

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,

Appellee,

Case No. 09-971

vs.

Byron Clayborn,

Appellant.

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District.

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MERIT BRIEF OF APPELLANT BYRON CLAYBORN

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Yeura R. Venters 0014879  
Franklin County Public Defender

and

Allen V. Adair 0014851  
Counsel of Record  
373 South High Street / 12<sup>th</sup> Floor  
Columbus, Ohio 43215  
Phone: (614) 719-2061  
Fax No.: (614) 461-6470  
avadair@franklincountyohio.gov

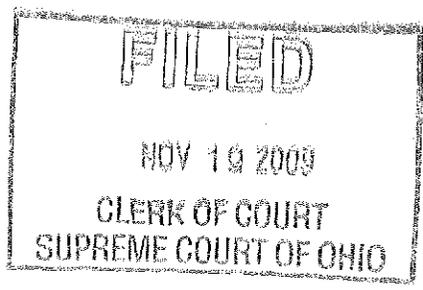
Counsel for Appellant Byron Clayborn

Ron O'Brien 0017245  
Prosecuting Attorney  
Franklin County, Ohio

and

Steven L. Taylor 0043876  
Counsel of Record  
373 S. High Street / 13<sup>th</sup> Floor  
Columbus, Ohio 43215  
Phone: 614 462-3555

Counsel for Appellee, State of Ohio



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## STATEMENT OF THE FACTS

Appellant was indicted in Franklin County on thirteen counts of pandering sexually oriented matter involving a minor (R.C. 2907.322) as a second degree felony and thirteen counts of the same offense as fourth degree felonies. Charges arose after appellant made photocopies of pornographic images of children at work and more were found during the execution of a search warrant at his home. (Tr. 8-9.) The record is not clear, but photocopying may have been the basis for the more serious counts and possession the basis for the lesser.

On May 27, 2008 appellant entered a guilty plea to count one which made reference to a period between March 1, 2007 and April 27, 2007. (Tr. 2-8.) The court imposed the jointly recommended sentence of two years incarceration. Pursuant to Revised Code Chapter 2950, as modified by Amended Substitute Senate Bill 10 of the 127th General Assembly, specifically R.C. 2950.03(A)(2), appellant was advised that he must register as a Tier II offender. Defense counsel objected on the basis that the January 1, 2008 effective date of these measures fell after the date of the criminal conduct appellant stood convicted of. (Tr. 10-15.)

The judgment entry filed on May 30, 2008 includes the following paragraph:

In addition, at the time of the plea the Court notified the Defendant that by entering into this plea the Defendant will be a sexual offender and classified pursuant to S.B. 10 as a Tier II with registration duties to last twenty-five (25) years; in person verification is required at the county sheriff's office every 180 days.

The entry concludes with the judge's signature. There are no instructions for service upon the parties and the docket does not reflect service upon the parties.

Appellant intended to appeal the retrospective application of amended Chapter 2950. However notice of appeal was not filed until July 15, 2008. Appellant was represented by the Franklin County Public Defender. Trial counsel did not forward the file to the office's appellate until more than thirty days had passed. The notice of appeal stated:

\* \* \* Appellant is mindful that more than thirty days have passed since the date of judgment, but relies upon State v. Cook (1998), 83 Ohio St. 3d 404, and State v. Wilson, 113 Ohio St. 3d 382, 2007-Ohio-2202 for the proposition that sex offender classification proceedings are civil in nature. Appellant further relies upon this

court's decision in State v. Furlong (February 6, 2001), Franklin Co. App. No. 00AP-637 finding that since sex offender classification is a civil proceeding, even when adjunct to a sentencing hearing, the time for filing the notice of appeal does not begin to run until the latter of (1) entry of the judgment or order appealed if the notice mandated by Civ.R. 58(B) is served within three days of the entry of judgment; or (2) service of the notice of judgment and its date of entry if service is not made upon the party within that three-day period. If the entry is not endorsed with directions to the clerk to serve all parties, time does not begin to run even though the defendant is in fact aware of the court's decision. The judgment entry in this case falls within this rule.

Thus appellant maintained that the notice of appeal was timely, since he was challenging his classification but not his conviction.

Appellant submitted a brief advancing the following assignments of error:

FIRST ASSIGNMENT OF ERROR: Application of the provisions of Senate Bill 10 to those convicted of offenses committed before its January 1, 2008 effective date, but sentenced after that date, violates the ban on ex post facto lawmaking by the states set forth in Article I, Section 10 of the United States Constitution.

SECOND ASSIGNMENT OF ERROR: Application of the provisions of Senate Bill 10 to those convicted of offenses committed before its January 1, 2008 effective date, but sentenced after that date, violates the ban on retroactive laws set forth in Article II, Section 28, of the Ohio Constitution.

THIRD ASSIGNMENT OF ERROR: Senate Bill 10's tier system of classification violates the Separation of Powers Doctrine.

FOURTH ASSIGNMENT OF ERROR: The residency restrictions within Chapter 2950, as amended, violate the substantive due process provisions of the United States Constitution and Article I, Section 16 of the Ohio Constitution. Furthermore, such restrictions violate the privacy guarantee of Article I, Section 1 of the Ohio Constitution.

FIFTH ASSIGNMENT OF ERROR: Retroactive application of S.B. 10 violates the procedural due process guarantees of the state and federal constitutions.

SIXTH ASSIGNMENT OF ERROR: Retroactive application of S.B. 10 violates the Double Jeopardy Clauses of the United States Constitution's Fifth Amendment and Article I, Section 10 of the Ohio Constitution.

SEVENTH ASSIGNMENT OF ERROR: Senate Bill 10 as applied to appellant constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

These were not addressed on the merits because the appellate court sua sponte dismissed the appeal. State v. Clayborn, Franklin App. No. 08AP-593, 2009-Ohio-1571.

On August 26, 2009 the Court accepted this case for further review.

## ARGUMENT

**PROPOSITION OF LAW:** Because prior decisions of this court have characterized sex offender classification, registration, and notification provisions set forth in Chapter 2950 of the Revised Code as civil in nature, pursuant to Appellate Rule 4(A) the defendant in a criminal case is excused from the requirement that notice of appeal be filed within thirty days when he has not been served with a copy of the trial court's judgment entry in the manner prescribed by Civil Rule 58(B). (State v. Cook (1998), 83 Ohio St. 3d 404; State v. Williams (2000), 88 Ohio St. 3d 513; State v. Hayden, 96 Ohio St. 3d 211, 2002-Ohio-4169; State v. Wilson, 113 Ohio St. 3d 382, 2007-Ohio-2202, and State v. Ferguson, 120 Ohio St. 3d 7, 2008-Ohio-4824, followed.)

As a matter of common sense, sex offender registration and notification requirements that are directly related to a criminal conviction are criminal in nature, as opposed to civil. But the law draws finer distinctions. Two overarching considerations affect ongoing litigation concerning the nature of Chapter 2950 statutes in relation to whether they may be retroactively applied. First, enactments of the legislature are afforded a presumption of constitutionality. Second, criminal proceedings afford the person held to account greater protection - a presumption of innocence, an enhanced burden of proof, the availability of delayed appeal, more beneficial standards of review upon appeal, and protection against double jeopardy and ex post facto laws. Thus the logically strained posture of this case.

