

ORIGINAL

IN THE SUPREME COURT OF OHIO

09-1974

STATE OF OHIO,
Appellee,

-vs-

Lambert Dehler,
Petitioner-Appellant.

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Case No. _____
On Appeal from the Trumbull
County Court of Appeals,
Eleventh Appellate District

Court of Appeals
Case No. **2008-T-0061**

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT LAMBERT DEHLER

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WHY LEAVE TO APPEAL SHOULD BE GRANTED

This appeal should be consolidated with the other cases already under review in this Court as explained below.

Secondly, leave to appeal should be granted to resolve the conflict between most court of appeals on the issue whether a hearing is required when a petitioner timely files a Motion for a Hearing pursuant to **R.C. §2950.032(E)**, and **R.C. §2950.11(F)(2)**.

In the case at bar, the appellate court reluctantly agreed that Petitioner-Appellant Lambert Dehler (“Dehler”) timely filed a Motion for Hearing under both sections of the revised code. Yet, the Eleventh District reasoned that Dehler is not entitled to an oral hearing, in contravention of the clear and unambiguous wording in both statutes. This result conflicted with other decisions in the 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th and 12th Districts. Accordingly, Dehler timely-filed a Motion to Certify a Conflict under **App.R. 25(A)** in the court of appeals on October 6, 2009. This motion is still pending in the court of appeals.

Dehler also alleged that he should have been appointed counsel under the AWA, and that this Court is currently reviewing other cases under the Adam Walsh Act (“AWA”) about the denial of counsel and the constitutionality of the

new Act. See, *In re Smith*, Case No. 2008-1624; *In re G.E.S.*, Case No. 2008-1926, 2009-Ohio-361; *Chojnacki (show-naw-kee) v. Rogers (8-6-08)*, Case Nos. 2008-0991, 2008-0992, review granted, 891 NE 2d 1405 (whether denial of counsel under AWA is a final appealable order; conflict with *King v. State*, Miami App.No.2008-CA-2 (3/19/08 & 5/30/08)):

“Warren App. No. CA2008-03-040. On review of order certifying a conflict. The court determines that a conflict exists. The parties are to brief the issue stated at page 2 of the court of appeals' Entry filed May 5, 2008:

“[W]hether a decision denying a request for appointment of counsel in a reclassification hearing held pursuant to Ohio's version of the Adam Walsh Act, Senate Bill 10, is a final appealable order.”

O'Donnell, J., dissents.

The conflict case is *King v. State* (Mar. 19, 2008), Miami App. No. 2008-CA-2.

Sua sponte, cause consolidated with 2008-0992, *Chojnacki v. Rogers*, Warren App. No. CA2008-03-040.”

119 Ohio St.3d 1405, 891 N.E.2d 767 (Table), 2008 -Ohio- 3880

See also, *State v. Clayborn*, Case No. 2009-0971 (review granted 8.26.09 and consolidated with *Chojnacki v. Rogers*).

Therefore leave to appeal should be granted and this case consolidated with all of the other AWA cases currently being reviewed by this Honorable Court.

STATEMENT OF THE CASE AND FACTS

On January 7, 2008, Dehler mailed to the Trumbull County Clerk of Courts a Petition challenging the new classification and registration duties under the Adam Walsh Act (hereinafter “AWA”) entitled, “Request for Hearing Pursuant to **R.C. § 2950.032(F)**.” The Petition was finally filed about one month later by the Trumbull County Clerk of Courts on February 1, 2008, and assigned Case No. **2008-CV-402**.

On January 31, 2008, Administrative Judge Andrew D. Logan, issued a “boiler-plate” Judgment Entry (with no case number assigned) approving Dehler’s poverty affidavit and denying a “Request for Counsel.” [No “Request for Counsel” was filed by Dehler at this time.]

On February 8, 2008, Dehler filed, “Petitioner’s Request for a Second Hearing pursuant to **R.C. § 2950.11(F)(2)**.” Dehler maintained that he had a right to a hearing under **R.C. § 2950.11(F)(2)** where the trial court was required to consider at least 11 factors under that division. In addition, Dehler raised several other issues and defenses as to why he should not be subject to the new notification requirements.

On February 8, 2008, Dehler filed, “Motion for Immediate Appointment of Counsel.” He maintained that a hearing was required under **R.C. §**

2950.11(F)(2) and **R.C. § 2950.032(E)**. In support of the appointment of counsel, Dehler relied upon **1999 Ohio Atty.Gen.Ops.No. 99-031** and **R.C. 120.16**.

On February 12, 2008, Dehler filed, “Petitioner’s Motion for Summary Judgment; Civ.R. 56.” He alleged that **R.C. 2950.032(E)** became effective on July 7, 2007, and that the statute provided in **R.C. 2950.032(A)(2)** that the Department of Rehabilitation and Correction (“DRC”) lost jurisdiction after December 1, 2007 to serve written notice of the new classifications and registration duties of a tier III Sex Offender. Dehler maintained that the AWA statute forbids late service and that summary judgment should be granted in his favor because the DRC lacked jurisdiction to serve a late notice after December 1, 2007.

On April 15, 2008, Dehler filed, “Request for Ruling on Motion Filed on 2/8/08.” He requested counsel especially because the state failed to respond or reply to his previously filed motion [2/8/08] requesting the Immediate Appointment of Counsel.

On May 1, 2008, the State filed a 13-page mostly “boiler-plate” motion entitled, “Plaintiff’s Motion for Summary Judgment.” Dehler replied by filing on May 16, 2008, “Request to Dismiss with Prejudice to the State *Or* Request for a Stay.” Dehler argued that the state failed to reply or respond to his Motion

for Summary Judgment where it was argued that the DRC lost jurisdiction to serve the AWA notice to Dehler after December 1, 2007. In addition, Dehler argued that he needed counsel and that the State failed to Reply to “Petitioner’s Request for a Second Hearing pursuant to **R.C. § 2950.11(F)(2)**” [filed on 2/8/08]. Finally, Dehler argued that two other cases are pending in higher state and federal courts and that a stay should be issued to await their outcomes.

On June 23, 2008, the trial court granted the State’s Motion for Summary Judgment and dismissed this case. The appellate court affirmed on September 28, 2009. Dehler’s Motion to Certify a Conflict between most of the other court of appeals is still pending as explained below.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A trial court loses jurisdiction to hear a petition filed under the Adam Walsh Act when the prison serves the notice after the deadline date of December 1, 2007.

Dehler provided to the trial court undisputed proof by way of affidavit that he was served the New Classification and Registration Duties Notice on January 7, 2008 at 9:45 a.m.

R.C. 2950.032 (A)(2) provides:

“At any time on or after July 1, 2007, and not later than December 1, 2007, except as otherwise described in this division, the department of rehabilitation and correction shall provide to each offender described in division (A)(1)(a) of this section and the department of youth services shall provide to each delinquent child described in division (A)(1)(b) of this section and to the delinquent child’s parents a written notice that contains the information described in this division ***.”

Dehler argued in the trial court and the appellate court that the Department of Rehabilitation and Correction (“DRC”) lacked jurisdiction to serve the New Classification and Registration Duties Notice after December 1, 2007.

