

ORIGINAL

IN THE SUPREME COURT OF OHIO

KENNETH RAY McKINNEY,

: Supreme Court No.:

Appellant(s),

:

09-1864

vs.

: On Appeal from the Warren

County Court of Appeals,

STATE OF OHIO,

: Twelfth Appellate District

Case No.: 2009 04 041

Appellee(s).

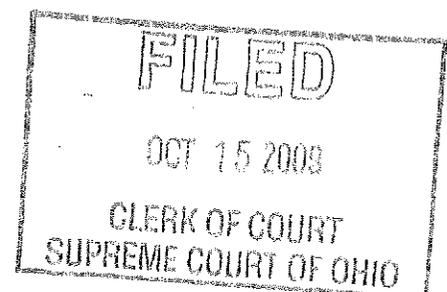
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MEMORANDUM IN SUPPORT OF JURISDICTION OF THE
SUPREME COURT OF OHIO ON BEHALF OF APPELLANT,
KENNETH RAY McKINNEY

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United States Constitutions inflicting a second punishment upon a sex offender for a single offense. Because S.B. 10 is punitive in both its intent and effect,⁶ the registration and notification requirements operate as a second punishment.

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II. STATEMENT AS TO WHY THIS CASE PRESENTS QUESTIONS OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS.

III. Statement of the Case:

This case provides the Court the opportunity to directly address all of the critical constitutional questions presented by Ohio's newly-enacted sex-offender classification law, Senate Bill 10. Challenges to the law based upon separation of powers, retroactivity, ex post facto, double jeopardy, due process, cruel and unusual punishment and breach of contract were raised and addressed below. Ohio's trial and appellate courts need this Court to direct them how to address the thousands of cases crowding their dockets that raise these issues. Many courts have stayed all S.B. 10 proceedings pending a ruling from this Court. Although prudent, these stays have a price in uncertainty and county by-county inconsistency. County sheriffs lack clear guidance regarding when and how often offenders are required to report, what information they are required to disclose, where they are permitted to reside, and what information must be provided to the public. Crime victims and members of the public do not know whether they can rely on the accuracy of the public registry. Law-abiding offenders do not know when or if, their judicially-imposed punishment will end, and the uncertainty may result in offenders facing felony failure to register charges despite efforts to comply. This Court should take this case and provide clarity and consistency on these issues for all concerned.

From Megan's Law to the Adam Walsh Act

In 1996, the General Assembly passed and the Governor signed H.B. 180, Ohio's version of Megan's Law--a comprehensive program of classification, registration, and

notification designed to protect the public from recidivism by sex offenders. Because H.B. 180 was specifically made retroactive, Ohio courts were required to resolve whether the law violated either the Retroactivity Clause of the Ohio Constitution or the Ex Post Facto Clause of the United States Constitution. In *State v. Cook* (1998), 83 Ohio St.3d 404, this Court held that it did not, that H.B. 180 had a remedial purpose and was narrowly targeted to track likely recidivists.

In 2003, the General Assembly adopted the first major revisions of Megan's Law. In *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, over dissents by three Justices, this Court concluded that the revised law, although more onerous than the 1996 law, survived retroactivity and ex post facto challenges.

In 2007, the General Assembly replaced Megan's Law entirely. S.B. 10, the Adam Walsh Act, abandoned H.B. 180's narrowly-focused, targeted scheme aimed at protecting the public from likely recidivists, and replaced it with sweeping new classification and registration requirements. S.B. 10 mandates that all previously classified offenders be reclassified under the new system and arbitrarily treats those previously found unlikely to reoffend the same as those found the most likely to reoffend.

The new system abandons all concerns with future dangerousness, increases the frequency and duration of registration, as well as requiring additional registrations in multiple locations. In short, it replaces remediation and regulation with punishment. Under S.B. 10, tens of thousands of people have been reclassified. Thousands of them have petitioned for review of the details and the constitutionality of their reclassifications. They have argued not just that the law violates the Ex Post Facto and

Retroactivity Clauses but also that its application to them violates the separation of powers, due process, double jeopardy, and cruel and unusual punishment. They further argue that, when applied to offenders who had been classified following negotiated pleas, it impairs contracts in violation of the Ohio and United States Constitutions.