On November 4, 2009 this court heard arguments in four cases concerning retroactive application of the Senate Bill 10 version of Revised Code Chapter 2950. State v. Bodyke, No. 2008-2502; Chojnacki v. Ohio Attorney General, No. 2008-991; In re Smith, No. 2008-1624; and In re Adrian R., No. 2009-189. In all likelihood the Court's decisions in these cases will have issued by the time the merits of this case are addressed, and the Court's finding on the civil/criminal distinction will drive determination of this case. As a matter of logic, there appear to be four

possible outcomes:

(1) If Chapter 2950 continues to be found civil in nature notwithstanding the S.B. 10 amendments, appellant's notice of appeal is timely, saved by the tolling provision included in Appellate Rule 4(A).

(2) If S.B. 10 is deemed to have rendered Chapter 2950 criminal in nature, then appellant has the option of pursuing a delayed appeal. Hopefully this would be allowed as notice of appeal was filed only two weeks late, due to the omissions of counsel, not the defendant.

(3) Alternately, as a transition rule, the Court may adopt the proposed syllabus rule advanced by appellant, and despite a finding in other cases that Chapter 2950 is now criminal in nature, appellant's appeal is saved by App.R. 4(A) based on the former civil classification.

(4) If the "quintessential criminal case" characterization underlying the lead opinion in the Court of Appeals somehow forms the basis for a hybrid classification, the Court should specify whether App. R. 4(A) or delayed appeal is the portal to appellate review of appellant's constitutional challenges.

One way or another appellant should be afforded access to the Court of Appeals.

## I.

Appellate Rule 4(A) provides:

A party shall file the notice of appeal required by App. R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.

Civil Rule 58(B) provides:

When the court signs a judgment, the court shall endorse thereon a direction to the clerk to serve upon all parties not in default for failure to appear notice of the judgment and the date of its entry upon the journal. Within three days of entering the judgment upon the journal, the clerk shall serve the parties in a manner prescribed by Civ. R. 5(B) and note the service in the appearance docket. Upon serving the notice and notation of the service in the appearance docket, the service is complete. The failure of the clerk to serve notice does not affect the validity of the judgment or the running of the time for appeal except as provided in App. R. 4(A)

Also see Atkinson v. Grumman Ohio Corp. (1988), 37 Ohio St. 3d 80, paragraph two of the syllabus. As previously noted, no such instructions appear on the judgment entry in this case and

the docket does not reflect service was made.

At the plea and sentencing hearing the judge stated he was mindful of other litigation in state and federal court, but constrained to follow the existing statutes, "until some other court tells me differently." The court's judgment entry set forth appellant's tier classification, thus formalizing rejection of his constitutional challenges to retroactive application of S.B. 10. This aspect of the court's judgment necessarily reflects its belief that this portion of proceedings remained civil in nature. Thus the instructions to the clerk called for by Civil Rule 58(B) were required.

Appellant's assertion that he was entitled to be classified under former Chapter 2950 provisions, as in effect at the time of his offense, brought him squarely within the rule of the Tenth District's decision in State v. Furlong (Feb. 6, 2001), Franklin App. No. 00AP-637, discussed below, where sex-offender classification proceedings were deemed civil in nature, though adjunct to a criminal prosecution. As noted by the dissenting judge in the Court of Appeals:

...(S)o, too, is the trial court's determination here under R.C. Chapter 2950, as amended by S.B. 10, that the amended provisions may be applied to Clayborn even though his crime pre-dated the statute's amendment.

2009-Ohio-593, ¶15.

...As in Furlong, the trial court's decision occurred as a result of a proceeding involving statutes deemed civil in nature. As a result, Clayborn, like Furlong, is entitled to invoke the tolling provision of App. R. 4(A). Indeed, when those accountable under the sexual classification provisions of R.C. Chapter 2950 historically have been subject to the restrictions evolving from R.C. Chapter 2950's civil nature, it seems an anomaly to reverse the characterization in the single instance where a benefit accrues from the characterization.

Id. ¶16.

## II.

Appellant is in the incongruous position of arguing his notice of appeal is timely by operation of Appellate Rule 4(A) because the classification aspect of trial court proceedings was civil in nature, though ultimately he maintains the controlling provisions within Chapter 2950 are criminal and punitive, thus making their application in his circumstances a violation of Article I,

Section 10 of the United States Constitution and Article II, Section 28, of the Ohio Constitution. Nonetheless invocation of appellate jurisdiction and the ultimate resolution of constitutional claims on their merits are separate matters.

As with all versions of Chapter 2950, collateral consequences are the result of a criminal prosecution. Thus the "quintessential criminal case" language in the majority opinion in this case makes some sense. But beginning with State v. Cook (1998), 83 Ohio St. 3d 404, classification, registration and community notification provisions have been declared civil and remedial, forestalling ex post facto and retroactive law challenges to their application to individuals convicted of offenses committed prior to the effective date of the provisions. This characterization has continued, though a split has developed.

In State v. Wilson, 113 Ohio St. 3d 382, 2007-Ohio-2202, the immediate issue was what standard of review should apply in appellate review of the sufficiency of the evidence in sex offender classification proceedings. The syllabus adheres to State v. Cook, holding: "Because sex-offender-classification hearings under Chapter 2950 are civil in nature, a trial court's determination in a sex-offender-classification hearing must be reviewed under a civil manifest-weight-of-the-evidence standard and may not be disturbed when the judge's findings are supported by some competent credible evidence." However, two justices and a Court of Appeals judge sitting by assignment dissented as to this categorization.

Senate Bill 5 of the 125th General Assembly had brought sweeping changes to Chapter 2950, effective July 21, 2003. Paragraphs 45-46 of the concurring and dissenting opinion addressed why these changes compelled the conclusion Chapter 2950 proceedings had become criminal and punitive in nature.

More recently, in State v. Ferguson, 120 Ohio St. 3d 7, 2008-Ohio-4824, the defendant lodged ex post facto and retroactive law challenges to application of the Senate Bill 5 version of Chapter 2950 to his convictions dating back to 1990. In a 4-3 split, the majority rejected both claims, finding the provisions civil for purposes of ex post facto analysis and remedial for purposes

of the retroactive law claim. *Id.* ¶43. But the shifting views of the justices are significant. Justice Lanzinger authored the minority opinion in both cases. Justice Lundberg Stratton wrote the opinion in Cook and the majority opinion in Wilson but joined the dissent in Ferguson. Justice Pfeiffer was part of the majority in Wilson, but joined the dissent in Ferguson. Justice O'Connor, who had joined the minority in Wilson authored the majority opinion in Ferguson, citing stare decisis as her rationale with respect to the version of Chapter 2950 under consideration. See footnote 4. Thus, between the two opinions, four justices found the 2003 version of Chapter 2950 criminal and punitive in nature.

Appellant is hopeful that further amendments to Chapter 2950 made by Senate Bill 10 of the 127th General Assembly will now tip a majority of the court to the conclusion that the challenged provisions are criminal and punitive in nature. But as noted by Justice O'Connor in Ferguson, and as stated by numerous trial and appellate courts passing on challenges to the latest version of Chapter 2950, Cook is afforded great precedential value, notwithstanding the substantial changes brought by Senate Bill 5 and Senate Bill 10.