The word, “shall” appears in **R.C. §2950.032(A)(2)**, when the statute specifies that the DRC *shall* provide a written notice not later than December 1, 2007. “It is axiomatic that when used in a statute, the word “shall” denotes that compliance with the commands of that statute is mandatory unless there appears a clear and unequivocal legislative intent that it receive a construction other than its ordinary usage.” See, *State ex rel. Botkins v. Laws*, (1994), **69 Ohio St.3d 383, 385, 632 N.E.2d 897, 900.**

In this case, there is clear and unequivocal legislative intent that the written notice be provided by the DRC or the attorney general to inmates *not later than* December 1, 2007. The Ohio legislature clearly spoke and used the mandatory “shall” provision. Moreover, there is no statutory provision for late service of the notice. Dehler was served late notice on January 7, 2008, in violation of **R.C. §2950.032(A)(2).**

In the case at bar, the DRC and the attorney general violated the mandatory provision of service not later than December 1, 2007.

The appellate court misunderstood Dehler's argument when they held that Dehler must comply with the AWA even if he was notified late. See, **Exhibit A, at ¶¶46-47.** This Court should find that the trial court and the appellate court did not have jurisdiction to hear this case due to the late notice beyond the statutory deadline of December 1, 2007.

Proposition of Law No. II: A trial court must hold a hearing under R.C. 2950.032(E) when a timely petition is filed.

The appellate court wrongly decided that Dehler did not need a hearing because a non-oral hearing suffices and nothing remains to be decided. See, **Exhibit A, at ¶¶54-60.**

The appellate court stated in ¶50: "Nothing in R.C. 2950.032(E) requires the court to hold an oral hearing upon the petitioner's request for a reclassification hearing."

It also stated in ¶60: "Once the court determines that the crime fits the tier, nothing remains to be decided. The need for an evidentiary hearing is obviated and summary judgment is appropriately granted."

Judge Timothy P. Cannon dissented. See, **id.** at ¶¶104-117. This decision therefore is in conflict with the following courts of appeals which have held otherwise:

Appellate Districts in Conflict:

2nd District

1. *State v. Reddish* (July 24,2009), Montgomery App.No. 22866, 2009-Ohio-3643, ¶17:

“R.C. 2950.032(E) allows imprisoned offenders to request court hearings as a matter of right, by filing petitions no later than sixty days after the offender receives the notice of his or her classification. If the court finds that the offender has proven by clear and convincing evidence that the new registration requirements do not apply, the court is required to issue an order stating that the requirements are inapplicable. See R.C. 2950.032(E) and R.C. 2950.031(E). Failure to timely request a hearing waives the right, and the offender is then bound by the Attorney General's determination. *Id.*”

3rd District

1. *Holcomb, et al., v. State* (Feb 23,2009), Logan App.Nos. 8-08-23, 8-08-24, 8-08-25, 8-08-26, 2009-Ohio-782, ¶14:

“The court also noted the provision of Senate Bill 10 providing for a hearing to challenge the reclassification. *Id.* We agree with the analysis of our sister court ***.”

2. *Downing v. State* (Apr.20,2009), Logan App.No. 8-08-29, 2009-Ohio-1834, ¶5:

“In August 2008, the trial court held an evidentiary hearing on the petition ***.”

4th District

1. *State v. Pletcher* (Apr.16,2009), Ross App.No. 08CA3044, 2009-Ohio-1819, ¶26:

“Appellant requested a hearing under R.C. 2950.031 and R.C. 2950.032 to contest his reclassification and the new requirements it imposed. But, at that hearing, he failed to produce any evidence whatsoever.”

9th District

1. *Brooks, et al. v. State, et al.* (Apr.20,2009), Lorain App.No. 08CA009452, 2009-Ohio-1825, ¶8:

“The trial court held a hearing on the petitions to contest reclassification.”

12th District

1. *Moran v. State* (Apr.20,2009), Clermont App.No. CA2008-05-057, 2009-Ohio-1840, ¶24: (finding that appellant testified at the mandatory hearing.)

2. *Brewer v. State* (June 29,2009), Butler App.No. CA2009-02-041, 2009-Ohio-3157, ¶10 and ¶16:

“We think it clear from a reading of R.C. 2950.031(E) that the plain language of the statute mandates a hearing upon a timely and properly filed petition under that section.”

“ *** R.C. 2950.031(E) mandates a hearing.”

Therefore, this Court should grant leave to appeal to resolve this conflict between the court of appeals.

Proposition of Law No. III: A trial court must hold a hearing under R.C. 2950.11(F)(2) when a timely and properly filed petition is made under that section, notwithstanding wording in R.C. 2950.11(H)(1).

The court below held that R.C. 2950.11(H)(1) obviates the need of the mandatory hearing specified in R.C. 2950.11(F)(2). The appellate court stated in ¶63: “R.C. 2950.11(F)(2), unlike R.C. 2950.03(E), does not mandate a

hearing.” It also stated in ¶65: “The right to a hearing is clearly discretionary under R.C. 2950.11.” And, again in ¶80: “[T]here is no mandatory right to a hearing pursuant to R.C. 2950.11(F)(2).”

Appellate Districts in Conflict:

1st District

1. *Allison v. State* (Feb.6,2009), Hamilton App.No, C-080439, 2009-Ohio-498, ¶3:

“Following a hearing, the trial court found that Allison was not required to register as a sex offender because of the expiration of time under his original order.”

2nd District

1. *State v. Barker* (June 12,2009), Montgomery App.No. 22963, 2009-Ohio-2774, ¶16:

“[B]arker may yet request a hearing pursuant to R.C. 2950.11(F)(2) to demonstrate that the notification provisions of SIB. 10 do not in fact apply to her.”

4th District

1. *State v. Pletcher* (Apr.16,2009), Ross App.No. 08CA3044, 2009-Ohio-1819, ¶30:

“Apparently, the trial court consolidated these two hearings.”

5th District

1. *Sigler v. State* (Apr.27,2009), Richland App.No. 08-CA-79, 2009-Ohio-2010, ¶28:

“ *** if a court finds at a hearing after considering the factors *** .”

6th District

1. *State v. Stockman* (Jan.23,2009), Lucas App.No. L-08-1077, 2009-Ohio-266, ¶19:

“As to the initial classification of a sexual offender, we find that R.C. 2950.11(F)(2) requires the sentencing court to hold a hearing prior to determining the necessity of community notification and to consider ***.”

8th District

1. ***Gildersleeve v. State* (Apr.30,2009), Cuyahoga App. Nos. 91515, 91519, 91521, 91532, 2009-Ohio-2031, ¶76:**

“For a Tier III offender who was not previously classified under Megan's Law and is, therefore, being classified for the first time under the AWA, we find that R.C. 2950.11(F)(2) does require the sentencing court to hold an individualized hearing in every case where community notification is at issue, and consider the required factors prior to determining whether the offender should be relieved of community notification. See *State v. Stockman*, 6th Dist. No. L-08-1077, 2009-Ohio-266, ---19 (upon initial classification of a sex offender, R.C. 2950.11(F)(2) requires sentencing court to hold a hearing and consider the factors listed therein).”

