

**ORIGINAL**

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Case No. 2009-1974

Appellee

vs.

LAMBERT DEHLER

On Appeal from the Trumbull County  
Court of Appeals, Eleventh Appellate  
District Case No. CA 2008-T-0061

Appellant

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BRIEF OF AMICUS CURIAE CUYAHOGA COUNTY PUBLIC DEFENDER  
IN SUPPORT OF APPELLANT LAMBERT DEHLER

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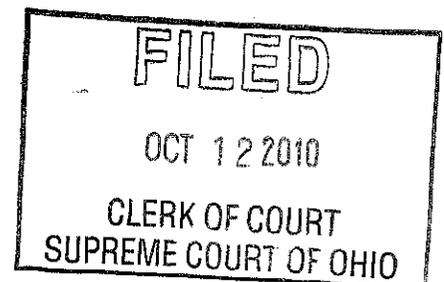
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## SUMMARY OF ARGUMENT

This case involves a challenge to the retroactive application of the Adam Walsh Act (“AWA” or “Senate Bill 10”) to an individual whose criminal conduct pre-dated the AWA by more than 15 years. Specifically, this case presents three separate legal questions for this Court to decide:

1. Whether this Court’s severance of the AWA’s reclassification provisions in *Bodyke* invalidates all reclassifications done pursuant to those provisions by the Ohio Attorney General;
2. Whether the retroactive application of the AWA violates the Ex Post Facto Clause of the United States Constitution and/or the Retroactivity Clause of the Ohio Constitution; and,
3. Whether indigent sex offenders are entitled to the appointment of counsel for AWA reclassification proceedings if those proceedings are civil in nature.

In the context of this case, “sex offenders” are individuals who were previously classified under Megan’s Law after the opportunity for a hearing with the benefit of counsel and who have been administratively *reclassified* by the Ohio Attorney General pursuant to the R.C. 2950.031 or R.C. 2950.032 of the AWA.

Amicus agrees with appellant Dehler that *Bodyke* invalidates all reclassifications conducted by the Ohio Attorney General and that the retroactive application of the AWA is unconstitutional. If this Court strikes down Dehler’s AWA classification for either of those reasons, then the appointment of counsel question would necessarily be moot. If, on the other hand, this Court finds *Bodyke* inapplicable and the AWA to be merely a procedural and non-punitive law, then it must confront the counsel issue.

Because Amicus Cuyahoga County Public Defender has represented hundreds of sex offenders at reclassification proceedings, it hopes to offer this Court a larger perspective about the challenges presented by reclassification proceedings and the need for appointed counsel. With this brief, Amicus elects to only address the appointment of counsel issue. And it asks this Court to hold that indigent sex offenders are entitled to appointment of counsel at AWA reclassification proceedings regardless of whether those proceedings are deemed criminal or civil in nature.

As an initial matter, reclassified *indigent* sex offenders are entitled to the appointment of counsel pursuant to R.C. 120.06 and R.C. 120.16.<sup>1</sup> Moreover, this right of counsel is required, as a matter of due process and equal protection, for numerous reasons, including: 1) The State has created a substantive right to a hearing for a reclassified sex offender to challenge the application of the Adam Walsh Act which must therefore comport with due process; 2) The reclassification proceeding is, if not criminal, quasi-criminal in nature as the classification is a direct result of a criminal conviction; 3) Reclassification of individuals previously governed by Megan's Law has the consequence of imposing serious burdens and restrains on an individual's liberty and property rights; 4) The reclassification proceeding involves complex legal issues that the average pro se litigant could not reasonably address; 5) There is a significant risk that the Adam Walsh Act will be misapplied to reclassified sex offenders if they are denied the right to counsel; and 6) Individuals classified for the first time under the Adam Walsh Act have the benefit of counsel because their classification proceeding occurs at the time of sentencing.

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<sup>1</sup> For the sake of simplicity, amicus focuses its subsequent statutory discussion on R.C. 120.16, which concerns the appointment of counsel through a county public defender system. However, the same argument applies to counties who provide legal representation through the state public defender, a joint county public defender system, or a system of privately appointed counsel. See R.C. 120.04-.06, R.C. 120.13-.18, R.C. 120.23-.28, and R.C. 120.33.

Before addressing the legal basis for a right to counsel if the reclassification proceedings are deemed technically civil, amici offer some context on the statewide impact of the administrative reclassification of more than 20,000 sex offenders by Senate Bill 10 and the challenges involved with litigating issues created by this massive reclassification.

### **BACKGROUND**

Under Ohio's Megan's Law, sex offenders generally had their sex offender classification determined at a judicial hearing in which the State bore the burden of proof and they enjoyed a statutory right to counsel. Both the state and the offender had the right to appeal the resulting judicial determination. Many of the classification decisions were a part of a negotiated plea agreement. If the State elected to forgo a hearing, the individual was classified under the least restrictive tier of sex offenders, i.e. as sexually oriented offenders. These Megan's Law classifications had been in place for individual sex offenders for as many as 10 years when the Adam Walsh Act was enacted in July 2007. Appellant Dehler was automatically classified as a sexually oriented offender because he was still incarcerated on a sex offense when Megan's Law was enacted. And the County Prosecutor elected not to pursue a higher classification despite the opportunity to do so for 10 years.