It is this precedent appellant relies upon for the claim he was excused from filing a notice of appeal within thirty days because he was not served with a civil judgment in the specified manner. As required by the current provisions, appellant was notified that he was classified as a Tier II offender, even though his offense predated the effective date of the present classification scheme. This was over defense objection premised on the issues appellant sought to raise in the Court of Appeals.

Though the prosecutor argued otherwise in the Court of Appeals, direct appeal is the necessary avenue to vindicate these claims, as it was in State v. Bodyke, Chojnacki v. Ohio Attorney General, In re Smith, and In re Adrian R. The state's memorandum opposing jurisdiction argued that constitutional challenges to retroactive application of Senate Bill 10 could not be heard in this appeal, citing the syllabus to Ohio Contract Carriers Assn. v. P.U.C.O. (1942), 140 Ohio St. 160:

Appeal lies only on behalf of a party aggrieved by the final order appealed from. Appeals are not allowed for the purpose of settling abstract questions, but only to correct errors injuriously affecting the appellant.

Plainly appellant was aggrieved by the trial court finding him subject to the new tier classification system. The judge noted that as a Tier II offender he would be treated more like a sexual predator under the old classification system, than a sexually oriented offender, which likely would have been his classification. (Tr. 11-12.)

### III.

In State v. Furlong (Feb. 6, 2001), Franklin App. No. 00AP-637 the defendant pleaded guilty to eight sexually oriented offenses. At the sentencing hearing he was classified as a sexual predator under the then controlling version of Chapter 2950. The judgment entry incorrectly stated that the parties stipulated that he be classified as sexual predator. As this would nullify any chance of success on appeal, the defense sought a correction, leading to a nunc pro tunc entry deleting the objectionable language. Notice of appeal was filed within thirty days of the corrected entry, but was untimely because a nunc pro tunc entry does not extend the time for filing the notice of appeal.

The appeal was saved by Appellate Rule 4(A):

While it is true that appellant filed his appeal more than thirty days after the May 2, 2000 entry and that the trial court's nunc pro tunc entry did not extend the thirty-day period, this court still has jurisdiction to review appellant's appeal. The reason for this is that a sexual predator hearing is a civil proceeding. State v. Gardiner (Nov. 16, 2000), Franklin App. No. 00AP-93, unreported. For civil cases, App. R. 4(A) requires the notice of appeal to be filed within thirty days of "service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure." Civ. R. 58(B) requires the court to endorse on its judgment "a direction to the clerk to serve upon all parties \* \* \* notice of the judgment and its date of entry upon the journal." "The thirty-day time limit for filing the notice of appeal does not begin to run until the later of (1) entry of the judgment or order appealed if the notice mandated by Civ. R. 58(B) is served within three days of the entry of the judgment; or (2) service of the notice of judgment and its date of entry if service is not made on the party within the three-day period in Civ. R. 58(B)." Whitehall ex rel. Fennessy v. Bambi Motel, Inc. (1998), 131 Ohio App. 3d 734, 741.

A review of both judgment entries shows that the court never endorsed upon the entries the required "direction to the clerk to serve upon all parties \* \* \* notice of the judgment and its date of entry upon the journal" pursuant to Civ. R. 58(B). Therefore, the time for filing a notice of appeal "never began to run because the trial court failed to comply with Civ. R. 58(B)." Id. at 741. Even though appellant was aware of the entry as evidenced by his objection filed May 5, 2000, "actual notice \* \* \* is insufficient to begin the running of the time for appeal in the absence of formal notice in compliance with Civ. R. 58(B)" Id. Accordingly, appellee's motion to dismiss appellant's appeal is overruled.

This court adopted similar reasoning the following year in In re Anderson (2001), 92 Ohio St. 3d 63, a delinquency case. The syllabus holds: "A juvenile court proceeding is a civil proceeding." Consequently delayed appeals pursuant to App. R. 5(A) were not available. (The Court has since amended App. R. 5(A) to permit delayed appeals in delinquency and serious youthful offender proceedings.) However, the saving provision of App. R. 4(A) applied, extending the time for filing the notice of appeal when service of the judgment entry was not made upon the parties within three days as required by Civ. R. 58. Though Furlong is not cited, the closing paragraphs of the Anderson decision closely follow the paragraphs from the Furlong quoted above.

As in Furlong and Anderson, the judgment entry in this case did not include the required directions to the clerk. On this basis, appellant maintains his notice of appeal was timely insofar as he challenged the civil aspect of proceedings in the trial court.

#### IV.

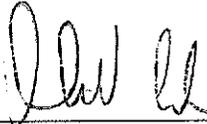
As to remedy, in In re Anderson, supra, the notice of appeal filed on behalf of the juvenile, as in the present case, invoked the saving provision of App. R. 4(A). The court of appeals dismissed, finding juvenile cases are neither civil nor criminal, thus neither App. R. 4(A) nor App. R. 5(A) applied. As in the present case, the juvenile argued before this court that juvenile court proceedings were one or the other, determining whether the appeal was timely under the civil rule or subject to delayed appeal. Following historical analysis, the Court found them civil in nature and applied App. R. 4(A). Based on its determination in the lead Senate Bill 10 cases, the Court is asked to make the same determination here. Alternately, the proposed syllabus rule would permit remand for determination on the merits notwithstanding the outcome in Bodyke et al.

**CONCLUSION**

For the above stated reasons the judgment of the Tenth District Court of Appeals should be reversed.

Respectfully submitted,

Yeura R. Venters 0014879  
Franklin County Public Defender

By   
Allen V. Adair 0014851  
(Counsel of Record)  
373 South High Street  
12th Floor  
Columbus, Ohio 43215  
Phone: 614-719-2061  
Counsel for Appellant  
Byron Clayborn

**PROOF OF SERVICE**

I hereby certify that a copy of this merit brief was hand delivered to the office of the Franklin County Prosecuting Attorney, Counsel for Appellee, 373 South High Street, 13th Floor, Columbus, Ohio 43215, this 19th day of November, 2009.

  
Allen V. Adair, Counsel of Record  
Counsel for Appellant,  
Byron Clayborn

IN THE SUPREME COURT OF OHIO

State of Ohio,  
Appellee,

vs.

Byron Clayborn  
Appellant.

On Appeal from the  
Franklin County Court  
of Appeals, Tenth Appellate  
District.