2. ***State v. Bradley* (May 7, 2009), Cuyahoga App.No. 90810, 2009-Ohio-2116, ¶7:**

“In his first assignment of error, Bradley argues that there was insufficient evidence to support the trial court's finding that he is “likely to reoffend” in the future and therefore his sexual predator classification should be vacated. He further argues in his second assignment of error that this court should, at a minimum, remand this case for another hearing because the trial court failed to consider the factors enumerated in former R.C. 2950.09(B)(3) before classifying him as a sexual predator. We find both arguments unpersuasive.FN2

FN2. Although Bradley was classified as a sexual predator under former R.C. Chapter 2950, which has subsequently been amended by the Adam Walsh Act (“AWA”) and S.B. 10, we still address his assignments of error applying the law that was in effect at the time that he was sentenced. We further note that Bradley's appeal is not rendered moot by the AWA (despite his automatic classification as a Tier III offender) because his obligations under the AWA, namely, community-notification requirements, would be different if we were to vacate his sexual predator determination in this case. See *State v. Clay*, 177 Ohio App.3d 78, 2008-Ohio-2980.

9th District

1. ***State v. McConville* (Apr.13,2009), Lorain App.No. 08CA009444, 2009-Ohio-1713, ¶¶3-17: (finding that a hearing is mandatory under R.C. 2950.11(F)(2), and that R.C. 2950.11(H) is not controlling).**

2. ***State v. Gruszka* (Aug.10,2009), Lorain App.No. 08CA009515, 2009-Ohio-3926, ¶13: (finding that the legislature mandated a hearing under R.C. 2950.11(F)(2).)**

12th District

1. *Moran v. State* (Apr.20,2009), Clermont App.No. CA2008-05-057, 2009-Ohio-1840, ¶24: (finding that appellant testified at the mandatory hearing.)
2. *Ritchie v. State* (Apr.20,2009), Clermont App.No. CA2008-07-073, 2009-Ohio-1841, ¶3: (finding that the trial court held a hearing under R.C. 2950.11(F)(2).

Therefore, this Court should grant leave to appeal to resolve this conflict between the court of appeals.

***Proposition of Law No. IV:* A trial court must appoint counsel under the Adam Walsh Act when a timely petition for a hearing is filed.**

The court below held that the AWA is a civil proceeding and therefore no right to counsel exists to contest reclassification. See, **Exhibit A at ¶¶76-83.**

However, other panels *from the same court of appeals* have recently held that the AWA is a criminal statute due to its' punitive nature. See, *State v. Strickland* (Oct.9,2009), Lake App.No. 2008-L-034, 2009-Ohio-5424, ¶22; and also holding that the appointment of counsel is mandatory. **id. at ¶75.**

Leave to appeal should be granted to resolve whether the appointment of counsel is mandatory for indigent inmates; and this case should be consolidated with *Chojnacki v. Rogers* (8-6-08), Case Nos. 2008-0991, 2008-0992, review granted, 891 NE 2d 1405 (whether denial of counsel under AWA is a final

appealable order; conflict with *King v. State*, Miami App.No.2008-CA-2 (3/19/08 & 5/30/08).

***Proposition of Law No. V:* The Adam Walsh Act violates the state and federal constitutions when it is retroactively applied to a prisoner who was sentenced more than 17 years ago and he was never previously labeled under Megan's Law.**

This Court is currently reviewing whether the AWA is unconstitutional when it is retroactively applied, and Dehler respectfully requests that this issue be consolidated with the other pending cases as explained above. The appellate court also believes that this case merits review by the Supreme Court. See, **Exhibit A at ¶93, fn.1.**

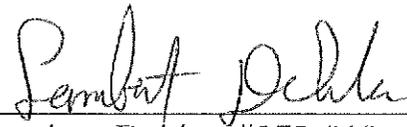
Dehler submits that the lower court erred when they failed to recognize that the retroactive application of the AWA to his case is prohibited by the application of *res judicata*; collateral estoppel; double jeopardy; separation of powers; **Clause 1, Section 10, Article I, of the United States Constitution** as ex post facto legislation; **Section 28, Article II, of the Ohio Constitution** as retroactive legislation; and, further violates **R.C. §§1.48 and 1.58, et. seq.**

For all of these reasons, Dehler respectfully requests that all of the above propositions of law be reviewed on appeal.

Conclusion

For the reasons discussed above, this case involves matters of public and great general interest and is in conflict with most of the other appellate courts. Dehler requests that this Court accept jurisdiction and consolidate this case with the other ones already under review under the AWA.

Respectfully submitted,

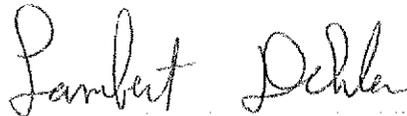


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CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail, postage prepaid, to the Trumbull County Prosecutor, Deena L. DeVico, at 160 High Street, NW, 4th floor, Warren, OH, 44481, on **October 24, 2009.**



Lambert Dehler, #273-819
Petitioner-Appellant, pro se

2009-ohio-5059

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
TRUMBULL COUNTY, OHIO

FILED
COURT OF APPEALS

SEP 28 2009

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

STATE OF OHIO, : OPINION
Respondent-Appellee, :
- vs - : CASE NO. 2008-T-0061
LAMBERT DEHLER, :
Petitioner-Appellant. :

Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 402.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *Deena L. DeVico*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Respondent-Appellee).

Lambert Dehler, pro se, PID: 273-819, Trumbull Correctional Institution, P.O. Box 901, Leavittsburg, OH 44430-0901 (Petitioner-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Mr. Lambert Dehler appeals from the trial court's grant of summary judgment in favor of the state, finding that he was properly classified as a Tier III offender based upon his convictions of two counts of rape and gross sexual imposition, as well as its finding that the new Sexual Offender Registration and Notification Act (SORN or the "Act"), R.C. Chapter 2950 (also known as Senate Bill 10, Ohio's version of the Adam Walsh Act or AWA) is constitutional.

Exhibit A

{¶2} We affirm, determining that Mr. Dehler was properly classified, that his classification and duty to register arose by operation of law solely by virtue of his convictions of rape and gross sexual imposition, and that when viewed through the prism of prior precedent set by a superior court, the new sexual offender registration provisions challenged by Mr. Dehler are constitutional.

{¶3} **Substantive and Procedural History**

{¶4} In 1992, a jury found Mr. Dehler guilty of two counts of rape and two counts of gross sexual imposition. Mr. Dehler was then sentenced to concurrently serve seven to 25 years on each count of rape; and to serve two consecutive terms of 18 months on each count of gross sexual imposition concurrently to the rape sentences.

{¶5} Mr. Dehler, who remains incarcerated, was notified of his new classification as a Tier III offender by the Attorney General on January 7, 2008. The notice informed Mr. Dehler that his classification and registration duties upon release will change due to the newly enacted R.C. Chapter 2950 SORN provisions. He was also notified of his new duties to register and his right to contest the application of the classification and requirements.

{¶6} Mr. Dehler timely filed his petition to contest the classification, and several days later filed a request for a second hearing, as well as other motions. Through these filings Mr. Dehler raised numerous arguments. Among them was an argument that the state was barred from classifying him as a sex offender because he had never been classified under prior versions of Ohio's sexual offender registration law. Thus, Mr. Dehler argued that the state was barred from classifying him as a sex offender due to the affirmative defenses of collateral estoppel, res judicata, and laches. He also

asserted that the Department of Rehabilitation and Correction ("DRC") "lost jurisdiction" after December 1, 2007, to serve written notice of the new registration and classification duties, and that inasmuch as his notice was served on January 1, 2008, and there is no statutory provision for late service, he is not subject to the Act. He further alleged double jeopardy, ex post facto, and separation of powers violations.

{¶7} The state did not file an answer brief opposing Mr. Dehler's motion for summary judgment, but filed its own motion for summary judgment, arguing that Mr. Dehler was properly classified as a Tier III offender because he committed rape, and that the new Act is constitutional.

