v. Schmitdt* (1920), 11 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 Ohio Op. at 137, 128 N.E.2d at 63.

State v. Cook, (1998) 83 Ohio St. 3d 404, 409; 700 N.E.2d 570, 576.

As a threshold matter, 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, 1601, 131 L. Ed. 2d 588, 594; *Collins v. Youngblood* (1990), 497 U.S. 37, 43, 110 S. Ct. 2715, 2719, 111 L. Ed. 2d 30, 39. 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*, 514 U.S. at 508-509, 115 S. Ct. at 1603, 131 L. Ed. 2d at 597. 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, 631, 82 L. Ed. 917, 922; *Allen v. Illinois* (1985), 478 U.S. 364, 368, 106 S. Ct. 2988, 2990-2991, 92 L. Ed. 2d 296, 304.

Courts 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. See *Roe v. Office of Adult Probation* (C.A.2, 1997), 125 F.3d 47, 53-55; *Russell v. Gregoire* (C.A.9, 1997), 124 F.3d 1079; *Doe v. Pataki* (C.A.2, 1997), 120 F.3d 1263, 1274-1276. . . .

In applying the intent-effects test, this 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" and second, where the General Assembly "has indicated an intention to establish a civil penalty, * * * whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." *United States v. Ward* (1980), 448 U.S. 242, 248-249, 100 S. Ct. 2636, 2641, 65 L. Ed. 2d 742, 749.

State v. Cook, (1998) 83 Ohio St. 3d 404, 415; 700 N.E.2d 570, 580.

In *State v. Cook*, this Court found that the language of the former version of R.C. 2950 was devoid of any language indicating an intention to punish. *Id.* at 417; 700 N.E.2d 570, 581. The Court also found that protecting the public and preventing crimes are the types of purposes the Supreme Court has found 'regulatory' and not punitive. *Id.*

Senate Bill 10 has not changed the stated purpose contained in R.C. 2950.02. R.C. 2950.02(2008). The main changes made by Senate Bill 10 in R.C. 2950.02 were to get rid of the labels of habitual sex offender and sexual predator. R.C. 2950.02(2007); R.C. 2950.02(2008).

Appellant's first argument states that the removal of discretion from the statute violates the *Ex Post Facto* provisions of the United States Constitution. However, Appellant fails to recognize that he was not subject to classification based solely on his

offense. Instead, the trial court was required to comply with R.C. 2152.83(B) and consider the factors in R.C. 2152.83(E) under the former law. These factors remain in R.C. 2152.83, under a different subsection. R.C. 2152.83(D)(2008). Therefore, Appellant was not classified based solely on his underlying offense.

Appellant's next argument under the intents prong of the test deals with the placement in Title 29 of Senate Bill 10. The United States Supreme Court, in *U.S. v. Ward*, found that Congress' placement of civil penalties and criminal penalties in the same statute, with different labels did not violate the intents prong of the analysis. *U.S. v. Ward*, (1980) 448 U.S. 242, 249. Additionally, the imposition of criminal penalties for failing to follow the law depends on a new action or inaction, did not change this Court's decision to find the statute remedial in *Cook*. *State v. Cook*, (1998) 83 Ohio St. 3d 404, 416-417; 700 N.E.2d 570, 580-581. Therefore, the intent of Senate Bill 10 was remedial, not punitive.

Appellant alleges that the effect of the bill is punitive instead of remedial. Appellant states that Senate Bill 10 imposes burdens on offenders that have historically been regarded as punishment and operate as affirmative disabilities and restraints. The dissemination of information required in R.C. 2950.11 by Sheriffs does not apply to Appellant, and only applies to defendants that either have been ordered by a judge to comply with community and victim notification, or meet the requirements of R.C. 2151.86. R.C. 2152.83(A)(2); R.C. 2152.86.

Appellant also alleges that the lifetime registration is retribution, and therefore punishment. However, the juvenile system allows the court to review the classification at the end of disposition, along with allowing Appellant the right to petition to be

that the statute so apply. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 522 N.E.2d 489, paragraph one of the syllabus.

State v. Cook, (1998) 83 Ohio St. 3d 404, 410; 700 N.E.2d 570, 576.

In as much as Senate Bill 10 requires offenders who already have been classified under the prior law to comply with new standards, as in Appellant's case, it does in fact apply retroactively.

'Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective or retroactive.' *Van Fossen*, 36 Ohio St. 3d at 106, 522 N.E.2d at 496, quoting *Cincinnati v. Seasingood* (1889), 46 Ohio St. 296, 303, 21 N.E. 630, 633.

In order to determine whether R.C. Chapter 2950 is unconstitutionally retroactive under *Van Fossen*, we must determine whether R.C. Chapter 2950 is substantive or merely remedial. See *Van Fossen*, 36 Ohio St. 3d 100, 522 N.E.2d 489, paragraph three of the syllabus. A statute is "substantive" if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation or liabilities as to a past transaction, or creates a new right. *Id.* at 107, 522 N.E.2d at 496. Conversely, remedial laws are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right. *Id.* at 107, 522 N.E.2d at 497. A purely remedial statute does not violate Section 28, Article II of the Ohio Constitution, even if applied retroactively. See *id.* at 107, 522 N.E.2d at 496. Further, while we have recognized the occasional substantive effect, we have found that it is generally true that laws that relate to procedures are ordinarily remedial in nature. *Id.* at 107-108, 522 N.E.2d at 497, citing *Wellston Iron Furnace Co. v. Rinehart* (1923), 108 Ohio St. 117, 140 N.E. 623, paragraph one of the syllabus.

State v. Cook, (1998) 83 Ohio St. 3d 404, 410-411; 700 N.E.2d 570, 577.

Appellant argues that this case is drastically different than the schemes found constitutional in *Cook*, *Williams*, and *Ferguson*. However, as argued in the First Proposition of Law, Senate Bill 10 as applied to juveniles is less restrictive than the

statutory scheme in *Cook*. Appellant's continuing argument that the Court had no discretion in classifying juveniles fails to take into consideration the factors contained in R.C. 2152.83. R.C. 2152.83(B)(2007).

Appellant further argues that movement restrictions are more stringent. However, this does not restrict where Appellant resides, but provides requirements for notifying the local sheriff prior to the move. R.C. 2950.04(G)(2008). Appellant states that a juvenile may not always be in charge of where he lives, and therefore this is an additional burden on him, carrying potential penalties. However, while a child is under eighteen, the child's parent, guardian or custodian, as the case may be, is also required to ensure the child is complying with the requirements, and if the parent, guardian or custodian fails to do so, that person can be charged criminally as well. R.C. 2950.03(B)(2)(c)(ii)(2008).

Since the restrictions now imposed on Appellant are less restrictive than in *Cook*, the restrictions are remedial and therefore do not violate the Retroactivity Clause of the Ohio Constitution.

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

Senate Bill 10 does not violate the 8th Amendment to the United States Constitution, which prohibits cruel and unusual punishments.

The Eighth Amendment to the United States Constitution provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" and is applied to the states through the Fourteenth Amendment of the United

States of America. *Furman v. Georgia* (1972), 408 U.S. 238, 239 (per curium); *Robinson v. California* (1962), 370 U.S. 660, 666-667; *Louisiana ex rel Francis v. Resweber* (1947), 329 U.S. 459, 463 (plurality opinion).

The Ohio Supreme Court has also held that in order for a sentence to constitute cruel and unusual punishment, the punishment must be so grossly disproportionate to the offense as to shock the sense of justice in the community. *State v. Cantiberry*, Hancock App. No. 5-01-14, 2001 Ohio 2277. The United States Supreme Court, in *Solem v. Helm*, concluded that a proportionality analysis "should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."

State v. Agner, 2003 Ohio 5458; 2003 Ohio App. LEXIS 4930, citing *State v. Chaffin* (1972), 30 Ohio St. 2d 13, 282 N.E.2d 46, paragraph three of the syllabus and *Solem v. Helm*, (1983), 463 U.S. 277, 290, 77 1. Ed. 2d 637, 103 S. Ct. 3001.

Using this analysis, it is clear that Senate Bill 10 does not violate Appellant's Eighth Amendment Rights. First, the penalty is civil in nature, as discussed above, and not meant as a punishment. Second, appellant has the ability to have his reporting requirements lessened or terminated. Third, all juvenile sex offenders in the State of Ohio will have to initially comply with the same reporting requirements as Appellant if they are classified a Tier III offender.