This statement as well as other parts of the brief are taken substantially from that brief filed in the case of *State of Ohio v. Bodkye*, Supreme Court Case No. 08-2502. This case has been accepted by the Court and is currently in the briefing stage. Appellants in this case asks that his case be held pending resolution in the *Bodkye* case.

In addition, Judge Ringland in this case and as he had in *Sears v. State*, 2009- Ohio 541 dissented arguing that retroactive modification of judicially determined sex offender classification violate the Separation of Powers Doctrine.

IV. Statement of the Facts

The appellant in this case, Kenneth McKinney, was reclassified as a Tier III offender. After being notified of the reclassification he filed an appeal and a declaratory judgment action. The Common Pleas Court, based on the Twelfth District Court of Appeals decision in *State v. Williams*, 2008 - Ohio - 6195 denied his challenged to his reclassification.

Appellant appealed to the Twelfth District Court of Appeals who affirmed the decision of the Warren County Common Pleas Court

This Court has accepted jurisdiction in the Twelfth District Court case. *State v. Williams* Docket No. 2009 - 0088 and held it for the decision in *State v. Bodkye*.

Appellant's offenses occurred prior to the original Megan's Law. In 1997 appellant was still in the penitentiary when a hearing was held in the Butler County Court of Common Pleas

where appellant had been convicted. At the original classification hearing the Trial Court found the sexual classification scheme was unconstitutional as being retroactive punishment.

The First District Court of Appeal reversed and remanded the Trial Court to issue certain orders, but did not include an order for community notification. No appeal was taken and that decision was affirmed. No further action was taken until appellant received his reclassification notice at which time he filed for a hearing in the Warren County Court of Common Pleas in which his challenge of his reclassification was denied and affirmed by the Twelfth District Court of Appeals.

V. Propositions of Law:

Proposition of Law I:

Application of S.B. 10, Ohio's version of the Adam Walsh Act, to offenders whose crimes occurred before its effective date violates the Ex Post Facto Clause of the United States Constitution.

Argument

Applying S.B. 10 to those whose crimes occurred before the date it was enacted violates the Ex Post Facto Clause of the United States Constitution. Clause 1, Section 10, Article I, United States Constitution.

Prior to S.B. 10, a person convicted of a sexually oriented offense was entitled to a hearing at which a court would determine and impose a classification: sexually oriented, habitual, or predator. Habitual offenders had been found guilty of a prior sexual or child-victim offense. Former R.C. 2950.09(C)(2)(c)(ii). Sexual predators were found "likely to engage in the future in one or more sexually oriented offenses." Former R.C.

2950.01(E). Sexually oriented offenders, by contrast, had not previously been convicted of sexual offenses and were not likely to commit them in the future. The frequency, duration, and onerousness of registration and community notification requirements increased from sexually oriented offenders to habitual offenders to sexual predators. The legislative purpose was clearly remedial: to protect the public from the likely recidivist. The classification, registration, and notification system advanced that purpose. *Cook, supra*, at 421 (Megan's Law designed 'to protect members of the public against those most likely to reoffend"). Because the purpose and effect of Megan's Law were primarily remedial, punitive, application to those whose offenses occurred before its effective date did not violate the Ex Post Facto Clause. "That is not true of S.B. 10. Both the purpose and the effect of S.B. 10 are dramatically different.

Although S.B. 10 retains from Megan's Law language denying a punitive purpose, such a declaration of intent is not dispositive. Formal attributes of legislative enactment such as manner of codification and enforcement procedures are also probative. *Smith v. Doe* (2003), 538 U.S. 84, 94.

As the legislature placed S.B. 10 squarely within Ohio's Criminal Code, so the enforcement mechanisms it established are clearly criminal. Tier III offender sexual classification is part and parcel of the criminal punishment. See R.C. 2929.19(B)(4)(a) ("court *shall* include in the offender's sentence a statement that the offender is a tier III sex offender/child-victim offender ...") (emphasis added). As former Attorney General Marc Dann said of S.B. 10, "by incorporating [classification and registration] *into the penalties*, the trial itself will provide sufficient due process" (emphasis added) 4

Furthermore, failure to comply with the registration, verification, or notification requirements of S.B. 10 subjects the offender to criminal prosecution and criminal penalties. R.C. 2950.99. See *State v. Williams*, 114 Ohio St.3d 103, 2007-Ohio-3268, at ¶10; cf., *Mrkaloff v. Walsh* (N.D. Ohio Sept. 4, 2007), 2007 WL 2572268 at *6. Finally, the legislative history of S.B. 10 indicates that the General Assembly did not enact the law to protect the public. As Senator Lance Mason noted, the law was enacted to "stiffen penalties." Senate Session, Wednesday, May 16, 2007.

