IN THE SUPREME COURT OF OHIO

ORIGINAL

IN RE: ADRIAN R., Alleged Delinquent Child	:	Case No. 2009-0189
	:	On Appeal from the Licking County Court of Appeals Fifth Appellate District
	:	C.A. Case No. 08-CA-17

REPLY BRIEF OF APPELLANT ADRIAN R.

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STATEMENT OF THE CASE AND FACTS

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ARGUMENT

PROPOSITION OF LAW

The retroactive application of Senate Bill 10 to juveniles whose offense was committed prior to the enactment of Senate Bill 10 violates the juvenile's right to Due Process as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 16 of the Ohio Constitution.

A. Retroactive Application of Senate Bill 10

In its Answer, the State asserts that Adrian's "purported 'retroactive' application is not addressed whatsoever" in his merit brief. (Answer, at p. 2). However, this claim is without substance. In his brief, Adrian submitted the following facts to this Court:

> On December 22, 2005, a complaint was filed in the Licking County Juvenile Court, alleging that then fifteen-year-old Adrian R. was delinquent of two counts of rape, violations of R.C. 2907.02(A)(1)(b), each a felony of the first degree if committed by an adult. On February 8, 2006, Adrian entered an admission to each charge. For disposition, the court ordered that Adrian be committed to the Ohio Department of Youth Services ("DYS") for a minimum of one year on each count, maximum to the age of twenty-one, with each commitment set to run concurrently with one another. While Adrian was serving his commitment in DYS, the Ohio General Assembly passed Senate Bill 10 ("S.B. 10"), which drastically changed the law governing Ohio's adult and juvenile sex offender registration and notification statutes. On January 14, 2008, Adrian was released from DYS and afforded a sex-offender-classification hearing pursuant to R.C. 2152.83(B)(1). The court classified Adrian a Tier III juvenile offender registrant—based solely on his offense—with a duty to comply with registration requirements every 90 days until his death. (Jan. 14, 2008; T.pp. 3-22; S-21).

(Merit Brief, at p. 1). Thus, the fact that S.B. 10 was applied to Adrian, even though his offense predated the law's enactment, is plainly stated in his merit brief.

Further, Adrian supplied this Court with a detailed history of juvenile sex offender registration and notification ("JSORN") in Ohio and the evolution of Ohio's sex offender

registration and notification laws ("SORN") for juveniles and adults alike. (Merit Brief, at pp. 2-7, 12-13). He also explained how he has been disadvantaged by the application of a law that was enacted after his offense was committed:

> At the time of his offense, the only way Adrian could have been classified as a sexual predator was if the juvenile court made certain factual findings, on the record, determining that he was likely to reoffend in the future. Former R.C. 2950.09(B)(2). And he could not have been classified as a habitual offender because he had not previously committed a sexually oriented offense. Former R.C. 2950.01(B). In fact, given his success in sex offender treatment at the Ohio Department of Youth Services, the record in this case would have supported a finding that if Adrian were to be classified at all, he would have been classified as a sexually oriented offender, with a duty to comply with registration requirements annually for ten years. However, because the Licking County Juvenile Court believed it had no discretion in determining Adrian's tier level, he is now registering as a Tier III juvenile offender registrant, every 90 days in the counties where he lives, works, and goes to school. And because reclassification or declassification is not guaranteed, Adrian may be registering as a Tier III juvenile offender registrant for the rest of his life—not because he was found to be a dangerous member of society, who was likely to commit future sexually oriented offenses—but because the juvenile court classified him as though he were an adult offender.

(Merit Brief, at pp. 20-21).

Contrary to the State's claims, Adrian's merit brief presents this Court with a specific argument regarding the way in which he was disadvantaged by being classified under a registration scheme that was not in effect at the time of his offense. Thus, the State's contention that Adrian's argument includes no discussion of the retroactive application of S.B. 10 is unfounded.

B. Tier Discretion

The State submits that whether juvenile courts retain discretion to determine tier level is a "predicate question" which must be addressed before the issue of S.B. 10's constitutionality can be resolved. (Answer, at p. 2). And, the State avers that Adrian has informed this Court that it *must* answer that question before considering the issue raised in his proposition of law. (Answer,

at p. 2). However, this is not an accurate assessment of what Adrian has urged this Court to do. While Adrian agrees that the issue of tier discretion is important and could potentially resolve the question presented in this case, the State is wrong in its assertion that this Court cannot answer the question presented without having the issue of tier discretion argued in a separate proposition.

To clarify the issue in this appeal, Adrian has argued that his retroactive, offense-based classification under S.B. 10 is unconstitutional. (Merit Brief, at pp. 8-22). He was classified based solely on his offense, without the protections that JSORN statutes provided at the time of his offense. (Merit Brief, at pp. 20-21). He avers that this Court must decide whether the assignment of offense-based tier levels violates a juvenile's right to due process in cases where a youth's offense was committed prior to S.B. 10's enactment and the youth did not have the same constitutional protections that a similarly situated adult defendant had prior to being convicted of a sexually oriented offense. (Merit Brief, at pp. 8-22). This Court can answer the question concerning Adrian's offense-based classification without making any determination as to whether juvenile courts have discretion in determining tier levels under S.B. 10.

However, given the confusion among Ohio courts and the divergent line of case law emerging on the issue of tier discretion, and specifically how tier discretion relates to the law's constitutionality, Appellant has urged that "*perhaps* before the constitutional question can be answered, this Court must give guidance as to whether juveniles are to be classified in the same way as adults." (Merit Brief, at p. 7). (Emphasis added.) Appellant acknowledges that the reasoning employed by the Ninth District in *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076, presents this Court with a potential remedy to the problem of S.B. 10's unconstitutionality as it relates to juvenile classifications. (Merit Brief, at p. 7). This is of particular importance given

the fact that many appellate districts have determined that one of the reasons S.B. 10 is constitutional is because juvenile courts retain discretion in determining juvenile classifications on a case-by-case basis. *G.E.S.*, at ¶37; *In re A.R.*., 12th Dist. No. CA2008-03-035, 2008-Ohio-6566, ¶36; *In re P.M.*, 8th Dist. No. 91922, 2009-Ohio-1624, ¶5; *In re C.A.*, 2nd Dist. No. 23022, 2009-Ohio-3303, ¶37-38; *In re Antwon C.*, 1st Dist. No. C-080847, 2009-Ohio-2567, ¶12; and *In re J.M.*, 4th Dist. No. 08CA782, 2009-Ohio-4574, ¶71.

The issue of tier discretion was not presented as an independent argument in *G.E.S.* Id. at ¶3, 48, 49, 55. In fact, it was not raised as an issue at all. Id. Instead, when faced with the question of whether S.B. 10 as applied to juveniles was punitive, the Ninth District opted to scrutinize the language of the statute and find the law remedial in part because it vests juvenile courts with discretion in determining classification levels for juvenile offender registrants. Id. In so holding, the Ninth District avoided answering the question of whether an offense-based classification scheme for juveniles was punitive, and thus unconstitutional, even though that issue was raised in that case. Id.

But this Court has no obligation to answer the issue of tier discretion before it examines the constitutionality of S.B. 10 as applied to children. This Court can review the constitutionality of S.B. 10 based solely on whether the offense-based application of S.B. 10 to Adrian was unconstitutional. In fact, this is precisely what Adrian has asked this Court to do. (Merit Brief, at pp. 13-22). However, should this Court choose to address the issue of tier discretion it would be well within the purview of the question presented, just as six appellate districts have determined that the law is constitutional in part because it provides juvenile courts with discretion to determine classification levels. (Merit Brief, at p. 8).

The State claims that there are four appellate courts that hold the view that juvenile courts are without discretion to determine tier levels under S.B. 10. (Answer, at p. 3). Specifically, the State cites that the Second, Third, Fourth, and Fifth Districts have found as such. (Answer, at p. 3). The State is mistaken. Contrary to the State's claims, only two appellate courts have made and affirmed such a holding. *In re Smith*, 3rd Dist. No. 1-07-58, 2008-Ohio-3234 and *In re Adrian R.* 5th Dist. No. 08-CA-17, 2008-Ohio-6581. See, also, *In re Gant*, 3rd Dist. No. 1-08-11, 2008-Ohio-5198 and *In re P.M.*, 5th Dist. No. 2008CA00152, 2009-Ohio-1761.

In its brief, the State cites to *In re S.R.B.*, 2nd Dist. No. 08-CA-8, 2008-Ohio-6340 and *In re T.M.*, 4th Dist. No. 08CA863, 2009-Ohio-4224, in support of its assertion that the Second and Fourth District Courts of Appeals have found that juvenile courts lack discretion in determining tier level. (Answer, at p. 3). However, the Second District overruled its holding in *S.R.B.*, (*In re C.A.*, 2nd Dist. No. 23022, 2009-Ohio-3303, ¶70-74) and the Fourth District has plainly held that juvenile courts retain discretion in determining tier level under S.B. 10's juvenile provisions. *In re J.M.*, 4th Dist. No. 08CA782, 2009-Ohio-4574, ¶68-74. Thus, the State misconstrues the holdings it cites from the Fourth and Second District Courts of Appeals. (Answer, at p. 3).

In *S.R.B.*, the Second District Court of Appeals considered a juvenile court's failure to make appropriate findings under R.C. 2950.11(F)(2), when it classified a sixteen-year-old youth as a Tier III juvenile offender registrant and ordered that the youth be subject to community notification. *S.R.B.*, at ¶1-4. Though the specific issue before the court concerned whether the juvenile court abused its discretion in imposing community notification, the Second District noted that juvenile courts did not have discretion to determine a youth's classification level:

> In this case, the offense that S.R.B. admitted to required, by definition, that the court classify him as a Juvenile Offender Registrant/Tier III sex offender. See R.C. 2152.83(A)(1), R.C. 2950.01(A)(1), (G)(1)(a), (M). This classification is non-discretionary, and is based upon the conviction for Rape, R.C.

> 2907.029(A)(1)(b) after January 1, 2002, while the offender was sixteen years old.

Id. at ¶7. The court ultimately found that, given the mandatory nature of the youth's classification level the juvenile court did not abuse its discretion when it ordered community notification. Id. at ¶16. *S.R.B.* was issued on December 5, 2008.

On July 2, 2009, the Second District overruled *S.R.B.* *C.A.*, at ¶70-74. In *In re C.A.*, the appellant assigned error to the juvenile court's finding that he was a mandatory Tier III juvenile offender registrant. Id. at ¶34. He specifically argued that the court had discretion in determining whether a Tier I, II, or III classification level was required. Id.

Contrary to what it noted *S.R.B.*, the Second District held that registration under S.B. 10 is a two-step process: first, the court determines if a discretionary registrant should have to register as a juvenile offender registrant; and second, the court determines what tier classification is appropriate for the youth. Id. at ¶38. Utilizing the same statutory construction analysis employed by the Ninth District Court of Appeals in *G.E.S.*, the Second District determined that S.B. 10 vests juvenile courts with discretion to determine tier levels:

> Unlike the classifications for adults, the tiers for juvenile sex offenders are not mandated by the offense of which the offender had been convicted. Rather, R.C. 2950.01 defines a juvenile sex offender for each tier as "[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 [R.C.] 2152.82 * * *, classifies a tier [I, II, or III] sex offender/child-victim offender relative to the offense." (Emphasis added.) R.C. 2950.01(E)(3), (F)(3), (G)(3).

Id. at ¶60.

The Second District then clarified and overruled its previous holding in *S.R.B.* Id. at ¶70-74. Specifically, the court found that *S.R.B.* is not binding precedent; and the court overruled its previous statement regarding tier discretion:

> The assignments of error in *S.R.B.* concerned whether the juvenile court appropriately required community notification as part of his Tier III classification, not whether the juvenile court employed the wrong analysis in determining whether he should be classified as a Tier III sex offender. In addition, unlike C.A., S.R.B. was 16 years old and was classified under R.C. 2152.83(A)(1).
>
> However, to the extent that we held that S.R.B.'s Tier III classification was mandatory, we believe that statement was not correct; we did not consider the differences in the tier definitions for adults and juveniles, and we supported our comment that S.R.B.'s classification as a Tier III sex offender was "non-discretionary" based upon his "conviction" for rape by citing R.C. 2950.01(G)(1), which sets forth the offenses that require Tier III classification for adults. In short, any expression in S.R.B. that a juvenile's classification was mandated solely by the offense of which the child was adjudicated was not supported with the relevant statutory provisions, and, to the extent that it is not dicta, that conclusion is hereby overruled.

Id. at ¶73-74. Thus, the State's position that the Second District currently holds two conflicting opinions as valid precedent is disingenuous.

Similarly, the State's interpretation of the Fourth District's stance on tier discretion is also flawed. In its brief, the State cites *T.M.* for the proposition that juvenile tier levels under S.B. 10 are offense-based. (Answer, at p. 3). But, the Fourth District has in fact found just the opposite. *J.M.*, at ¶71. In *T.M.*, the Fourth District held that a juvenile court erred when it found that the appellant's classification as a Tier III juvenile offender registrant was mandatory. *T.M.*, at ¶1. However the court's use of the term "mandatory" did not concern the youth's tier level. Rather, it referred to his status as a juvenile offender registrant and *whether* the juvenile court was required to make him a registrant or find that he did not have to register at all under R.C. 2152.83(B). Id. at ¶14-15. The Fourth District did not actually address the issue of tier discretion until it announced its decision in *J.M.* on August 14, 2009. *J.M.*, at ¶71-72.