With the AWA, the General Assembly upset settled classification decisions which were based on the risk each individual presented to the community (as assessed by a trial court or county prosecutor), and replaced them with classifications which ignored those prior determinations and which were tied directly to the offense of conviction. These changes occurred administratively, without notice or a judicial hearing. Although reclassified sex offenders have a limited statutory right to contest the retroactive application of the AWA, they must do so within a strict 60-day filing deadline. Moreover, sex offenders, who received inadequate notice

regarding how to file and where to file these challenges, face the daunting prospect of navigating a vaguely-defined litigation process that has been implemented inconsistently across the various counties of Ohio. If sex offenders do not challenge the ramifications of their already-implemented change in their registration status in the manner prescribed by a particular county court of common pleas, they face the risk of having procedurally defaulted their opportunity to challenge the AWA's application to themselves. These challenges are amplified for incarcerated individuals, like Dehler, who do not enjoy ready access to legal materials or legal assistance.

With respect to the reclassification proceedings, the AWA does not expressly provide for a right to counsel; however, it does not expressly foreclose one either.

#### **I. Statewide Effect of Senate Bill 10 Reclassification**

Ohio's Adam Walsh Act fundamentally transformed Ohio's sex offender classification process and offender registration requirements, notification requirements, and residency restrictions. The AWA explicitly provides that these changes are to be applied retroactively to individuals whose classification was previously governed by Ohio's Megan's Law. The retroactive reclassifications occurred administratively without any hearing and resulted in a substantial increase in the burdens and obligations endured by those individuals previously classified under Ohio's Megan's Law. In order to demonstrate the significance of the change, amicus provide a summary of the effects of reclassification below.<sup>2</sup>

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<sup>2</sup> This Court's decision in *Bodyke* has reduced the number of reclassifications significantly because it has caused the Ohio Attorney General to return numerous sex offenders to their prior classifications under Ohio's Megan's Law. Because the Ohio Attorney General has reclassified *every* habitual sex offender and sexual predator, the impact of the AWA on the remaining offenders (all of whom were previously sexually oriented offenders) is even more acute.

Under Ohio's Megan's Law, sex offenders were predominately classified at the lowest (least restrictive) level. Specifically, adult sex offender classifications were comprised as follows:

- 77% sexually-oriented or child-victim offenders (17,356 individuals);
- 2% habitual sex or child-victim offenders without notification (510 individuals);
- 2% habitual sex or child-victim offenders with notification (395 individuals);
- 18% sexual predators or child-victim predators (4115 individuals).<sup>3</sup>

Accordingly, most classified offenders had to register annually for ten years without community notification. See generally former O.R.C. 2950.04, 2950.05, 2950.06, 2950.07. Only 20% of registered adult sex or child-victim offenders under Ohio's Megan's law faced community notification.

The administrative reclassification of sex offenders pursuant to the Adam Walsh Act changes this picture dramatically. Under the Adam Walsh Act, most adult sex offenders fall under the higher (more restrictive) levels:

- 13% Tier I sex offenders and child-victim offenders (2842);
- 33% Tier II sex offenders and child-victim offenders (7492);
- 54% Tier III sex offenders and child-victim offenders (12,006).<sup>4</sup>

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<sup>3</sup> These figures are based on discovery provided by the Ohio Attorney General in *Doe v. Dann*, Case No. 1:08-CV-00220 (N.D. Ohio) and do not include 85 individuals classified as "aggravated sexually oriented offenders." Counsel for Amicus Cuyahoga County Public Defender was co-counsel in *Doe v. Dann*.

<sup>4</sup> These figures are based on discovery provided by the Ohio Attorney General in *Doe v. Dann*, Case No. 1:08-CV-00220 (N.D. Ohio) and do not include 890 cases that have been stayed by the trial court, nor do they include 824 juvenile offenders.

Thus, almost 90% of reclassified sex offenders have to register either every 180 days for 25 years or every 90 days for life. See generally O.R.C. 2950.04, 2950.05, 2950.06, 2950.07.

These changes also mean that thousands of reclassified sex offenders are subject to community notification, *for the first time*, as a direct result of their reclassification under the AWA.

In addition, if the AWA is determined to apply retroactively in its entirety, all reclassified sex offenders face more expansive restrictions on where they can lawfully reside. Compare former R.C. 2950.031 with current R.C. 2950.034. For example, in Franklin County, sex offenders would be effectively banned from 60% of all residential property in Franklin County, and more than 80% of property in high-poverty areas is covered by the restrictions. See *Assessing Housing Availability under Ohio's Sex Offender Residency Restrictions* (Mar. 25, 2009), Red Bird, S., Ohio State University (prepared for the Franklin County Public Defender).

Many reclassified sex offenders have also been misclassified by the Attorney General under the AWA. It is impossible to have definite numbers regarding the total number of misclassified individuals. However, Amicus Cuyahoga County Public Defender has represented sexual registrants in more than 460 reclassification cases. In approximately 19% of these cases (87 of 460), individuals have raised arguments that they have been misclassified under the AWA and should either have been placed in a lower tier or not classified at all under the AWA.

## **II. Provisions for Challenging Application of the Act and the Imposition of Community Notification**

For reclassified sex offenders, the AWA includes a provision for challenging the application of the AWA in general and a provision for challenging the imposition of community notification in particular. However, the Act places the onus on reclassified sex offenders to pursue these challenges and forces them to comply with the Act's provisions unless and until their challenges succeed.

First, in O.R.C. 2950.031(E) and O.R.C. 2950.032(E), the Ohio General Assembly established a procedure for challenging the retroactive application of the AWA. O.R.C. 2950.031(E) provides, in relevant part, that an offender “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.”<sup>5</sup> These challenges must be filed, within 60 days of receiving the registered reclassification letter, in “the court of common pleas, or for a delinquent child, the juvenile court of the county in which the offender or delinquent child resides or is temporarily domiciled.”<sup>6</sup> O.R.C. 2950.031(E). If an offender does not request a hearing within the “applicable sixty-day period,” he or she waives his or her right to a hearing and is “bound by the determinations of the attorney general” regarding his or her reclassification and associated duties. O.R.C. 2950.031(E). Even those individuals who file timely challenges to the application of the Adam Walsh Act must nonetheless comply with the provisions of the Adam Walsh Act unless and until their challenge to the Act succeeds. O.R.C. 2950.031, R.C. 2950.032, and 2950.033(B).