09-0971

Court of Appeals  
Case No. 08AP-593

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NOTICE OF APPEAL

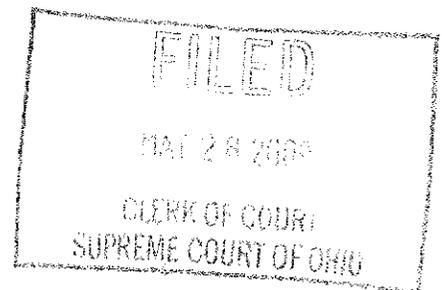
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Yeura R. Venters 0014879  
Public Defender  
Franklin County Ohio  
373 South High Street / 12<sup>th</sup> Floor  
Columbus, Ohio 43215  
614/ 719-8877  
And

Allen V. Adair 0014861  
(Counsel of Record)  
614 / 719-2061  
Counsel for Appellant

Ronald J. O'Brien 0017245  
Prosecuting Attorney  
Franklin County Ohio  
373 S. High St. / 13<sup>th</sup> Floor  
Columbus, Ohio 43215  
And

Steven L. Taylor 0043876  
Assistant Prosecuting Attorney  
Counsel for Appellee  
614 462-3555

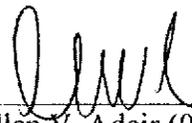


NOTICE OF APPEAL OF APPELLANT BYRON CLAYBORN

Appellant Byron Clayborn gives notice of appeal to the Supreme Court of Ohio from the judgment of the Franklin County Court of Appeals, Tenth Appellate District, entered in Court of Appeals Case No. 08AP-593 on April 14, 2009.

This case raises a substantial constitutional question, and is one of public or great general interest.

Respectfully submitted,

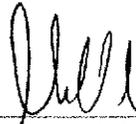


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Allen V. Adair (0014851)  
Counsel of Record  
Counsel for Appellant  
Byron Clayborn

CERTIFICATE OF SERVICE

I hereby certify that a copy of this notice of appeal was had-delivered to the office of Steven L. Taylor, Assistant Prosecuting Attorney, 373 South High St., 13<sup>th</sup> Floor, Columbus, Ohio 43215 on this the 28<sup>th</sup> day of May, 2009.



---

Allen V. Adair (0014851)  
Counsel of Record  
Counsel for Appellant  
Byron Clayborn

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :  
 :  
 Plaintiff-Appellee, :  
 :  
 v. : No. 08AP-593  
 : (C.P.C. No. 07CR08-5606 )  
 Byron Clayborn, : (REGULAR CALENDAR)  
 :  
 Defendant-Appellant. :

---

O P I N I O N

Rendered on April 14, 2009

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*Ron O'Brien*, Prosecuting Attorney, *Steven L. Taylor* and *Laura M. Swisher*, for appellee.

*Yeura R. Venters*, Public Defender, and *Allen V. Adair*, for appellant.

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APPEAL from the Franklin County Court of Common Pleas.

KLATT, J.

{¶1} Defendant-appellant, Byron Clayborn, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of one count of pandering sexually oriented matter involving a minor. Because Clayborn failed to timely appeal from this judgment, we dismiss his appeal.

{¶2} On August 6, 2007, Clayborn was indicted with: (1) 13 counts of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(1) and/or (2), a second degree felony, and (2) 13 counts of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(5), a fourth degree felony. Ultimately, Clayborn

pled guilty to one count of pandering sexually oriented matter involving a minor in violation of R.C. 2907.322(A)(1) and/or (2), a second degree felony. During the combined plea and sentencing hearing, the trial court informed Clayborn that his guilty plea rendered him a tier II sex offender. Pursuant to R.C. 2950.03, the trial court then notified Clayborn of his duties to register and periodically verify his address.

{¶3} On May 30, 2008, the trial court issued a judgment entry convicting Clayborn of pandering sexually oriented matter involving a minor and imposing a two-year sentence. Clayborn now appeals from that judgment.

{¶4} According to App.R. 4(A):

A party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed or, in a civil case, service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure.

Failure to comply with App.R. 4(A) is a jurisdictional defect and is fatal to any appeal. *In re H.F.*, 120 Ohio St.3d 499, 2008-Ohio-6810, ¶17; *Bond v. Village of Canal Winchester*, 10th Dist. No. 07AP-556, 2008-Ohio-945, ¶11.

{¶5} In the case at bar, Clayborn filed his notice of appeal on July 15, 2008—46 days after the entry of the May 30, 2008 judgment. Thus, Clayborn's notice of appeal was untimely, and we must dismiss his appeal due to his noncompliance with App.R. 4(A).

{¶6} Clayborn, however, argues that this court should apply the portion of App.R. 4(A) governing the filing of notice of appeals in civil cases to his appeal. App.R. 4(A) tolls the time period for filing a notice of appeal in a civil case if the trial court's clerk fails to serve the parties within the three-day period specified in Civ.R. 58(B). *State ex rel. Sautter v. Grey*, 117 Ohio St.3d 465, 2008-Ohio-1444, ¶16. Clayborn asserts that the

clerk did not serve him as mandated in Civ.R. 58(B), and thus, this lack of service indefinitely tolled the time for filing his notice of appeal.

{¶7} The App.R. 4(A) tolling provision only saves Clayborn's appeal if Clayborn is appealing from a "civil case." Clayborn, however, appeals from a quintessential *criminal case*—a case initiated with an indictment alleging that Clayborn committed criminal offenses and concluded with a conviction for one of those offenses and a two-year sentence. Moreover, *State v. Furlong* (Feb. 6, 2001), 10th Dist. No. 00AP-637, does not provide Clayborn with a basis for claiming that he appeals from a civil case. In *Furlong*, we applied the App.R. 4(A) tolling provision to an appeal from a judgment finding that the defendant was a sexual predator. There, we allowed the defendant to benefit from a tolling provision that applies only to "civil case[s]" because the "sexual predator hearing is a civil proceeding." *Id.* In the case at bar, no civil proceeding occurred.

{¶8} Relying upon *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, the dissent asserts that a defendant's sex offender classification, even if imposed as a matter of law through the operation of statute, is civil in nature. While we do not disagree, we do not believe that the underlying case is a "civil case" merely because the trial court informed Clayborn that R.C. Chapter 2950 categorized him as a tier II sex offender.

{¶9} Because Clayborn appeals from a criminal—not civil—case, the App.R. 4(A) tolling provision does not extend the time for filing his appeal. Having found Clayborn's notice of appeal untimely, we dismiss this appeal.

*Appeal dismissed.*

SADLER, J, concurs.  
BRYANT, J., dissents.

BRYANT, J., dissenting.

{¶10} Being unable to agree with the majority that the tolling provision contained in App.R. 4(A) does not apply and that, as a result, Clayborn's notice of appeal must be dismissed as untimely, I respectfully dissent.

{¶11} During the combined plea and sentencing hearing the trial court conducted, Clayborn objected to the trial court's applying R.C. Chapter 2950, as amended by Am.Sub.S.B. No. 10 ("S.B. 10"). Clayborn contended the prior version of R.C. Chapter 2950, in effect when he committed the offense that formed the basis of his guilty plea, must be applied to his conviction. After noting the objection for the record, the trial court determined Clayborn would be classified under the new law, S.B. 10, rather than the law existing at the time Clayborn committed the offense underlying his guilty plea. In his notice of appeal to this court, Clayborn appeals his sex-offender-classification under S.B. 10; he does not appeal his criminal conviction. Relying upon *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, and *State v. Furlong* (Feb. 6, 2001), 10th Dist. No. 00AP-637, Clayborn argues in his notice of appeal that the App.R. 4(A) tolling provision applies in this case because sex offender classification proceedings are civil in nature.