In *J.M.*, the Fourth District considered whether juvenile courts have discretion in determining tier level through an ineffective-assistance-of-counsel claim. Id. at ¶68-74. Analyzing whether trial counsel rendered ineffective assistance at a juvenile's classification

hearing, the court noted that "if a juvenile court decides to issue an order classifying the juvenile as a juvenile offender registrant, then the court must determine which tier the juvenile should be classified under." Id. at ¶71. The Fourth District observed that five of the districts in Ohio had held that S.B. 10 vests juvenile courts with discretion in determining tier level. Id. It then joined the Ninth, Twelfth, Eighth, Second, and First Districts in finding that "a trial court has the discretion in classifying a juvenile offender registrant to a particular tier." Id.

Upon review of the holdings announced by the Second District in *C.A.*, and by the Fourth District in *J.M.*, it is clear that only two appellate courts in Ohio which have held that juveniles are subject to offense-based classification under S.B. 10. *In re Smith*, 3rd Dist. No. 1-07-58, 2008-Ohio-3234; *In re Gant*, 3rd Dist. No. 1-08-11, 2008-Ohio-5198; *In re Adrian R.*, 5th Dist. No. 08-CA-17, 2008-Ohio-6581; and *In re P.M.*, 5th Dist. No. 2008CA00152, 2009-Ohio-1761.

C. Statutory Construction

In its brief, the State seems to argue that the reason appellate courts have found that juvenile courts retain discretion to determine tier level under S.B. 10 is based upon the use of the word "convicted" in R.C. 2950.01(E)-(G):

> [i]n considering whether a juvenile court has discretion as to the tier in which to place a juvenile, those courts supporting the discretionary view rely upon the language of the statute, specifically, those portions of the definitions of the various tier offenders that state they include one who "has been convicted of, or has pleaded guilty to" a list of enumerated offenses. The proponents of that position assert that, as juveniles are not "convicted," then they do not fall under the mandatory definitions of Tier I, or Tier II, or Tier III offenders found in R.C. 2950.01(E)-(G).

(Answer, at p. 5). The State fails to provide any case citations for this claim. In fact, the leading opinion on the issue of tier discretion does not rely at all on whether juvenile adjudications are considered "convictions" for sex offender classification purposes. *In re G.E.S.*, 9th Dist. No. 24079, 2009-Ohio-4076, ¶37. Instead, the Ninth District focused on the definitions for Tier I, II,

and II offender registrants, found in R.C. 2950.01(E)(3), (F)(3), and (G)(3). Id. Specifically, the Ninth District found that:

> 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 [**34] 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.

Id.

The State then relies on this Court's decision in *In re Russell* (1984), 12 Ohio St.3d 304, 446 N.E.2d 553, to support its argument that a delinquency adjudication constitutes a conviction for purposes of applying S.B. 10 to juvenile sex offenders; and therefore, juveniles are subject to offense-based tier classifications. (Answer, at pp. 4-5). The State's argument is without merit.

As recognized by the Ninth District in *G.E.S.*, R.C. 2950.01(E)-(G) contains subsections distinguishing registration-eligible juveniles from their adult counterparts. R.C. 2950.01 contains multiple definitions for Tier I, II, and III offender registrants. R.C. 2950.01(E)(1)(2)(3), (F)(1)(2)(3), and (G)(1)(2)(3). Even though R.C. 2950.01(E)(1), (F)(1), and (G)(1) all use the term "convicted" to define the three offender levels, subsections (E)(3), (F)(3), and (G)(3) specifically define Tier I, II, and III offender registrants as individuals who have been "adjudicated a delinquent child for committing any sexually oriented offense." The General Assembly chose to separately define Tier I, II, and III offender registrants based on whether the

person subject to registration was a convicted adult or an adjudicated delinquent child. Thus, whether a juvenile adjudication is the same as an adult conviction for registration purposes is of no consequence in this case because the statute addresses each separately.

The State's analysis of the language in R.C. 2152.191 is also flawed. The State claims that the General Assembly intended for juveniles to be classified based on their offense, since R.C. 2152.191 provides that "Sections 2152.82 to 2152.86" and the remaining provisions of S.B. 10 "apply to the child and the adjudication." (Answer, at p. 6). This broad conclusion does not take into account that, like R.C. 2950.01(E)-(G), R.C. 2152.82 through 2152.86 and the remaining provisions of S.B. 10 each contain specific provisions that apply only to juveniles, which are vastly different than S.B. 10's adult provisions. For example, S.B. 10 does not require that all youth adjudicated delinquent of a sexually oriented offense be classified as juvenile offender registrants. R.C. 2152.83. And, the length of registration for juvenile offenders differs from the length of registration for adult offenders. R.C. 2950.07. Further, R.C. 2152.84 provides for the reclassification or declassification of children who have completed their parole responsibilities and who are no longer a threat to society. And, under R.C. 2152.85, all non-public registry-qualified juvenile offender registrants may be removed from the registry within three years of completing their parole responsibilities. Similar provisions do not exist for adults.

The State also relies on the Ohio Attorney General's 2008 Guide to Ohio's Sex Offender Registration and Notification Laws ("Guide") to support its assertion that the General Assembly intended for S.B. 10 to require offense-based classifications for juveniles. (Answer, at pp. 9-11). The older version of the Guide expressly states that juvenile classifications under S.B. 10 are offense-based, and that juvenile courts have no discretion in determining tier level. (See Appendix E to State's Answer). In relying on this document, the State asserts that it rests on the

Ohio Attorney General's position as chief law enforcement officer of the State as being indicative of the General Assembly's intent in drafting S.B. 10. (Answer, at pp. 9-10). But the State's reliance on the 2008 Guide is misplaced because that version is outdated.

In its amicus brief in *Smith*, the Ohio Attorney General recanted its previous interpretation of S.B. 10 and conceded that is previous interpretation of the law was wrong:

> Some confusion about the meaning of S.B. 10's juvenile provisions can be attributed to the Attorney General's Office. In June 2008, after the passage of S.B. 10, the Attorney General's Office released a document titled, 'Guide to Ohio's Sex Offender Registration and Notification Laws 'SORN' 2008 Update Following Passage of the Adam Walsh Act.' The document was not intended as an authoritative interpretation of S.B. 10, but rather an overview of the amendments and revisions to Ohio's existing sex offender laws. In its description of S.B. 10's juvenile offender provisions, the document stated that '[t]he [juvenile] court does not have discretion on which tier classification to impose' in a hearing under R.C. 2152.831.
>
> After reviewing the text of S.B. 10 and the recent decisions from the court of appeals that have provided further deliberation and guidance on the issue, the Attorney General's Office has now determined that that interpretation was incorrect. As discussed above, the relevant code provisions unmistakably afford discretion to the juvenile courts when fixing tier classifications for juvenile offenders. Furthermore, a discretionary construction is consistent with the overall structure and purpose of the juvenile justice system.

(Brief of Amicus Curiae Ohio Attorney General, filed in support of neither party in *Smith*, Case No. 2008-1624, pp. 11-12). The Ohio Attorney General has since released a new version of the Guide, which states that juvenile courts retain discretion in determining tier level under S.B. 10. Notwithstanding the Attorney General's acceptance of blame for the confusion surrounding juvenile classifications, the State dismisses the Attorney General's current position on the issue of discretion because it believes that the Attorney General's interpretation of the law at the time of Adrian's classification is controlling here. (Answer, at p. 11, fn 5).

Finally, the State cites to the U.S. Department of Justice SMART office compliance review letter—addressed to the Ohio Attorney General on January 16, 2009—and asserts that

since the SMART office requires SORNA to be a conviction-based system, convictions include juvenile adjudications; as such, Ohio's JSORN provisions are offense-based and in compliance with the federal directive. (Answer, at p. 11). But, the fact that the U.S. Department of Justice dictates that SORNA is an offense-based classification system does not mean that the language in Ohio's version of SORNA complies with that offense-based requirement. In fact, at the time of its January 16, 2009 letter, the SMART office informed the Ohio Attorney General that Ohio was not in compliance with the federal Adam Walsh Act ("AWA"), in part because the juvenile provisions of S.B. 10 did not comply with the federal directives of AWA.[1]

On March 10, 2009, the United States House of Representatives Committee on the Judiciary held a hearing at which it examined the difficulties states were having with implementing the requirements of AWA.[2] On September 23, 2009, despite the fact that the Ohio General Assembly has not made any changes to S.B. 10, the SMART office issued a new press release in which it determined that, upon further review, Ohio is one of the first states to reach "substantial compliance" with the federal directive.[3] However, in a letter dated September 22, 2009, the SMART office informed the Ohio Attorney General that, "Ohio has made great strides since our original report in January 2009. Nevertheless, as reflected in that report, there remain a handful of outstanding issues which we encourage Ohio to address in the future and we remain committed to assisting you with these efforts."[4] At the time of filing this Reply Brief, the SMART office has not released to the public any detailed explanation as to why the provisions of S.B. 10 are now considered to be in substantial compliance.

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[1] U.S. Dept. of Justice Letter to the Ohio Attorney General, released January 16, 2009.
[2] SORNA: Barriers to Timely Compliance by the States, Hearing webcast at http://judiciary.house.gov/hearings/hear_090310_1.html.
[3] Ohio Attorney General SMART Office Press Release, Sept. 23, 2009.
[4] U.S. Dept. of Justice Letter to the Ohio Attorney General, released September 22, 2009.

The State concludes its discussion opposing tier discretion by arguing that legislative intent can be gleaned from the fact that the legislature did not include in R.C. 2152.82 or 2152.83, any factors for juvenile courts to consider when determining to what tier a child should be classified. (Answer, at pp. 12-13). But, while Appellant agrees that the General Assembly did not give much guidance as to how a juvenile court is to determine tier level, none of the parties can speculate as to what the General Assembly should have included as factors for consideration. And that is not the function of this Court. *State v. Lewis*, 99 Ohio St.3d 97, 2003-Ohio-2476, ¶31(this Court noted a refusal to "encroach upon a clearly legislative" function by deciding what new legislation should be). However, in the alternative to finding that R.C. 2152.82 and 2152.83 are silent as to what factors a juvenile court is to consider before assigning a youth to a particular tier, this Court can adopt the reasoning of the Ninth District in *G.E.S.*, and find that juvenile courts are to use the factors found in R.C. 2152.83(D) in determining what tier is appropriate for a particular youth. *G.E.S.*, at ¶37.

D. The Constitutionality of an Offense-Based Classification System

The State claims that the United States Supreme Court "came to the conclusion that tying a tier classification directly and solely to the underlying offense does not violate the juvenile's due process rights." (Answer, at p. 14, citing *Smith v. Doe* (2003), 537 U.S. 84, 123 S. Ct. 1140. This statement is misleading. The Supreme Court was not examining a sex offender registration and notification law for juveniles in *Smith v. Doe*. Id. at 90-91. It was examining a classification system for adults. Id. This is of particular importance given the nature of Adrian's claim– that his offense-based classification effectively subjected him to adult sanctions without having enjoyed the same due process rights as similarly-situated adults. And, this distinction is significant in light of this Court's long-standing history of handling juvenile justice with

particular care and concern for the unique rights of juveniles. See *State v. Agler* (1969), 19 Ohio St.2d 70, 71, 249 N.E.2d 808; and *In re D.H.*, 120 Ohio St.3d 540, 2009-Ohio-9, ¶51.

Similarly, the State's reliance on this Court's holding in *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169 is misplaced. The State discounts Adrian's due process challenge by referencing this Court's holding as it relates to the process by which adult offenders become sexually oriented offenders: "if a defendant has been convicted of a sexually oriented offense as defined in R.C. 2950.01(D) and is neither a habitual sex offender nor a sexual predator, the sexually oriented offender designation attaches as a matter of law." (Answer, at p. 15, citing *Hayden*, at 506). But the present case can be distinguished from *Hayden*. First, Adrian's case challenges the offense-based classification of a juvenile, a question of first impression for this Court. Further, the fact of having to register as a sexually oriented offender does not attach as a matter of law to all children who have been adjudicated delinquent of a sexually oriented offense. R.C. 2152.82, 2152.83, and 2152.86. Unlike adults, juveniles who commit a single sexually oriented offense while they are under the age of fourteen never have to register as a juvenile offender registrant. R.C. 2152.82 and 2152.83. And first-time offenders who are fourteen or fifteen years of age only have to register if the juvenile court chooses to conduct a hearing at which the court considers a number of factors and determines that the youth should be classified as a juvenile offender registrant. R.C. 2152.83(D). Then, and only then, is that youth able to be placed into a tier.

The State claims that, in light of this Court's holding in *Hayden*, Adrian is asking for more due process rights than adults are afforded. This is not the case. Adrian is asking this Court to ensure that S.B. 10 affords registration-eligible juveniles the same due process rights that juveniles have historically been afforded in Ohio's juvenile justice system, and that youth

are not subject to an adult sanction without having been afforded the same due process considerations of a similarly situated adult. As Adrian stated in his merit brief,

> The offense-based application of S.B. 10 has effectively placed children into the same categories as adults who are convicted of sexually oriented offenders, without those children having received the same due process rights that similarly situated adults have been afforded prior to being subject to automatic classification. Unlike children who have a right to a jury prior to being eligible for a serious-youthful-offender disposition, non-PRQJOR youth who are subject to classification under S.B. 10 do not have that right. And unlike adults, who have a constitutional right to a trial by jury prior to being convicted and sentenced, youth who are subject to classification as juvenile offender registrants, do not have that right.
>
> These new registration requirements, which are indiscriminately applicable to juveniles, have imposed criminal punishments on members of society who have historically been shielded from criminal prosecution.

(Merit Brief, at pp.14-15). The State's claim that Adrian is asking for "due process plus" (Answer, at p. 16) ignores the fundamental differences between adults and juveniles in the justice system, and why those differences call for sanctions and procedures that protect the rights of children in a manner that maintains the integrity of the purpose of the juvenile court. (Merit Brief, at pp. 16-20). *D.H.*, at ¶53-59.