Second, the AWA includes a provision by which newly classified Tier III Sex Offenders can remove the requirement of community notification. O.R.C. 2950.11(F). Under the Adam Walsh Act, a Tier III Sex Offender is not subject to the requirement of community notification if a court:

[F]inds at a hearing after considering the factors described in this division that the person would not be subject to the notification provisions of this section that were

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<sup>5</sup> R.C. 2950.032(E) also provides similar procedures for individuals who, like Dehler, received notice of their reclassification from the Department of Rehabilitation and Corrections or the Department of Youth Services.

<sup>6</sup> The only exception to filing in county of residence is for individuals who work or go to school in Ohio but who do not reside there. O.R.C. 2950.031(E).

in the version of this section that existed immediately prior to the effective date of this amendment.

O.R.C. 2950.11(F)(2). Put another way, a Tier III Sex Offender is not subject to community notification requirements unless he or she would have been subject to those requirements under Ohio's Megan's Law. Despite a clear likelihood of success on the issue of community notification, these individuals nonetheless face community notification until such time as they take affirmative action pursuant to O.R.C. 2950.11(F) and receive a ruling from some unspecified court.

Unfortunately, these individuals do not receive notice of their right to such a hearing and the statute does not advise them when, where, and how to request such a hearing.

### **III. Reclassification Letters Sent By the Ohio Attorney General**

The AWA provides that the reclassification of individual sex offenders was to be accomplished by the Attorney General without a hearing and prior to providing notice to the affected individuals. O.R.C. 2950.031(A)(1) and 2950.032(A).

The AWA only requires notice be sent to sex offenders *after* they have been reclassified. O.R.C. 2950.031(A)(2) and 2950.032(A)(2). Specifically, the AWA provides that the Attorney General, Department of Rehabilitation and Correction, and/or the Department of Youth Services shall notify the offender of the following: 1) The changes to Chapter 2950 made by the AWA; 2) The individual's new classification under the AWA; 3) Their right to hearing to challenge the AWA, the procedures for requesting a hearing, and the period of time within which the request must be made.<sup>7</sup> O.R.C. 2950.031(A)(2). For those individuals who are not incarcerated, this notification must be made by registered letter sent to "the last reported address of the person and, if the person is a delinquent child, the last reported address of the parents of the delinquent

child.” R.C. 2950.031(A)(2). For incarcerated individuals, that notification was to be distributed by DRC or DYS prior to December 1, 2007. R.C. 2950.032(A)(2).<sup>8</sup>

Pursuant to these provisions, the Ohio Attorney General sent reclassification letters to reclassified sex offenders informing them of their new classification and new registration duties, and advising them of the following:

**Right to Contest application of new classification and registration requirements**

Under Ohio Revised Code §2950.031(E), you have the right to challenge the new classification and registration requirements. You have sixty (60) days after receipt of this letter to file a petition in the Court of Common Pleas in the county where you reside in Ohio, or if you reside outside the state, the county in which you work or attend school. You must also send a copy of the petition to the county prosecutor in that county. If you fail to file your petition within the sixty (60) day period, you have waived your right to contest the application of the new classification and registration requirements. You are required to comply with the new registration requirements unless otherwise modified by Court order.

The reclassification letter does not define “county of residence” and does not indicate whether the petition should be filed as a criminal or civil matter. This reclassification letter also fails to provide reclassified sex offenders with sufficient information about the AWA so that they can determine whether or not they have been misclassified. The reclassification letters simply inform individuals of their new classification and do not advise them what offenses fall into which tier. Because the letter provides no information about the classification of specific offenses, reclassified sex offenders lack sufficient information to question the Attorney General’s determination and to argue that they have been misclassified. Those that have been misclassified are left to discover the error, often while indigent and incarcerated, and figure out how and where to challenge it.

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<sup>7</sup> There is additional information that must be provided to individuals whose obligations under the prior version of Chapter 2950 were “scheduled to terminate on or after July 1, 2007 and prior to January 1, 2008.” R.C. 2950.031(A)(2)(d).

With respect to community notification, the notices provided different information to each level of offender. For Tier I Sex Offenders, the notice did not say anything about community notification. For Tier II Sex Offenders, the notice informed them that “[i]f you were previously subject to community notification prior to January 1, 2008, pursuant to Ohio Revised Code § 2950.11, that requirement remains in effect.” The information provided to Tier II Sex Offenders is incorrect because there is no provision in the Adam Walsh Act for community notification of Tier II Sex Offenders. For Tier III Sex Offenders, the notice informed them that:

As a Tier III Sex Offender, you are subject to the community notification requirements under Ohio Revised Code § 2950.11. If you were previously not subject to community notification prior to January 1, 2008, pursuant to Ohio Revised Code § 2950.11(F)(2), the Court may make a determination that removes this requirement.

Although the notice suggests the possibility that a Court may remove the notification requirement, it does not advise individuals that they must affirmatively seek that relief or how to do so.