{¶12} Based upon its determination that Clayborn appeals from a criminal case, not a "civil case," the majority concludes "the App.R. 4(A) tolling provision does not extend the time for filing his appeal." (Opinion, ¶9.) I respectfully disagree with the majority's conclusion that the App.R. 4(A) tolling provision does not apply to extend the time for filing this appeal.

{¶13} The Supreme Court of Ohio consistently has held that an offender's sexual offender classification under R.C. Chapter 2950 is civil in nature even though it arises

from an offender's criminal conviction. See *Cook*, supra (holding that the statutory scheme provided for in R.C. Chapter 2950, as enacted in 1996 H.B. No. 180, is civil in nature); *State v. Williams* (2000), 88 Ohio St.3d 513 (reaffirming that principle); *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169 (reaffirming *Cook* and *Williams*, and further holding a trial court may determine whether a defendant is a sexually oriented offender without conducting a hearing for that purpose); *Wilson*, supra, at syllabus (affirming that sex-offender classification proceedings under R.C. Chapter 2950 remain civil in nature); *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824 (concluding R.C. Chapter 2950, as amended by 2003 S.B. No. 5, is a civil, remedial statute). See also *Smith v. Doe* (2003), 538 U.S. 84, 123 S.Ct. 1140 (concluding statutory schemes similar to S.B. No. 5's amendment of R.C. Chapter 2950 are civil in nature).

{¶14} The Supreme Court of Ohio has not yet determined whether R.C. Chapter 2950 remains a civil, regulatory scheme after S.B. 10 amended it. Although S.B. 10 altered the landscape with regard to sex offender classification, registration and notification provisions in R.C. Chapter 2950, the precedent the Ohio Supreme Court set with respect to that chapter cannot be ignored. Until the Supreme Court decides otherwise, I must conclude, as have other appellate courts in this state, that an offender's sexual offender classification under R.C. Chapter 2950, as amended by S.B. 10, is civil in nature. See *Sewell v. State*, 1st Dist. No. C-080503, 2009-Ohio-872; *State v. King*, 2d Dist. No. 08-CA-02, 2008-Ohio-2594; *In re Gant*, 3d Dist. No. 1-08-11, 2008-Ohio-5198; *State v. Sewell*, 4th Dist. No. 08CA3042, 2009-Ohio-594; *Montgomery v. Leffler*, 6th Dist. No. H-08-011, 2008-Ohio-6397; *State v. Omiecinski*, 8th Dist. No. 90510, 2009-Ohio-1066; *State v. Williams*, 12th Dist. No. CA2008-02-029, 2008-Ohio-6195.

{¶15} Moreover, I disagree with the majority's attempt to distinguish *Furlong*. Just as this court determined in *Furlong* that the trial court's sexual predator determination under the prior version of R.C. Chapter 2950 was a civil proceeding subject to App.R. 4(A)'s tolling provision, so, too, is the trial court's determination here under R.C. Chapter 2950, as amended by S.B. 10, that the amended provisions may be applied to Clayborn even though his crime pre-dated the statute's amendment.

{¶16} In reality, my view of this case diverges from the majority opinion because we begin from a different premise. The majority apparently relies heavily on its conclusion that the trial court took no action under R.C. Chapter 2950 because defendant's classification occurred as a matter of law. By contrast, in my opinion the trial court decided an appealable issue under R.C. Chapter 2950: whether the amended provisions may be applied retroactively. As in *Furlong*, the trial court's decision occurred as a result of a proceeding involving statutes deemed civil in nature. As a result, Clayborn, like *Furlong*, is entitled to invoke the tolling provision of App.R. 4(A). Indeed, when those accountable under the sexual classification provisions of R.C. Chapter 2950 historically have been subject to the restrictions evolving from R.C. Chapter 2950's civil nature, it seems an anomaly to reverse the characterization in the single instance where a benefit accrues from the characterization.

{¶17} Based on the foregoing, I conclude the trial court's decision on which version of R.C. Chapter 2950 to apply is an adverse decision that Clayborn may appeal, is civil in nature, and therefore is subject to App.R. 4(A)'s tolling provision, despite the fact the decision was rendered in conjunction with Clayborn's criminal conviction and sentencing. *Cook; Williams; Wilson; Hayden; Ferguson; Furlong*, supra. Because the trial court apparently failed to comply with Civ.R. 58(B) in the underlying case, I conclude this

court has jurisdiction in this matter under App.R. 4(A) because the time for filing a notice of appeal of the trial court's judgment was delayed. *Furlong*, supra; *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, syllabus. Because the majority concludes otherwise, I dissent.

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IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
COURT OF APPEALS  
FINAL  
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CLERK OF COURTS

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	No. 08AP-593
	:	(C.P.C. No. 07CR08-5608)
Byron Clayborn,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on April 14, 2009, it is the judgment and order of this court this appeal is dismissed as untimely. Costs assessed against appellant.

KLATT & SADLER, JJ.

By William A Klatt  
Judge William A. Klatt

ALLEN V. ADAIR  
P.C. PUBLIC DEFENDER  
376 SOUTH HIGH STREET  
12 FLOOR  
COLUMBUS, OH 43260

**COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CRIMINAL DIVISION**

State of Ohio,	:	<u>TERMINATED NO. 13</u>	BY: JA
Plaintiff,	:	CASE NO. 07CR-08-5606	
-vs-	:	JUDGE CONNOR	
Bryon Clayborn,	:		
Defendant.	:		

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**JUDGMENT ENTRY**  
**(Prison Imposed)**

On May 27, 2008, the State of Ohio was represented by Prosecuting Attorney Dan Hawkins, and the Defendant was represented by Attorney Catherine Kurila. The Defendant, after being advised of his rights pursuant to Crim. R. 11, entered a plea of guilty to Count One of the indictment, to wit: **PANDERING SEXUALLY ORIENTED MATTER INVOLVING A MINOR**, a violation of R.C. 2907.322, and a Felony of the Second Degree.

Upon application of the Prosecuting Attorney and for good cause shown, it is ORDERED that a Nolle Prosequi be entered for Counts Two through Twenty Six.

The Court found the Defendant guilty of the charge to which the plea was entered.

The Court proceeded immediately to sentencing.

On May 27, 2008, a sentencing hearing was held pursuant to R.C. 2929.19. The State of Ohio was represented by Prosecuting Attorney Dan Stanley and the Defendant was represented by Attorney Catherine Kurila. The Prosecuting Attorney and the Defendant's Attorney did recommend a sentence of two (2) years.

The Court afforded counsel an opportunity to speak on behalf of the Defendant and addressed the Defendant personally affording him an opportunity to make a statement on his own behalf in the form of mitigation and to present information regarding the existence or non-existence of the factors, which the Court must consider and weigh.

In addition, at the time of the plea the Court notified the Defendant that by entering into this plea the Defendant will be a sexual offender and classified pursuant to S.B. 10 as a Tier II with

registration duties to last twenty-five (25) years; in person verification is required at the county sheriff's office every 180 days.

The Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. The Court further finds that a prison term is not mandatory pursuant to R.C. 2929.13(F).

The Court hereby imposes the following sentence: **TWO (2) YEARS DETERMINATE SENTENCE to be served at the OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS.**

After imposing sentence, the Court stated its reasons as required by RC. 2929.19 and consistent with State v. Foster, 2006-Ohio-856.

