

IN THE SUPREME COURT OF OHIO

State of Ohio,	)	
	)	SUPREME COURT
	)	CASE NUMBER: 2009-0893
Appellant,	)	
	)	
v.	)	ON APPEAL FROM THE COURT OF
	)	APPEALS, NINTH APPELLATE
Stephen J. McConville,	)	DISTRICT
	)	
	)	Court of Appeals Case Number
Appellee.	)	08CA009444

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**MEMORANDUM OF APPELLEE, STEPHEN J. MCCONVILLE, IN  
RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISDICTION**

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**STATEMENT AS TO WHY A SUBSTANTIAL CONSTITUTIONAL QUESTION IS  
NOT INVOLVED AND WHY THIS  
CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST**

Appellee, Stephen J. McConville, respectfully asks this Honorable Court to deny jurisdiction in this matter as it fails to raise a substantial constitutional question and is not of public or great general interest.

While it is true that the problem of sexual offenders in the community is of public and general interest, it must be noted that Appellant's argument surrounds the well established rules of statutory interpretation and not sexual offenders. *Memorandum of Appellant, page 2, State v. McConville, 2009 Ohio 1713 (2009)*. These rules have been in existence for a number of years and are not of public or great general interest. Additionally, these rules do not involve substantial constitutional questions.

It is well established that: "The primary purpose of the judiciary in the interpretation or construction of a statute is to give effect to the intention of the legislature, as gathered from the provisions enacted by application of well-settled rules of construction or interpretation." *Henry v. Cent. Natl. Bank, 16 Ohio St.2d 16 (1968)*. This Honorable Court is essentially being asked by Appellant to apply the rules of construction to apply the Adam Walsh Act to Appellee.

"It is a cardinal rule that a court must first look to the language of the statute itself to determine the legislative intent." *Provident Bank v. Wood, 36 Ohio St.2d 101 (1973)*. Furthermore, "In determining legislative intent, it is the duty of the court to give effect to the words used, not to delete words used or to insert words not used. *Columbus-Suburban Coach Lines v. Public Utilities Commission, 20 Ohio St.2d 125 (1969)*. O.R.C. 2950.11 is not ambiguous and is capable of interpretation as written by the General Assembly.

“If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly.” *Id.* quoting, *Sears v. Weimer*, 143 Ohio St. 312 (1944). When analyzing the language of O.R.C. 2950.11, it is clear that the Trial Court and the Ninth District Court of Appeals properly interpreted this statute, as the language used is susceptible to only one meaning, as drafted by the General Assembly, and further review is not necessary.

Appellant itself simplified this position by arguing: “Conversely, if a statute is not ambiguous, ‘then we need not interpret it; we must simply apply it.’ \*\*\* (‘An unambiguous statute is to be applied, not interpreted.)” *Memorandum of Appellant*, page 2. This statute needs only to be interpreted.

Appellee, Stephen J. McConville, respectfully moves this Honorable Court to deny jurisdiction in this matter as the rules of interpretation do not present a substantial constitutional question and are not of great public or general interest.

## **ARGUMENT IN OPPOSITION TO APPELLANT’S SOLE PROPOSITION OF LAW**

### **I. THE TRIAL COURT AND NINTH DISTRICT COURT OF APPEALS PROPERLY APPLIED O.R.C. 2950.11(F) AND (H)**

The Trial Court and the Ninth District Court of Appeals correctly applied O.R.C 2950.11 and declined to impose the Community Notification aspect of the Adam Walsh Act upon Appellee.

Appellee knowingly, intelligently, and voluntarily withdrew his not guilty plea and entered a plea of guilty to offenses which labeled him a Tier III sex offender pursuant to the Adam Walsh Act. The Trial Court sentenced Appellee accordingly and labeled him a Tier III

sex offender, but declined to impose Community Notification upon Appellee. The Trial Court examined and relied upon O.R.C. 2950.11(F)(2)(a-k) in making this determination. The Trial Court went through each and every factor and weighed them in favor of Appellee.

A court need only interpret a statute when it is deemed to be ambiguous. *State ex. Rel. Celebrezze v. Allen County Bd. of Commrs.*, 32 Ohio St.3d 24 (1987). If the statute is not ambiguous, then all a court needs to do is apply it. In the current case, the Ninth District Court of Appeals specifically refused to find any ambiguity in the statute or find that the statute is susceptible to more than one meaning. *State v. McConville*, 9<sup>th</sup> Dist. No. 08CA009444, 2009 Ohio 1713. The statute at bar is not ambiguous and a trial court has the discretion to impose community notification upon a Tier III sex offender.