The State concludes its Answer with the argument that S.B. 10 is constitutional because registration is a collateral consequence, not a punitive sanction. (Answer, at p. 16, citing *State v. Cook*, 83 Ohio St. 3d 404, 1998-Ohio-291; and *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824). However, given the new, more stringent requirements of S.B. 10, and the mandatory classification levels, this statement is far from the truth.

When assessing the punitive effects of a particular statute, the United States Supreme Court has suggested that a reviewing court consider the following factors: 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.

Senate Bill 10 imposes on defendants and juvenile offenders burdens 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 an adult defendant or juvenile offender, "running from mild personal embarrassment to social ostracism," the notification of where that individual lives causes S.B. 10 to resemble colonial punishments of "public shaming, humiliation, and banishment." *Smith v. Doe*, at 98.

For example, for non public-registry-qualified-juvenile-offender-Tier III registrants, a judge may subject a juvenile offender registrant to the community and victim notification provisions in R.C. 2950.10 and 2950.11. R.C. 2152.83(C)(2). This would include forwarding the 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).

This dissemination of information resembles shaming punishments, which are 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").

Senate Bill 10 also furthers the traditional aims of punishment: retribution and deterrence. *Smith v. Doe*, at 102. The automatic placement of an offender into a tier without determining whether he or she is likely to reoffend is a form of retribution, meant to prospectively deter the commission of sexually oriented offenses. *Tison v. Arizona* (1987), 481 U.S. 137, 180-181 ("Retribution has as its core logic the crude proportionality of "an eye for an eye."). See, also, *Roper v. Simmons* (2005), 543 U.S. 551, 125 S. Ct. 1183, 571-572 (found that the "penalogical 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).

Though this Court has found that previous versions of Ohio's SORN and JSORN statutes withstand constitutional muster, this Court has yet to consider the provisions of S.B. 10 to determine the new law's constitutionality. The fact that Ohio's SORN and JSORN laws have progressively become more punitive, restrictive, and burdensome calls for more than the cursory application of *Cook* and *Ferguson* that the State has applied, because the new law has brought significant changes in the registration duties and responsibilities of offenders, the length of registration, and the manner of determining classification level.

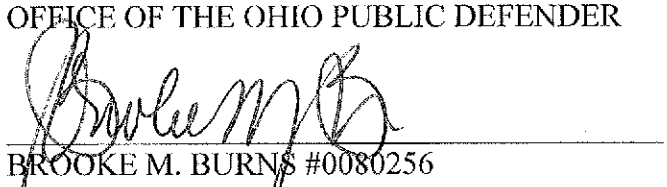
CONCLUSION

Adrian was classified as a Tier III juvenile sex offender registrant under S.B.10, based solely on his offense, in part because the Licking County Juvenile Court was under the impression that S.B. 10 removed its discretion to determine what level Adrian should be classified, if at all. This offense-based application of Ohio's new JSORN law violates Due Process Clause of both the United States and Ohio Constitutions. Therefore, Adrian 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 *G.E.S.*, which has been followed by all but two of the appellate districts that have issued decisions on the issue of tier discretion, 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 to what tier level a juvenile offender registrant should be subject. If this Court finds S.B. 10 unconstitutional, or that juvenile courts retain discretion in determining a juvenile offender registrant's tier level, Adrian's classification must be vacated and his case remanded so that the Licking 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, Adrian also asks 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
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded by regular U.S. Mail this 29th day of September, 2009 has been sent by regular U.S. mail, postage prepaid, to the office of Alice R. Bond, Assistant Licking County Prosecuting Attorney, Licking County Prosecutor's Office, Licking County Admin. Bldg., 20 South Second Street, 4th Floor, Newark, Ohio 43055.

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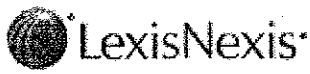
Assistant State Public Defender

COUNSEL FOR MINOR CHILD-
APPELLANT, ADRIAN R.

IN THE SUPREME COURT OF OHIO

IN RE: ADRIAN R., Alleged Delinquent Child	: : : : : : : : : :	Case No. 2009-0189 On Appeal from the Licking County Court of Appeals Fifth Appellate District C.A. Case No. 08-CA-17

APPENDIX TO REPLY BRIEF OF APPELLANT ADRIAN R.



LEXSEE 2009 OHIO 2567

IN RE: ANTWON C.

APPEAL NO. C-080847

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

182 Ohio App. 3d 237; 2009 Ohio 2567; 912 N.E.2d 182; 2009 Ohio App. LEXIS 2189

June 5, 2009, Date of Judgment Entry on Appeal

PRIOR HISTORY:
Criminal Appeal From: Hamilton County Juvenile Court. TRIAL NO. 05-14749.

DISPOSITION: Judgment affirmed in Part and Reversed in Part, and Cause Remanded.

COUNSEL: Elizabeth R. Miller, Office of the Ohio Public Defender, for Appellant Antwon C.

Joseph T. Deters, Hamilton County Prosecuting Attorney, and Paula E. Adams, Assistant Prosecuting Attorney, for Appellee State of Ohio.

JUDGES: MARK P. PAINTER, Presiding Judge. SUNDERMANN and DINKELACKER, JJ., concur.

OPINION BY: MARK P. PAINTER

OPINION

[***183] [*238] *DECISION.*

MARK P. PAINTER, Presiding Judge.

[**P1] Antwon C., a minor, was adjudicated delinquent because of a sexual offense and was placed on probation. He violated his probation. The trial court committed him to a term in the Department of Youth Services ("DYS") and classified him as a Tier II sexual offender. Antwon now appeals. We affirm the delinquency adjudication and commitment, but we vacate his sexual offender classification and remand this case to the trial court.

I. Background

[**P2] In 2005, Antwon was adjudicated delinquent on a charge of gross sexual imposition. [1] At Antwon's dispositional hearing, the trial court suspended a commitment to DYS, placed Antwon on probation, and ordered him to complete the residential treatment program at Hillcrest in Cincinnati. The trial court continued Antwon's case for several weeks to determine his classification as a sexual offender. Between his dispositional hearing and his classification hearing, Antwon fled from the jurisdiction and went to Florida. The trial court issued a warrant for him.

1 *R.C. 2907.05.*

[**P3] Soon after Antwon arrived in Florida, he was involved in an incident for which he was committed to a residential facility for two years. Antwon finished the program and was placed on probation in Florida. He finished high school, obtained employment, and enrolled in college.

[**P4] In June 2008, Antwon was stopped for speeding in Georgia. The police officer discovered that there was an outstanding warrant for Antwon in Ohio. [*239] Antwon was returned to Ohio. The trial court held dispositional hearings. In the first hearing, the magistrate classified Antwon as a Tier II sexual offender, noting that "[i]t's a mandatory classification." At a second hearing, Antwon was committed to DYS for a minimum of six months or for a longer period ending with his 21st birthday.

[**P5] In this appeal, Antwon asserts that the trial court erred by (1) violating his due-process rights by failing to provide notice; (2) committing him to DYS; (3) failing to exercise discretion when it classified him as a Tier II sexual offender; and (4) denying him effective assistance of counsel.

II. Juv.R. 35 and Disposition

[**P6] Antwon argues that the trial court violated his due-process rights when it failed to comply with *Juv.R. 35*. He argues that the rule required the trial court to invoke its continuing jurisdiction and provide notice.

[***184] [**P7] *Juv.R. 35* governs proceedings that take place after judgment. But *Juv.R. 35* is not applicable to this case because Antwon fled to Florida before the trial court had reached a complete judgment.

[**P8] At the last hearing attended by Antwon, the trial court continued the case for 17 days to hold a hearing on Antwon's sex-offender classification. But during those 17 days, Antwon fled to Florida, and the trial court was unable to address the final aspect of the case. Thus, the court was not required to comply with *Juv.R. 35*.

[**P9] Antwon also argues that the trial court erred by failing to impose the least restrictive disposition available. Under *R.C. 2152.19(A)(4)*, the trial court had discretion to craft an appropriate disposition. [2] We will only reverse if we determine that the trial court's decision was unreasonable, arbitrary, or unconscionable. [3] Nothing in the record suggests that the court acted improperly. We overrule Antwon's first and second assignments of error.

2 *In re D.S., 111 Ohio St. 3d 361, 2006 Ohio 5851, 856 N.E.2d 921, P6.*
3 *State v. Adams (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.*

[**P10] In his final assignment of error, Antwon argues that he was represented by ineffective trial counsel because his attorney failed to object to the trial court's failure to comply with *Juv.R. 35*. We have already determined that *Juv.R. 35* did not apply. We overrule this assignment of error.

III. Classification

[**P11] Antwon argues that the juvenile court failed to use discretion when classifying him a Tier II sexual offender. We agree, so we must reverse the classification.

[*240] [**P12] *R.C. 2950.01* creates three classification tiers for sexual offenders, each with a list of different enumerated offenses. For adult offenders, classification is automatic and based solely on the underlying offense. [4]

4 *In re G.E.S., 9th Dist. No. 24079, 2008 Ohio 4076, at P37*

[**P13] Antwon argues in his brief--and the state conceded at oral argument--that the juvenile court has discretion to classify juvenile offenders under any of the three categories. Several Ohio appellate districts [5] and the Ohio Attorney General [6] have recognized that the statute treats juveniles differently.

5 *In re Adrian R., 5th Dist. No. 08-CA-17, 2008 Ohio 6581, at P17; In re P.M., 8th Dist. No. 91922, 182 Ohio App. 3d 168, 2009 Ohio 1694, at P5; In re A.R., 12th Dist. No. CA2008-03-036, 2008 Ohio 6566, at P36; In re G.E.S., 9th Dist. No. 20479, 2008 Ohio 4076, at P37.* But, see, *In re Smith, 120 Ohio St. 3d 1416, 2008 Ohio 6166, 897 N.E.2d 652, P31; In re S.R.B., 2nd Dist. No. 08-CA-8, 2008 Ohio 6340, at P7.*
6 *Smith, supra* (amicus brief of Ohio Attorney General Richard Cordray supporting neither party).

[**P14] Since Antwon was 16 at the time of his offense, it was mandatory for the trial court to impose registration requirements on him. [7] But the trial court was required to hold a hearing to determine in which tier to classify Antwon. [8] If the tier classification was automatic for juveniles, it would have been pointless to hold a hearing to determine the classification--the trial court would have automatically assigned a tier after it had adjudicated Antwon [***185] delinquent for committing gross sexual imposition.

7 *R.C. 2152.83(A).*
8 *R.C. 2151.413.*

[**P15] Our conclusion is bolstered by a reading of *R.C. 2950.01. Sections (E), (F),* and *(G)* of the statute define the three tiers through lists of enumerated offenses. *Subsections (1)* and *(2)* of these sections apply to adults. For example, *R.C. 2950.01(F)(1)* defines a Tier II offender as a sex offender who "has been convicted of, or has pleaded guilty to" a list of enumerated offenses. The classification under *subsection (F)(1)* is based solely on the offense for which the adult has been convicted.

[**P16] In Ohio, juveniles are not convicted of crimes. Instead, they are "adjudicated delinquent" for committing crimes. [9] And *R.C. 2950.01* provides an alternate means of classifying juvenile sex offenders. For example, *R.C. 2951.01(F)(3)* defines a Tier II sex offender as one who "is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for [*241] committing any sexually oriented offense and who a juvenile court * * * classifies a tier II sex offender/child-victim offender relative to the offense."

9 *State v. Hanning, 89 Ohio St.3d 86, 89, 2000 Ohio 436, 728 N.E.2d 1059.*

[**P17] In short, a juvenile sex offender is classified by being adjudicated delinquent *and* by being categorized by the trial court. The trial court has discretion to consider all relevant information and to appropriately categorize the juvenile.

IV. Invited Error

[**P18] We understand why the magistrate originally classified Antwon and stated that the classification was "mandatory." In an amicus brief for a case before the Ohio Supreme Court on this issue, the Attorney General stated that a juvenile court has discretion to determine in which tier a delinquent child belongs. But he admitted that some of the confusion over the issue was the fault of the Attorney General's office as a result of its release of a document meant to provide guidance about sex-offender classification. Although that document stated that juvenile courts do not have discretion to determine tiers, the Attorney General, after reviewing the statute and various case law, concluded that the original interpretation was incorrect. The brief stated, "The relevant code provisions unmistakably afford discretion to the juvenile courts when fixing tier classification for juvenile offenders." [10]

10 *In re Smith, 120 Ohio St. 3d 1416, 2008 Ohio 6166, 897 N.E.2d 652* (amicus brief of Ohio Attorney General Richard Cordray, at 12).

V. Appealability

[**P19] The state argues that the classification order is not appealable because it is not a final order--a mandatory reclassification hearing had not been completed. [11]

[**P20] Juvenile sex offenders are afforded two classification hearings. First, under *R.C. 2152.83*, a juvenile is afforded a tier-classification hearing either as part of the child's disposition or, if the child is committed to a secure facility, when the child is released. Second, under *R.C. 2152.84*, when a child completes all aspects of the disposition, including probation and any ordered treatment, the trial court "shall conduct a hearing" to consider the risk of reoffending so that the trial court can determine whether the order to register as a sex offender should be continued or terminated. Further, at the reclassification hearing, the trial court must determine whether the specific tier classification in which the child has been placed is proper [***186] and if it should be continued or modified.