The Court has considered the Defendant's present and future ability to pay a fine and financial sanction and does, pursuant to R.C. 2929.18, hereby renders judgment for the following fine and/or financial sanctions: **Court Costs – Two Hundred Nineteen Dollars and 50/100 (\$219.50).**

**The total fine and/or financial sanction judgment is Two Hundred Nineteen Dollars and 50/100 (\$219.50); said fine and/or financial sanction to be paid through the Clerk of Court's office. Payment of court costs deferred until May 27, 2010.**

After the imposition of sentence, the Court notified the Defendant, orally and in writing, that the Defendant **shall be** subject to a period of mandatory post-release control pursuant to R.C. 2929.19(B)(3)(c)(d) and (e).

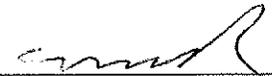
Therefore, the Defendant shall be subject to a **mandatory** period of post release control for five (5) years after the Defendant is released from prison.

**IF THE DEFENDANT VIOLATES POST-RELEASE CONTROL SUPERVISION OR ANY CONDITION THEREOF, THE ADULT PAROLE AUTHORITY MAY IMPOSE A PRISON TERM, AS PART OF THE SENTENCE, OF UP TO NINE (9) MONTHS, WITH A MAXIMUM FOR REPEATED VIOLATIONS OF FIFTY PERCENT (50%) OF THE STATED PRISON TERM. IF THE DEFENDANT COMMITS A NEW FELONY WHILE SUBJECT TO POST-RELEASE CONTROL, THE DEFENDANT MAY BE SENT TO PRISON FOR THE**

REMAINING POST-RELEASE CONTROL PERIOD OR TWELVE (12) MONTHS, WHICHEVER IS GREATER. THIS PRISON TERM SHALL BE SERVED CONSECUTIVELY TO ANY PRISON TERM IMPOSED FOR THE NEW FELONY OF WHICH THE DEFENDANT IS CONVICTED.

Further, the Court **disapproves** of the defendant's placement in a shock incarceration program or an intensive prison program.

The Court finds that the Defendant has ~~-294-~~ days of jail credit and hereby certifies the time to the Ohio Department of Corrections. The Defendant is to receive jail time credit for all additional jail time served while awaiting transportation to the institution from the date of the imposition of this sentence.

  
\_\_\_\_\_  
JUDGE JOHN A. CONNOR

**01-LW-0326 (10th)**

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State of Ohio, Plaintiff-Appellee  
v.  
Frank J. Furlong, Defendant-Appellant

No. 00AP-637  
10th District Court of Appeals of Ohio, Franklin County.  
Decided February 6, 2001.

APPEAL from the Franklin County Court of Common Pleas.

Ron O'Brien, Prosecuting Attorney, and Steven L. Taylor, for appellee.

Carol A. Wright, for appellant.

**OPINION**

PETREE, J.

Frank J. Furlong, defendant-appellant, appeals the judgment of the Franklin County Court of Common Pleas, finding that he is a sexual predator. We affirm.

On April 8, 1999, appellant was indicted on eight counts of sexual battery, a violation of R.C. 2907.03, and on four counts of illegal use of a minor in nudity-oriented material or performance ("illegal use of a minor"), a violation of R.C. 2907.323. On April 7, 2000, appellant pled guilty to four counts of sexual battery and four counts of illegal use of a minor. The trial court accepted appellant's guilty plea, and on April 26, 2000, the court held a sexual predator hearing during appellant's sentencing hearing. The court found appellant to be a sexual predator, which was journalized in an entry filed May 2, 2000. On June 9, 2000, appellant filed an appeal of the court's sexual predator determination and presents the following two assignments of error:

1. THE TRIAL COURT'S DETERMINATION THAT APPELLANT WAS A SEXUAL PREDATOR IS BASED ON INSUFFICIENT EVIDENCE AS A MATTER OF LAW.
2. DEFENSE COUNSEL'S ACTIONS AND OMISSIONS AT APPELLANT'S HEARING DEPRIVED HIM OF THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9, 10 AND 16 OF THE OHIO CONSTITUTION.

Before we address appellant's assignments of error, we will first address a motion to dismiss filed by appellee on October 16, 2000. Appellee argues that this court is required to dismiss appellant's appeal pursuant to App.R. 15 because appellant failed to file a timely appeal.

App.R. 4(A) states that "a party shall file the notice of appeal required by App.R. 3 within thirty days of the later of entry of the judgment or order appealed." The time requirement of App.R. 4(A) is jurisdictional and may not be extended. Ditmars v. Ditmars (1984), 16 Ohio App.3d 174, 175; State v. Blunt (Mar. 6, 1997), Franklin App. No. 96APA09-1231, unreported.

In the present case, the trial court filed a judgment entry on May 2, 2000, finding appellant to be a sexual predator. On May 5, 2000, appellant filed an objection to the May 2, 2000 entry, which states in part:

[Appellant] objects to the Court's finding that he or his counsel stipulated along with the prosecutor to the Court's determination pursuant to ORC 2950 that he is a sexual predator. [Appellant] respectfully requests that the Judgment Entry be corrected to reflect that the determination as to [appellant's] classification per ORC 2950 was determined without a stipulation and or agreement.

The court subsequently released a "Corrected Judgment Entry" on May 12, 2000. The only change between the two entries was the removal of the following sentence: "This characterization [that appellant is a sexual predator] was also stipulated to by both the prosecutor and [appellant]." Appellant's notice of appeal filed June 9, 2000, was from the May 12, 2000 entry.

A review of the trial court's two entries shows that the second entry filed on May 12, 2000, was a nunc pro tunc entry.<sup>(fn1)</sup> A nunc pro tunc order may be issued by a trial court, as an exercise of its inherent power, to make its record speak the truth. It is used to record that which the trial court did, but which has not been recorded. It is an order issued now, which has the same legal force and effect as if it had been issued at an earlier time, when it ought to have been issued. Thus, the office of a nunc pro tunc order is limited to memorializing what the trial court actually did at an earlier point in time. It can be used to supply information which existed but was not recorded, to correct mathematical calculations, and to correct typographical or clerical errors. \*\*\*

A nunc pro tunc order cannot be used to supply omitted action, or to indicate what the court might or should have decided, or what the trial court intended to decide. \*\*\* Its proper use is limited to what the trial court actually did decide. [State v. Greulich (1988), 61 Ohio App.3d 22, 24-25. (Citations omitted).]

"The general rule is that a nunc pro tunc entry cannot operate to extend the period within which an appeal may be prosecuted especially where the appeal grows out of the original order rather than the nunc pro tunc entry." Lindle v. Inland Lakes Mgt., Inc. (June 4, 1998), Cuyahoga App. No. 72947, unreported, quoting Prudential Ins. Co. of America v. Corporate Circle Ltd. (June 5, 1997), Cuyahoga App. No. 71772, unreported.