{¶8} Before the trial court were Mr. Dehler's request for a hearing on the reclassification, both parties' motions for summary judgment, Mr. Dehler's motion for the immediate appointment of counsel, and Mr. Dehler's motion to dismiss the state's motion for summary judgment.

{¶9} The court found the new sex offender classification scheme was constitutional, and that Mr. Dehler was properly classified as a Tier III offender. The court denied Mr. Dehler's motions, including his request for an oral hearing. Finding no genuine issues of material fact remained for determination, the court granted the state's motion for summary judgment.

{¶10} Mr. Dehler timely appealed, raising five assignments of error:

{¶11} "[1.] The trial court erred by not granting Petitioner's Motion for Summary Judgment because the Department of Rehabilitation and Correction lost jurisdiction to distribute to adult prison inmates the Notice of New Classification and Registration Duties after December 1, 2007.

{¶12} “[2.] The trial court erred by not granting a hearing pursuant to R.C. 2950.032(E).

{¶13} “[3.] The trial court erred when it failed to provide the mandatory hearing under R.C. 2950.11(F)(2).

{¶14} “[4.] The trial court erred when it denied the appointment of counsel because the Petitioner filed timely requests for counsel under the Adam Walsh Act.

{¶15} “[5.] The Adam Walsh Act (AWA) amendments to R.C. 2950.01 et seq., do not apply to the Defendant because he was sentenced in 1992 and the state previously declined to avail itself of the prior law (“Megan's Law”) and the current application of the AWA violates the doctrine of laches, res judicata, Clause I, Section 10, Article I, of the United States Constitution as ex post facto legislation, and violates Section 28, Article II, of the Ohio Constitution as retroactive legislation, and further violates R.C. 1.48 and 1.58, et. seq.”

{¶16} **Senate Bill 10 and the New SORN Act Provisions**

{¶17} “Ohio’s new sexual offender law was adopted by the Ohio General Assembly in Senate Bill 10. The legislation was enacted so that the state law would be consistent with the federal Adam Walsh Child Protection and Safety Act of 1996.

{¶18} “Prior to Senate Bill 10, when a defendant was found guilty of a sexually oriented offense, he could be classified as a sexually oriented offender, a habitual sex offender, or a sexual predator. The prior statutory scheme provided that a defendant’s designation under the three categories would be predicated upon the nature of the underlying offense and findings of fact made by the trial court during a sexual classification hearing.

{¶19} “Under the new legislation, those three labels are no longer applicable. Instead, a defendant who has committed a sexually oriented offense can only be designated as either a sex offender or a child victim offender. There are now three tiers of sexual offenders. The extent of the defendant’s registration and notification requirements will depend on the tier. Furthermore, the placement in a tier turns solely on the crime committed.

{¶20} “Another change of the sexual offender classification system implemented under the new law concerns the duration of the registration and notification requirements for the sex offenders. Prior to Senate Bill 10, if a defendant was deemed a sexually oriented offender, he was required to register once each year for a period of 10 years, but there was no notification requirement; if he was labeled as a habitual sex offender, he had to register once every six months for 20 years, and the community could be given notice of his presence at the same rate; and, if he was designated a sexual predator, the duty to register was once every three months for life, and notification could also take place at the same rate for life.

{¶21} “Under the new statutory scheme set forth in current R.C. Chapter 2950, the registration and community notification requirements are increased for sex offenders. If the defendant’s sexual offense places him in the ‘Tier I’ category, he is required to register once every year for a period of 15 years, but there is no community notification; if the defendant’s offense falls under the ‘Tier II’ category, registration must take place once every six months for 25 years, and there is still no notification requirement; and, if the sexual offense places the defendant in the ‘Tier III’ category, the requirements are essentially the same as for a sexual predator, in that there is a duty to

register once every three months for life, and community notification can occur at that same rate for life. Community notification under the new scheme requires the sheriff to give the notice of an offender's name, address, and conviction to all residents, schools, and day care centers within 1,000 feet of the offender's residence. The new law also prohibits all sex offenders from residing within 1,000 feet of a school or day care center. These registration and notification requirements under the Adam Walsh Act are retroactive and applicable to offenders whose crimes were committed before the effective date of the statute." *State v. Charette*, 11th Dist. No. 2008-L-069, 2009-Ohio-2952, ¶7-11.

{¶22} In Mr. Dehler's case, he is automatically classified as a Tier III offender because rape is a Tier III offense. See R.C. 2950.01(G)(1)(a).

{¶23} **Summary Judgment Standard of Review**

{¶24} Mr. Dehler first contends that the trial court erred in granting summary judgment to the state because the DRC "lost jurisdiction" to give inmates the Notice of New Classification and Registration Duties after December 1, 2007. He asserts that as there is no question he received his notice on January 8, 2007, he is entitled to a judgment as a matter of law that he is not subject to the new classification.

{¶25} "Pursuant to Civ.R. 56(C), summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Welch v. Zicarelli*, 11th Dist. No. 2006-L-229, 2007-Ohio-4374, ¶36, citing *Holik v. Richards*, 11th Dist. No. 2005-A-0006, 2006-Ohio-2644, ¶12, citing *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. "In addition, it must appear from the evidence and stipulations that reasonable minds can come to only one conclusion,

which is adverse to the nonmoving party.” Id., citing Civ.R. 56(C). “Further, the standard in which we review the granting of a motion for summary judgment is de novo.” Id., citing *Holik* at 293, citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105.

{¶26} “Accordingly, ‘[s]ummary judgment may not be granted until the moving party sufficiently demonstrates the absence of a genuine issue of material fact. The moving party bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim.’” Id. at ¶37, citing *Brunstetter v. Keating*, 11th Dist. No. 2002-T-0057, 2003-Ohio-3270, ¶12, citing *Dresher* at 292. “Once the moving party meets the initial burden, the nonmoving party must then set forth specific facts demonstrating that a genuine issue of material fact does exist that must be preserved for trial, and if the nonmoving party does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party.” Id., citing *Brunstetter*, citing *Dresher* at 293.

{¶27} “Since summary judgment denies the party his or her ‘day in court’ it is not to be viewed lightly as docket control or as a ‘little trial.’ The jurisprudence of summary judgment standards has placed burdens on both the moving and the nonmoving party. In *Dresher v. Burt*, the Supreme Court of Ohio held that the moving party seeking summary judgment bears the initial burden of informing the trial court of the basis for the motion and identifying those portions of the record before the trial court that demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party’s claim. The evidence must be in the record or the motion cannot succeed. The moving party cannot discharge its initial burden under Civ.R. 56 simply

by making a conclusory assertion that the nonmoving party has no evidence to prove its case but must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) that affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims. If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied. If the moving party has satisfied its initial burden, the nonmoving party has a reciprocal burden outlined in the last sentence of Civ.R. 56(E) to set forth specific facts showing there is a genuine issue for trial. If the nonmoving party fails to do so, summary judgment, if appropriate shall be entered against the nonmoving party based on the principles that have been firmly established in Ohio for quite some time in *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112.

{¶28} "The court in *Dresher* went on to say that paragraph three of the syllabus in *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, is too broad and fails to account for the burden Civ.R. 56 places upon a moving party. The court, therefore, limited paragraph three of the syllabus in *Wing* to bring it into conformity with *Mitseff*." *Id.* at ¶40-41.