11 *R.C. 2152.84(A)(1).*

[*242] [**P21] In this case, the trial court erred in two ways. First, under *R.C. 2152.831* it exercised no discretion when it categorized Antwon as a Tier II sexual offender. Failing to exercise discretion due to an incorrect impression that discretion does not exist is almost always reversible error. [12] Second, *R.C. 2152.83(A)(1)* tells us *when* a trial court should issue its classification order. If the juvenile does not serve time in a secure facility, the trial court "shall" issue the order as part of its disposition. But if the trial court commits a juvenile to a secure facility, the order "shall issue at the time of the child's release from the secure facility." [13]

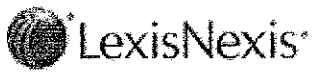
12 *State v. Zukowski, 10th Dist. No. 06AP-4, 2006 Ohio 5299, at P9.*
13 *R.C. 2152.83(A)(1).*

[**P22] Thus, the court in this case should not have classified Antwon as a Tier II juvenile offender until he was released from DYS. We order the trial court to conduct a hearing and to exercise discretion to properly determine Antwon's sex-offender registration status upon his release from DYS under *R.C. 2152.82(A)(1)*. Antwon shall also receive a reclassification hearing under *R.C. 2152.84(A)(1)* when he finishes any probation and treatment ordered by the trial court.

[**P23] For the foregoing reasons, we affirm Antwon's adjudication and commitment to DYS but reverse his sex-offender classification and remand the case to the trial court for the appropriate hearings to determine a sex-offender classification under the relevant statutes.

Judgment affirmed in part and reversed in part, and cause remanded.

SUNDERMANN and **DINKELACKER, JJ.**, concur.



LEXSEE 2009 OHIO 4574

IN THE MATTER OF: [J.M., an Adjudicated] Delinquent Child

Case No. 08CA782

COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT, PIKE COUNTY

2009 Ohio 4574; 2009 Ohio App. LEXIS 3852

August 14, 2009, File-stamped

DISPOSITION: [**1] JUDGMENT AFFIRMED, IN PART, AND VACATED, IN PART, AND CAUSE REMANDED.

COUNSEL: Timothy Young, Ohio Public Defender, and Angela Miller, Assistant Ohio Public Defender, Columbus, Ohio, for appellant.

C. Robert Junk, Jr., Pike County Prosecutor, and Anthony A. Moraleja, Assistant Pike County Prosecutor, Waverly, Ohio, for appellee.

JUDGES: Roger L. Kline, Presiding Judge. Abele, J.: Concurs in Judgment and Opinion. McFarland, J.: Concurs in Judgment Only.

OPINION BY: Roger L. Kline

OPINION

DECISION AND JUDGEMENT ENTRY

Kline, P.J.:

[*P1] J.M. appeals his delinquency adjudication of the juvenile court in Fairfield County and his classification as a juvenile offender registrant by the juvenile court in Pike County. On appeal, J.M. contends that the trial court erred by permitting experts to impermissibly vouch for the testimony of the victim. Because J.M. failed to preserve this error, and because we find that any impermissible vouching did not constitute plain error, we disagree. J.M. next contends that the trial court erred in its admission of other acts evidence under *Evid.R. 404(B)*. Because we find that the court did not abuse its discretion in finding this evidence probative of identity, we disagree. J.M. next contends that the victim's [**2] statements to mandatory reporters (i.e., people who are required to report certain information to the authorities) are testimonial, and therefore, their admission violated his rights under the *Confrontation Clause*. Because we find it unlikely the victim gave these statements with any understanding that they would later be used in a prosecution, we disagree. J.M. next contends that the court's adjudication of delinquency was against the manifest weight of the evidence. We disagree, holding that substantial evidence exists to support the delinquency adjudication. J.M. next contends that the cumulative errors in this case require this Court to reverse and remand the matter to the trial court for another adjudicatory hearing. Because we find that any errors during the hearing were minor, we disagree. Finally, J.M. contends that he was afforded ineffective assistance of counsel, and this failure warrants reversal. We disagree as to the court's delinquency adjudication in Fairfield County but agree as to J.M.'s classification in Pike County. Accordingly, we affirm the trial court's delinquency adjudication in Fairfield County but vacate the trial court's classification of J.M. as a juvenile [**3] offender registrant and as a tier III offender in Pike County. We remand this matter to the juvenile court in Pike County for a re-classification hearing.

I.

[*P2] On August 23, 2007, a complaint was filed in the Juvenile Division of the Court of Common Pleas in Fairfield County. This complaint alleged that J.M. was a delinquent child on the basis of two separate rapes (acts of sodomy) in violation of *R.C. 2907.02(A)(1)(b)*. The juvenile court granted several continuances, and both parties filed numerous evidentiary motions.

[*P3] The case came to trial on February 4-6, 2008. The state apparently chose to only present evidence of the second alleged rape. The trial court determined that

J.M. was delinquent because he had committed the rape offense.

[*P4] The state's evidence showed that the rape occurred on July 3, 2007, during a family visit. J.M. spent much of the visit with his cousins in a room separate from where the adults were. J.M. tied two of his cousins to a chair with a bicycle chain. He then took the third to a closet and sexually assaulted her. She was four-years-old. The trial court credited this evidence, concluded that J.M. was a delinquent child based on the rape of the four-year-old, [**4] and transferred the matter for disposition and classification to the Court of Common Pleas, Juvenile Division, in Pike County. The offense took place in Fairfield County, while J.M. resided in Pike County.

[*P5] The juvenile court in Pike County committed J.M. to the legal custody of the Ohio Department of Youth Services for an indefinite term consisting of a minimum period of eighteen months and a maximum period not to exceed his 21st birthday. The court suspended this order on condition that the child be of good behavior until age 21 and successfully complete a program at the Hocking Valley Community Residential Center. The court then released J.M. to the custody of his parents for them to place him in the residential center.

[*P6] The juvenile court in Pike County also considered the issue of classification and classified J.M. as a juvenile offender registrant after considering the factors laid out in the statute. The court further determined that J.M. was a tier III offender under Ohio's current classification scheme. The court also determined that J.M. was a Public Registry Qualified Juvenile Offender Registrant and was subject to community notification provisions.

[*P7] J.M. appeals and assigns [**5] the following errors for our review. I. "THE TRIAL COURT ERRED BY PERMITTING A SOCIAL WORKER, HER SUPERVISOR AND A DOCTOR TO TESTIFY AS 'EXPERTS' WHEN THEIR TESTIMONY AMOUNTED TO NOTHING MORE THAN VOUCHING FOR THE VICTIM IN VIOLATION OF *EVIDENCE RULE 702*, THE *FIFTH*, *SIXTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION* AND *ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION*." II. "INTRODUCTION OF 'OTHER ACTS' EVIDENCE, EXCEPT UNDER LIMITED, CLEARLY DEFINED CIRCUMSTANCES, DENIES A DEFENDANT A FAIR TRIAL AND DUE PROCESS. THE INTRODUCTION OF 'OTHER ACTS' EVIDENCE THAT [J.M.] SEXUALLY ABUSED [A DIFFERENT CHILD], UNFAIRLY DENIED HIM DUE PROCESS AND A FAIR TRIAL IN VIOLATION OF THE *FIFTH*, *SIXTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION* AS WELL AS *ARTICLE I, SECTIONS 2*, 9, 10 AND 16 OF THE OHIO CONSTITUTIONS." III. "[J.M'S] RIGHT TO CONFRONTATION, PURSUANT TO THE *SIXTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION*, WAS VIOLATED WHEN HEARSAY STATEMENTS MADE BY NON-TESTIFYING JUVENILES WERE ADMITTED UNDER THE GUISE OF 'MEDICAL TREATMENT' AND *EVIDENCE RULE 803(4)*." IV. "THE TRIAL COURT VIOLATED [J.M.'S] RIGHT TO DUE PROCESS UNDER THE *FIFTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION* [**6] AND *ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION* WHEN IT ADJUDICATED HIM DELINQUENT OF RAPE WHEN THAT FINDING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE." V. "THE CUMULATIVE ERROR THAT OCCURRED DURING [J.M.'S] TRIAL WARRANTS GRANTING HIM RELIEF PURSUANT TO THE *FIFTH*, *SIXTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION*." VI. "THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT [J.M'S] CLASSIFICATION AS A TIER III JUVENILE SEX OFFENDER REGISTRANT WAS MANDATORY IN VIOLATION OF *R.C. 2950.01 (E)-(G)*. ADDITIONALLY THE COURT ABUSED ITS DISCRETION IN FINDING THAT [J.M.] WAS A PUBLIC REGISTRANT IN VIOLATION OF *R.C. 2152.86*." VII. "[J.M] WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE *SIXTH* AND *FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION* AND ARTICLE I, SECTION SIXTEEN OF THE OHIO CONSTITUTION AT BOTH THE ADJUDICATION AND DISPOSITION PHASES WHEN DEFENSE COUNSEL FAILED TO: 1) OBJECT TO THE QUALIFICATION OF SEVERAL 'EXPERTS'; 2) OBJECT TO VOUCHING TESTIMONY PROVIDED BY 'EXPERTS'; 3) MAKE CRAWFORD OBJECTIONS AS TO WITNESSES WHO WERE ALSO MANDATORY REPORTERS; 4) FAMILIARIZE HIMSELF ON OHIO'S JUVENILE OFFENDER CLASSIFICATION PROCEDURES; AND [**7] 5) PROPERLY ADVISE THE COURT REGARDING HIS CLIENT'S DUTY TO REGISTER UNDER *R.C. 2152.82* AND *R.C. 2152.83*, *2152.86*."

II.

[*P8] J.M. first contends that the state's expert witnesses in Fairfield County engaged in impermissible vouching. J.M. contends Sarah Kuss (a social worker), Helen Nemith (Kuss's supervisor), and Dr. Scansen all impermissibly vouched for the credibility of the victim in this case.

[*P9] All three witnesses testified as experts under *Evid.R. 702*. *Evid.R. 702* provides that if a "witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony" then that expert may testify "to matters beyond the knowledge or experience possessed by lay persons or [to dispel] a misconception common among lay persons" so long as the "testimony is based on reliable scientific, technical, or other specialized information." "The determination of whether a witness possesses the qualifications necessary to allow expert testimony lies within the sound discretion of the trial court." *Willis v. Martin, Scioto App. No. 06CA3053, 2006 Ohio 4846, at P20*; see, also, *State v. Maupin (1975), 42 Ohio St.2d 473, 479, 330 N.E.2d 708*. Likewise, we review [**8] the scope of an expert's testimony for an abuse of discretion. See *Werts v. Goodyear Tire & Rubber Co., Cuyahoga App. No. 91403, 2009 Ohio 2581, at P33*.

[*P10] An abuse of discretion connotes more than an error of judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140*. So long as a trial court exercises its discretion in accordance with the rules of procedure and evidence, a reviewing court will not reverse that judgment absent a clear showing of an abuse of discretion with attendant material prejudice to defendant. *Rigby v. Lake Cty. (1991), 58 Ohio St.3d 269, 271-72, 569 N.E.2d 1056*; *State v. Hymore (1967), 9 Ohio St.2d 122, 128, 224 N.E.2d 126*.

A.

[*P11] Kuss testified as to her qualification. She stated that she had a bachelor's degree in fine arts from the University of Notre Dame as well as a master's of science degree from Auburn University. See Transcript, vol. I, at 175-79 for her qualifications. She said that she was studying in the clinical psychology program at New Horizon's Youth and Family Center and had completed all requirements for her Ph.D. in clinical psychology except the dissertation. Finally, she indicated that [**9] she had been a counselor and therapist since 1982 in various capacities, and had previously testified as an expert in Alabama regarding delinquency charges and abuse. However, Kuss said that she was not independently licensed and any of her diagnoses had to be approved by her supervisor. The state then offered Kuss as an expert witness in the counseling field, and the defense offered no objection to that certification. Id. at 179.

[*P12] Kuss testified about the four-year-old victim's behavior at her therapy sessions as well as the victim's reported behavior at home. Kuss offered her expert opinion that the victim suffered from "[a]djustment disorder with mixed disturbance of emotions and conduct." Transcript, vol. II, at 120. Defense counsel made no objection to this particular diagnosis, and Kuss testified that this condition would require "a traumatic psychosocial stressor[.]" Id. at 122. Finally, Kuss testified that she could not identify any stressor other than the alleged conduct of J.M.

[*P13] On cross examination, defense counsel pursued a line of questioning that indicated the victim may have simply repeated what she had heard her mother say. In part, this theory was based on the fact that [**10] the mother was present during Kuss's questioning of the victim. Id. at 109, 126-29. "Is it possible that [the victim] mimicked what you and her mother discussed there in front of her?" Id. at 127. In response, the state elicited Kuss's opinion that the statements did not at all appear to be parroted or mimicked from the mother. And the state then proceeded to have Kuss explain the basis for this opinion. J.M. contends that the admission of this evidence is reversible error.

[*P14] "Once qualified, '[a]n expert witness's testimony that the behavior of an alleged child victim of sexual abuse is consistent with behavior observed in sexually abused children is admissible under the Ohio Rules of Evidence.'" *State v. Konkel, Summit App. No. 23592, 2007 Ohio 6186, at P20*, citing *State v. Stowers, 81 Ohio St.3d 260, 261, 1998 Ohio 632, 690 N.E.2d 881*. However, "[a]n expert may not testify as to the expert's opinion of the veracity of the statements of a child declarant." *State v. Boston (1989), 46 Ohio St.3d 108, 545 N.E.2d 1220*, syllabus, overruled on other grounds by *State v. Dever (1992), 64 Ohio St.3d 401, 1992 Ohio 41, 596 N.E.2d 436*.

[*P15] In *Boston*, the expert testified that the victim "had not fantasized her abuse and that [the victim] had not been programmed to make accusations [**11] against her father." *Boston at 128*. The Supreme Court of Ohio held that the admission of this testimony was "egregious, prejudicial and constitutes reversible error." Id. But as the Supreme Court of Ohio explained in *Stowers*: "*Boston's* syllabus excludes expert testimony offering an opinion as to the truth of a child's statements (*e.g.*, the child does or does not appear to be fantasizing or to have been programmed, or is or is not truthful in accusing a particular person). It does not proscribe testimony which is additional support for the truth of the *facts testified to* by the child, or which assists the fact finder in assessing the child's veracity." *Stowers at 262-63*.