#### **IV. Handling of AWA Petitions Varies By County**

Because the AWA is vague regarding the procedure for challenging an individual’s reclassification under the AWA, the procedures established by counties throughout Ohio have varied. While some counties require that the petition be filed as a new civil action, other counties will accept petitions filed in their original criminal case. See AWA County Survey conducted by the Ohio Public Defender (“OPD AWA Survey”) available at [http://www.opd.ohio.gov/AWA\\_Attorney\\_Forms/AWA\\_SB10\\_County\\_Survey.pdf](http://www.opd.ohio.gov/AWA_Attorney_Forms/AWA_SB10_County_Survey.pdf). While some counties have not required filing fees for the petitions, other counties have imposed filing fees ranging from \$0 to \$350. See OPD AWA Survey. While some counties provide for the random assignment of petitions challenging reclassification, other counties provide that a reclassification petition

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<sup>8</sup> Dehler did not receive his notification from DRC until January 7, 2008.

should be assigned to the judge who handled the original criminal case, or to a single judge assigned to handle all of the petitions filed in that county. See OPD AWA Survey.

Moreover, because the AWA does not define the term “reside,” it is unclear whether an incarcerated individual receiving a reclassification letter should file his or her petition in the county of incarceration or the county of residency prior to incarceration. As a result of the confusion created by the statute, some county prosecutors have filed motions to dismiss petitions filed as new civil actions; while other county prosecutors have filed motions to dismiss petitions filed under their original criminal case. In relation to the incarcerated petitioners, some prosecutors are moving to dismiss the petitions as being filed in the wrong county.

For the purpose of this case, the most significant inconsistency relates to the appointment of counsel for indigent petitioners. In Cuyahoga County, trial courts have taken one of *four different approaches to a request for counsel*. Some trial courts appoint counsel in every case. Some trial courts deny counsel in every case. Some trial courts deny counsel but refer petitioners to the public defender for “advice.” And some trial courts have not ruled on the requests for counsel.

This inconsistency regarding the appointment of counsel is not limited to Cuyahoga County. See OPD AWA Survey. In seventeen counties, trial courts generally appoint counsel to represent indigent petitioners.<sup>9</sup> In at least two other counties (Hamilton and Lawrence), trial courts sometimes appoint counsel. In the remaining counties, trial courts have generally denied indigent petitioners’ requests for counsel.

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<sup>9</sup> The seventeen counties include Auglaize, Brown, Clark, Clermont, Fairfield, Fayette, Franklin, Guernsey, Holmes, Logan, Medina, Montgomery, Ottawa, Preble, Putnam, Stark, and Wayne.

## LAW AND ARGUMENT

Even if reclassification proceedings under the Adam Walsh Act are deemed civil and remedial rather than criminal and punitive, appellant Dehler is nonetheless entitled to counsel at AWA reclassification hearings pursuant to 120.16.<sup>10</sup>

Dehler is likewise entitled to the appointment of counsel as a matter of state and federal due process and equal protection. Although counsel is generally not afforded to indigent litigants in civil cases, state and federal due process requires it where the interests and rights involved are substantial and where the complexity of the proceedings is such that the litigants are unlikely to adequately identify potentially meritorious legal issues, much less present arguments that will enable courts to decide those issues through a meaningful adversarial process. Reclassification proceedings held pursuant to R.C. 2950.031 and R.C. 2950.032 implicate substantial rights and involve complex legal issues such that due process requires the appointment of counsel for indigent petitioners. Moreover, state and federal equal protection principles require the appointment of counsel in reclassification proceedings because newly classified offenders enjoy the benefit of appointed counsel at classification proceedings which occur as a part of a criminal sentencing hearing.

### **I. R.C. 120.16 Requires the Appointment of Counsel for Indigent Petitioners at R.C. 2950.031 and R.C. 2950.032 Reclassification Hearings.**

Reclassified sex offenders are also entitled to the appointment of counsel in R.C. 2950.031 and R.C. 2950.032 hearings pursuant to R.C. 120.16(A)(1) and R.C. 120.16(B).

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<sup>10</sup> As noted supra at fn.1, reclassified sex offenders' right to counsel could, depending on the type of appointed counsel system in a particular county, also be found in See R.C. 120.04-.06, R.C. 120.13-.18, R.C. 120.23-.28, and R.C. 120.33.

R.C. 120.16 establishes the parameters for when an indigent person is entitled to the appointment of counsel through the County Public Defender system.<sup>11</sup> This statute provides, among other things, that the county public defender shall provide legal representation to indigent adults who:

[A]re 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. . .

R.C. 120.16(A)(1). Such representation shall be provided “at every stage of the proceedings following arrest, detention, service of summons, or indictment.” R.C. 120.06(B). In other words, as explained by the Office of the Ohio Attorney General in Opinion 99-031 (hereinafter OAG 99-031), individuals are entitled to be represented by the county public defender: “(1) at every stage of a proceeding in which an indigent defendant is charged with the commission of an offense or act; (2) that is a violation of a state statute; and (3) for which the penalty or any possible adjudication includes the potential loss of liberty.” Sex offender reclassification hearings satisfy all three of these criteria.

**A. Sex offender reclassification hearings are “a stage of the proceedings following arrest, detention, service of summons, or indictment.”**

Under Ohio’s Adam Walsh Act, an individual’s classification is tied directly to the individual having been charged and subsequently convicted of a sexually oriented (or child-victim oriented offense). See generally R.C. 2950.01. A sex offender reclassification hearing “arises only” because a defendant was previously charged and convicted of a sexually oriented

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<sup>11</sup> The statute is clear, however, that such legal representation is not necessarily limited to the appointment of county public defenders as “[n]othing in this section shall prevent a court from appointing counsel other than the county public defender or from allowing an indigent person to select the indigent person’s own personal counsel to represent the indigent person.” R.C. 120.16(E).

offense. OAG 99-031; R.C. 2950.031 and R.C. 2950.032. Thus, a sex offender reclassification hearing is a “stage of the proceedings following arrest, detention, service of summons, or indictment” for persons convicted of sexually-oriented offenses. Cf. OAG 99-031 (reaching that conclusion for a sex offender classification hearing under Megan’s Law).