Under Megan's Law, classification and registration requirements were based on judicial determinations of future dangerousness, of a continuing threat to the community. Under S.B. 10, future dangerousness, the risk to the community, is wholly irrelevant. All that matters is the offense of conviction. S.B. 10 replaced a "narrowly tailored" solution, *Cook* at 417, with simple punishment that reflects neither risk to the community nor likelihood of reoffending. Unlike Megan's Law which required hearings and determinations of danger, S.B. 10 classifies sex offenders solely on the offense of conviction. Deliberately requiring non-dangerous individuals to register for the rest of their lives underscores the General Assembly's intent to make S.B.10 a criminal statute. Even if S.B. 10 were not punitive in intent, it is punitive in effect "so as to negate a declared remedial intention." *Allen v. Illinois*, 478 U.S. 364, 369.

S.B. 10 imposes burdens that have historically been regarded as punishment and operate as affirmative disabilities and restraints. Limitations regarding where offenders may live cause S.B. 10 to resemble colonial punishments of "shaming, humiliation, and banishment." *Smith v. Doe*, 538 U.S. at 98. They resemble conditions of probation or

parole. See *Mikloff, supra* at *9. S.B. 10 categorically bars sex offenders from residing within 1000 feet of a school, preschool, or child day-care center. R.C. 2950.034.5 Additionally, each time that a Tier III offender registers, updated information may be sent to neighbors, school superintendents and principals, preschools, daycares, and all volunteer organizations where contact with minors may occur. R.C. 2950.11(A)-(F). Of course, they in turn may disseminate that information which is, in any event, public. Dissemination of that personal information, including photographs, addresses, email addresses, travel documents, license plate numbers, fingerprints, and DNA samples also resembles shaming punishments intended to inflict public disgrace. R.C. 2950.04(B); 2950.04(C). See Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. Chi. L. Rev. 733, 739 (1998).

S.B. 10 also furthers the traditional aims of punishment: retribution and specific deterrence. *Smith v. Doe*, 538 U.S. at 102. By placing offenders into tiers based on the offenses of conviction, and without reference to the likelihood that they will commit other sexual offenses, the General Assembly attempts both to punish the offenders and, prospectively, to deter the commission of other crimes by them. Absent specific determination that the offender is likely to reoffend, the argument that registration and notification are purely remedial means of protecting the public is unsupportable. Automatic classification without determining the likelihood of reoffending is simple retribution. See *Tison v. Arizona* (1987), 481 U.S. 137, 180-181.

A law violates the ex post facto prohibition if it is retrospective and disadvantages those it affects. *Miller v. Florida*, 482 U.S. at 430. A retrospective law "changes the

5Although the residency restrictions do not apply retroactively, *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, they do indicate the punitive effect of the law.

Legal consequences of acts completed before its effective date." *Id.* at 431, citing *Weaver v. Graham* (1981), 450 U.S. 24, 31. A law disadvantages the offender when it is "more onerous than the prior law." *Id.* S.B. 10 meets both of those tests and violates the Ex Post Facto Clause of the United States Constitution. Clause 1, Section 10, Article 1.

Proposition of law II:

Application of S.B. 10, Ohio's version of the Adam Walsh Act, to offenders whose crimes occurred before its effective date violates the Retroactivity Clause of the Ohio Constitution.

Argument

Section 28, Article II, Ohio Constitution forbids retroactive laws. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 106.

When the General Assembly orders that a new law be applied retroactively, as it did with S.B. 10, the question is whether that law affects substantive rights. *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 137. A retroactively applied statute is unconstitutional, if it "impairs or takes away vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligation or liabilities as to a past transaction, or creates a new right." *Cook, supra*, at 411.