[*P16] Here, J.M.'s trial counsel arguably opened the door in his questioning of Kuss because the prosecution only went into this issue on redirect after J.M.'s counsel raised it. Nonetheless, Kuss's testimony did go too far in that she offered an opinion on the truthfulness of the victim, or more precisely, an opinion that the vic-

tim was not straying from the truth by parroting or mimicking her mother. But J.M.'s counsel made no objection to this opinion, and his counsel elicited the same opinion on re-cross examination. [**12] Transcript, vol. II, at 145. In fact, the only objection the defense raised was related to Kuss's introduction of certain statements of the victim.

[*P17] J.M. failed to raise an objection to the admission of this evidence at trial and so he must show the trial court committed plain error in its admission of the evidence.

[*P18] Pursuant to *Crim.R. 52(B)*, we may notice plain errors or defects affecting substantial rights. "Inherent in the rule are three limits placed on reviewing courts for correcting plain error." *State v. Payne, 114 Ohio St.3d 502, 2007 Ohio 4642, at P15, 873 N.E.2d 306*. "First, there must be an error, *i.e.*, a deviation from the legal rule. * * * Second, the error must be plain. To be 'plain' within the meaning of *Crim.R. 52(B)*, an error must be an 'obvious' defect in the trial proceedings. * * * Third, the error must have affected 'substantial rights.' We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial." *Id. at P16*, quoting *State v. Barnes, 94 Ohio St.3d 21, 27, 2002 Ohio 68, 759 N.E.2d 1240* (omissions in original). We will notice plain error "only to prevent a manifest miscarriage of justice." *State v. Long (1978), 53 Ohio St.2d 91, 372 N.E.2d 804*, paragraph three [**13] of syllabus. And "[r]eversal is warranted only if the outcome of the trial clearly would have been different absent the error." *State v. Hill, 92 Ohio St.3d 191, 203, 2001 Ohio 141, 749 N.E.2d 274*.

[*P19] Here J.M. cannot demonstrate the error affected substantial rights. On page 142 of the transcript, Kuss clearly did offer her opinion that the victim was not mimicking her mother. This, under *Boston*, is impermissible testimony. However, the thrust of her testimony explained why she believed the victim. This testimony concerned the manner and circumstances of the victim's statements, all permissible testimony under *Stowers*. Kuss's plain opinion is not by itself particularly persuasive. Her observations that the victim stated her account with relative ease, that the victim used different language than the mother, and that the victim's account was elicited without the use of leading questions carry far more weight. This permissible testimony appears more important, both in substance and persuasiveness, than the impermissible testimony. As a result, we find that it is unlikely that the trial court was unduly swayed by the impermissible opinion.

[*P20] Accordingly, we do not find plain error on this issue.

B.

[*P21] J.M. next contends that [**14] the trial court erred by permitting Kuss's supervisor Nemith to testify. J.M. contends that "Given the lack of any personal interaction between Nemith and the [victim], the sole purpose of Nemith's testimony was to bolster Kuss'[s] testimony. Because Kuss'[s] testimony vouched for [the victim] * * * Nemith's testimony did as well."

[*P22] However, as noted above we find that any vouching on the part of Kuss was de minimis. Nemith testified that she was Kuss's supervisor and was a child case manager coordinator. She also testified that she graduated in 1980 with a master's degree in clinical counseling, and indicated that she was presently licensed to make independent diagnoses. She explained the procedure that she used to review the assessments of her employees and to ensure that the diagnoses matched the symptoms. She admitted that she had never met with the victim in this case, but that she agreed with Kuss's diagnosis based on the facts in the file.

[*P23] J.M. objected to her testimony at trial, but did so based on her admission that she had no personal knowledge of the victim in this case. Thus, he has forfeited all but plain error.

[*P24] However, after reviewing the record, we see no basis to conclude [**15] that Nemith engaged in impermissible vouching on the stand.

[*P25] Accordingly, we find no error, let alone plain error, regarding this issue.

C.

[*P26] J.M. further contends that the testimony of Dr. Scansen also included impermissible vouching. J.M. asserts that her testimony was based on nothing more than the victim's statement, and under Ohio law this constitutes nothing more than impermissible vouching by a more circuitous means. J.M. cites two cases in support of this proposition.

[*P27] In the first case, a doctor testified that it was her opinion that the victim was sexually abused "based solely on the history that [the victim] provided and on the physical exam. Since the physical exam's results were normal, the doctor admitted that her opinion was based on what [the victim] told her." *State v. Schewirey, Mahoning App. No. 05 MA 155, 2006 Ohio 7054, at P51*. In the second case, again the expert testified "to a reasonable degree of medical certainty, [the victim] was sexually abused[, and this opinion] was based solely upon the child's statements." *State v. Knight, Cuyahoga App. No. 87737, 2006 Ohio 6437, at P31*.

[*P28] Here, Dr. Scansen explained the procedures the hospital used in the emergency room for [**16] dealing with child abuse cases. The doctor also explained

the medical examinations, and stated that they were negative. And she offered her opinion that this result did not confirm J.M.'s denial that any sexual abuse took place. Dr. Scansen testified that "[a] child's skin is very elastic and very resilient, so, you may not see any changes, even if there was penetration or sexual abuse." Transcript, vol. I, at 92. Finally, the doctor indicated she did observe an abrasion on the buttocks, and a bruise on the thigh, and these injuries were consistent with the history as given by the victim.

[*P29] Unlike the cases cited by J.M., Dr. Scansen never testified it was her opinion that abuse took place. She merely testified that the negative findings of the medical examinations did not foreclose the possibility of sexual abuse, and that the other observed injuries were consistent with the victim's account. On cross-examination, Dr. Scansen admitted there were other possible explanations for the injuries.

[*P30] This distinction, that Dr. Scansen never offered her expert opinion that the child was in fact abused, may seem like a small one, but it is crucial. If an expert offers an opinion that the victim [**17] was abused and only relies upon the statements of the victim, then the expert is doing nothing more than stating that the jury should believe the victim. This is an impermissible opinion under the *Boston* case cited earlier. Here, Dr. Scansen never testified that the child had in fact been raped, but instead testified that the medical examinations and observed injuries were consistent with rape.

[*P31] J.M. also claims that Dr. Scansen's testimony would not have been helpful to the trier of fact as it did not involve matters outside the normal lay person's experience. Hopefully, the nature of injuries suffered by a four-year-old as a result of sexual abuse is outside the common experience of a lay person. Thus, we cannot say that the trial court abused its discretion in admitting her testimony.

[*P32] Accordingly, for the foregoing reasons, we overrule J.M.'s first assignment of error.

III.

[*P33] J.M. contends in his second assignment of error that the trial court erred in the admission of "other acts" evidence. The disputed evidence concerns an alleged prior rape of a different victim, who was a five-year-old cousin of J.M.

[*P34] As we stated earlier, a trial court has discretion in the admission or exclusion [**18] of evidence. Thus, under our standard of review, we must decide if the trial court abused its discretion.

[*P35] *Evid.R. 404(A)* prohibits the use of evidence of other acts to prove that an individual has acted in conformity with those other acts on a particular occasion. *Evid.R. 404(B)* and *R.C. 2945.59* provide an exception that allows the admission of the same other act evidence so long as it is used to prove something other than the fact an individual acted in conformity with those other acts.

[*P36] Specifically, *Evid.R. 404(B)* states, "**Other crimes, wrongs or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

[*P37] Because *Evid.R. 404(B)* and *R.C. 2945.59* [1] create an exception to the common law, we must construe the standard for admissibility against the state. *State v. Jamison (1990), 49 Ohio St.3d 182, 183-84, 552 N.E.2d 180.* For proper admissibility, the trial court must determine that: (1) the other act is relevant to the crime in question, and [**19] (2) evidence of the other act is relevant to an issue placed in question at trial. *State v. McCornell (1993), 91 Ohio App.3d 141, 146, 631 N.E.2d 1110*, citing *State v. Strong (1963), 119 Ohio App. 31, 196 N.E.2d 801*; *State v. Howard (1978), 57 Ohio App.2d 1, 6, 385 N.E.2d 308.* Additionally, the court must consider factors such as (1) the time of the other act, *State v. Henderson (1991), 76 Ohio App.3d 290, 294, 601 N.E.2d 596*; (2) the accused's modus operandi, see *State v. Coleman (1988), 37 Ohio St.3d 286, 291-92, 525 N.E.2d 792*; *State v. Hill (1992), 64 Ohio St.3d 313, 323, 1992 Ohio 43, 595 N.E.2d 884*; (3) the nature of the other acts committed, *State v. Smith, Ross App. No. 02CA2687, 2003 Ohio 5524, PP13-14*; and (4) the location of the other acts, *State v. Moorehead (1970), 24 Ohio St.2d 166, 169, 265 N.E.2d 551*, vacated on different grounds by *Moorehead v. Ohio, 408 U.S. 938, 92 S. Ct. 2869, 33 L. Ed. 2d 759 (1972).*

1 *R.C. 2945.59* provides "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are [**20] contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

[*P38] Introduction of other acts evidence to prove a scheme or plan is permissible in only one of two situa-

tions. *State v. Curry (1975), 43 Ohio St.2d 66, 72-73, 330 N.E.2d 720.* "First, those situations in which the 'other acts' form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment." *Id. at 73.* The second potential situation is where the identity of a perpetrator of the crime is at issue. *Id.* "One recognized method of establishing that the accused committed the offense set forth in the indictment is to show that he has committed similar crimes within a period of time reasonably near to the offense on trial, and that a similar scheme, plan or system was utilized to commit both the offense at issue and the other crimes." Id., citing *Whiteman v. State (1928), 119 Ohio St. 285, 6 Ohio Law Abs. 695, 164 N.E. 51; Barnett v. State (1922), 104 Ohio St. 298, 135 N.E. 647.*

[*P39] The trial court explained its rationale for admitting the evidence as follows. "And the Court finds that, under *Evidence Rule 404(B)*, although normally not admitted, [**21] they may be admitted for purposes other than showing a defendant's character as to criminal propensity, and specifically being admissible to prove the identity of the person through modus operandi. And here specifically the two girls are of tender age, four and five, I believe, both acts are acts of similar nature, acts of sodomy, both girls are relatives to the defendant; therefore, based upon the answers to those questions, the Court does find them admissible and, therefore, overrules the objection to the prior acts[.]" Transcript, vol. II, at 25-26.

[*P40] J.M. cites a case from the fifth district, *State v. Lindsay, Richland App. No. 02CA66, 2003 Ohio 2748.* In that case, the state prosecuted the defendant for sexual abuse and introduced allegations from the victim that the defendant had attempted to abuse her earlier. *Lindsay at P6.* The fifth district reversed and remanded, finding that the admission of the prior incident and other violations constituted plain error. *Lindsay at P16.* However, the *Lindsay* case defies application. The court did not describe the prior incident nor explain why it did not qualify for admission under *Evid.R. 404(B).*

[*P41] We find a third district case more persuasive. [**22] *State v. Pearson (1996), 114 Ohio App.3d 168, 682 N.E.2d 1086.* In *Pearson*, the court held a prior rape was admissible to prove identity where both rapes were committed in the same area, within a three month period, by a similarly described individual, and the individual attacked in a similar manner. *Pearson at 186-87.* Here, the trial court noted the similarity of the victims, their relationship to the offender, and the similarity of the offense itself both in the nature of the abuse and the familial setting.

[*P42] Therefore, under these circumstances, we find that the trial court did not abuse its discretion in admitting this evidence.

[*P43] Accordingly, we overrule J.M.'s second assignment of error.

IV.

[*P44] J.M. contends that the admission of certain evidence at trial, involving hearsay statements, violated his rights under the *Sixth Amendment to the United States Constitution.* He asserts that as a matter of law any statement made to a mandatory reporter is testimonial. Thus, our review is de novo.

[*P45] The *Sixth Amendment of the United States Constitution* guarantees among other things an accused's right "to be confronted with the witnesses against him[.]" "Where testimonial evidence is at issue * * * the *Sixth Amendment* [**23] demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford v. Washington (2004), 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177.*

[*P46] The *Crawford* court avoided defining testimonial for the purpose of the *Sixth Amendment*, but the court did note that statements made to the police in the course of interrogations qualify as testimonial under any definition. *Crawford at 52.* "For *Confrontation Clause* purposes, a testimonial statement includes one made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *State v. Stahl, 111 Ohio St.3d 186, 2006 Ohio 5482, 855 N.E.2d 834*, paragraph one of the syllabus, quoting *Crawford at 52.* "In determining whether a statement is testimonial for *Confrontation Clause* purposes, courts should focus on the expectation of the declarant at the time of making the statement; the intent of a questioner is relevant only if it could affect a reasonable declarant's expectations." Id. at paragraph two of the syllabus. "The proper inquiry, then, is whether the *declarant* intends to bear testimony against the accused. That intent, in turn may be determined by querying *whether a* [**24] *reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.*" *United States v. Johnson (C.A.6, 2006), 440 F.3d 832, 843* (emphasis in original), citing *United States v. Cromer (C.A.6, 2004), 389 F.3d 662, 675.*

[*P47] At trial, neither of the victims testified. Instead, the state introduced their statements through various hearsay exceptions to which the defense offered various objections. On appeal, J.M. only argues the admission of hearsay statements under 803(4) violates his *confrontation clause* rights where the declarant was speaking to an individual who had a mandatory duty to

report any allegation of child abuse to the authorities. As persuasive precedent, J. M. cites *People v. Stechly (2007), 225 Ill.2d 246, 870 N.E.2d 333, 312 Ill. Dec. 268.*

[*P48] *Evid.R. 803(4)* permits the admission of "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment." *Evid.R. 803(4)*. Ohio Courts have extended this rule [**25] to social workers and psychologists. *State v. Arnold, Franklin App. No. 07AP-789, 2008 Ohio 3471, at P37* (statements to social worker admissible); *State v. Sheppard, 164 Ohio App.3d 372, 2005 Ohio 6065, at P23, 36, 842 N.E.2d 561* (statements to psychologist admissible).