**B. The commission of a sexually oriented offense constitutes a violation of a state statute.**

Each offense listed in 2950.01(A) as a “sexually oriented offense” and (C) as a “child-victim oriented offense “constitutes conduct that is prohibited by a statute of the Revised Code.” OAG 99-031. “Accordingly, a person who commits one of those offenses commits an offense that ‘is a violation of a state statute.’” OAG 99-031 (quoting R.C. 120.16(A)(1)).

**C. A sexually oriented offense is a violation of a state statute for which the penalty includes the potential loss of liberty.<sup>12</sup>**

A court “may impose a prison [or jail] term” for every sexually oriented or child-victim oriented offense listed in R.C. 2950.01(A) and (C), pursuant to R.C. 2929.14 and R.C. 2929.21. OAG 99-031. Moreover, every reclassified sex offender faces the possibility of further incarceration if he or she fails to comply with the registration and verification requirements of the AWA.<sup>13</sup> R.C. 2950.99. Accordingly, a sexually oriented offense “is a violation of a state statute for which the penalty includes the potential loss of liberty.” OAG 99-031.

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<sup>12</sup> While Amicus maintains that the potential loss of liberty contemplated by R.C. 120.16 includes more than simply potential incarceration, it is unnecessary for this Court to address the scope of that provision because the possibility of incarceration clearly constitutes the potential loss of liberty.

<sup>13</sup> The possibility of *future* criminal penalties for non-compliance with the registration duties of the AWA provides yet another basis for requiring the appointment of counsel at reclassification hearings. In Lake County, domestic relations judges appoint counsel, pursuant to R.C. 120.16, for indigent individuals at *civil* show cause hearings. The justification for appointing counsel for a technically civil hearing is that the individual could face potential jail time if he or she failed to comply with an order issued as a result of the show cause hearing.

## D. Conclusion

Thus, as concluded by the Ohio Attorney General in the context of Ohio's Megan's Law, a sex offender reclassification hearing is "a stage in a proceeding that is instituted against a defendant charged with the commission of a violation of a state statute for which the penalty includes the potential loss of liberty." OAG 99-031. In the Ohio Attorney General's opinion, individuals are entitled to counsel at sex offender classification proceedings, pursuant to R.C. 120.16, regardless of whether they are deemed civil in nature. OAG 99-031. Amici agree.

### II. State and Federal Due Process Requires the Appointment of Counsel for Indigent Petitioners at R.C. 2950.031 and R.C. 2950.032 Reclassification Hearings.

As a matter of state and federal due process, indigent petitioners challenging their reclassification under Senate Bill 10, pursuant to R.C. 2950.031 and R.C. 2950.032, are entitled to the appointment of counsel.

R.C. 2950.031(E) and R.C. 2950.032(E) create a substantive right to a hearing at which reclassified sex offenders can challenge their administrative reclassification under Senate Bill 10. Both sections provide that reclassified sex offenders "may contest 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." R.C. 2950.031(E) and R.C. 2950.032(E). Having afforded reclassified sex offenders a statutory right to a hearing to challenge their classification, that hearing must be conducted within the strictures of state and federal due process. *See Wolff v. McDonnell* (1974), 418 U.S. 539, 556-58 (explaining that a "state-created right" entitles an individual pursuing that right to the protections of the due process clause).

The “fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). It is well-established that:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.

*Powell v. Alabama* (1932), 287 U.S. 45, 68-69. Recognizing that reality, both this Court and the United States Supreme Court have held, in several different civil contexts, that due process can require the appointment of counsel for indigent litigants. See e.g. *State ex rel. Heller v. Miller* (1980), 61 Ohio St. 2d 6, paragraph two of the syllabus (state and federal due process and equal protection requires the appointment of counsel in parental termination proceedings); *In re Fisher* (1974), 39 Ohio St. 2d 71, 77-82 (due process requires the appointment of counsel in civil commitment proceedings); *In re Gault* (1967), 387 U.S. 1, 35-37 (due process requires the appointment of counsel at juvenile delinquency proceedings); *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 790 (due process may require, on a case-by-case basis, the appointment of counsel at a probation and/or parole hearing); *Lassiter v. Dep’t of Social Services* (1981), 452 U.S. 18, 31 (due process may require, on a case-by-case basis, the appointment of counsel for parents in a proceeding involving the termination of parental rights). The common thread in these cases is that counsel is required because of the nature and character of the interests involved and because the effectiveness of the hearing may “depend on the use of skills which the [litigant] is unlikely to possess.” *Gagnon*, 411 U.S. at 786-87.

Although the basic contours of the process required by the Due Process Clause are clear, the precise procedural protections vary depending on the particular situation involved. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); see also *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895

(1961). Specifically, in ascertaining the dictates of due process in particular cases, this Court must consider the following three factors: 1) the private interest that will be affected by the official action; 2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; 3) the Government's interest, including the function involved and the fiscal and administrative burdens, that the additional or substitute procedural requirement would entail. *Matthews*, 424 U.S. at 334-35.

Here, as discussed below, due process requires that indigent petitioners be appointed counsel at reclassification hearings held under R.C. 2950.031(E) and R.C. 2950.032(E).