Under S.B. 10, offenders who were previously adjudicated sexually oriented offenders have been reclassified and placed into tiers that mandate, at the very least, five additional years of reporting requirements with significantly more information required to

be reported and then made public. The law thus and poses obligations and burdens which did not exist when the offense was committed.

S.B. 10 also takes away or impairs vested rights. Previously adjudicated sexually oriented offenders had a vested right in the final judgments which limited their registration duties to ten years. Under S.B. 10, all of those people's registration requirements have been extended. Many have been reclassified as Tier-III Offenders, and ordered to register every ninety days for the rest of their lives. Moreover, those prior classifications were judicially determined with the state bearing the burden of proving dangerousness by clear and convincing evidence. Under S.B. 10, all those convicted of offenses occurring before January 1, 2008 lost their right to that judicial adjudication.

Proposition of Law No. 3: Application of S.B. 10, Ohio's version of the Adam Walsh Act, to offenders who were classified under Megan's Law effectively vacates valid judicial orders, and violates the Separation of Powers Doctrine embodied in the Ohio Constitution.

S.B. 10 violates the separation-of-powers principle inherent in Ohio's constitutional framework by unconstitutionally limiting the powers of the judicial branch of the government.

"Although the Ohio Constitution does not contain explicit language establishing the doctrine of separation of powers, it is inherent in the constitutional framework of government defining the scope of authority conferred upon the three separate branches of government" *State v. Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790, at ¶22. As this Court explained in *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, paragraph

one of the syllabus, "the administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers." S.B. 10 improperly interferes with the exercise of the judicial function.

In *State v. Hochhausler* (1996), 76 Ohio St.3d 455, this Court held that former R.C. 4511.191(H)(1), by constraining the power of the courts to grant stays of certain license suspensions, "improperly interfere[d] with the exercise of a court's judicial functions." *Id.* at 464. In *State v. Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790, this Court held former R.C. 2953.82(D), unconstitutional because it allowed the executive to prosecute and punish crime. As the Court explained, "the judicial power resides in the judicial branch. Section 1, Article IV, Ohio Constitution. The determination of guilt in a criminal matter *and the sentencing of a defendant convicted of a crime are solely the province of the judiciary.*" *Id.* at ¶ 31 (citation omitted). S.B. 10 similarly divests the judiciary of power to sentence.. By directing trial courts to place offenders in specific tiers based on their crimes of conviction, the legislature acts as "judge, prosecutor, and jury, which [goes] beyond the role of the [legislative] branch." *Sterling, supra*, at ¶31. Final court orders are immune from executive-branch interference. In *City of South Euclid v. Jemison* (1986), 28 Ohio St.3d 157, striking a statute that allowed an executive- branch agency to overrule final court judgments, this Court explained that "the doctrine of the separation of powers precludes the General Assembly from conferring appellate jurisdiction upon an administrative agency from a decision rendered by an Ohio court." *Id.* at 162.

Under S.B. 10, the Attorney General, an executive-branch official, vacates existing court judgments regarding sex offenders' classifications, and reverses final court judgments setting the duration of registration. The General Assembly did not merely grant the executive power to overrule final court judgments. It ordered the Attorney General to overrule them.

S.B. 10 does more. R.C. 2950.132, authorizes the Attorney General to adopt rules "to require additional sex offender registration or notification . . ." Thus, the General Assembly authorized the Attorney General effectively to supersede arxl repeal statutes by administrative fiat! That it requires the executive branch to overrule final court judgments is only one aspect of its failure to respect the separation of powers.

Proposition of Law No. 3:

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Argument

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Court explained in *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, paragraph one of the syllabus, "the administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers." S.B. 10 improperly interferes with the exercise of the judicial function.

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Proposition of Law IV:

Application of S.B. 10, Ohio's version of the Adam Walsh Act, to offenders who have previously been sentenced for sex offenses violates the Double Jeopardy Clauses of the Ohio and United States Constitutions. S.B. 10 violates the Double Jeopardy Clauses of the Ohio and United States Constitutions inflicting a second punishment upon a sex offender for a single offense. Because S.B. 10 is punitive in both its intent and effect,⁶ the registration and notification requirements operate as a second punishment.