{¶29} Thus, in *Dresher*, the Supreme Court of Ohio held that "when neither the moving nor nonmoving party provides evidentiary materials demonstrating that there are no material facts in dispute, the moving party is not entitled to a judgment as a matter of law as the moving party bears the initial responsibility of informing the trial court of the basis for the motion, and 'identifying those portions of the record which demonstrate the absence of a genuine issue of fact on a material element of the nonmoving party's claim.'" *Id.* at ¶42, citing *Dresher* at 276.

{¶30} Specifically, Mr. Dehler contends that the trial court erred in granting the state's motion for summary judgment because pursuant to R.C. 2950.032(A)(2), the DRC was required to notify offenders of their new reclassification and registration duties by December 1, 2007. His theory on summary judgment is that he is entitled to judgment as a matter of law as he is not subject to the Act because the DRC was without "jurisdiction" to serve him with notice after December 1, 2007. He also contends that the state waived any defense to this argument because the state did not file an answer brief in opposition to his motion for summary judgment. Rather, the state filed its own motion for summary judgment presenting three grounds.

{¶31} The state argued that as a matter of law there is no factual dispute as to classification based upon Mr. Dehler's rape conviction. The state also argued that Mr. Dehler's constitutional arguments are not properly raised within the rubric of a R.C. 2950.031(E) and R.C. 2950.032(E) hearing. Thirdly, the state argued that assuming the constitutional challenge was properly before the court, the Act is presumptively constitutional and Mr. Dehler cannot meet his burden of proof.

{¶32} On April 8, 2008, the court set a non-oral hearing date of May 30, 2008, for the summary judgment motion. Upon the submitted briefs and evidentiary materials, the court found there was no genuine issue of material fact in that Mr. Dehler was properly notified and classified. Thus, the court granted the state's motion for summary judgment and denied the relief sought in Mr. Dehler's various motions.

{¶33} We agree with the trial court that there is no genuine issue of material fact remaining for determination, and we determine that the court properly granted the state's motion for summary judgment.

{¶34} Mr. Dehler had never been classified as a sex offender, but his status as a Tier III offender arose by operation of law when he was convicted of rape in 1992. Furthermore, he received timely notice of his classification and duties to register under the new Act pursuant to R.C. 2950.03.

{¶35} Timeliness of Receipt of Notice

{¶36} Mr. Dehler is correct in his assertion that pursuant to R.C. 2950.032, the Attorney General was required to determine the offender's classification relative to the offender's offense between July 1, 2007 and December 1, 2007. See R.C. 2950.032(A)(1).

{¶37} Further, pursuant to R.C. 2950.032(A)(2), the DRC was required to provide written notice between July 1, 2007 and December 1, 2007, to all such offenders, *except that "[t]he department *** [is] not required to provide the written notice to an offender *** if the attorney general included in the document provided to the particular department *** notice that the attorney general will be sending that offender *** a registered letter and that the department is not required to provide to that offender *** the written notice."* (Emphasis added.)

{¶38} It is axiomatic that statutes in pari materia are to be construed together; thus R.C. 2950.032 must be read in conjunction with the primary notice to offender statute, R.C. 2950.03.

{¶39} R.C. 2950.03(A)(1), notice to offender of duty to register, provides in relevant part:

{¶40} "Regardless of when the person committed the sexually oriented offense *** , if the person is an offender who is sentenced to a prison term, a term of

imprisonment, or any other type of confinement for any offense, and *if on or after January 1, 2008, the offender is serving that term*, *** the official in charge of the jail, workhouse, state correctional institution, or other institution in which the offender serves the prison term, ***, shall provide the notice to the offender *before the offender is released* ***." (Emphasis added.)

{¶41} While the statutory language is a tad convoluted, Mr. Dehler's argument that the provision of the new Act cannot apply to him because he received his notice after December 1, 2007, must fail because he remains incarcerated. None of his rights have been abused. His classification under either the old sex offender registration framework or the newly enacted one arose by operation of law, and the failure to classify Mr. Dehler and notify him of his classification and registration duties would be a failure only if it occurred after his release.

{¶42} Mr. Dehler's "Notice of New Classification and Registration Duties" is a part of our record. He received the notice on January 7, 2008. The notice was dated November 30, 2007, thus it is clear that the Attorney General made the determination that Mr. Dehler was a Tier III offender on that date. The notice was then timely provided, pursuant to R.C. 2950.03(A)(1), which clearly states that regardless of when the sexually oriented offense was committed and if, on or after January 1, 2008, the offender is incarcerated for that offense, notice shall be provided before the offender is released.

{¶43} This statutory interpretation is further reinforced by a reading of R.C. 2950.033, which applies to offenders whose duties to register are scheduled to terminate on or after July 1, 2007, and prior to January 1, 2008.

{¶44} R.C. 2950.033(A)(5) states in relevant part:

{¶45} "If the offender *** is in a category described in division (A)(1)(a) of section R.C. 2950.032 *** but does not receive a notice from the department of rehabilitation and correction *** pursuant to (A)(2) of that section, *notwithstanding the failure of the offender *** to receive the registered letter or the notice, the offender's *** duty to comply with Sections R.C. 2950.04, 2950.041, 2950.05, and 2950.06 shall continue in accordance with, and for the duration specified in, the provisions of Chapter 2950 of the Revised Code as they will exist under the changes to the provisions that will be implemented on January 1, 2008.*" (Emphasis added.)

{¶46} Thus, even those offenders who did not receive notice between July 1, 2007 and December 1, 2007, and whose duties were set to expire during that time period, are still expected to comply with the new Act. Regardless of whether those offenders received timely notice, their duties have been extended pursuant to the Act.

{¶47} As Mr. Dehler received his notice on January 7, 2008, and is still incarcerated for the 1992 conviction for rape and gross sexual imposition, we fail to see how he is relieved of the mandatory requirements of the Act. Indeed, even offenders whose duties were set to expire, and who did not receive timely notice, are expected to comply.

{¶48} Mr. Dehler's first assignment of error is without merit.

{¶49} **Right to a Hearing Pursuant to R.C. 2950.032(E)**

{¶50} Mr. Dehler next contends that he was entitled to a hearing pursuant to R.C. 2950.032(E). This contention is wholly without merit as the court did hold a hearing, albeit on the motions, briefs, and evidentiary materials supplied by the parties.

Nothing in R.C. 2950.032(E) requires the court to hold an oral hearing upon the petitioner's request for a reclassification hearing.

{¶51} Pursuant to R.C. 2950.031(E), “*** [i]n any hearing under this division, the *Rules of Civil Procedure* *** apply. *** The court shall schedule a hearing, and shall provide notice to the offender *** and prosecutor of the date, time, and place of the hearing.”

{¶52} Firstly, the docket reflects that the court sent proper notice on April 8, 2008, and that a hearing was scheduled for May 30, 2008, on Mr. Dehler's motion for summary judgment.

{¶53} Secondly, Civ.R. 7(B)(2) provides: “To expedite its business, the court may make provision by rule or order for the submission and determination of motion without oral hearing upon brief written statements of reasons in support and opposition.” As the state properly notes, Local Rule 9.06 of the Trumbull County Court of Common Pleas provides that “[e]very motion shall state its nature with specificity, and be submitted and determined upon the papers hereinafter referenced. *Oral argument of motions may be permitted on application and proper showing.* ***.” (Emphasis added.)