[*P49] The Illinois Supreme Court in *Stechly* concluded that an interview conducted in a similar manner to those in this case resulted in testimonial statements. In part, the *Stechly* Court reached this conclusion because of the mandatory reporting duty Illinois law placed on the relevant medical personnel. *Stechly at 365*. However, the Supreme Court of Ohio has already had the occasion to address statements like those in the present case. *State v. Muttart, 116 Ohio St.3d 5, 2007 Ohio 5267, 875 N.E.2d 944*. In *Muttart*, the disputed statements included statements to a social worker conducting a screening before the child victim saw the doctor and statements to a clinical counselor during play therapy. *Id. at P15, 19*. The *Muttart* court held that these statements were not testimonial. *Id. at P61*. And we find the present case factually indistinguishable from *Muttart*.

[*P50] Therefore, we find that the trial court did not err.

[*P51] Accordingly, we overrule J.M.'s third assignment [**26] of error.

V.

[*P52] J.M. contends in his fourth assignment of error that the trial court's finding of delinquency was against the manifest weight of the evidence.

[*P53] When determining whether a criminal conviction is against the manifest weight of the evidence, we "will not reverse a conviction where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *State v. Eskridge (1988), 38 Ohio St.3d 56, 526 N.E.2d 304*, paragraph two of the syllabus. See, also, *State v. Smith, Pickaway App. No. 06CA7, 2007 Ohio 502, at P41*. We "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial granted." *Smith at P41*, citing *State v. Garrow (1995), 103 Ohio App.3d 368, 370-71, 659 N.E.2d 814*; *State v. Martin (1983), 20 Ohio App.3d 172, 175, 20 Ohio B. 215, 485 N.E.2d 717*. However, "[o]n the trial of a case, * * * the weight to be given the evidence and the credibility of the witnesses are primarily [**27] for the trier of the facts." *State v. DeHass (1967), 10 Ohio St.2d 230, 227 N.E.2d 212*, paragraph one of the syllabus.

[*P54] Here, the state introduced evidence of the following: the victim alleged J.M. raped her, doctors and other medical personnel testified that her physical condition was consistent with her accusation, a psychologist testified that the victim suffered a diagnosable condition consistent with the victim's accusation, and the mother of the victim testified the victim's behavior had altered in accord with the psychologist's diagnosis. Therefore, substantial evidence supports the trial court's finding of delinquency.

[*P55] Accordingly, we overrule J.M.'s fourth assignment of error.

VI.

[*P56] J.M. contends in his fifth assignment of error that the cumulative errors that transpired during the trial requires this court to reverse and remand this matter back to the trial court.

[*P57] Under the cumulative error doctrine, "a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." *State v. Garner (1995), 74 Ohio St.3d 49, 64, 1995 Ohio 168, 656 N.E.2d 623*; [**28] *State v. DeMarco (1987), 31 Ohio St.3d 191, 31 Ohio B. 390, 509 N.E.2d 1256*, paragraph two of the syllabus. "If, however, a reviewing court finds no prior instances of error, then the doctrine has no application." *State v. McKnight, Vinton App. No. 07CA665, 2008 Ohio 2435, at P108*; *State v. Hairston, Scioto App. No. 06CA3089, 2007 Ohio 3707, at P41*.

[*P58] As explained above, we find that the only assignment of error that actually brought error to our attention is the first one. And this error, as we noted, was relatively minor. Therefore, we find that cumulative errors did not occur.

[*P59] Accordingly, we overrule J.M.'s fifth assignment of error.

VII.

[*P60] J.M. contends in his sixth assignment of error that the trial court abused its discretion when it found that J.M.'s classification as a tier III juvenile sex offender was mandatory. J.M. also states that his classification as a public registrant status was an abuse of discretion. Apparently, the parties have resolved the public registrant issue by agreement.

[*P61] Based on our resolution of J.M.'s seventh assignment of error, we find J.M.'s sixth assignment of error moot and decline to address it. See *App.R. 12(A)(1)(c)*.

VIII.

[*P62] Finally, J.M. contends in his seventh assignment of error that [**29] he was denied the effective assistance of counsel. J.M. contends the following actions or omissions demonstrate that his trial counsel was ineffective. Counsel's failure to object to the state's requests to designate Kuss, Nemith, and Dr. Scansen as experts. Counsel's failure to object to admission of hearsay statements. J.M. also contends his counsel was ineffective at his classification hearing because he failed to argue that he was only a discretionary registrant and that he was not a public registrant qualified juvenile offender registrant.

[*P63] Ohio law provides a statutory right to counsel for juveniles in proceedings held under *R.C. 2152.83. R.C. 2151.352*; see, also, *In re C.A.C., 2nd Dist. Nos. 2005-CA-134, 2005-CA-135, 2006 Ohio 4003, at P44* (affording a juvenile a right to counsel at a classification hearing without considering the basis of the right). Ohio courts have construed other statutory rights to counsel as requiring the effective assistance of counsel. *State v. Jordan, 6th Dist. No. L-02-1270, 2003 Ohio 3428, at P28*; *State v. Price 10th Dist. No. 00AP-14342001, 2001 Ohio 8874*, unreported; *State v. Dotson 4th Dist. No. 99CA33, 2001 Ohio 2507*.

[*P64] "'In Ohio, a [**30] properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel's ineffectiveness.'" *State v. Countryman, 4th Dist. No. 08CA12, 2008 Ohio 6700, at P20*, quoting *State v. Wright, 4th Dist. No. 00CA39, 2001 Ohio 2473*, unreported; *State v. Hamblin (1988), 37 Ohio St.3d 153, 155-56, 524 N.E.2d 476*. To secure reversal for the ineffective assistance of counsel, one must show two things: (1) "that counsel's performance was deficient * * *" which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by [law;]" and (2) "that the deficient performance prejudiced the defense * * * [,]" which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. See, also, *Countryman at P20*. "Failure to establish either element is fatal to the claim." *In re B.C.S., Washington App. No. 07CA60, 2008 Ohio 5771, at P16*, citing *Strickland; State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373*, paragraph two of the syllabus.

[*P65] "A defendant establishes prejudice if 'there is a reasonable probability that, [**31] but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Meddock, Ross App. No. 08CA3020, 2008 Ohio 6051, at P13*, quoting *Strickland at 694*.

[*P66] First, J.M. contends his counsel's failure to object to expert testimony offered by the state demonstrates ineffective assistance of counsel. However, as we explained in regard to J.M.'s first assignment of error, any error in the examination of these witnesses was relatively minor. All of the witnesses had at least one degree in the relevant field as well as substantial work experience in the field. So any argument related to certification would almost certainly have failed. Some of Kuss's testimony likely transgressed into offering an opinion on the credibility of the victim in this case, but the exclusion of the offending portion of the testimony would have left the proof substantially intact. In other words, regardless of whether the error indicated the attorney fell below standards of professional conduct, J.M. fails to demonstrate that he suffered any prejudice on account of those alleged errors.

[*P67] [**32] Next, J.M. contends that his attorney's performance was deficient because he failed to raise a *confrontation clause* challenge to the hearsay "coming in via the other mandatory reporters." However, as noted above, this legal argument conflicts with Supreme Court of Ohio case law. We cannot say that an attorney has provided deficient performance where the attorney fails to make an objection foreclosed by Supreme Court of Ohio case law.

[*P68] Finally, J.M. contends that trial counsel was ineffective at the classification hearing for two reasons. First, counsel failed to argue that the trial court should have exercised its discretion and declined to issue an order classifying J.M. as both a juvenile offender registrant and as a tier III offender. Second, counsel failed to argue that the trial court erred when it classified J.M. as a public registrant. As noted above, the second issue was resolved through the agreement of the parties and any ineffective assistance of counsel in relation to it is now moot so we need not address it. See *App.R. 12(A)(1)(c)*.

[*P69] However, the trial court clearly erred in concluding that classification here is mandatory. Likewise, counsel clearly erred in failing to object [**33] or in failing to argue that J.M. was a discretionary registrant.

[*P70] The trial court classified J.M. a juvenile offender registrant pursuant to *R.C. 2152.83(B)*. "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 to determine whether the child should be classified as a juvenile offender registrant.]" *R.C 2152.83(B)(1)*. A second provision of the same section clearly provides the juvenile court with the discretion to decline to issue an order at this hearing. *R.C. 2152.83(B)(2)(a)*.

[*P71] If a juvenile court decides to issue an order classifying the juvenile as a juvenile offender registrant, then the court must determine which tier the juvenile should be classified under. For adults, this determination is mechanical and is answered exclusively by the nature of the convictions. However, under *R.C. 2950.01 (E) - (G)*, each tier includes a definition for delinquent children, which states that the tier includes "sex offender[s] who [are] adjudicated [**34] a delinquent child * * * for committing *any* sexually oriented offense[.]" *R.C. 2950.01(E)(3), (F)(3), (G)(3)* (emphasis added). This provision is precisely the same in each division defining the three different tiers. Ohio courts considering these provisions have generally concluded that these provisions provide the juvenile court with the discretion to classify a juvenile offender registrant in any of the three tiers. *In re G.E.S., Summit App. No. 24079, 2008 Ohio 4076, at P37*; *In re: A.R., Warren App. No. CA2008-03-036, 2008 Ohio 6566, at P36*; *In re P.M., Cuyahoga App. No. 91922, 2009 Ohio 1694, at P5*; *In re Adrian R., Licking App. No. 08-CA-17, 2008 Ohio 6581, at P17*; *In re Antwon C., Hamilton App. No. C-080847, 2009 Ohio 2567, at P13*; But, see, *In re S.R.B., Miami App. No. 08-CA-8, 2008 Ohio 6340, at P7*. Given the text of the statute, we join the majority of the courts of appeals who have held that a trial court has the discretion in classifying a juvenile offender registrant to a particular tier.

[*P72] The trial court expressly stated that the classification of the juvenile was "mandatory." Disposition Transcript at 4. Whether the trial court was referring to the classification as a [**35] juvenile offender registrant or as a tier III offender, the trial court's classification was discretionary. A subsequent judgment entry indicated that the court understood classification of J.M. as a juvenile offender registrant was discretionary, and therefore it is likely that the trial court erroneously thought its classification of J.M. as a tier III offender was mandatory. Trial counsel failed make any argument related to J.M.'s classification as either a juvenile offender registrant or as a tier III registrant. Therefore, we find the performance of J.M.'s attorney was deficient under the first prong of the *Strickland* test.

[*P73] As to the prejudice prong of the *Strickland* test, J.M. contends that "[t]he outcome in [J.M.]'s case clearly would have been different if defense counsel would have familiarized himself with the law; educated the court as to the statutes; and simply assisted the court in applying the law to his client." The failures of J.M.'s attorney do not so easily translate into evidence that the outcome of the proceedings would have been different. Nonetheless, where a court fails to appreciate it has discretion and an attorney fails to argue based on that discretion, [**36] we find our confidence in the outcome of the proceedings is undermined. See *In the Matter of B.W., Darke App. No. 1702, 2007 Ohio 2096, at P28-30*.

[*P74] Accordingly, we sustain J.M.'s seventh assignment of error insofar as he contends that he was denied effective assistance of counsel at his classification hearing.

IX.

[*P75] In conclusion, for the above stated reasons, we find J.M.'s sixth assignment of error moot; overrule all of J.M.'s remaining assignments of error except for part of his seventh. We sustain J.M.'s seventh assignment of error, in part, vacate J.M.'s classification and remand this matter to the trial court for a re-classification hearing.

JUDGMENT AFFIRMED, IN PART, AND VACATED, IN PART, AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, IN PART, and BE VACATED, IN PART, and this cause BE REMANDED to the trial court for a re-classification hearing. Appellant shall pay three-fourths of the costs taxed and Appellee shall pay one-fourth of the same.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pike County Common Pleas Court, Juvenile Division, to carry this judgment [**37] into execution.

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

Abele, J.: Concurs in Judgment and Opinion.

McFarland, J.: Concurs in Judgment Only.

For the Court

BY:

Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

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

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LEXSEE 2008 OHIO 6340

IN THE MATTER OF: S.R.B.

Appellate Case No. 08-CA-8

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, MIAMI COUNTY

2008 Ohio 6340; 2008 Ohio App. LEXIS 5281

December 5, 2008, Rendered

PRIOR HISTORY: [**1]
(Juvenile Appeal from (Common Pleas Court). Trial Court Case No. 20820013.

COUNSEL: GARY A. NASAL, by ROBERT E. LONG, Miami County Prosecutor's Office, Troy, Ohio, Attorney for Plaintiff-Appellee.

J. ANDREW WANNEMACHER, Miami County Public Defender's Office, Troy, Ohio, Attorney for Defendant-Appellant.

JUDGES: Sumner E. Walters, J. (Hon. Sumner E. Walters, retired from the Third Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.). BROGAN, J., and DONOVAN, J., concur.

OPINION BY: WALTERS

OPINION

WALTERS, J.

[*P1] Defendant-Appellant, S. R. B., appeals a judgment of the Miami County Common Pleas Court, Juvenile Division classifying him as a Juvenile Sex Offender Registrant/Tier III and subjecting him to community notification requirements. Appellant asserts that the trial court failed to make the appropriate finding under *R.C. 2950.11(F)(2)*, that Appellant would have been subject to community notification under the old law, and that the trial court failed to determine whether Appellant was a sexual predator under *R.C. 2950.01(E)(1)*.