Appellant argues that the penalty for failing to comply has drastically changed. However, he fails to show how it has changed. Second, a failure to comply with the requirement is a new offense, and not a punishment for the underlying adjudication. Therefore, since there is no increase in his penalty for the offense, and the new requirements are not punishment, Senate Bill 10 does not violate *Solem v. Helm*.

Appellant also alleges that Senate Bill 10 confers adult penalties on juvenile offenders. Again, the registration and notification requirements are not punishment. Failure to comply with these requirements do contain penalties, however, whether they are commiserate with adult penalties depends on whether the offender is under or over the age of 18. R.C. 2950.03(B)(2)(c)(2008).

Appellant argues that juveniles are inherently amenable to rehabilitation. This is recognized in the sex offender law under the prior law and Senate Bill 10. Both contain the ability to be reclassified or declassified, depending on specified factors. R.C. 2152.84 (2007); R.C. 2152.85(2007); R.C. 2152.84(2008); R.C. 2152.85(2008). Thus, appellant's argument that Senate Bill 10 is particularly cruel because of the inherent amenability to rehabilitation fails to recognize the reviews built in to juvenile sex offender law that recognizes the amenability of juveniles.

Therefore, Senate Bill 10 does not violate the 8th Amendment to the United States Constitution.

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.

Appellant's final proposition of law states that there was no statutory authority to classify Appellant because of the enactment of Senate Bill 10.

Section 1 of Senate Bill 10 includes all the additions, deletions and amendments to the Revised Code dealing with, among other things, the procedure for classifying juveniles, including the highlighted portions in Appellant's brief. Section 2 of Senate

Bill 10 states that the current sections of the statutes that are being amended or deleted, are repealed. Section 3 of Senate Bill 10 states that certain amendments and deletions are to be effective on January 1, 2008. However, Section 4 states that Sections 1, 2, and 3 are effective as of July 1, 2007.

Appellant's argument fails to recognize that Section 1 was effective as of July 1, except that pursuant to Section 3, some of the amendments and deletions contained in Section 1 will have a later effective date. This effectively recodified the prior law until January 1, 2008, when the new sections were effective.

The appellate court below agreed, holding as follows:

[W]e 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.

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, 525 N.E.2d 466. Accordingly, Darian's second assignment of error is overruled.

In Re Darian J. Smith, 2008 Ohio 3234; 2008 Ohio App. LEXIS 2755, paragraph 22-23.

Therefore, the Court should overrule Appellant's fourth proposition of law.

CONCLUSION

The retroactive application of Senate Bill 10 does not violate the *Ex Post Facto* of the United States Constitution and does not violate the Retroactivity Clause of the Ohio Constitution. Under the *Ex Post Facto Clause*, the intent and effect of Senate Bill 10 is clearly civil in nature. While Senate Bill 10 is to be applied retroactively, its changes are

remedial in nature, and similar to the changes reviewed and approved by this Court in *State v. Cook*.

Appellant's arguments under the Cruel and Unusual Punishment Clause of the Eighth Amendments are not persuasive, and therefore, Senate Bill 10 does not violate the Eighth Amendment to the United States Constitution.

Appellant's analysis of Senate Bill 10 fails to recognize that Section 4 of the Act made Sections 1 effective on July 1, 2007. Section 3 just delayed the effective date of some of the amendments contained in Section 1, thereby making keeping in place the old system of classifying juveniles until January 1, 2008.

Therefore, the Court should overrule all of Appellant's assignments of error.

Respectfully submitted,



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PROOF OF SERVICE

I hereby certify that a copy of the foregoing ^{Brief and appendix} was served upon Brooke M. Burns, Assistant State Public Defender, at 250 East Broad Street, Suite 1400, Columbus, OH 43215, Jeffrey M. Gamso, Legal Director of American Civil Liberties Union of Ohio Foundation, Inc., at Max Wohl Civil Liberties Center, 4506 Chester Avenue, Cleveland, OH 44103, Katherine Hunt Federle, Professor of Law and Director Justice for Children Project, 55 West 12th Avenue, Columbus, OH 43210, and Benjamin C. Mizer, Solicitor General, Ohio Attorney General's Office, 30 East Broad Street, 17th Floor, Columbus, OH 43215, on this 22nd day of April, 2009, by ordinary mail service.



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