#### **A. Private Interest**

The interest of the reclassified sex offenders involves not being erroneously subjected to new and/or extended obligations as a registered sex offender under the AWA. Although the effect of the AWA may vary for particular offenders, the AWA requires, as a general rule, most offenders to register more frequently and for longer periods of time than they did under Megan's Law. Reclassified sex offenders may also face significantly more burdensome residency restrictions. Moreover, thousands of reclassified sex offenders will face community notification as a direct result of the application of the Adam Walsh Act and each of these individuals is entitled to pursue relief from such notification pursuant to R.C. 2950.11(F)(2). Finally, numerous individuals have colorable claims that the AWA, even if constitutional, has been misapplied to them. To the extent that the AWA should not be applied or has been misapplied to reclassified sex offenders, they will suffer significant irreparable harm.

## **B. Risk of Erroneous Deprivation and Probable Value of Substitute Procedural Safeguards**

The risk of erroneous application of the Adam Walsh Act is exceedingly high if reclassified sex offenders are denied the right to counsel at reclassification hearings. Reclassified sex offenders have four basic arguments that the AWA, in part or in its entirety cannot be applied to them: 1) Its retroactive application violates several substantive state and federal constitutional rights; 2) Its retroactive application constitutes a breach of plea agreements previously entered into with the State; 3) Its community notification provisions should not be applied to any reclassified sex offender who was not subject to community notification under Ohio's Megan's Law; and 4) It has been misapplied by the Attorney General in classifying them. Given the breadth and complexity of these issues, appointed counsel is invaluable to avoid the misapplication of a very complex law.

The AWA clearly contemplates that reclassified sex offenders may have legitimate claims regarding the retroactive application of the AWA. See O.R.C. 2950.031(E), 2950.032(E), and 2950.11(F). However, indigent sex offenders are unlikely to successfully litigate these claims absent the appointment of counsel. This is particularly true given the inadequate notice<sup>14</sup>

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<sup>14</sup> Under the AWA, the Attorney General reclassifies individuals without giving them notice or an opportunity to be heard. It is only after reclassification that any notice of their right to challenge the reclassification is attempted. O.R.C. 2950.031(A)(2) and 2950.032(A)(2). Although the Attorney General is statutorily required to advise petitioners of "the procedures for requesting a hearing," O.R.C. 2950.031(A)(2)(c), the notice provided by the Attorney General is woefully inadequate as it fails to:

- Advise reclassified offenders whether their petitions should be filed as a civil or criminal matter and/or as new case or under the original criminal case.
- Define "county where you reside" which serves as the proper venue for filing a petition.

afforded sex offenders about the reclassification hearings and the short time period available for requesting such a hearing.

Even for those reclassified sex offenders who successfully navigate the procedural obstacles associated with filing some sort of challenge to their reclassification,<sup>15</sup> they are unlikely to properly identify and litigate all of the complex legal issues present in their particular case.<sup>16</sup> Every reclassified sex offender could raise numerous complex constitutional arguments regarding the retroactive application of the AWA. These constitutional issues include claims that the retroactive application of the law violates the Ex Post Facto Clause of the United States

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- Advise reclassified sex offenders what types of challenges can be raised in their petition.
  - Provide reclassified sex offenders with sufficient information about the AWA so that they can determine whether or not they have been misclassified.
  - Advise reclassified sex offenders whether they are entitled to counsel to contest the application of the AWA.
  - Advise reclassified sex offenders whether or not they must pay a filing fee to contest the application of the AWA.

<sup>15</sup> As a consequence of this inadequate notice, indigent reclassified sex offenders have had their petitions dismissed when they filed under their original criminal case and incarcerated reclassified sex offenders have had their petitions dismissed when they filed in their county of residence prior to involuntary incarceration. Moreover, some reclassified sex offenders who have filed petitions as new civil actions have also faced motions to dismiss from county prosecutors.

<sup>16</sup> The complexity of Senate Bill 10 is beyond dispute. Indeed, the Ohio Attorney General's Office recently acknowledged, in its amicus brief before this Court in *In re Smith*, Case No. 2008-1624, that it had misinterpreted the law as it applied to juveniles. (Br. at 11-12) (explaining that it had incorrectly interpreted the juvenile AWA provisions as eliminating judicial discretion regarding a juvenile offender's classification). Both the Second and Eighth District Courts of Appeals have lamented about the complexity of the Adam Walsh Act. *Gildersleeve v. State*, Cuyahoga App. No. 91515-91519 and 91521-91532, 2009 Ohio 2031, ¶ 56 (explaining that the community notification provisions under the Senate Bill 10 are "wrought with confusion."); *In re S.R.B.*, Miami App. No. 08-CA-8, 2008 Ohio 6340, ¶ 6 (describing the enactment of Senate Bill 10 as resulting in "a confusing array of very poorly worded statutory provisions.")

Constitution, the Retroactivity Clause of the Ohio Constitution, the Double Jeopardy and Due Process Clauses of both the United States and Ohio Constitutions, separation of powers principles, and the constitutional prohibition on cruel and unusual punishment. This Court's separation of powers' ruling in *Bodyke* has created further litigation about the scope of that decision. In Cuyahoga County, the prosecutor's office has argued that *Bodyke*'s severance remedy does not apply to individuals whose convictions occurred in other states, to individuals who did not have H.B. 180 hearings under Megan's Law, and to individuals who did have H.B. 180 hearings but who were resentenced after the AWA was enacted.

Moreover, reclassified sex offenders may have additional claims depending on the particular circumstances of their case. For instance, every reclassified sex offender who entered into a plea agreement with the State of Ohio has a claim that the State's reclassification constitutes a breach of contract and a constitutional impairment on the obligation of contracts. Moreover, all reclassified Tier III sex offenders have extraordinarily strong claims that they should not, pursuant to O.R.C. 2950.11(F)(2), be subject to community notification. Indeed, some such individuals have, with the assistance of counsel, successfully raised such arguments with the assistance of counsel. See e.g. *Gildersleeve v. State*, Cuyahoga App. No. 91515-91519 and 91521-91532, 2009 Ohio 2031, ¶ 77 (holding that Tier III sex offenders who were not subject to community notification under Megan's Law are "exempt from community notification under the AWA"); *State v. Toles*, Franklin County Common Pleas 00CR-02 875, at 30-39 (Schneider, J. presiding; 9/9/08 Decision).