[*P2] Because we find that an express finding is only required when the trial court determines that the offender is not subject to community notification, and because [**2] the community notification provisions are appropriate based upon the commission of an Aggravated Sexually Oriented Offense under the prior law, we affirm the judgment of the trial court.

[*P3] On three different occasions between July 27, 2007 and December 30, 2007, sixteen year-old S. R. B. engaged in both oral and vaginal intercourse with an eleven to twelve year-old female. He was charged with three counts of delinquency by reason of rape, in violation of *R.C. 2907.02(A)(1)(b)*, a felony of the first degree if committed by an adult. Pursuant to a plea agreement, S. R. B. admitted to and was adjudicated on one of the three counts. Prior to disposition, a sex offender evaluation and a predispositional investigation report were completed; both suggesting that S. R. B. was a moderate risk to re-offend because of a history of sexual activity with girls in addition to the present victim, a significant history of anger, drug, and alcohol problems, and substantial prior involvement in Juvenile Court rehabilitation programs.

[*P4] At disposition, contrary to the recommendation of the State, the Court permitted S. R. B. to remain in the community on probation, with outpatient sex offender treatment. The [**3] Court also classified S. R. B. as a Juvenile Sex Offense Registrant/Tier III sex offender, and the Court required Community Notification. It is from this judgment, ordering Community Notification, that Appellant brings this timely appeal, setting forth two assignments of error for our review.

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED WHEN IT FAILED TO MAKE THE APPROPRIATE FINDING UNDER

OHIO REVISED CODE SECTION 2950.11(F)(2).

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ABUSED ITS DISCRETION WHEN DETERMINING TO SUBJECT THE APPELLANT TO COMMUNITY NOTIFICATION REQUIREMENTS.

[*P5] In the first assignment of error, S. R. B. argues that the trial court is required to make an affirmative finding that he would have been subject to community notification under the prior law, and in the second assignment of error, the appellant contends that the finding that the offense that S. R. B. committed was an aggravated sexually oriented offense may only be made after a determination that the offender is a sexual predator.

[*P6] The enactment of the "Adam Walsh Law" by the Ohio legislature, has resulted in a confusing array of very poorly worded statutory provisions that require a trial court to constantly refer [**4] to the law in effect prior to the enactment of the Adam Walsh Law in order to apply the current law.

[*P7] In this case, the offense that S. R. B. admitted required, by definition, that the court classify him as a Juvenile Offender Registrant/Tier III sex offender. See *R.C. 2152.83(A)(1), R.C. 2950.01(A)(1), (G)(1)(a), (M).* This classification is non-discretionary, and is based upon the conviction for Rape, *R.C. 2907.02(A)(1) (b)* after January 1, 2002, while the offender was sixteen years old.

[*P8] While the above classification is mandatory, the decision to impose the community notification requirements was discretionary with the trial court. *R.C. 2152.83(C)(2)* provides that after determining that the offender is a tier III offender, and after determining that he is not a public registry-qualified offender, that " * * * the judge may impose a requirement subjecting the child to the victim and community notification provisions of *R.C. 2950.10* and *2950.11 of the Revised Code.*"

[*P9] In determining whether to impose community notification, *R.C. 2950.11(F)(2)* provides that "[t]he notification provisions of this section do not apply * * * if a court finds at a hearing after considering the factors described [**5] in this division that the person would not be subject to the notification provisions of this section that existed immediately prior to [January 1, 2008] * * *."

[*P10] Appellant bootstraps this statutory requirement to make a finding, in the event the court determines that the offender would not have been subject to the community notification provision under the prior law, to suggest that the corollary affirmative finding ought to be required before the court may impose community notification. Because the statute does not require such an affirmative finding, we decline to add this requirement to the statute, and the first assignment of error will be overruled.

[*P11] While the new law eliminates the prior provisions requiring the trial court to determine whether an offender is a sexual predator or a habitual sexual offender, the legislature apparently wants a juvenile sex offender to be subject to community notification under the new law only if he would have been subject to community notification under the old law. Thus, the trial court is mandated to determine under repealed law what the result would have been in making its determination under the new law.

[*P12] Under the prior law, *R. C. 2950.11(F)(1),* [**6] community notification provisions were applicable to a delinquent child in any of the following three categories: "(a) [t]he * * * delinquent child has been adjudicated a sexual predator * * * or has been adjudicated a child-victim predator * * *. (b) [t]he * * * delinquent child has been determined * * * to be a habitual sex offender or a habitual child-victim offender * * *. (c) [t]he sexually oriented offense * * * is an aggravated sexually oriented offense, regardless of whether the offender has been adjudicated a sexual offender relative to the offense or has been determined to be a habitual sex offender."

[*P13] *R.C. 2950.01(O),* as in effect immediately prior to January 1, 2008, defined "aggravated sexually oriented offense," among other things, as: "* * * a violation of division *(A)(1)(b) of section 2907.02 of the Revised Code,* committed on or after June 13, 2002 * * *." Therefore, by definition, the offense that S. R. B. admitted and for which he was adjudicated is an aggravated sexually oriented offense.

[*P14] Appellant relies on language taken from *State v. Fulton, Miami App. No. 06-CA-38, 2007 Ohio 4894,* where this court stated that "[r]eading *R.C. 2950.09 (B)(4)* in its entirety, we [**7] construe this statute to require a trial court to indicate that the subject offense was an aggravated sexually oriented offense, *after determining that the offender is a sexual predator.*" Appellant says that the trial court here was required to determine that S. R. B. was a sexual predator before it could determine him to have committed an aggravated sexually oriented offense. *Id. at P 8* (emphasis in original). This holding in *Fulton* is inapplicable herein.

[*P15] In *Fulton*, the trial court determined the offender to be a sexual predator and an aggravated sexually oriented offender. Under the then existing law, there were different reporting requirements for sexual predators vis a vis aggravated sexually oriented offenders. Fulton argued that the trial court erred in making the sexual predator determination, and that this court should reverse that determination and allow him to be subject only to the reporting requirements applicable to an aggravated sexually oriented offender. We found error in the trial court's determination of the sexual predator status and remanded the case for a new sexual predator hearing. In this case, the reporting requirements, under the new law, are based upon the [**8] appellant's mandatory classification as a Tier III offender.

[*P16] In this case, as of January 1, 2008, the applicable statute clearly provides that the trial court may impose the community notification provisions after a determination that under the prior law, the offender would have been either a sexual predator, a habitual sexual offender, or that he had been adjudicated for an aggravated sexually oriented offense. Because, by definition, the offense on which S.R.B. was adjudicated was an aggravated sexually oriented offense, the trial court was not required to determine whether he was also a sexual predator or a habitual sexual offender. Therefore, the trial court did not abuse its discretion in imposing the community notification provisions.

[*P17] Appellant's second assignment of error is overruled.

[*P18] For the foregoing reasons, the judgment of the Miami County Common Court, Juvenile Division is hereby affirmed.

. . . .

(Hon. Sumner E. Walters, retired from the Third Appellate District, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.)

BROGAN, J., and DONOVAN, J., concur.

LexisNexis

LEXSEE 2009 OHIO 4224

IN [RE: T.M., an Adjudicated] delinquent child.

Case No. 08CA863

COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT, ADAMS COUNTY

2009 Ohio 4224; 2009 Ohio App. LEXIS 3562

July 29, 2009, File-stamped

DISPOSITION: [**1] JUDGMENT AFFIRMED, IN PART, VACATED, IN PART, AND CAUSE REMANDED.

COUNSEL: Appearances: Elizabeth R. Miller, Columbus, Ohio, for appellant.

C. David Kelley, Adams County Prosecutor, and Aaron E. Haslam, Assistant Adams County Prosecutor, West Union, Ohio, for appellee [1].

1 C. David Kelley was the elected County Prosecutor at the time the appeal case was filed. However, Aaron E. Haslam is now the elected County Prosecutor.

JUDGES: Roger L. Kline, Presiding Judge. Abele, J.: Concurs in Judgment and Opinion. McFarland, J.: Concurs in Judgment Only.

OPINION BY: Roger L. Kline

OPINION

DECISION AND JUDGMENT ENTRY

Kline, P.J.:

[*P1] T.M. appeals the juvenile court's classification of him as a juvenile offender registrant and, under Senate Bill 10, as a tier III registrant. On appeal, T.M. contends that he was denied effective assistance of counsel because his attorney failed to argue that the trial court should use its discretion and not subject him to classification. We agree and vacate the classification. T.M. contends Ohio's laws requiring registration and notification for sex offenders violate the United States and Ohio Constitutions. T.M. contends these laws violate the *Due Process Clause*, the Ex Post Facto Clause, the *Retroactivity Clause*, and the [**2] prohibition against cruel and unusual punishment. We disagree and find T.M. has failed to carry his burden to show beyond a reasonable doubt that these laws violate the United States or Ohio Constitution. Accordingly, we affirm, in part, and vacate, in part, the judgment of the trial court. We remand this cause to the trial court for re-classification under *R.C. 2152.83(B)*.

I.

[*P2] On September 12, 2005, the state filed a complaint in juvenile court. The state alleged that 15-year-old T.M. was a delinquent child because he had engaged in sexual conduct, between December 1, 2001 and February 14, 2005, with a person less than thirteen years of age in violation of *R.C. 2907.02(A)(1)(b)*.

[*P3] T.M. admitted to the charge. As a result, the court found that T.M. was a delinquent child. The court later sentenced T.M. to the care and custody of the Ohio Department of Youth Services for a minimum period of one year and a maximum period not to exceed his 21st birthday. The court stated in its entry that a classification hearing would be held upon the child's release from custody.

[*P4] T.M. was scheduled for release on January 2, 2008. The court therefore scheduled the classification hearing for December 26, [**3] 2007. The court found that T.M. was (1) a "Juvenile Sex Offender Registrant" and (2) a tier III registrant under recently enacted Senate Bill 10. The court reduced its findings to writing and filed two entries showing the same on February 11, 2008.

[*P5] T.M. filed a motion for reconsideration. The trial court denied the same by entry on February 21, 2008.

[*P6] T.M. appeals the trial court's classification determinations as stated in its February 11, 2008 entries and asserts the following assignments of error: I. "The trial court erred when it classified [T.M.] as a juvenile sexual offender registrant because it did not first make a determination as to [T.M.]'s age at the time of the offense and even if [T.M.] was age eligible for classification, the court erred because [T.M.] was only subject to discretionary classification and the court failed to consider all of the factors mandated by *R.C. 2152.83*." II. "[T.M.] was denied the effective assistance of counsel when trial counsel failed to educate herself about the age distinctions in the classification law and the difference between mandatory and discretionary juvenile offender registrants and to ensure the court understood the non-mandatory [**4] nature of her client's duty to register under *R.C. 2152.83*, which led the court to classify [T.M.] as a Tier III juvenile offender registrant, as well as failed to object to the court's classification order despite evidence that no registration was possible or appropriate." III. "The trial court erred when it applied Senate Bill 10 to [T.M.], as the application of Senate Bill to [T.M.] violates his right to due process as guaranteed by the *Fourteenth Amendment to the United States Constitution* and *Article I, Section 16 of the Ohio Constitution*." IV. "The trial court erred when it applied Senate Bill 10 to [T.M.], as the retroactive application of Senate Bill 10 to [T.M.] violates the Ex Post Facto clause of the United States Constitution and the *Retroactivity Clause of the Ohio Constitution*." V. "The trial court erred when it applied Senate Bill 10 to [T.M.], as the application of Senate Bill 10 to [T.M.] violates the United States Constitution's prohibition against cruel and unusual punishments."

II.

[*P7] We address T.M.'s second assignment of error out of order. T.M. contends that he was denied the effective assistance of counsel.

[*P8] Ohio law provides a statutory right to counsel for juveniles [**5] in proceedings held under *R.C. 2152.83*. *R.C. 2151.352*; see, also, *In re C.A.C., 2nd Dist. Nos. 2005-CA-134, 2005-CA-135, 2006 Ohio 4003, at P44* (affording a juvenile a right to counsel at a classification hearing without considering the basis of the right). Ohio courts have construed other statutory rights to counsel as requiring the effective assistance of counsel. *State v. Jordan, 6th Dist. No. L-02-1270, 2003 Ohio 3428, at P28*; *State v. Price, 10th Dist. No. 00AP-1434, 2001 Ohio 8874*, unreported; *State v. Dotson (Mar. 12, 2001), 4th Dist. No. 99CA33, 2001 Ohio 2507*.

[*P9] "'In Ohio, a properly licensed attorney is presumed competent and the appellant bears the burden to establish counsel's ineffectiveness.'" *State v. Countryman, 4th Dist. No. 08CA12, 2008 Ohio 6700, at P20*, quoting *State v. Wright, 4th Dist. No. 00CA39, 2001 Ohio 2473*; *State v. Hamblin (1988), 37 Ohio St.3d 153, 155-56, 524 N.E.2d 476*. To secure reversal for the ineffective assistance of counsel, one must show two things: (1) "that counsel's performance was deficient* * * " which "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by [law;]" and (2) "that the [**6] deficient performance prejudiced the defense * * * [,]" which "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington (1984), 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674*. See, also, *Countryman at P20*.

[*P10] "A defendant establishes prejudice if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Meddock, 4th Dist. No. 08CA3020, 2008 Ohio 6051, at P13*, quoting *Strickland at 694*.