Argument

The Double Jeopardy Clause states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." Fifth Amendment to the United States Constitution. See, also, Section 10, Article I, Ohio Constitution. Among other

things, the Clause protects against a state imposing multiple punishments for a single offense or from attempting a second time to criminally punish an offender for the same offense. See *Kansas v. Hendricks*, 521 U.S. at 369; *Witte v. United States* (1995), 515 U.S. 389, 396. Although only "punitive" sanctions are subject to the Fifth Amendment protection against multiple punishments, *Hudson v. United States* (1997), 522 U.S. 93, 101, S.B. 10 is punitive. The application of the statute, through reclassification and increased registration requirements, to those who had already been punished, and even subjected to prior sexual classification and registration requirements, for their sexual offenses is an additional punishment.

Proposition of Law V:

Application of S.B. 10, Ohio's version of the Adam Walsh Act, to offenders who have previously been subject to the provisions of either the 1996 or 2003 version of Megan's Law violates Due Process and constitutes cruel and unusual punishment as prohibited by the Ohio and United States Constitutions.

Argument

Both the Eighth Amendment to the United States Constitution and Section 9, Article I of the Ohio Constitution, protect against excessive sanctions. See *Atkins v. Virginia* (2002), 536 U.S. 304. The right flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States* (1910), 217 U.S. 349, 367. By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons. *Roper v. Simmons*, 543 U.S. at 560.

The prohibition against cruel and unusual punishments must be measured by reference to "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles* (1958), 356 U.S. 86, 100-101 (plurality opinion).

When it comes to laws that involve sex offenders, the passions of the majority must be tempered with reason. Joseph Lester, *The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 Akron L. Rev. 339, 340 (2007). "Overborne by a mob mentality for justice, officials at every level of government are enacting laws that effectively exile convicted sex offenders from their midst with little contemplation as to the appropriateness or constitutionality of their actions." *Id.* See, also, Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261, 1267 (Summer, 1998). ("That sex offenders are deserving of disdain is not the issue, for they surely are. The issue, rather, is whether they deserve the protection of the Constitution, which they surely do.") Particularly for those offenders who have served their periods of incarceration and have previously been determined to be the least likely to reoffend, the extension of registration and notification under SB 10 is an additional punishment that is has no proportional relation to their crimes.

Proposition of Law No. VI:

Application of S.B. 10, Ohio's version of the Adam Walsh Act, to offenders who, pursuant to agreement with the prosecutor and before the Act's effective date, entered pleas of guilty or no contest impairs the obligation of contracts as protected by the Ohio and United States Constitutions.

Argument

A plea agreement is a contract that binds the State and is governed by principles of contract law. *State v. Butts* (1996), 112 Ohio App.3d 683, 686. Moreover, "the law in effect at the time a plea agreement is entered is part of the contract." *Ridenour v. Wilkinson*, 10th Dist. No. 07AP-200, 2007-Ohio-5965, at ¶21, citing cases. The state, not just the county prosecutor, is contractually bound by the terms of a plea agreement. See *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St.3d 456, 2002-Ohio-6719.

Many offenders resolve the criminal charges against them by entering into plea agreements. Sex-offender classification and the attendant obligations imposed by the sex offender law in existence at the time of a defendant's plea is a material part of the plea agreements. Retroactive application of S.B. 10 to reclassify any defendant who pleaded guilty or no contest imposes new and additional obligations, and constitutes a breach of the plea agreement. As such, it impairs contractual obligations in violation of Section 28, Article II, Ohio Constitution and Article I, Section 10, Clause 1, United States Constitution.

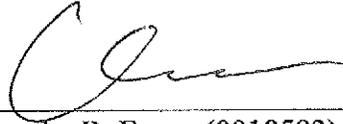
When a plea agreement is breached, the breach may be remedied by specific performance. *Santobello v. New York*, 404 U.S. 257. Accordingly, any defendant who entered into a plea agreement including sentence or sex classification is entitled to specific performance of the State's obligation to impose the sex-offender requirements that are materially identical to those contemplated by the law in effect at the time of the plea agreement.

VI. Conclusion:

In conclusion, appellant submits that the Court should accept jurisdiction over this case

as it involves the same questions presently pending before the Court and hold this case for decision in the case of *State v. Bodkye*, 2008 - 2502.

