

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,

Plaintiff-Appellee,

v.

Wesley Lloyd,

Defendant-Appellant.

: Case No. 11-0212
:
: On Appeal from the Holmes County
: Court of Appeals, Fifth Appellate
: District, Case No. 09CA12
:
: Expedited Review Requested
: Hearing on Bond Revocation:
: Feb. 8, 2011

**Motion of Defendant Wesley Lloyd to Stay the Court Of Appeals'
December 30, 2010 Decision and to
Maintain the Trial Court's Stay of His Sentence**

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FILED
FEB 07 2011
CLERK OF COURT
SUPREME COURT OF OHIO

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**Motion of Defendant Wesley Lloyd to Stay the Court Of Appeals'
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I. Introduction

A. Relief Requested.

Wesley Lloyd asks this Court to stay the decision of the court of appeals and to maintain the stay on the execution of the trial court's sentence for failing to properly notify the sheriff's of Auglaize and Holmes Counties of his move from Auglaize to Holmes County. Exhibit 1, Appeal Bond.

B. Mr. Lloyd has abided by the terms of his bond.

Mr. Lloyd. has faithfully abided by the terms of his pre-trial and appeal bonds, he has work as a newspaper carrier, and his victim was his then wife.

C. Mr. Lloyd did not abscond, instead he provided notice of his move the day of his move and by telephone, instead of providing in-person notice in advance as well as in-person notice immediately after the move.

Further, he did not abscond from registration. The State concedes that Mr. Lloyd notified the Auglaize County Sheriff of his move, albeit only on the day of the move and only by phone. State's Trial Brief, Exhibit 6, at p. 4. The Holmes County Sheriff learned that Lloyd was in Holmes County because Lloyd had reported the move to the Auglaize County Sheriff.

D. This case presents several issues that merit this Court's attention.

This case presents several issues that relate to other cases this Court is considering concerning the retroactive application of *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424. Further, this case presents issue of whether

recklessness is an element of the offense of failure to properly register under R.C. 2950.04 and 2901.21(B) because R.C. 2950.04 contains no mental state for any element.

The issue is particularly strong given that 1) this Court held in *State v. Johnson*, Slip Op. 2010-Ohio-6301 that the General Assembly intended for R.C. 2901.21(B) to apply to statutes that contain no mental state; 2) the federal law that prompted SB10 requires the government to prove a knowing violation of registration requirements; 3) it is uncontested that Mr. Lloyd orally notified the sheriff of Auglaize County the day he moved to Holmes County; and 4) Mr. Lloyd raised this issue in the trial and appellate courts.

E. A stay would preserve the status quo and would give the State a longer period of supervision over Mr. Lloyd if the State prevails on appeal.

Mr. Lloyd has abided by the terms of his bond since 2008 and his offense was technical, not malicious. Exhibit 1. Further, the equities support a stay because if Mr. Lloyd ultimately loses this appeal the stay will only have lengthened his total time under supervision, but if he wins the appeal, the stay will prevent the improper imposition of prison time. If he loses the appeal, none of the time under the stay will count toward his prison sentence, and he will have to complete five years of mandatory postrelease control at the end of the prison. So if Mr. Lloyd does not prevail, the time he has spent under the supervision conditions of the appeal bond will just be added to his total time of incarceration and supervision. By contrast, if Mr. Lloyd wins the appeal, the State will not be able to give back any time he improperly spent in prison.

F. This stay motion merits immediate attention because a brief incarceration could seriously hurt Mr. Lloyd's ability to maintain his employment to support his family, including three children.

On the afternoon of February 2, 2011, undersigned counsel received the State's pleading that asserted that the trial court lacked authority to extend Mr. Lloyd's stay. Late that afternoon, Counsel filed a motion in the court of appeals requesting a stay. Likely because of weather-related issues, the State could not receive fax service until the next day. But as of 8:30 a.m. on February 7, 2011, undersigned counsel could not determine whether the Court of Appeals had ruled on the motion.

Given that trial court staff informed undersigned Counsel that Mr. Lloyd must be present at the February 8, 2011 hearing so that he can be placed into custody if the trial court grants the State's motion, this case merits immediate attention.

Mr. Lloyd is employed and supports his fiancée and three children. A bond revocation, even if later reversed, would put his employment in jeopardy and would likely require that his family find funds to pay yet another bond.

II. Procedural History

A. A 1995 Texas Conviction, a move to Ohio, an SB10 Reclassification Letter.

As a result of a 1995 Texas conviction for the aggravated sexual assault of his then wife, Mr. Lloyd registered as a sexually oriented offender when he came to Ohio in 2005. There is no evidence that he was required to register as a sex offender in Texas. The State concedes that it does not know how the

State determined that Mr. Lloyd had any registration duty in Ohio as a sexually oriented offender. State's Supplemental Brief, Sept. 8, 2010, p. 3 ("The record is unclear whether Lloyd was initially classified as a sexually oriented offender by the Ohio Attorney General or by law enforcement").

In late 2007, the Ohio Attorney General sent him an SB10 letter telling him that he was no longer a "sexually oriented offender." Instead, Mr. Lloyd was, according to the Attorney General, a Tier III Offender with far more extensive and intrusive registration requirements.