Finally, the assistance of counsel is necessary to prevent numerous reclassification errors. With the assistance of counsel, individuals have successfully argued that the Adam Walsh Act does not apply to them at all because: 1) they were not, in fact, convicted of a sexually oriented

or child-victim oriented offense; 2) their offense was not a sexually oriented or child-victim oriented offense prior to the enactment of the AWA; 3) their offense fits within one of two statutory exceptions established by the AWA in R.C. 2950.01(B)(2);<sup>17</sup> 4) they had no duty to register under Megan's Law despite having a conviction for a sexually oriented offense; 5) their duty to register under Megan's Law expired prior to the effective date of the AWA; and 6) their out-of-state conviction had been expunged.

Similarly, many reclassified sex offenders have had their classifications reduced because the Attorney General misclassified these offenders by, among other things: 1) relying on a charge that had been reduced or dismissed; 2) misinterpreting the Ohio equivalent of out-of-state convictions; and 3) misapplying the law for individuals convicted of gross sexual imposition, unlawful sexual conduct with a minor, kidnapping, and felonious assault.

Such misclassification errors, which were made by experienced lawyers at the Attorney General's Office who were intimately familiar with the law, are unlikely to be discovered by indigent laypersons without the assistance of counsel. This is particularly true as the "notice" provided by the Ohio Attorney General of an individual's reclassification does not provide sufficient information (such as the statutory classification level for each offense) to enable laypersons to determine whether they have been misclassified. Simply put, most indigent sex

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<sup>17</sup> R.C. 2950.01(B)(2) provides that an individual who commits a sexually oriented offense is not a "[s]ex offender" if "the offense involves consensual sexual conduct or consensual sexual contact" and either of the following applies:

- (a) The victim of the sexually oriented offense was eighteen years of age or older and at the time of the sexually oriented offense was not under the custodial authority of the person who [committed] the sexually oriented offense.
- (b) The victim of the offense was thirteen years of age or older, and the person who [committed] the sexually oriented offense is not more than four years older than the victim.

offenders lack sufficient knowledge to question the Attorney General's reclassification determinations. Without counsel, it is likely that a significant number of individuals will fail to properly identify and present misclassification arguments and will therefore be bound by the erroneous classification. *See* R.C. 2950.031(E) (explaining that the failure to raise a misclassification issue in a petition constitutes waiver such that the individual is "bound by the determinations of the attorney general" regarding his or her reclassification and associated duties).

The value of substitute procedural safeguards (i.e. the appointment of counsel) is equally apparent. The appointment of counsel will ensure that the statutory procedures established by the Ohio General Assembly for challenging the application of the Adam Walsh Act are meaningful. Counsel will enable reclassified sex offenders to present the many complex issues presented by the retroactive application of the Adam Walsh Act and will ensure that resulting reclassification, if any, is consistent with their constitutional, contractual, and statutory rights. This additional procedure (appointment of counsel) will ensure, at a minimum, that thousands of individuals are not be improperly subject to community notification and that Ohio's sex offender registration system is not riddled with misclassification errors.

### **C. Public Interest**

"In striking the appropriate due process balance the final factor to be assessed is the public interest." *Matthews*, 424 U.S. at 347.

The State's interest is disserved if the AWA is improperly applied to reclassified sex offenders. *See Goss v. Lopez* (1975), 419 U.S. 565, 579; *see also Morrissey*, 408 U.S. at 484. As with parolees, "[s]ociety has a stake in whatever may be the chance of restoring [registered sex offenders] to normal and useful li[ves] within the law." *Morrissey*, 408 U.S. at 484. Society

has a further interest in treating reclassified sex offenders with basic fairness as fair treatment will increase the likelihood of compliance with the law and “enhance the chance of rehabilitation by avoiding reactions to arbitrariness.” *Id.* This Court has already cautioned that if sex offenders are overrepresented in the most restrictive classification:

[W]e run the risk of ‘being flooded with a number of persons who may or may not deserve to be classified as high-risk individuals, with the consequence of diluting both the purpose behind and the credibility of the law. This result could be tragic for many.’

*State v. Eppinger* (2001), 91 Ohio St. 3d 158, 165 (citation omitted).

Moreover, one of the State’s purported purposes in enacting sex offender registration legislation is to provide information to the general public about sex offenders. *See generally* R.C. 2950.02. This purpose is frustrated when the information provided is inaccurate. As such, the public has an interest in procedural safeguards that ensure that the AWA is correctly and fairly applied to registered sex offenders previously governed by Ohio’s Megan’s Law.

Although the financial cost of a particular procedural safeguard is not a “controlling factor,” the Government’s interest in conserving fiscal and administrative resources is “a factor that must be weighed.” *Matthews*, 424 U.S. at 348. In this case, the additional procedural safeguard of appointed counsel may actually conserve fiscal and administrative resources of the State of Ohio. States that have study this issue have determined that the implementation and the administration of the enhanced registration requirements necessary for compliance with the federal Adam Walsh Act is extraordinarily costly. In Virginia, officials determined that compliance with the federal AWA would cost \$12.4 million *for the first year alone*. *See High Cost of the Adam Walsh Act*, Justice Policy Institute.