Respectfully submitted,



Timothy R. Evans (0018593)
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Facsimile (513) 868.2229

Certificate of Service

A copy of the foregoing Memorandum in Support of Jurisdiction was mailed by ordinary US mail to:

Rachael Hutzell, Esq.
Prosecuting Attorney
Warren County, Ohio
500 Justice Drive
Lebanon, OH 45036

and

Jeffrey Clark, Esq.
Assistant Attorney General
30 East Broad Street, 16th Floor
Columbus, OH 43215

this 13th day of October, 2009.



Timothy R. Evans (0018593)

Appendix

COURT OF COMMON PLEAS

WARREN COUNTY, OHIO

KENNETH RAY MCKINNEY

Case No.: 08 MS 0077

Appellant

vs.

STATE OF OHIO

Appellee

COURT OF APPEALS
WARREN COUNTY
FILED

NOTICE OF APPEAL

APR 10 2009

James L. Spaeth, Clerk
LEBANON OHIO

WARC

2009-04-04

ADMINISTRATIVE
WARREN COUNTY OHIO
FILED

09 APR 10 AM 10:27

JAMES L. SPAETH
CLERK OF COURTS

Notice is hereby given that plaintiff, Kenneth Ray McKinney, gives Notice of Appeal to the Court of Appeals, Twelfth Appellate District, Butler County, Ohio from the and Entry of Dismissal filed on March 18, 2009 in the above captioned action.

Timothy R. Evans (0018593)
Attorney for Appellant, *Kenneth Ray McKinney*
29 North "D" Street
Hamilton, OH 45013
Telephone (513) 868.8229
Facsimile (513) 868.2229

TO THE CLERK:

Please prepare a transcript of the hearing as well as all exhibits, docket entries, attachments and transmit said transcript with attachments to the Court of Appeals, Twelfth Appellate District.

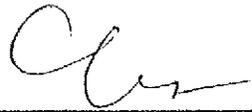
CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was mailed by ordinary US mail to:

Rachael Hutzal, Esq.
Prosecuting Attorney
Warren County, Ohio
500 Justice Drive
Lebanon, OH 45036

Jeffrey Clark, Esq.
Assistant Attorney General
30 East Broad Street, 16th floor
Columbus, OH 43215

this 9th day of April, 2009.



Timothy R. Evans (0018593)

IN THE COURT OF COMMON PLEAS
WARREN COUNTY, OHIO

KENNETH RAY MCKINNEY

VS

CASE NO: 08MS0077

STATE OF OHIO

March 18, 2009

To: TIMOTHY R EVANS

YOU ARE HEREBY NOTIFIED THAT A FINAL APPEALABLE JUDGMENT WAS
ENTERED IN THE ABOVE CASE ON MARCH 18, 2009.

JAMES L. SPAETH
CLERK OF COURTS
500 JUSTICE DRIVE
P.O. BOX 238
LEBANON, OH 45036

C: KENNETH RAY MCKINNEY
STATE OF OHIO
JERRY MAYS
DEREK B FAULKNER

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

COURT OF APPEALS
WARREN COUNTY
FILED

SEP 8 2009

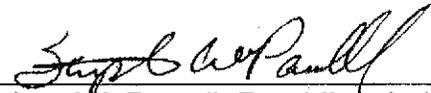
James L. Spaeth, Clerk
LEBANON OHIO

KENNETH RAY MCKINNEY, :
Appellant-Petitioner, : CASE NO. CA2009-04-041
: JUDGMENT ENTRY
- vs - :
STATE OF OHIO, :
Appellee-Respondent. :

The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Warren County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.



Stephen W. Powell, Presiding Judge



William W. Young, Judge

(Concurs in Part / Dissents in Part)

Robert P. Ringland, Judge



* W C 0 1 5 - 2 0 0 9 - 0 4 - 0 4 1 *
00/09/00 JUDGMENT ENTRY FILED (APPENDIX)

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

COURT OF APPEALS
WARREN COUNTY
FILED

SEP 8 2009

James L. Spaeth, Clerk
LEBANON OHIO

KENNETH RAY MCKINNEY, :

Appellant-Petitioner, :

CASE NO. CA2009-04-041

- vs - :

OPINION

9/8/2009

STATE OF OHIO, :

Appellee-Respondent. :

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08-MS-0077

Timothy R. Evans, 29 North D Street, Hamilton, OH 45013, for appellant-petitioner

Rachel A. Hutzell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive,
Lebanon, OH 45036, for appellee-respondent

Jeffrey Clark, Assistant Attorney General, 30 East Broad Street, 16th Floor, Columbus, OH
43215, for appellee-respondent

YOUNG, J.