B. Mr. Lloyd provides actual notice of his move to law enforcement the day of his move, but he does not meet the deadlines in R.C. 2950.04.

Twelve days before he moved from Auglaize County to Holmes County in 2008, Mr. Lloyd sent a letter to the Auglaize County Sheriff to inform him of the move. It is undisputed that he called the Auglaize County Sheriff the day that he completed the move. As a result of Mr. Lloyd's call to the Auglaize County Sheriff, that sheriff called the Holmes County Sheriff. The Holmes County Sheriff arrested Mr. Lloyd ten days after his arrival in Holmes County for failing to register within three days and for failing to provide 20 days advance notice of the move.

C. Two missed deadlines lead to first-degree felony convictions despite actual notice to law enforcement.

After a contested bench trial, the Holmes County Common Pleas Court convicted Mr. Lloyd of failing to provide 20 days advance notice of his move to both the Auglaize and Holmes County Sheriff's, as well as the failure to register

in person in Holmes County within three days of his move. The trial court imposed a three-year prison term, but stayed it pending appeal.

D. The State argues that the trial court cannot continue bond pending this Court's review.

The State claims that the trial court cannot extend the stay because such motion had to be filed within three days of the court of appeals decision. Exhibit 5, citing R.C. 2949.03. Mr. Lloyd could not have complied with the three-day deadline, because his appellate lawyer apparently considered his job to be over when the appellate court issued its decision. Even if appellate counsel physically received a copy within the three-day deadline as claimed by the State, he would not have filed.

But even if counsel had not already withdrawn, the theoretical possibility of filing was a practical impossibility. The court of appeals issued its decision on December 30, 2010, before a three-day holiday weekend. If the decision was served the day it was filed in Holmes County Clerk's Office, counsel would not have received a copy in the mail until January 3, 2011 at the earliest, leaving only hours to read the decision, understand its contents, consult with Mr. Lloyd, draft a motion, and get that motion to the clerk's office for filing. In addition, undersigned counsel was not assigned this case until well after the three-day time period, and counsel could not have filed a substantive motion without a chance to read the record and to understand the case.

- E. A hearing on the State's motion to revoke bond is scheduled for February 8, 2011 at 10:30 a.m. in the Holmes County Common Pleas Court. Mr. Lloyd must be present to that he can be immediately incarcerated if he does not prevail at the hearing.**

The trial court has set a hearing on the State's motion for bond revocation for 10:30 a.m. on February 8, 2011. Mr. Lloyd must be present so that he can be immediately incarcerated if the trial court revokes Mr. Lloyd's bond.

A motion to stay is pending in the court of appeals, but it is uncertain whether the court of appeals will rule on it before the trial court can revoke Mr. Lloyd's bond.

III. Discussion

- A. The State does not and has not alleged that Mr. Lloyd has violated his appeal bond.**

The State does not and has not alleged that Mr. Lloyd has violated the terms of his appeal bond. Mr. Lloyd has a job and helps supports his fiancée and three teenage children. His Ohio registration offenses were technical, not malicious. He is not a danger to the public.

- B. Mr. Lloyd served in the Army during Operation Desert Storm, and received shrapnel in the head from an explosion.**

Mr. Lloyd has an honorable discharge from the Army. He left as a sergeant. He was injured in the head from an explosion while working on top of a decontamination truck during Operation Desert Storm. He reports that he has not been evaluated for the potential of traumatic brain injury, despite the fact that his convictions in this case result from

not timely following detailed reporting requirements that most lawyers do not understand.

C. Mr. Lloyd’s appeal will present several issues that this Court would likely accept.

1. This case addresses the question of whether the default mental state for failure to register is recklessness.

a. The failure to register statute does not include a mental state for any element.

The trial and appellate courts ruled that failing to timely register is a strict liability, but the offense does not contain a mental state, so the provisions of R.C. 2901.21(B) can apply to make recklessness the mental state. See, *State v. Johnson*, Slip Op. 2010-Ohio-6301 at ¶38.

b. The federal law after which Ohio based its program punishes only knowing violation of registration requirements.

It would be difficult for the State to prove that the failure to register statute “plainly indicates a purpose to impose strict criminal liability” because the statute’s purpose was to implement the federal Adam Walsh Act, and that act requires the government to prove a “knowing” violation. See, 18 U.S.C. § 2250(a)(3); *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424 at ¶18-20 (Ohio adopted SB10 in response to federal legislation). In addition, federal regulations require that officials report the non-registration of sex offenders only when a sex offender actually absconds. See, e.g., National Guidelines for Sex Offender Registration and Notification at 59 (“If a jurisdiction receives information indicating that a sex offender may have absconded, as described in

the preceding bullets, and takes the measures described therein but cannot locate the sex offender, then the jurisdiction must . . .”).¹

The level of penalty militates against making this offense strict liability. The court ruled that Mr. Lloyd’s Texas offense was the equivalent of a First Degree Felony, which makes any registration violation a First Degree Felony with a presumption of at least three years in prison and a mandatory five years of post-release control. R.C. 2950.99(A)(1)(a)(i). If this is a strict liability offense, a defendant who reports a move 19 days in advance instead of 20, or reports to a sheriff 4 days after a move instead of 3, faces a first-degree felony for a deadline miscalculation. And given that many lawyers don’t understand the maze of registration requirements, some defendants will innocently (or at least negligently) misinterpret their duties.

c. The mental state is important in this case because it is uncontroverted that Mr. Lloyd orally reported his move to Holmes County to the Auglaize County Sherriff.