Utilizing the “cardinal rule” this Court stated in Provident Bank v. Wood,: “that a court must first look to the language of the statute itself to determine the legislative intent.” *Provident Bank v. Wood*, 36 Ohio St.2d 101 (1973). Examining the language of O.R.C 2950.11(F)(2), the legislative intent by the Ohio General Assembly is clear, i.e. that a trial court shall have discretion as to when to apply community notification to a tier III sex offender. The Ohio Revised Code, section 2950.11(F)(2)(a-k), clearly states:

(2) The notification provisions of this section do not apply to a person described in division (F)(1)(a), (b), or (c) of this section if a court finds at a hearing after considering the factors described in this division that the person would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment. In making the determination of whether a person would have been subject to the notification provisions under prior law as described in this division, the court shall consider the following factors:

- (a) The offender's or delinquent child's age;
- (b) The offender's or delinquent child'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 or the order of disposition is to be made;

(d) Whether the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made involved multiple victims;

(e) Whether the offender or delinquent child used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;

(f) If the offender or delinquent child 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 or delinquent child 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 or delinquent child participated in available programs for sexual offenders;

(g) Any mental illness or mental disability of the offender or delinquent child;

(h) The nature of the offender's or delinquent child'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 or delinquent child, 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) Whether the offender or delinquent child would have been a habitual sex offender or a habitual child victim offender under the definitions of those terms set forth in section 2950.01 of the Revised Code as that section existed prior to the effective date of this amendment;

(k) Any additional behavioral characteristics that contribute to the offender's or delinquent child's conduct. *O.R.C. 2950.11(F)(2)(a-k)*.

This statute was clearly drafted by the General Assembly in granting a trial court the discretion to use its judgment, being familiar with the facts and circumstances of a case, to impose community notification upon a Defendant or to refuse to do so after examining the various factors. There is no need to further interpret this statute, all that is left to do is apply it, an action

both the Trial Court and the Ninth District Court of Appeals have already done and found in favor of Mr. McConville.

Appellant is asking this Court, as it had asked the Ninth District Court of Appeals, to read into the statute that it only applies to individuals classified prior to January 1, 2008 and who were reclassified by the Adam Walsh Act. “In determining legislative intent, it is the duty of the court to give effect to the words used, not to delete words used or to insert words not used.”

*Columbus-Suburban Coach Lines v. Public Utilities Commission, 20 Ohio St.2d 125 (1969).*

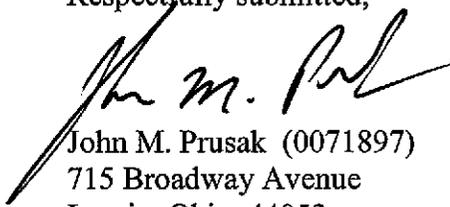
Appellant claims the “plain text” of the statute states this limiting language. However, Appellant fails to quote the exact “plain text” or at least tell us where to find it. This language is not in O.R.C. 2950.11(F)(2). In fact, the very first line of O.R.C 2950.11 states: “Regardless of when the sexually oriented offense...was committed...” This language obliterates Appellant’s claim that this statute is to apply only to offenders classified prior to January 1, 2008 and subsequently reclassified by the Adam Walsh Act. Rather it is clear that it does not matter when the sexually oriented offense occurred for O.R.C. 2950.11 to be invoked. Had the General Assembly intended the result crafted by Appellant, it could have simply added the language, a step it did not take. This statute, as drafted by the Ohio General Assembly applies regardless of when the offense takes place.

It needs to be pointed out that Appellant attempts to cloud this issue by bringing in O.R.C 2950.11(H) which is not applicable to this case. It appears that O.R.C. 2950.11(H) applies only to offenders who have been registering for a period exceeding twenty (20) years. This is not the case we are presented with in this appeal.

**CONCLUSION**

For the foregoing reasons, Appellee, Stephen J. McConville, respectfully moves this Honorable Court to deny jurisdiction in the instant matter and allow the sound reasoning of the Trial Court and Ninth District Court of Appeals to stand and find that a trial court has discretion when determining whether or not to impose community notification upon a Tier III sex offender after considering the necessary factors.

Respectfully submitted,



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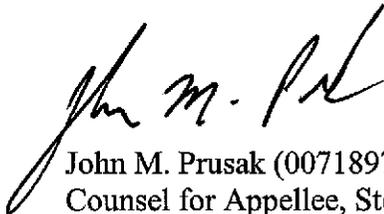
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**CERTIFICATE OF SERVICE**

A copy of the foregoing Appellee's Memorandum in Response to Appellant's Memorandum is Support of Jurisdiction was served via regular U.S. Mail upon the Lorain County Prosecutor's Office, 225 Court Street, Third Floor, Elyria, Ohio 44035 on the 5th day of June, 2009.



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