While it is true that appellant filed his appeal more than thirty days after the May 2, 2000 entry and that the trial court's nunc pro tunc entry did not extend the thirty-day period, this court still has jurisdiction to review appellant's appeal. The reason for this is that a sexual predator hearing is a civil proceeding. State v. Gardner (Nov. 16, 2000), Franklin App. No. 00AP-93, unreported. For civil cases, App.R. 4(A) requires the notice of appeal to be filed within thirty days of "service of the notice of judgment and its entry if service is not made on the party within the three day period in Rule 58(B) of the Ohio Rules of Civil Procedure." Civ.R. 58(B) requires the court to endorse on its judgment "a direction to the clerk to serve upon all parties \*\*\* notice of the judgment and its date of entry upon the journal." "The thirty-day time limit for filing the notice of appeal does not begin to run until the later of (1) entry of the judgment or order appealed if the notice mandated by Civ.R. 58(B) is served within three days of the entry of the judgment; or (2) service of the notice of judgment and its date of entry if service is not made on the party within the three-day period in Civ.R. 58(B)." Whitehall ex rel. Fennessy v. Bambi Motel, Inc. (1998), 131 Ohio App.3d. 734, 741.

A review of both judgment entries shows that the court never endorsed upon the entries the required "direction to the clerk to serve upon all parties \*\*\* notice of the judgment and its date of entry upon the journal" pursuant to Civ.R. 58(B). Therefore, the time for filing a notice of appeal "never began to run because the trial court failed to comply with Civ.R. 58(B)." Id. at 741. Even though appellant was aware of the entry as evidenced by his objection filed May 5, 2000, "actual notice \*\*\* is insufficient to begin the running of the time for appeal in the absence of formal notice in compliance with Civ.R. 58(B)." Id. Accordingly, appellee's motion to dismiss appellant's appeal is overruled.

Appellant argues in his first assignment of error that insufficient evidence was presented to sustain the trial court's determination that he is a sexual predator. Appellant argues that "no signed plea agreement was stipulated by the parties, no copy of the indictment was presented to the court, no pre-sentence investigation was before the court, no witnesses or videotapes were presented to the court or made a part of the record and there was thus, absolutely no evidence from which the court could make this determination."

The presentation of evidence at a sexual predator hearing is not governed by the Rules of Evidence because "[a] sexual predator determination hearing is similar to sentencing or probation hearings where it is well settled that the Rules of Evidence do not strictly apply." State v. Kachermeyer (Dec. 21, 1999), Franklin App. No. 99AP-439, unreported, discretionary appeal not allowed (2000), 88 Ohio St.3d 1497, quoting State v. Cook (1998), 83 Ohio St.3d 404, 425, certiorari denied 525 U.S. 1182, 119 S.Ct. 1122. Sexual predator hearings are different in that the hearing "is intended to determine the offender's status, not to determine the guilt or innocence of the offender." Id. at 425. A court may rely upon the record when it makes its determination because "R.C. 2950.09 does not require the prosecutor to again present evidence that had been previously presented in the same case." Kachermeyer. One of the reasons for the distinctive nature of a sexual predator hearing as opposed to a criminal or civil trial was explained by another appellate court:

\*\*\* We are well aware of the potential stress and strain that could be inflicted on a young child by requiring him or her to come back into a courtroom and recount (for the second time) all the circumstances surrounding his or her sexual assault. If there is sufficient evidence in the record to render a determination as to one's sexual offender status, then the prosecution should have discretion to rely on that evidence. The trial court should have similar discretion to accept that evidence, rather than holding additional hearings simply to facilitate reintroduction of the same material. \*\*\* [State v. Mollohan (Aug. 19, 1999), Washington App. No. 98-CA-13, unreported, discretionary appeal not allowed (2000), 90 Ohio St.3d 1440.]

A trial court may rely upon an offender's indictment, guilty plea, sentencing entry, and parole board hearing file when determining whether a person is a sexual predator. State v. Dillbeck (Dec. 14, 1999), Franklin App. No. 99AP-399, unreported.

In the present case, the record contains appellant's plea of guilty to four counts of sexual battery and four counts of illegal use of a minor. The transcript of the sexual predator hearing shows that the prosecutor read into the record, without any objections from appellant, the details of appellant's crimes that had been previously presented to the court.

Additionally, R.C. 2950.09(B)(1) allows the offender to have "an opportunity to testify, present evidence, call and examine witnesses and expert witnesses, and cross-examine witnesses and expert witnesses regarding the determination as to whether the offender is a sexual predator." A review of the hearing transcript shows that appellant's counsel did not refute the evidence presented by the prosecution, but instead simply asked for "the mercy of the court as to these matters" and that the court "consider the statutory considerations and do the appropriate balancing test in making its determination." Therefore, we find that the facts presented during appellant's sexual predator hearing were properly before the court and could be considered by the court when it determined appellant's status as a sexual offender.

A sexual predator is defined as "a person who has been convicted of or pleaded guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses." R.C. 2950.01(E). After reviewing all testimony and evidence presented at a hearing conducted pursuant to R.C. 2950.09(B)(1), a judge shall determine by clear and convincing evidence whether the offender is a sexual predator. R.C. 2950.09(B)(3). In making the determination of whether the offender is a sexual predator, the judge shall consider all relevant factors, including, but not limited to, all of the following:

- (a) The offender's age;
- (b) The offender's prior criminal record regarding all offenses, including, but not limited to, all sexual offenses;
- (c) The age of the victim of the sexually oriented offense for which sentence is to be imposed;
- (d) Whether the sexually oriented offense for which sentence is to be imposed involved multiple victims;
- (e) Whether the offender used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;
- (f) If the offender previously has been convicted of or pleaded guilty to any criminal offense, whether the offender completed any sentence imposed for the prior offense and, if the prior offense was a sex offense or a sexually oriented offense, whether the offender participated in available programs for sexual offenders;
- (g) Any mental illness or mental disability of the offender;
- (h) The nature of the offender's sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;
- (i) Whether the offender, during the commission of the sexually oriented offense for which sentence is to

be imposed, displayed cruelty or made one or more threats of cruelty;

(j) Any additional behavioral characteristics that contribute to the offender's conduct. [R.C. 2950.09(B)(2) (a) through (j).]

An appellate court in reviewing a finding that the appellant is a sexual predator must examine the record to determine whether the trier of fact had sufficient evidence before it to satisfy the clear and convincing standard. State v. Keffe (Sept. 21, 2000), Franklin App. No. 00AP-118, unreported.

Clear and convincing evidence is that measure or degree of proof which is more than a mere preponderance of the evidence, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases, and which will provide in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. [State v. Smith (June 22, 1999), Franklin App. No. 98AP-1156, unreported, following Cincinnati Bar Assn. v. Massengale (1991), 58 Ohio St.3d 121, 122.]

A review of the record shows that appellant pled guilty to four counts of sexual battery, which is a violation of R.C. 2907.03. Sexual battery is considered a "sexually oriented offense" pursuant to R.C. 2950.01(D)(1). Appellant also pled guilty to illegal use of a minor, a violation of R.C. 2907.323. Although not stated in the judgment entry, a review of the facts shows that appellant was found guilty of photographing a minor in a state of nudity, which is a violation of R.C. 2907.323(A)(1). A violation of R.C. 2907.323(A)(1) is considered a "sexually oriented offense" pursuant to R.C. 2950.01(D)(2)(d).