The required mental state is material in this case because the State concedes that Mr. Lloyd orally notified the Auglaize County Sheriff of the move on the day of the move. State’s Trial Brief, Exhibit 6 at pp. 3-4.

2. This case has issues similar to four other cases concerning how *Bodyke* affects the retroactive application of SB10.

This Court has accepted jurisdiction over at least four pending cases that will adjudicate claims relating to the application of SB10 to defendants whose offenses predate the law. See *In re Smith*, Case No. 2008-1624; *State v. Gingell*,

¹ << http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf>>

Case No. 2010-0047; *In re Messmer*, Case No. 2010-0780; *State v. Dehler*, Case No. 2009-1974. Accordingly, Mr. Lloyd has a reasonable chance of obtaining review of this case.

IV. Conclusion

Mr. Lloyd has demonstrated that he can successfully comply with an appellate bond. Further, this case has several issues that this Court would likely accept. Accordingly, Mr. Lloyd asks this Court maintain the status quo by staying the decision of the court of appeals as well as the trial court's judgment entry of sentence, conditioned on his continued compliance with the terms of the trial court's bond.

Respectfully submitted,

Office of the Ohio Public Defender

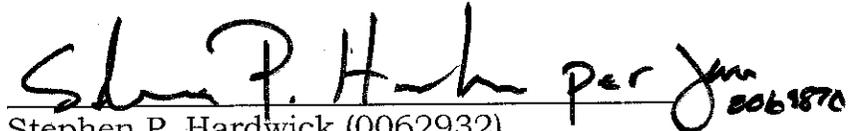

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Certificate of Service

I certify that on February 7, 2011, a copy of the foregoing was sent via telefax to the office of Sean Mathew Warner, Assistant Prosecuting Attorney, Holmes County Prosecutor's Office, 164 East Jackson Street, Millersburg, OH 44654, 330-674-0183.


Stephen P. Hardwick (0062932)
Assistant Public Defender

#336395

IN THE SUPREME COURT OF OHIO

State of Ohio, : Case No.
 :
 Plaintiff-Appellee, : On Appeal from the Holmes County
 : Court of Appeals, Fifth Appellate
 v. : District, Case No. 09CA12
 :
 Wesley Lloyd, : Expedited Review Requested
 : Hearing on Bond Revocation:
 Defendant-Appellant. : Feb. 8, 2011

Appendix to

**Motion of Defendant Wesley Lloyd to Stay the Court Of Appeals'
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FILED

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IN THE COURT OF COMMON PLEAS
HOLMES COUNTY, OHIO

DORCAS L. MILLER, CLERK
COMMON PLEAS COURT
HOLMES COUNTY, OHIO

STATE OF OHIO,
Plaintiff,
vs.
WESLEY LLOYD,
Defendant.

CASE NO. 09CR001
JOURNAL ENTRY

Journalized: Journal 206, Page(s) 750

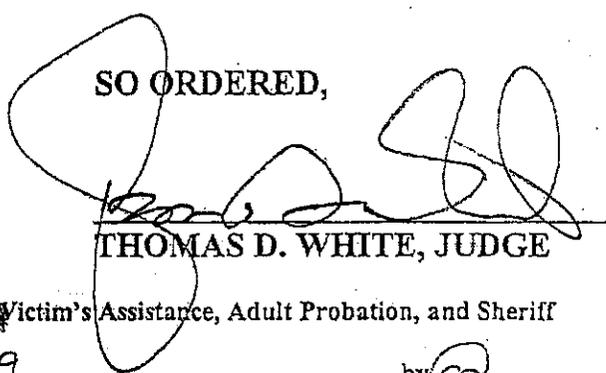
On September 3, 2009, after sentencing, Attorney Kellogg indicated on the record that Mr. Lloyd would request that he be appointed as appeal counsel.

Therefore, the Court appoints Attorney Jeffrey Kellogg to represent Defendant in the appeal in this case.

Without objection from the Prosecuting Attorney, defendant's appeal bond is set at \$20,000 cash or surety, no 10%.

The \$20,000 surety bond previously posted in this case shall be continued as defendant's appeal bond.

SO ORDERED,



THOMAS D. WHITE, JUDGE

DATED: September 3, 2009

cc: Pros. Atty., Defendant, ~~Attorney~~ Victim's Assistance, Adult Probation, and Sheriff

[] Copies distributed on 9-3-09, by ep.

*Atty. Hardwick,
Robert D. Zintgraf is
now the Judge*

EXHIBIT
1

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED

2010 DEC 30 AM 10:25

COURT
HOLMES COUNTY
DORCAS L. MILLER, CLERK

STATE OF OHIO

Plaintiff-Appellee

-vs-

WESLEY LLOYD

Defendant-Appellant

JUDGES:

Hon. Julie A. Edwards, P. J.

Hon. W. Scott Gwin, J.

Hon. John W. Wise, J.