{¶1} Petitioner-appellant, Kenneth Ray McKinney, appeals the decision of the Warren County Court of Common Pleas dismissing a petition contesting his sex offender reclassification. We affirm the trial court's decision.

{¶2} On May 19, 2008, appellant received a letter from the Ohio Attorney General



* W C 0 1 6 - 2 0 0 9 - 0 4 - 0 4 1 *

00/02/00 OPINION FILED

informing him that he had been reclassified as a Tier III sex offender as a result of the Ohio General Assembly's passage of Senate Bill 10, Ohio's Sex Offender Registration and Notification Act, also known as Ohio's Adam Walsh Act.¹ On July 8, 2008, appellant filed a petition contesting his reclassification, as well as a complaint for declaratory judgment, arguing that his reclassification under Ohio's Adam Walsh Act was unconstitutional. On March 18, 2009, the trial court dismissed appellant's petition by finding Ohio's Adam Walsh Act constitutional.

{¶3} Appellant now appeals the trial court's decision to dismiss his petition, raising one assignment of error.

{¶4} "THE COURT ERRED IN FINDING THAT SENATE BILL 10, IN ITS APPLICATION TO APPELLANT, IS UNCONSTITUTIONAL."

{¶5} In his sole assignment of error, appellant argues that Ohio's Adam Walsh Act violates the Ex Post Facto Clause of the United States Constitution, the Double Jeopardy Clause of the United States and Ohio Constitutions, the Retroactivity Clause of the Ohio Constitution, as well as the separation of powers doctrine. This court has previously held that the law in Ohio's Adam Walsh Act does not violate the Ex Post Facto Clause of the United States Constitution, the Double Jeopardy Clause of the United States and Ohio Constitutions, or the Ohio Constitution's prohibition against retroactive laws. See *State v. Williams*, Warren App. No. CA2008-02-029, 2008-Ohio-6195, ¶¶36, ¶¶75, ¶¶107-111; *State v.*

1. {¶a} As the trial court found, "[i]t is unknown from the [p]etition what [appellant's] original conviction and classification was, but [only that] he received notice from the Ohio Attorney General of new classification and registration duties under Tier III." In fact, after reviewing the record, the only evidence regarding appellant's original conviction or classification is found in the Ohio Attorney General's "Motion to Dismiss and Reservation of Right to be Heard" filed with the trial court on August 7, 2008, which states:

{¶b} "On or around September 25, 1985, [appellant] was convicted of three counts of Rape, in violation of Ohio Revised Code 2907.02."

{¶c} Regardless, on appeal, appellant does not argue that his classification as a Tier III sexual offender was in error, but instead, merely challenges the constitutionality of Ohio's Adam Walsh Act.

Bell, Clermont App. No. CA2008-05-044, 2008-Ohio-2335, ¶104; *State v. Sears*, Clermont App. No. CA2008-07-068, 2009-Ohio-3451, ¶7; *Ritchie v. State*, Clermont App. No. CA2008-07-073, 2009-Ohio-1841, ¶16. See, also, *Burchett v. State*, Richland App. No. 2009-CA0135, 2009-Ohio-4240, ¶25. Likewise, this court has held that Ohio's Adam Walsh Act does not violate the separation of powers doctrine of the United States or Ohio Constitutions. *Williams* at ¶99, ¶101; *Sears* at ¶10-13. Accordingly, appellant's lone assignment of error lacks merit and is overruled.

{¶6} Judgment affirmed.

POWELL, J., concurs.

RINGLAND, J., concurs in part and dissents in part.

RINGLAND, J., concurring in part and dissenting in part.

{¶7} I respectfully dissent based upon my analysis in *Sears v. State*, Clermont App. No. CA2008-07-068, 2009-Ohio-3541, finding that the retroactive modification of judicially-determined sex offender classifications by the Adam Walsh Act violates the separation of powers doctrine. I concur with the majority's resolution of the remaining issues.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>