The record also shows that sufficient evidence exists to demonstrate that appellant is likely to engage in the future in one or more sexually oriented offenses. Appellant was convicted of eight separate offenses that are considered "sexually oriented offenses" pursuant to R.C. 2950.01. Appellant's sexual battery convictions were based upon appellant undressing his girlfriend without her consent. Appellant inserted various objects in her vagina and rectum including a shot glass, candles, a plastic cup, and his fingers. Appellant videotaped his actions. The prosecutor stated that the videotape showed that the victim "remained motionless as if she were asleep or passed out or unconscious." The videotape also showed appellant masturbating while sexually assaulting the victim. The prosecutor also stated that the reason why the victim was unaware of appellant's actions was "due to her employment \*\*\* as a dancer and she comes home after work and she falls asleep and/or either passes out or she sleeps very heavily." The victim became aware of the videotape after she awakened during one of the occurrences and saw that appellant was taping her. The victim contacted the police after she viewed the videotape.

Appellant's four illegal use of a minor convictions were based upon appellant videotaping three teenage girls under the age of eighteen years of age while they were undressing. Appellant videotaped the victims without their knowledge through the open blinds or curtains of their residences. The prosecutor stated that the videotape showed the victims "changing in their bedrooms and would be caught with some of their breasts exposed." The prosecutor further stated that when he was asked what was the purpose of the videotape footage, appellant "stated that he watched the tapes later and he masturbated to them."

After having reviewed the record, we find that sufficient evidence was presented demonstrating that appellant is a sexual predator. The record shows that appellant has had a pattern of sexual behavior in which he used others, including those whom he did not know, in order to satisfy his own pleasures. Appellant's actions were done without the consent of the victims. Appellant's videotaping of minors while they were in a state of nudity also demonstrates that appellant's pattern of abuse extended to minors. Appellant's use of a shot glass, candles, a plastic cup, and his fingers while sexually abusing one of the victims without her knowledge can also be characterized as cruel pursuant to R.C. 2950.09(B)(2)(i). As stated by the trial court, "this was a thought out pattern of activity that happened once, happened twice, and happened again with some kind of methodology which involved--and apparently for [appellant's] sexual gratification." Accordingly, appellant's first assignment of error is overruled.

Appellant argues in his second assignment of error that he was denied effective assistance of counsel as guaranteed by the United States and Ohio Constitutions. We first note that a sexual offender classification hearing pursuant to R.C. 2950.09(B) is civil in nature. State v. Gowdy (2000), 88 Ohio St.3d 387, 398. Therefore, appellant's Sixth Amendment right to counsel under the United States Constitution is not implicated. State v. Wilson (Nov. 13, 2000), Fayette App. No. CA99-09-024, unreported. Additionally, appellant's rights to due process under the Fifth and Fourteenth Amendments to the United States Constitution are not implicated because they "provide a due process right to counsel whenever the

state seeks to infringe on a person's life, liberty or property interest." *Id.* "A favorable reputation is not a protected liberty interest." *State v. Williams* (2000), 88 Ohio St.3d 513, 527, certiorari denied *Suffecool v. Ohio* (2000), \_\_\_U.S. \_\_\_, 121 S.Ct. 241.

Appellant's right to counsel under Section 9, Article I, Ohio Constitution is not applicable because it concerns a person's right to not be subjected to excessive bail or cruel and unusual punishment. Section 10, Article I is not applicable because it concerns the rights of criminal defendants. Section 16, Article I also is not applicable because it is similar to the Due Process Clause found in the Fifth and Fourteenth Amendments to the United States Constitution.

However, the "Ohio Revised Code secures [a right to assistance of counsel] by providing that an offender has 'the right to be represented by counsel and, if indigent, the right to have counsel appointed to represent the offender.'" *Wilson*, *supra*, quoting R.C. 2950.09(B)(1). Therefore, even though appellant's right to counsel does not arise under the United States and Ohio Constitutions, appellant does have a right to effective assistance of counsel at a sexual predator hearing pursuant to R.C. 2950.09(B)(1). *Cook*, *supra*, at 423. In order to prove that appellant's counsel was ineffective during his sexual predator hearing, appellant must show that: (1) counsel's actions were outside the wide range of professionally competent assistance; and (2) appellant was prejudiced as a result of counsel's actions. *Wilson*, following *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052.

In the present case, appellant claims that his counsel was ineffective because counsel failed to object to the prosecutor's statement concerning his crimes and failed to present evidence establishing that appellant was not a sexual predator. The difficulty in reviewing appellant's claims is that he fails to argue how he was prejudiced by his counsel's actions. In a similar sexual predator case, we stated:

\*\*\* Appellant does not argue that if counsel had objected to the introduction of the state's evidence, that there was a reasonable probability that it would have been excluded. While appellant argues that his counsel should have presented mitigating evidence, appellant fails to point out what evidence would have been beneficial to him in the hearing. As stated by another appellate court, "[w]e do not know whether such evidence exists." [*Dillbeck*, *supra*, quoting *State v. Combs* (Apr. 16, 1999), Miami App. No. 98-CA-42, unreported.]

Appellant also argues that his counsel failed to object to the court's refusal to give jail-time credit to appellant for his four months of house arrest. Appellant cannot show that his counsel was ineffective because appellant cannot demonstrate that he was prejudiced. "[H]ouse confinement with electronic monitoring, whether it is called 'arrest' or 'detention' or otherwise, is not assessable as credit time against imprisonment when it is a condition of bail prior to sentencing." *State v. Holt* (May 12, 2000), Montgomery App. No. 18035, unreported. The court discussed whether appellant would be eligible for jail-time credit during appellant's hearing:

It is the court's impression that that was a condition of the bond rather than any kind of incarceration. I permitted him to continue his livelihood and to continue his real estate education so no, that was considered as part of his bond, that was for bond consideration.

Since appellant's house arrest was pursuant to a condition of bail prior to sentencing, appellant was not eligible for jail-time credit. Therefore, even if appellant's counsel had objected, appellant's sentence would not have been reduced.

Appellant also contends that he was prejudiced because his counsel's "advice played a part in his acceptance of the plea agreement and may invalidate his knowing, voluntary acceptance of the plea." However, this claim is not based upon the record.

It is fundamental that appellate review is limited to the record as it existed at the time of judgment. Appellant's argument that he received ineffective assistance of counsel is based upon facts that are not part of the record. It would be improper for this court to decide issues on appeal based upon factual allegations that appellant presents for the first time in his appellate brief. This type of evidence outside of the record is most properly presented in a petition for postconviction relief and not in a direct appeal. [*State v. Williams* (Apr. 29, 1999), Franklin App. No. 98AP-975, unreported, citations omitted. See, also, *State v. Green* (2000), 90 Ohio St.3d 352, 375.]

Accordingly, after having reviewed the record and appellant's allegations, we find that appellant has failed to prove that his counsel was ineffective. Appellant's second assignment of error is overruled.

For the foregoing reasons, both of appellant's assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

KENNEDY, J., and BRYANT, P.J., concur.

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Footnotes:

1. The common law rule giving courts the power to enter nunc pro tunc orders has been codified by Civ.R. 60(A). McGowan v. Giles (Mar. 16, 2000), Cuyahoga App. No. 76332, unreported.