Case No. 09 CA.12

OPINION

CHARACTER OF PROCEEDING:

Criminal Appeal from the Court of Common
Pleas, Case No. 09 CR 1

JUDGMENT:

Affirmed in Part; Reversed in Part and
Vacated:

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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EXHIBIT

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2

Wise, J.

{¶1} Appellant Wesley Lloyd appeals from his conviction, in the Holmes County Court of Common Pleas, on three counts of sexual offender registration violations. The appellee is the State of Ohio. The relevant facts leading to this appeal are as follows.

{¶2} In 1995, appellant was convicted, in the State of Texas, of one count of aggravated sexual battery, pursuant to the Texas Penal Code. He was sentenced in that case to seven years in prison. Appellant appealed, but on March 5, 1998, the Court of Appeals of Texas, Eastland, affirmed the conviction.

{¶3} After appellant was released from prison in Texas in 2005, he moved to Auglaize County, Ohio. Appellant thereupon registered as a sexually-oriented offender in Auglaize County, and continued to register as required in 2006 and 2007. In November 2007, appellant received a letter from the Ohio Attorney general indicating that he was being reclassified as a Tier III offender, requiring increased periodic registration. Appellant continued to register, pursuant to his Adam Walsh Act reclassification, in February 2008 and May 2008.

{¶4} On May 21, 2008, appellant purportedly sent a letter to the Auglaize County Sheriff, advising him of his intention to move to Holmes County. On or about June 2, 2008, appellant completed his move to Holmes County.

{¶5} On June 12, 2008, appellant was arrested in Holmes County on charges of failing to register as a sex offender. What we will label as Count I was based on appellant's failure to register with the Holmes County Sheriff within three days of moving into Holmes County. See R.C. 2950.04(E). Count II was based on appellant's failure to provide written notice to the Holmes County Sheriff of his intent to reside in Holmes

County at least twenty days prior to moving. See R.C. 2950.04(E). Furthermore, on June 17, 2008, appellant was indicted in Auglaize County for failure to give a twenty-day advance notice of an address change prior to moving. We will label this as "Count III." See R.C. 2950.05(F)(1).

{16} The charges were consolidated for trial in Holmes County. On April 7, 2009, the case was heard via a bench trial. On July 9, 2009, the court found appellant guilty on all three counts. On September 3, 2009, the court sentenced appellant to three years in prison on each count, to be served concurrently.

{17} On September 14, 2009, appellant filed a notice of appeal. He herein raises the following nine Assignments of Error:

{18} "I. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS WHEN HE WAS TRIED AND CONVICTED OF FELONIES FOR FAILURE TO NOTIFY OF CHANGE OF ADDRESS WHEN UNDER OHIO LAW HE WAS NOT REQUIRED TO REGISTER AS A SEX OFFENDER.

{19} "II. THE DEFENDANT-APPELLANT WESLEY LLOYD WAS DENIED DUE PROCESS WHEN HE WAS TRIED AND CONVICTED OF FELONIES OF THE FIRST DEGREE WHEN UNDER OHIO LAW HE SHOULD HAVE BEEN CHARGED WITH FELONIES OF THE THIRD DEGREE.

{110} "III. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS WHEN HE WAS CONVICTED OF A VIOLATION OF R.C. 2950.04(A)(2)(a) [SIC] AFTER BEING TOLD BY LAW ENFORCEMENT THAT HE COULD NOT REGISTER IN HOLMES COUNTY.

{¶11} "IV. THE DEFENDANT-APPELLANT WESLEY LLOYD WAS DENIED DUE PROCESS WHEN HE WAS CONVICTED OF VIOLATING R.C. 2950.04(E) AND R.C. 2950.04(G) WHEN R.C. 2950.04 ONLY APPLIES TO THE INITIAL REGISTRATION OF A SEX OFFENDER UPON RELEASE FROM PRISON OR UPON ENTERING INTO THE STATE.

{¶12} "V. THE DEFENDANT-APPELLANT WESLEY LLOYD WAS DENIED DUE PROCESS OF LAW WHEN HE WAS CONVICTED OF FAILING TO REGISTER IN HOLMES COUNTY WHEN THE EVIDENCE SHOWED THAT REGISTRATION BY LLOYD IN HOLMES COUNTY WAS IMPOSSIBLE.

{¶13} "VI. THE DEFENDANT-APPELLANT WESLEY LLOYD WAS DENIED DUE PROCESS WHEN HE WAS CONVICTED OF A STRICT LIABILITY OFFENSE WITHOUT RECEIVING NOTICE OF THE NEW REGISTRATION REQUIREMENTS.

{¶14} "VII. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS OF LAW WHEN HE WAS CONVICTED OF COUNT I OF THE INDICTMENT UPON INSUFFICIENT EVIDENCE.

{¶15} "VIII. THE DEFENDANT-APPELLANT WAS DENIED DUE PROCESS WHEN HE WAS CONVICTED OF VIOLATING R.C. 2950.04(E) UPON INSUFFICIENT EVIDENCE.

{¶16} "IX. THE DEFENDANT'S PROSECUTION UNDER TITLE 2950 OF THE R.C. VIOLATES DUE PROCESS BECAUSE R.C. 2950.031 AND R.C. 2950.032 ARE UNCONSTITUTIONAL PURSUANT TO THE OHIO SUPREME COURT'S DECISION IN *STATE V. BODYKE*."