{¶54} Thirdly, nothing in Civ.R. 56 requires the court to hold an oral hearing. “[A] trial court is not required to set or hold a hearing prior to ruling on a motion for summary judgment. Rather, the non-moving party is entitled simply to sufficient notice of the filing of the motion [pursuant to] Civ.R. 5, and an adequate opportunity to respond [pursuant to] Civ.R. 56(C).” *Marino v. Oriana House, Inc.*, 9th Dist. No. 23389, 2007-Ohio-1823, ¶12. (Citations omitted.)

{¶55} This is not a case where the court must determine at an evidentiary hearing whether Mr. Dehler was properly classified. Having been convicted on two counts of rape in violation of R.C. 2907.02, as well as two counts of gross sexual imposition in violation of 2907.04, his classification as a Tier III offender automatically arose by operation of law. That is because the determination of the tier turns solely upon the offense committed. Mr. Dehler does not claim that his offenses place him in another tier. Thus, there exists no genuine issue of material fact as to his proper classification.

{¶56} Pursuant to R.C. 2950.01(G)(1)(a), a Tier III sex offender means:

{¶57} ****

{¶58} *"A violation of section 2907.02 or 2907.03 of the Revised Code."*

{¶59} It makes no difference whether the offender committed the crime with an underage victim, a sexual motivation, or violence. In other words, the trial court need not make any of the determinations that must be made in order to classify an offender as a Tier III offender who has been convicted of other sexual offenses, such as gross sexual imposition, but which are heightened due to the offender's actions or the context of the crime, such as the age of the victim, violations of other laws, sexual motivation, violence, and conspiracy. See R.C. 2950.01(G)(1)(a)-(i).

{¶60} The very fact that Mr. Dehler was convicted on two counts of rape automatically classifies him as a Tier III offender. Once the court determines that the crime fits the tier, nothing remains to be decided. The need for an evidentiary hearing is obviated and summary judgment is appropriately granted.

{¶61} Mr. Dehler's second assignment of error is without merit.

{¶62} Right to a Hearing Pursuant to R.C. 2950.11(F)(2)

{¶63} In his third assignment of error, Mr. Dehler contends that the trial court erred by failing to hold a mandatory hearing pursuant to R.C. 2950.11(F)(2). R.C. 2950.11(F)(2), unlike R.C. 2950.03(E), does not mandate a hearing. Rather, a plain reading of the statute reveals the trial court's decision to hold a hearing is discretionary. Thus, Mr. Dehler's contention is without merit.

{¶64} Specifically, R.C. 2950.11(F)(2) outlines the factors a court must consider *if* it holds a hearing. Thus, it provides that the community notification provisions of R.C. 2950.11 do not apply if, after considering the eleven factors of R.C. 2950.11(F)(2)(a)-(k), the court determines that the offender would not have been subject to the notification provisions of former R.C. 2950.11.

{¶65} The right to a hearing is clearly discretionary under R.C. 2950.11. The relevant portion of R.C. 2950.11 is located in R.C. 2950.11(H)(1), which states “[u]pon the motion of the offender or the prosecuting attorney *** the judge *may schedule a hearing* to determine whether the interests of justice would be served by suspending the community notification requirement under this section in relation to the offender. The judge *may dismiss the motion without a hearing* but may not issue an order suspending the community notification requirement without a hearing. ***.” (Emphasis added.)

{¶66} Thus, it is within the court's discretion to hold a hearing pursuant to R.C. 2950.11 to determine whether community notifications for certain offenders should be considered, and further, the court may dismiss the motion without holding a hearing. The court may not, however, issue an order suspending the community notification requirements without holding a hearing and considering all the relevant factors.

{¶67} In either case, the court dismissed Mr. Dehler's motion for a hearing pursuant to R.C. 2950.11, after finding that there was no error in his classification upon a review of Mr. Dehler's various motions and the state's motion for summary judgment. The court properly found there were no genuine material issues of fact as Mr. Dehler was properly classified pursuant to the new provisions of the Act. The court, quite simply, was not required to hold a hearing pursuant to R.C. 2950.11(F)(2), and upon dismissal, was not required to issue findings of fact. We find no abuse of discretion in the trial court's denial of the request for a hearing.

{¶68} Mr. Dehler's third assignment of error is without merit.

{¶69} Right to Counsel Pursuant to the Adam Walsh Act

{¶70} In his fourth assignment of error, Mr. Dehler contends that he was denied an appointment of counsel, which he timely requested pursuant to the new Act, and that he is entitled to such counsel pursuant to R.C. 120.16, Ohio Atty. Gen. Ops. No. 99-031, and R.C. 2950.11(F)(2). Mr. Dehler's contentions are without merit as he cites to authorities that were in effect under the former provisions which contained a statutory right to appointed counsel.

{¶71} Although former R.C. 2950.09(B)(1) contained a statutory right to counsel, there is no such right under the new Act. Rather, a review of Senate Bill 10 reveals the legislature intended sex offender reclassification hearings to be purely civil and non-punitive in nature; and, most fundamentally, eliminated the statutory right to counsel that was contained in former R.C. 2950.09. Thus, Mr. Dehler's contentions are without merit.

{¶72} We note at the outset that other districts confronted with this issue have similarly found that there is no right to counsel under the new Act. *State v. King*, 2d Dist. No. 08-CA-02, 2008-Ohio-2594, ¶35; *State v. Linville*, 4th Dist. No. 08CA3051, 2009-Ohio-313, ¶17. The General Assembly eliminated the statutory provision for the right to counsel in enacting the new Act, and the Supreme Court of Ohio, in interpreting former R.C. Chapter 2950, has been clear that these proceedings are constitutional, civil, and non-punitive in nature. See *State v. Cook* (1998), 83 Ohio St.3d 404, 413 and *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202 (Lanzinger J., concurring in part and dissenting in part.)

{¶73} “[L]itigants have no generalized right to appointed counsel in civil actions.” *Linville* at ¶14, quoting *Graham v. City of Findlay Police Dept.*, 3d Dist. No. 5-01-32, 2002-Ohio-1215, citing *State ex rel. Jenkins v. Stern* (1987), 33 Ohio St.3d 108; *Roth v. Roth* (1989), 65 Ohio App.3d 768.

{¶74} Thus, Mr. Dehler would only be entitled to counsel if it was statutorily provided or if there was an infringement of his substantial liberty interest or vested right. As succinctly stated by Judge Fain in his concurring opinion in *State v. King*, “[i]ncarceration is not one of the possible outcomes that may result from the proceeding for which [he] seeks the appointment of counsel, and, therefore [he] is not entitled to the appointment of counsel at the State’s expense.” *Id.* at ¶36.

{¶75} Pursuant to R.C. 120.16(A)(1), representation is provided to “indigent adults *** who are charged with the commission of an offense or act that is a violation of a state statute and for which the penalty or any possible adjudication includes the potential loss of liberty ***.”

{¶76} R.C. 120.16, however, is concerned with criminal matters, and the Supreme Court of Ohio has been clear the sexual offender classification and notification provisions, although located in Ohio's criminal code, are civil in nature. See *Cook* and *Wilson*.

{¶77} More fundamentally, Mr. Dehler has not been deprived of a substantial liberty by being classified as a Tier III sex offender. The Supreme Court of Ohio succinctly stated in *Cook* that "except with regard to constitutional protections against ex post facto laws *** felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation." *Id.* at 412, quoting *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281-282. (Emphasis added.) This is so because "where no vested right has been created, 'a later enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, unless the past transaction or consideration created at least a reasonable expectation of finality.'" *Id.*, quoting *Matz* at 281.