[*P11] "When counsel's alleged ineffectiveness involves the failure to pursue a motion or legal defense, this actual prejudice prong of *Strickland* breaks down into two components. First, the defendant must show that the motion or defense 'is meritorious,' and, second, the defendant must show that there is a reasonable probability that the outcome would have been different if the motion had been granted or the defense pursued." *In re Adrian R., 5th Dist. No. 08-CA-17, 2008 Ohio 6581, at P23*, citing *Kimmelman v. Morrison (1986), 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305* (other citations [**7] omitted).

[*P12] Here, under the first prong of the *Strickland* test, we find counsel's performance at the classification hearing deficient.

[*P13] "The court that adjudicates a child a delinquent child, on the judge's own motion * * * may conduct at the time of the child's release from the secure facility a * * * hearing to determine whether the child should be classified a juvenile offender registrant." *R.C 2152.83(B)(1)-(2)*. However, the juvenile court has discretion and may decline to issue an order at this hearing. *R.C. 2152.83(B)(2)(a)*. If the court issues an order, it must consider the six factors listed in *R.C. 2152.83(D)*.

[*P14] Here, it appears from the record that not only T.M.'s counsel, but the prosecuting attorney and the court, may have mistakenly believed that T.M.'s classification was mandatory. T.M.'s counsel did not raise any

argument that T.M. should not be subject to classification. Further, T.M.'s counsel made no argument based on the factors listed as mandatory considerations under *R.C. 2152.83(D)* before the court issued its order. Stated differently, even if the trial court understood the discretionary nature of its determination, defense counsel made no argument that indicated that [**8] the trial court should decline to issue an order classifying T.M. as a juvenile offender registrant, let alone make that argument on the basis of the mandatory factors listed in the statute. Therefore, for these reasons, we find the performance of T.M.'s attorney deficient.

[*P15] We now examine the second prong of the *Strickland* test, i.e., the prejudice prong. Under *Strickland*, as noted above, the question is whether there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. As we stated earlier, a reasonable probability is a probability sufficient to undermine confidence in the outcome.

[*P16] The record indicates T.M.'s argument has some merit. The trial court did consider whether T.M. should be subjected to community notification and concluded that he should not be. Transcript at 43. Furthermore, the court stated, "It's been a long time since I've seen a transformation [* * *] I mean, a complete change in one person, * * * to the positive[.] * * * That you've made a lot of good decisions. * * * Department of Youth Services has done a tremendous job in bringing back a much better product than that which we had sent. So, I see no [**9] reason why you shouldn't be highly successful in this life." Transcript at 66. Thus, in this case, the court may well have exercised its discretion under *R.C. 2152.83(B)(2)(a)* to decline to issue an order that classifies the child a juvenile offender registrant. Of course, the offense T.M. admitted to is a serious one, and the court may well have classified T.M. as a juvenile offender registrant anyway. But under these circumstances, we find that the failure of trial counsel to raise any argument in this case that T.M. should not be subject to classification undermines our confidence in the outcome of the hearing. Consequently, under the second prong of the *Strickland* test, we find that T.M. was prejudiced by his counsel's performance.

[*P17] In fairness, T.M. raised the issue of the trial court's discretion to not issue an order classifying a child in the "motion for reconsideration." However, there is no apparent rule that would allow such a motion under the rules for juvenile procedure. The statutory provision that allows for the filing of petitions to reclassify or declassify does not apply because the motion for reconsideration was filed within three years of the first classification [**10] hearing. *R.C. 2152.85(B)(1)*. The trial court does not explain why the motion was denied. "However, after a trial court issues a final, appealable order, a motion for reconsideration of that final order is a nullity, and any judgment entered on such a motion is also a nullity." *Napier v. Napier, 4th Dist. No. 08CA9, 2009 Ohio 3111, at P7*, citing *Pitts v. Ohio Dep't of Trans. (1981), 67 Ohio St. 2d 378, 379, 423 N.E.2d 1105*; *Kauder v. Kauder (1974), 38 Ohio St.2d 265, 267, 313 N.E.2d 797*. Therefore, we will not consider the motion for reconsideration or the judgment denying it.

[*P18] Accordingly, we sustain T.M.'s second assignment of error. We vacate T.M.'s classification and remand this cause to the trial court for a re-classification hearing.

IV.

[*P19] T.M.'s third, fourth, and fifth assignments of error consist of challenges to the constitutionality of S.B. 10.

[*P20] As T.M.'s constitutional claims are matters of law, we review them de novo. *Long Beach Ass'n, Inc. v. Jones (1998), 82 Ohio St.3d 574, 576*, citing *Ohio Bell Tel. Co. v. Pub. Util. Comm. (1992), 64 Ohio St. 3d 145, 147, 593 N.E.2d 286*.

[*P21] Statutes enacted in Ohio are "presumed to be constitutional." *State v. Ferguson, 120 Ohio St.3d 7, 2008 Ohio 4824, at P12, 896 N.E.2d 110*, citing *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas (1967), 9 Ohio St.2d 159, 161, 224 N.E.2d 906*. [**11] This presumption remains until one challenging a statute's constitutionality shows, "beyond reasonable doubt, that the statute is unconstitutional." Id., citing *Roosevelt Properties Co. v. Kinney (1984), 12 Ohio St.3d 7, 13, 12 Ohio B. 6, 465 N.E.2d 421*.

A.

[*P22] T.M. in his third assignment of error contends that the application of S.B. 10 to him violates his right to due process of law. T.M. raises two arguments that S.B. 10 violates his due process rights.

[*P23] First, T.M. contends that the statute violates procedural due process as it substantially decreased the procedural protections afforded to juvenile offenders. Most notably, T.M. states, "Under Senate Bill 10, a court no longer makes specific case-by-case determinations of a juvenile offender's dangerousness or likelihood to reoffend; rather, the court simply notes the offense committed and assigns the child to the corresponding registration tier." T.M.'s Brief at 14. But nowhere does T.M. provide a citation or an argument for the principle that a sex offender classification system violates due process where that system does not make case by case decisions.

[*P24] We have previously explained procedural due process rights in reference to S.B. 10 in *State v.*

Netherland, 4th Dist. No. 08CA3043, 2008 Ohio 7007, at P17. [**12] "The right to procedural due process is found in the *Fourteenth Amendment to the United States Constitution* and *Section 16, Article I of the Ohio Constitution.* To trigger protections under these clauses, a sex offender must show that he was deprived of a protected liberty or property interest as a result of the registration requirement. See *Steele v. Hamilton Cty. Community Mental Health Bd., 90 Ohio St.3d 176, 181, 2000 Ohio 47, 736 N.E.2d 10.* Although due process is 'flexible and calls for such procedural protections as the particular situation demands,' *Mathews v. Eldridge (1976), 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed.2d 18*, quoting *Morrissey v. Brewer (1972), 408 U.S. 471, 481, 92 S.Ct. 2593, 33 L.Ed.2d 484*, the basic requirements of this clause are notice and an opportunity to be heard. *State v. Hochhausler, 76 Ohio St.3d 455, 459, 1996 Ohio 374, 668 N.E.2d 457." Netherland at P17.*

[*P25] The Supreme Court of the United States recently considered a procedural due process challenge to Connecticut's sex offender registry. *Connecticut Dep't of Public Safety v. Doe (2003), 538 U.S. 1, 123 S. Ct. 1160, 155 L. Ed. 2d 98.* The registration scheme at issue in that case, much like S.B. 10, relied exclusively on the nature of [**13] the conviction. *Id. at 4-5.* The petitioner argued he was entitled to a hearing so he could demonstrate that he was not currently dangerous. *Id. at 4.* The Court held that the state was under no obligation to provide a hearing to establish a fact unnecessary under the statute, unless the registrant could show that fact was necessary because of a constitutional provision. *Id.* Likewise, for T.M. to prevail on this assignment of error, T.M. must demonstrate that S.B. 10 violates substantive due process. A procedure to demonstrate a particular fact is only constitutionally required when the constitution requires that fact to be determined.

[*P26] "[T]he state violates an individual's substantive due process rights when it engages in 'conduct which shocks the conscience and offends those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.'" *Walters v. Ghee (Apr. 1, 1998), 4th Dist. No. 96CA2254, 1998 Ohio App. LEXIS 1421*, unreported, quoting *Newell v. Brown (C.A.6 1992) 981 F.2d 880* (other internal quotations omitted).

[*P27] T.M. contends S.B. 10 somehow violates substantive due process because it inflicts punishment on the accused [**14] and this conflicts with the principles of juvenile law, which is meant to promote rehabilitation and in furtherance of that goal the law "should make every effort to avoid [juveniles] being attainted as criminal before growing to the full measure of adult responsibility." T.M.'s Brief at 14, quoting *State v. Agler (1969), 19 Ohio St.2d 70, 71, 249 N.E.2d 808.*

[*P28] However, this court has repeatedly held that S.B. 10 is civil in nature; a conclusion that necessarily rejects T.M.'s argument. *State v. Coburn, 4th Dist. No. 08CA3062, 2009 Ohio 632, at P12*; *State v. Randlett, 4th Dist. No. 08CA3046, 2009 Ohio 112, at P14*; *State v. Linville, 4th Dist. No. 08CA3051, 2009 Ohio 313, at P11*; *State v. Messer, 4th Dist. No. 08CA3050, 2009 Ohio 312, at P12.* We see no reason to revisit this conclusion now, and we find S.B. 10 is not so punitive as to frustrate the purpose of Ohio's juvenile law.

B.

[*P29] T.M. in his fourth assignment of error contends that the application of S.B.10 to him violates the Ex Post Facto Clause of the United States Constitution and the *Retroactivity Clause of the Ohio Constitution.*

[*P30] Previously, we have found S.B. 10 does not violate the United States Constitution's prohibition on ex post facto laws [**15] or the Ohio Constitution's prohibition on retroactive laws; see, e.g., *Coburn at P8-13*; *Randlett at P8-15*; *Linville at P7-12*; *Messer at P7-13.* We see no reason to revisit this issue for this case.

C.

[*P31] T.M. in his fifth assignment of error contends the application of S.B. 10 to him violates the United States Constitution's prohibition against cruel and unusual punishments.

[*P32] This court has not yet addressed these specific challenges to S.B. 10, but other Ohio courts have found that S.B. 10 does not constitute either (1) excessive punishment; see, e.g., *Holcomb v. State, 3rd Dist. Nos. 8-08-23, 8-08-24, 8-08-25, 8-08-26, 2009 Ohio 782, at P11*; *State v. Williams, 12th Dist. No. CA2008-02-029, 2008 Ohio 6195, at P103-105*; *State v. Byers, 7th Dist. No. 07 CO 39, 2008 Ohio 5051, at P75-77*; or (2) cruel and unusual punishment. See, e.g., *Gildersleeve v. State, 8th Dist. Nos. 91515, 91519, 91521, 91532, 2009 Ohio 2031, at P41-43*; *In re M.E., 5th Dist. No. 2008CA00161, 2009 Ohio 1762, at P24*; *Montgomery v. Leffler, 6th Dist. No. H-08-011, 2008 Ohio 6397, at P24*; *In re Smith, 3rd Dist. No. 1-07-58, 2008 Ohio 3234, at P37-38.* "As long as *R.C. Chapter 2950* is viewed as civil, and not criminal--remedial, [**16] and not punitive--then the period of registration cannot be viewed as punishment. Accordingly, it logically follows that it does not constitute cruel and unusual punishment since the punishment element is lacking." *Byers at P77.* We choose to follow *Byers* and all other Ohio courts that holds the same. Therefore, we find that, as applied to T.M., S.B. 10 does not constitute either excessive punishment or cruel and unusual punishment.

D.

[*P33] In T.M. third, fourth, and fifth assignments of error, we find that T.M. has failed to show beyond a reasonable doubt that S.B. 10 is unconstitutional.

[*P34] Accordingly, we overrule T.M. third, fourth, and fifth assignments of error.

IV.

[*P35] T.M. contends in his first assignment of error that the lower court erred by failing to consider mandatory statutory considerations before classifying him as a juvenile offender registrant. However, based on our resolution of T.M.'s second assignment of error, T.M.'s first assignment of error is moot. See *App.R. 12(A)(1)(c)*.

V.

[*P36] In conclusion, we sustain T.M.'s second assignment of error, vacate the lower court's classification and remand this cause for re-classification. We overrule T.M.'s third, fourth, and fifth assignments [**17] of error. Finally, we find T.M.'s first assignment of error moot.

JUDGMENT AFFIRMED, IN PART, VACATED, IN PART, AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, IN PART, and VACATED, IN PART. We remand this cause to the trial court for a re-classification hearing. Appellant and Appellee shall equally pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

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

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

Abele, J.: Concurs in Judgment and Opinion.

McFarland, J.: Concurs in Judgment Only.

For the Court

BY:

Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

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

LEXSTAT O.R.C. 2152.191

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH JULY 16, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2009 ***

TITLE 21. COURTS -- PROBATE -- JUVENILE
CHAPTER 2152. DELINQUENT CHILDREN; JUVENILE TRAFFIC OFFENDERS

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ORC Ann. 2152.191 (2009)

§ 2152.191. Children subject to sex offender registration and notification law

If a child is adjudicated a delinquent child for committing a sexually oriented offense or a child-victim oriented offense, if the child is fourteen years of age or older at the time of committing the offense, and if the child committed the offense on or after January 1, 2002, both of the following apply:

(A) Sections 2152.82 to 2152.86 and Chapter 2950. of the Revised Code apply to the child and the adjudication.

(B) In addition to any order of disposition it makes of the child under this chapter, the court may make any determination, adjudication, or order authorized under sections 2152.82 to 2152.86 and Chapter 2950. of the Revised Code and shall make any determination, adjudication, or order required under those sections and that chapter.

HISTORY:

149 v S 3. Eff 1-1-2002; 150 v S 5, § 1, eff. 7-31-03; 152 v S 10, § 1, eff. 1-1-08.