IX.

{¶17} We will address appellant's Ninth Assignment of Error first.

{¶18} In *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, the Ohio Supreme Court severed R.C. 2950.031 and 2950.032, the reclassification provisions of the Adam Walsh Act, and held that after severance, those provisions could not be enforced. The Court further held that R.C. 2950.031 and 2950.032 may not be applied to offenders previously adjudicated by judges under "Megan's Law." See also *Chojnacki v. Cordray*, 126 Ohio St.3d 321, 933 N.E.2d 800, 2010-Ohio-3212, ¶5.

{¶19} The only Count potentially affected by *Bodyke* in this instance is Count II. In other words, the registration/notice requirements in Counts I and III were not impacted by the Adam Walsh Act. The State responds, however, that even Count II is not altered by *Bodyke*, because his Tier III classification did not disturb a ruling by the judicial branch. However, recently, in *State v. Clager*, Licking App.No.10-CA-49, 2010-Ohio-6074, this Court found that even out-of-state offenders are not subject to an Ohio Attorney General reclassification based on the doctrine of separation of powers.

{¶20} Appellant's Ninth Assignment of Error is therefore sustained in regard to appellant's Tier III – based offense in Count II.

I.

{¶21} In his First Assignment of Error, appellant contends his convictions for failure to register and notify of an address change violated due process, because he was not required to register as a sexually-oriented offender in Ohio. We disagree.

{¶22} R.C. 2950.04(A)(4) states as follows:

{¶23} "Regardless of when the sexually oriented offense was committed, each person who is convicted, pleads guilty, or is adjudicated a delinquent child in a court in another state **** for committing a sexually oriented offense shall comply with the following registration requirements if, at the time the offender or delinquent child moves to and resides in this state or temporarily is domiciled in this state for more than three days, the offender or public registry-qualified juvenile offender registrant enters this state to attend a school or institution of higher education, or the offender or public registry-qualified juvenile offender registrant is employed in this state for more than the specified period of time, the offender or delinquent child has a duty to register as a sex offender or child-victim offender under the law of that other jurisdiction as a result of the conviction, guilty plea, or adjudication:

{¶24} "(a) Each offender and delinquent child shall register personally with the sheriff, or the sheriff's designee, of the county within three days of the offender's or delinquent child's coming into the county in which the offender or delinquent child resides or temporarily is domiciled for more than three days.

{¶25} "(b) Each offender or public registry-qualified juvenile offender registrant shall register personally with the sheriff, or the sheriff's designee, of the county immediately upon coming into a county in which the offender or public registry-qualified juvenile offender registrant attends a school or institution of higher education on a full-time or part-time basis regardless of whether the offender or public registry-qualified juvenile offender registrant resides or has a temporary domicile in this state or another state.

{¶26} "(c) Each offender or public registry-qualified juvenile offender registrant shall register personally with the sheriff, or the sheriff's designee, of the county in which the offender or public registry-qualified juvenile offender registrant is employed if the offender resides or has a temporary domicile in this state and has been employed in that county for more than three days or for an aggregate period of fourteen days or more in that calendar year.

{¶27} "(d) Each offender or public registry-qualified juvenile offender registrant shall register personally with the sheriff, or the sheriff's designee, of the county in which the offender or public registry-qualified juvenile offender registrant then is employed if the offender or public registry-qualified juvenile offender registrant does not reside or have a temporary domicile in this state and has been employed at any location or locations in this state for more than three days or for an aggregate period of fourteen or more days in that calendar year."

{¶28} In order to define "sexually oriented offense" for purposes of the first paragraph of R.C. 2950.04(A)(4), supra, we turn to the definition found in R.C. 2950.01(A)(11): "A violation of *** any existing or former municipal ordinance or law of another state or the United States *** that is or was *substantially equivalent* to any offense listed in division (A)(1), (2), (3), (4), (5), (6), (7), (8), (9), or (10) of this section." (Emphasis added).

{¶29} Among the Ohio offenses listed in division (A)(1) of R.C. 2950.01 are rape and sexual battery. The pertinent rape section, R.C. 2907.02(A)(2), states: "No person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." The pertinent sexual battery section,

R.C. 2907.03(A)(1), states: No person shall engage in sexual conduct with another, not the spouse of the offender, when *** [t]he offender knowingly coerces the other person to submit by any means that would prevent resistance by a person of ordinary resolution."

{¶30} In appellant's 1995 Texas conviction for aggravated sexual assault, the jury was instructed as follows pursuant to Texas Penal Code Title 5, Chapter 22, Sec. 22.201:

{¶31} "Our law provides that a person commits the offense of aggravated sexual assault if the person intentionally or knowingly causes the penetration of the mouth or female sexual organ of another person by the sexual organ of the actor without that person's consent, and by acts or words such person places the victim in fear that serious bodily injury or death will be imminently inflicted on any person.

{¶32} "Such assault is without the other person's consent if the actor compels the other person to submit or participate by threatening to use force or violence against the other person, and the other person believes that the actor has the present ability to execute the threat. * * *

{¶33} "A person acts intentionally, or with intent, with respect to the nature of his conduct when it is his conscious objective or desire to engage in the conduct.