{¶78} Ohio has had a sex offender registration statute in effect since 1963. See *Cook* at 406. Further, the "harsh consequences [of] classification and community notification *** come not as a direct result of the sexual offender law, but instead as a direct societal consequence of [the offender's] past actions." *Id.* at 413, quoting *State v. Lyttle* (Dec. 22, 1997), 12th Dist. No. CA97-03-060, 1997 Ohio App. LEXIS 5705.

{¶79} "As a result, convicted sex offenders 'have no reasonable expectation that [their] criminal conduct would not be subject to future versions of R.C. Chapter 2950.'" *Linville* at ¶16, quoting *King* at ¶33. Thus, because Mr. Dehler has no settled

expectation regarding his registration obligations, he has not been deprived of any liberty interest.

{¶80} Mr. Dehler further argues that pursuant to R.C. 2950.11(F)(2), he is entitled to appointed counsel because counsel is necessary “to allow petitioner to present evidence of at least 11 factors which would have shown that he would not have been subject to notification provisions under the prior law.” This argument is simply without merit. As we noted in Mr. Dehler’s third assignment of error, there is no mandatory right to a hearing pursuant to R.C. 2950.11(F)(2).

{¶81} While R.C. 2950.11(F)(2) allows the court to hold a hearing on the notification provisions, notably absent is a provision providing for a statutory right to counsel at the hearing. This statute simply lists eleven factors the court is required to consider in determining whether “the person would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment. ***.”

{¶82} Mr. Dehler is correct that former R.C. 2950.09 provided a statutory right to counsel to determine whether an offender was a sexual predator under the former classification scheme. Former R.C. 2950.09, however, has since been repealed under the new Act, and again, notably absent in the new provisions is the former statutorily created right to counsel. Further, the court no longer makes a determination as to the offender’s classification, but rather the classification is now automatic based on the offender’s crime.

{¶83} As Mr. Dehler has no right to appointed counsel, statutory or otherwise, his fourth assignment of error is without merit.

{¶84} The New Act is Constitutional

{¶85} In his final assignment of error, Mr. Dehler contends that the new Act is not applicable to him because he was sentenced in 1992 and was never classified; thus, the application of the current law as applied to him violates the “doctrines of laches; res judicata; Clause I, Section 10, Article I of the United States Constitution as ex post facto legislation; violates Section 28, Article II of the of the Ohio Constitution as retroactive legislation, and further violates R.C. 1.48 and 1.58, et. seq.”

{¶86} First, the fact that Mr. Dehler has never been classified as a sex offender under the old sex offender classification scheme is of no consequence so long as he is classified prior to his release from confinement.

{¶87} In *State v. Brewer* (1999), 86 Ohio St.3d 160, the Supreme Court of Ohio reviewed the version of R.C. 2950.03 then in effect, which required “that the offender be provided with notice, including information regarding registration duties, and including a statement as to whether the offender has been adjudicated as being a sexual predator. *** This notice must be provided by the appropriate official ‘at least ten days before the offender is released.’” *Id.* at 165, citing former R.C. 2950.03(A)(1). Thus, even under the former scheme of R.C. Chapter 2950, classification was proper as long as it occurred prior to the offender’s release. As Mr. Dehler is currently still incarcerated, he may now for the first time be classified.

{¶88} Furthermore, under the new scheme, sex offender hearings prior to classification no longer exist. “S.B. 10 abolished prior sex offender classifications in former R.C. Chapter 2950. *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195, ¶15. Designations like ‘sexual predator’ no longer exist, nor do sex offender

hearings under the former law. *Williams* at ¶15. Now, under S.B. 10, an offender who commits a sex offense is classified as either a sex offender or a child-victim offender. *Williams* at ¶16. Depending on the sex offense committed, the offender is placed in Tier I, Tier II, or Tier III. *Id.* Trial courts no longer have discretion in imposing a certain classification on offenders, and the offender's likelihood to reoffend is no longer considered. *Id.* Rather, offenders are now classified solely on the offense for which they were convicted. *Id.* As an exception, offenders are automatically placed in a higher tier if (1) they have a prior conviction for a sexually-oriented or child victim-oriented offense, or (2) they have been previously classified as sexual predators. *Id.*" *State v. Gilfillan*, 10th Dist. No. 08AP-317, 2009-Ohio-1104, ¶110.

{¶89} "Each tier under S.B. 10 has registration requirements, but they differ in terms of the duration of the duty and the frequency of the in-person address verification." *Gilfillan* at ¶111, citing *Williams* at ¶18. Mr. Dehler is a Tier III offender because rape is a Tier III offense. *Id.*, citing R.C. 2950.01(G)(1)(a). As such, "Tier III offenders are required to register for life and to verify their addresses every 90 days; community notification may occur every 90 days for life." *Id.*, citing *Williams* at ¶18.

{¶90} Second, as to the constitutional challenges Mr. Dehler raises, the Supreme Court of Ohio considered these challenges under the former sex offender statutes and determined that because a convicted felon has no reasonable expectation that his or her criminal conduct will not be subject to further legislation, the former version of R.C. Chapter 2950 could be applied to sex offenders who committed their crimes before the legislation took effect. *King* at ¶33, citing *Cook* at 412. Similarly here,

Mr. Dehler could have no reasonable expectation that his criminal conduct would not be subject to future versions of R.C. 2950.

{¶91} As the Second Appellate District noted in *King*: “[i]ndeed, *Cook* indicates that convicted sex offenders have no reasonable ‘settled expectations’ or vested rights concerning the registration obligations imposed on them. If the rule were otherwise, the initial version of R.C. Chapter 2950 could not have been applied retroactively in the first place.” *Id.* at ¶33.

{¶92} Therefore, as to Mr. Dehler's constitutional challenges of the new Act, we find they are without merit, as we and other districts have recently determined these new provisions, while they may make the registration requirements more onerous and burdensome, do not violate any constitutional rights of offenders.

{¶93} In our recent decision, *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, we found that the newly enacted provisions of the Act withstood constitutional challenges with respect to ex post facto, retroactivity, due process, and separation of powers claims. We determined that the newly enacted legislation was civil, remedial, and non-punitive in nature, and although the registration and notification provisions are now heightened depending on the classification of the offender, we determined that based on the prior decisions of the Supreme Court of Ohio in *Cook* and *Wilson*, these provisions were de minimis procedural requirements.¹ See, also,

1. We note, however, as we did in *Charette*, that the Supreme Court of Ohio has become more divided on the issue of whether the registration and notification statute has evolved from a remedial and civil statute into a punitive one. As Justice Lanzinger stated in her concurring in part and dissenting in part opinion in *Wilson*: “I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions.” See, also, *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824 (Lanzinger, J., dissenting). We believe Senate Bill 10 merits review by the Supreme Court of Ohio to address the issue of whether the current version of R.C.

Charette; Gilfillan at ¶¶109-119; *Sewell v. State*, 1st Dist. No. C-080503, 2009-Ohio-872; *State v. Sewell*, 4th Dist. No. 08CA3042, 2009-Ohio-594, *State v. Desbiens*, 2d Dist. No. 22489, 2008-Ohio-3375.

{¶94} Mr. Dehler's fifth assignment of error is without merit.