The fiscal and administrative burden on local sheriff’s offices associated with the implementation of the AWA has been well-documented. On January 21, 2008, the Cleveland

Plain Dealer quoted an officer with the Cuyahoga County Sheriff's Sex Offender Registration Unit lamenting the resources dedicated to the implementation of the AWA: "It's a disaster for us... I think many people didn't think this all the way through." and "I'm sitting here most of the day trying to bail out a sinking ship." Rachel Dissel & Gabriel Baird, THE PLAIN DEALER, January 21, 2008, at A3. If it is ultimately determined that the AWA does not apply, in whole or in part, to reclassified sex offenders across Ohio, counties will have wasted significant financial and personnel resources in an unnecessary attempt to comply with the burdensome law. For instance, in Richland County, the average cost of a single community notification mailing is \$152 (with mailings in highly populated areas costing as much as \$400 per mailing.<sup>18</sup> Given that approximately thousands of Tier III sex offenders are likely to be exempted from notification if they properly present their claims with the assistance of counsel, the State could save millions of dollars by not sending out improper notifications. Moreover, because a significant number of individuals have been overclassified as Tier II or Tier III sex offenders, the State will likewise experience a reduced fiscal and administrative burden individuals are properly classified.

In short, the public's interest, like the interest of the reclassified sex offenders, weighs in favor of affording counsel to reclassified sex offenders to ensure that the AWA is properly applied.

### **III. State and Federal Equal Protection Requires the Appointment of Counsel for Indigent Petitioners at R.C. 2950.031 and R.C. 2950.032 Reclassification Hearings.**

As a matter of state and federal equal protection, indigent petitioners challenging their reclassification under Senate Bill 10, pursuant to R.C. 2950.031 and R.C. 2950.032, are entitled to the appointment of counsel. Specifically, the denial of counsel to *reclassified* sex offenders

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<sup>18</sup> This figure is based on discovery provided by the Richland County Sheriff in *Doe v. Dann*,

would violate their equal protection rights because *newly* classified sex offenders enjoy the benefit of appointed counsel. In addition, because several counties and specific trial courts are appointing counsel for petitioners, those individuals who have been denied counsel merely due to their county of residence are being denied equal protection.

The Equal Protection Clause of the Fourteenth Amendment “is essentially a direction that all persons similarly situated should be treated alike.” *Cleburne v. Cleburne Living Center, Inc.* (1985), 473 U.S. 432, 439; see also *Plyler v. Doe* (1982), 457 U.S. 202, 216. The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.” *Cleburne*, 473 U.S. at 440; see also *Department of Agriculture v. Moreno* (1973), 413 U.S. 528, 534. Similarly, the due process clause requires state legislation to “rationally advance[] some legitimate governmental purpose.” *Reno v. Flores* (1993), 507 U.S. 292, 306; *Bolling v. Sharp* (1954), 347 U.S. 497, 499-500 (explaining that “[l]iberty under the law extends to the full range of conduct which an individual is free to pursue”); see also *Fabrey v. McDonald Village Police Dep’t* (1994), 70 Ohio St. 3d 351, 354.

Similar to its predecessor, the Adam Walsh Act provides that an offender’s classification occurs at his or her sentencing hearing. Pursuant to R.C. 2950.03(A)(2) and (B)(1), individuals sentenced “on or after January 1, 2008” of a sexually oriented or child-victim oriented offense are notified of their classification and registration duties by the trial court “at the time of sentencing.” At sentencing, indigent offenders are obviously represented by court-appointed counsel who can and should raise misclassification and constitutional arguments regarding the application of the Adam Walsh Act. Indeed, if the offender’s counsel fails to raise such issues in

the trial court at the time of the offender's sentencing and classification, those issues are arguably forfeited on appeal. *See e.g. State v. Turner*, Montgomery App. No. 22777, 2008 Ohio 6836, ¶¶ 23-24; *State v. Riddle*, Cuyahoga App. No. 90999, 2009 Ohio 348, ¶ 9.

Because newly classified offenders enjoy the benefit of counsel at the time of their classification (as do many reclassified offenders depending on where they live), the denial of counsel to reclassified sex offenders violates their equal protection rights. Individuals reclassified by the Adam Walsh Act and individuals newly classified by the AWA are similarly situated and there is no rational basis for treating them differently with respect to the process provided to ensure the correct application of the AWA. Therefore, reclassified sex offenders *in all counties* must enjoy that same right to counsel at reclassification hearings held pursuant to R.C. 2950.031 and 2950.032.

#### CONCLUSION

Whether or not the AWA is punitive, Dehler and other reclassified sex offenders are entitled to counsel at sex offender reclassification hearings as a matter of state statutory law and state and federal constitutional law.

The Adam Walsh Act radically alters individual's obligations under Ohio's sex offender laws. As Adam Walsh classifications are an outgrowth of criminal law and have consequences that often burden a registrant for life, the stakes are both high and complex. In making the sweeping changes with the AWA, the Ohio General Assembly explicitly recognized that reclassified sex offenders may have legitimate claims regarding the complex law's application by affording them a right to a reclassification hearing. Such reclassification hearings will be of little utility if reclassified sex offenders are denied the assistance of counsel. Thus, indigent individuals facing Adam Walsh classification should be extended right to counsel.

Respectfully submitted,

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**SERVICE**

A copy of the foregoing Brief of Amici Curiae was served by ordinary mail upon Dennis Watkins, Trumbull County Prosecutor, 160 High Street, Warren, OH 44481 and Timothy Young, Office of the Ohio Public Defender, 250 E. Broad Street, Suite 1400, Columbus OH 43215 on this 12<sup>th</sup> day of October, 2010.

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