{¶34} "A person acts knowingly or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result."

Appellant's Appendix at A-1, A-2.

{¶35} In essence, appellant contends that since rape under Ohio law (R.C. 2907.02(A)(2)) has a "purpose" element, while sexual battery (R.C. 2907.03(A)(1)) has

a "knowing" element, no single Ohio statute is "substantially equivalent" to aggravated sexual assault under the aforesaid Texas statute, which includes either purpose (intention) or knowledge. However, upon review, we find appellant's argument lacks merit, and we are further unpersuaded by appellant's reliance on the decision of the First District Court of Appeals in *Doe v. Leis*, Hamilton App.No. C-050591, 2006-Ohio-4507, as that case focused on variances between Ohio and Florida law as to the element of "force" in a criminal sexual assault context.

{¶36} Appellant's First Assignment of Error is therefore overruled.

II.

{¶37} In his Second Assignment of Error, appellant contends his first-degree felony convictions, as opposed to third-degree felonies, violated due process. We disagree.

{¶38} R.C. 2950.99(A)(1)(a) states as follows:

{¶39} "Except as otherwise provided in division (A)(1)(b) of this section, whoever violates a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code shall be punished as follows:

{¶40} ****

{¶41} "(ii) *** [I]f the most serious sexually oriented offense or child-victim oriented offense that was the basis of the registration, notice of intent to reside, change of address, or address verification requirement that was violated under the prohibition is a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the same degree as that offense committed in the other jurisdiction would constitute if committed in this state."

{¶42} Appellant maintains that because of the "intentionally or knowingly" language of the Texas aggravated sexual assault statute, it is impossible to know if the Texas jury's determination was equivalent to rape or to sexual battery under Ohio law; hence, due process requires that the lesser degree of culpability apply, which in this instance would be sexual battery, a third-degree felony. However, the Texas indictment at issue includes "use of physical force and violence" allegations on the aggravated sexual assault count, and we therefore find no error or violation of due process in appellant's first-degree felony convictions for failure to register at the same degree as the offense of rape.

{¶43} Appellant's Second Assignment of Error is overruled.

III.

{¶44} In his Third Assignment of Error, appellant contends his conviction under Count I (failure to register in Holmes County within three days of relocating) violated due process. We disagree.

{¶45} Appellant first argues the forms utilized under the electronic sexual offender system ("eSORN") are insufficient under Ohio law. He directs us to R.C. 2950.04(B) and (C), which state as follows:

{¶46} "(B) An offender or delinquent child who is required by division (A) of this section to register in this state personally shall obtain from the sheriff or from a designee of the sheriff a registration form that conforms to division (C) of this section, shall complete and sign the form, and shall return the completed form together with the offender's or delinquent child's photograph, copies of travel and immigration documents, and any other required material to the sheriff or the designee. The sheriff or designee

shall sign the form and indicate on the form the date on which it is so returned. The registration required under this division is complete when the offender or delinquent child returns the form, containing the requisite information, photograph, other required material, signatures, and date, to the sheriff or designee.

{¶47} "(C) The registration form to be used under divisions (A) and (B) of this section shall include or contain all of the following for the offender or delinquent child who is registering:

{¶48} "(1) The offender's or delinquent child's name and any aliases used by the offender or delinquent child;

{¶49} "(2) The offender's or delinquent child's social security number and date of birth, including any alternate social security numbers or dates of birth that the offender or delinquent child has used or uses;

{¶50} "(3) Regarding an offender or delinquent child who is registering under a duty imposed under division (A)(1) of this section, a statement that the offender is serving a prison term, term of imprisonment, or any other type of confinement or a statement that the delinquent child is in the custody of the department of youth services or is confined in a secure facility that is not operated by the department;

{¶51} "(4) Regarding an offender or delinquent child who is registering under a duty imposed under division (A)(2), (3), or (4) of this section as a result of the offender or delinquent child residing in this state or temporarily being domiciled in this state for more than three days, the current residence address of the offender or delinquent child who is registering, the name and address of the offender's or delinquent child's employer if the offender or delinquent child is employed at the time of registration or if

the offender or delinquent child knows at the time of registration that the offender or delinquent child will be commencing employment with that employer subsequent to registration, any other employment information, such as the general area where the offender or delinquent child is employed, if the offender or delinquent child is employed in many locations, and the name and address of the offender's or public registry-qualified juvenile offender registrant's school or institution of higher education if the offender or public registry-qualified juvenile offender registrant attends one at the time of registration or if the offender or public registry-qualified juvenile offender registrant knows at the time of registration that the offender or public registry-qualified juvenile offender registrant will be commencing attendance at that school or institution subsequent to registration;

{152} "(5) Regarding an offender or public registry-qualified juvenile offender registrant who is registering under a duty imposed under division (A)(2), (3), or (4) of this section as a result of the offender or public registry-qualified juvenile offender registrant attending a school or institution of higher education in this state on a full-time or part-time basis or being employed in this state or in a particular county in this state, whichever is applicable, for more than three days or for an aggregate of fourteen or more days in any calendar year, the name and current address of the school, institution of higher education, or place of employment of the offender or public registry-qualified juvenile offender registrant who is registering, including any other employment information, such as the general area where the offender or public registry-qualified juvenile offender registrant is employed, if the offender or public registry-qualified juvenile offender registrant is employed in many locations;