{¶95} The judgment of the Trumbull County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion,

TIMOTHY P. CANNON, J., dissents with a Dissenting Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶96} I concur with the judgment ultimately reached by the majority, but do so for reasons other than those adduced by the majority. Accordingly, I concur in judgment only.

{¶97} In 1992, Dehler was convicted of two counts of Rape and two counts of Gross Sexual Imposition and sentenced to serve two consecutive prison terms of seven to twenty-five years.²

{¶98} In 1996, R.C. Chapter 2950 was rewritten as part of Am.Sub.H.B. No. 180, effective January 1, 1997. Although former R.C. 2950.09(C)(1) provided for the classification of sex offenders convicted prior to H.B. 180 and serving a term of imprisonment as of January 1, 1997, Dehler was never classified as a sexual offender.

Chapter 2950 has been transformed from remedial to punitive law. Before that court revisits the issue, however, we, as an inferior court, are bound to apply its holdings in *Cook and Wilson*.

2. Dehler's convictions for Gross Sexual Imposition were subsequently vacated on appeal. See *State v. Dehler*, 8th Dist. Nos. 65006 and 66020, 1994 Ohio App. LEXIS 2269.

{¶99} There are currently many pending appeals by offenders who have been classified under the Adam Walsh Act, but who were convicted and classified in final sentencing judgments prior to its enactment. In these cases, where there is an existing prior final sentencing judgment, re-classification under the provisions of the Adam Walsh Act violates the constitutional doctrine of separation of powers.

{¶100} “It is well settled that the legislature has no right or power to invade the province of the judiciary, by annulling, setting aside, modifying, or impairing a final judgment previously rendered by a court of competent jurisdiction.” *Cowen v. State ex rel. Donovan* (1922), 101 Ohio St. 387, 394; *Bartlett v. Ohio* (1905), 73 Ohio St. 54, 58 (“it is well settled that the legislature cannot annul, reverse or modify a judgment of a court already rendered”). In effect, the separation of powers doctrine applies the principle of *res judicata*, typically used as a bar to further litigation by parties, to legislative action. Cf. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, at paragraph one of the syllabus (“[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action”).

{¶101} An offender’s classification as a sexual offender constitutes such a valid final judgment. *State v. Washington*, 11th Dist. No. 99-L-015, 2001-Ohio-8905, 2001 Ohio App. LEXIS 8905, at *9 (“a defendant’s status as a sexually Oriented offender *** arises from a finding rendered by the trial court, which in turn adversely affects a defendant’s rights by the imposition of registration requirements”).

{¶102} Thus, where an offender has been previously classified as a Sexually Oriented Offender, Habitual Sex Offender, or Sexual Predator in a valid judgment entry

rendered by a court of competent jurisdiction, that judgment may not be impaired by subsequent legislative enactment. See *Spangler v. State*, 11th Dist. No. 2008-L-062, 2009-Ohio-3178, at ¶¶55-64.

¶103 In contrast to the majority of these cases, Dehler has not been previously classified as a sexual offender. As the application of the Adam Walsh Act to Dehler does not disturb the settled judgment of a court of competent jurisdiction, there is no constitutional impediment to his classification.

TIMOTHY P. CANNON, J., dissenting.

¶104 I respectfully dissent. The majority concludes that Dehler's right to a hearing was not compromised. I disagree.

¶105 Dehler filed a request for a hearing pursuant to R.C. 2950.032(E) to contest his classification as a Tier III offender. This request was filed within 60 days of Dehler receiving notice of his classification, thus it was timely. R.C. 2950.032(E).

¶106 Dehler had a right to a hearing pursuant to R.C. 2950.032(E), which provides, in pertinent part:

¶107 "An offender or delinquent child who is provided a notice under division (A)(2) or (B) of this section may request *as a matter of right* a court hearing to contest the application to the offender or delinquent child of the new registration requirements under Chapter 2950 of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008." (Emphasis added.)

{¶108} R.C. 2950.032(E) states that the provisions in R.C. 2950.031 apply regarding the conduct of the hearing. R.C. 2950.031(E) provides, in part:

{¶109} “[If a hearing is properly requested, the] court shall schedule a hearing, and shall provide notice to the offender or delinquent child and prosecutor *of the date, time, and place of the hearing.* ***

{¶110} “*** If an offender or delinquent child requests a hearing in accordance with this division, *at the hearing, all parties are entitled to be heard, and the court shall consider all relevant information and testimony* presented relative to the application to the offender or delinquent child of the new registration requirements under Chapter 2950 of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008. ***” (Emphasis added.)

{¶111} The “non-oral hearing” that occurred in this matter did not give Dehler an opportunity to be heard or to present testimony. Also, it did not occur at a specific “date, time, and place.”

{¶112} The majority cites to the following language of R.C. 2950.031(E), which indicates the Rules of Civil Procedure are to apply to these hearings:

{¶113} “In any hearing under this division, the Rules of Civil Procedure *** apply, *except to the extent that those Rules would by their nature be clearly inapplicable.*” (Emphasis added.)

{¶114} The majority uses this language to conclude that non-oral hearings are permitted in summary judgment exercises pursuant to Civ.R. 56 and, thus, a hearing was not required in this matter. The majority also notes that Civ.R. 7(B)(2) and Loc.R.

9.06 of the Trumbull County Court of Common Pleas permit certain motions to be decided without an oral hearing.

{¶115} I believe rules of civil procedure (or local rules) that are in direct conflict to the mandate of the statute to conduct a hearing are “by their nature *** clearly inapplicable.” See R.C. 2950.031(E). Moreover, pursuant to the language of the statute, the Rules of Civil Procedure apply *at the hearing*.

{¶116} The requirement of having a hearing appears, on its face, to be somewhat nonsensical. The limited issues the trial court is permitted to consider appear to be capable of resolution by simple administrative review. However, by mandating a hearing, it appears the legislature has attempted to provide a procedural safeguard to an otherwise unattractive due process picture. Whatever the reason, the legislature did not *suggest* a hearing, nor did it make the hearing an *option*. I believe the clear language, no matter how empty a right it supports, can only be read to *mandate* a hearing. As a result, I do not believe the legislature intended for a court to use a rule of civil procedure or a local rule to supersede its unambiguous directive that a hearing occur.

{¶117} The statute calls for a hearing. Dehler did not receive a hearing. Accordingly, I would reverse the judgment of the Trumbull County Court of Common Pleas and remand this matter to the trial court in order for the trial court to provide Dehler with his statutory right to a hearing.³

3. I note that, pursuant to R.C. 2950.032(E), this hearing should occur by video conferencing, if such technology is available, unless the trial court determines that “the interests of justice” require Dehler to be physically present.

STATE OF OHIO)
)SS.
COUNTY OF TRUMBULL)

IN THE COURT OF APPEALS
ELEVENTH DISTRICT

STATE OF OHIO,

JUDGMENT ENTRY

Respondent-Appellee,

CASE NO. 2008-T-0061

- vs -

LAMBERT DEHLER,

Petitioner-Appellant.

For the reasons stated in the opinion of this court, appellant's assignments of error are without merit. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

Costs to be taxed against appellant.



PRESIDING JUDGE MARY JANE TRAPP

DIANE V. GRENDALL, J., concurs in judgment only with a Concurring Opinion,
TIMOTHY P. CANNON, J., dissents with a Dissenting Opinion.

FILED
COURT OF APPEALS

SEP 28 2009

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

Exhibit B