{¶53} "(6) The identification license plate number of each vehicle the offender or delinquent child owns, of each vehicle registered in the offender's or delinquent child's name, of each vehicle the offender or delinquent child operates as a part of employment, and of each other vehicle that is regularly available to be operated by the offender or delinquent child; a description of where each vehicle is habitually parked, stored, docked, or otherwise kept; and, if required by the bureau of criminal identification and investigation, a photograph of each of those vehicles;

{¶54} "(7) If the offender or delinquent child has a driver's or commercial driver's license or permit issued by this state or any other state or a state identification card issued under section 4507.50 or 4507.51 of the Revised Code or a comparable identification card issued by another state, the driver's license number, commercial driver's license number, or state identification card number;

{¶55} "(8) If the offender or delinquent child was convicted of, pleaded guilty to, or was adjudicated a delinquent child for committing the sexually oriented offense resulting in the registration duty in a court in another state, in a federal court, military court, or Indian tribal court, or in a court in any nation other than the United States, a DNA specimen, as defined in section 109.573 of the Revised Code, from the offender or delinquent child, a citation for, and the name of, the sexually oriented offense resulting in the registration duty, and a certified copy of a document that describes the text of that sexually oriented offense;

{¶56} "(9) A description of each professional and occupational license, permit, or registration, including those licenses, permits, and registrations issued under Title XLVII of the Revised Code, held by the offender or delinquent child;

{¶157} "(10) Any email addresses, internet identifiers, or telephone numbers registered to or used by the offender or delinquent child;

{¶158} "(11) Any other information required by the bureau of criminal identification and investigation."

{¶159} Upon review of the record in this case, we are unconvinced that any purported noncompliance by Auglaize and Holmes law enforcement officials with the data-collection requirements of R.C. 2950.04(B) and (C) would result in a due process violation regarding appellant or in any way excuse his failure to adhere to statutory relocation registration requirements.

{¶160} Appellant secondly contends that he was denied due process based on police entrapment and outrageous police conduct.

{¶161} In *State v. Doran* (1983), 5 Ohio St.3d 187, the Ohio Supreme Court held: "The defense of entrapment is established where the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order to prosecute." In *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369, 375, 6 OBR 421, 453 N.E.2d 666, the Ohio Supreme Court described outrageous conduct as follows: "[S]o outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!' " *Id.*

{¶62} The State's witnesses in this matter consistently recounted the basis for appellant's Count I violation: His failure to register in Holmes County based on his failure or refusal to first clear his name from the registration system in Auglaize County by properly and timely notifying officials there of his intent to move. Upon review, we find appellant's claims of police entrapment and outrageous police conduct unpersuasive.

{¶63} Appellant's Third Assignment of Error is overruled.

IV.

{¶64} In his Fourth Assignment of Error, appellant contends his convictions for failure to register or notify of an address change violated due process, because he was not required to register as a sexually-oriented offender in Ohio.

{¶65} We find this assigned error relates to Counts I and II only. Those Counts were based on R.C. 2950.04((E), which states: "No person who is required to register pursuant to divisions (A) and (B) of this section, and no person who is required to send a notice of intent to reside pursuant to division (G) of this section, shall fail to register or send the notice of intent as required in accordance with those divisions or that division."

Count I (3-Day Requirement in Holmes Co.)

{¶66} We first consider, by cross-reference within R.C. 2950.04((E), the requirement of R.C. 2950.04(A)(4)(a) that "[r]egardless of when the sexually oriented offense was committed, each person who is convicted *** in a court in another state *** for committing a sexually oriented offense shall comply with the following registration requirements if, at the time the offender *** moves to and resides in this state or temporarily is domiciled in this state for more than three days, the offender *** enters

this state to attend a school or institution of higher education, or the offender *** is employed in this state for more than the specified period of time, the offender *** has a duty to register as a sex offender or child-victim offender under the law of that other jurisdiction as a result of the conviction, guilty plea, or adjudication:

{¶67} "(a) Each offender *** shall register personally with the sheriff, or the sheriff's designee, of the county within three days of the offender's or delinquent child's coming into the county in which the offender or delinquent child resides or temporarily is domiciled for more than three days."

{¶68} Appellant essentially argues that R.C. 2950.04(A)(4)(a) applies only to out-of-state-offenders who are *initially* moving into Ohio. However, our reading of the above subsection indicates that the "moves to and resides in this state" language is instead merely tied to the question of whether an offender has a duty to register under another jurisdiction's law at the time he or she moves to Ohio.

{¶69} We therefore find no error on this basis as to Count I under R.C. 2950.04(A)(4)(a).

Count II (20-Day Intent to Reside Requirement for Holmes Co.)

{¶70} R.C. 2950.04(G) states as follows:

{¶71} "If an offender or delinquent child who is required by division (A) of this section to register is a tier III sex offender/child-victim offender, the offender or delinquent child also shall send the sheriff, or the sheriff's designee, of the county in which the offender or delinquent child intends to reside written notice of the offender's or delinquent child's intent to reside in the county. The offender or delinquent child shall

send the notice of intent to reside at least twenty days prior to the date the offender or delinquent child begins to reside in the county.

{¶72} Based on our redress of appellant's Ninth Assignment of Error, appellant's Tier III-based conviction in Count II is erroneous as a matter of law and will be ordered to be reversed.

{¶73} Appellant's Fourth Assignment of Error is therefore overruled in part and sustained in part.

V.

{¶74} In his Fifth Assignment of Error, appellant contends his conviction for failure to register in Holmes County violated due process, because the evidence purportedly shows it was impossible for him to do so.¹

{¶75} Appellant maintains that the computerized registration system prevented him from registering in Holmes County, because he had not been recognized in the system at that time as having been transferred out of Auglaize County. However, appellant was required to give a twenty-day advance notice to Auglaize County prior to leaving for Holmes County; this he failed to do. Thus, the trial court properly concluded that appellant could not rely on an impossibility defense when the alleged impossibility was created by his original violation of the law in Auglaize County.

{¶76} Appellant's Fifth Assignment of Error is therefore overruled.

¹ At this juncture, we have found appellant's Count II conviction to be reversible error. Furthermore, Count III concerns his Auglaize County notification. We will thus only consider Count I in this assigned error.

VI.

{¶77} In his Sixth Assignment of Error, appellant contends his conviction for failure to notify of an address change violated due process, because he was not notified of his "Tier III" requirements under R.C. 2950.04(G).

{¶78} Appellant's arguments in this assigned error are directed solely at Count II, which is his Tier III – based conviction. Based on our redress of his Ninth Assignment of Error, supra, we find further analysis of the present issue to be moot.

{¶79} Appellant's Sixth Assignment of Error is therefore found moot.

VII.

{¶80} In his Seventh Assignment of Error, appellant contends his conviction for failure to register under what we have labeled as Count III was not supported by sufficient evidence. We disagree.

{¶81} In reviewing a claim of insufficient evidence, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶82} Count III was based on R.C. 2950.05(F)(1), which reads as follows: "No person who is required to notify a sheriff of a change of address pursuant to division (A) of this section *** shall fail to notify the appropriate sheriff in accordance with that division." However, the indictment language for Count III references both division (A) and (B) of R.C. 2950.05, and charges that appellant failed to notify the appropriate

Sheriff "in accordance with these divisions ***." Appellant argues that the State was thus required to prove both R.C. 2950.05(A) and (B), which it failed to do.

{¶83} We find no merit in appellant's argument. The pertinent statute in Count III is R.C. 2950.05(F)(1), to which R.C. 2950.05(B) is wholly inapplicable, and the reference to R.C. 2950.05(B) set forth in the charge was superfluous. The State therefore sufficiently proved the elements of R.C. 2950.05(F)(1).

{¶84} Appellant's Seventh Assignment of Error is overruled.

VIII.

{¶85} In his Eighth Assignment of Error, appellant contends his conviction for failure to notify of an address change violated due process, because he was not required to register as a sexually-oriented offender in Ohio.

{¶86} R.C. 2950.04(A)(4), supra, imposes registration requirements if "the offender or delinquent child has a duty to register as a sex offender or child-victim offender under the law of that other jurisdiction as a result of the conviction, guilty plea, or adjudication." Appellant essentially contends the State failed to prove he had a duty under Texas law to register as a sex offender. However, the record reveals that appellant himself testified that he was required to register in Texas following his 2005 conviction. See Tr. at 104-105. Moreover, a review of appellant's multiple-ground oral motion for acquittal at the close of the State's case does not reveal that appellant asserted the present "duty under Texas law" argument to the trial court. See Tr. at 93-100. Under the invited error doctrine, a party will not be permitted to take advantage of an error which he himself invited or induced. See *He v. Zeng*, Licking App.No.

2003CA00056, 2004-Ohio-2434, ¶ 13, citing *State v. Bey* (1999), 85 Ohio St.3d 487, 493, 709 N.E.2d 484.

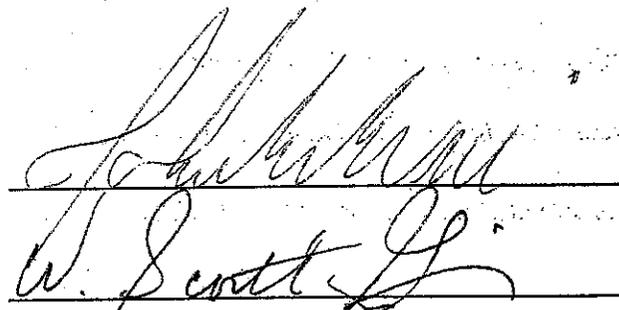
{¶187} Accordingly, appellant's Eighth Assignment of Error is overruled.

{¶188} For the reasons stated in the foregoing opinion, the judgment of the Court of Common Pleas, Holmes County, Ohio, is hereby affirmed in part and reversed in part. Appellant's conviction and sentence under Count II are hereby vacated.

By: Wise, J.

Gwin, J., concurs.

Edwards, P. J., concurs separately.



W. Scott G.

JUDGES

JWW/d 1118

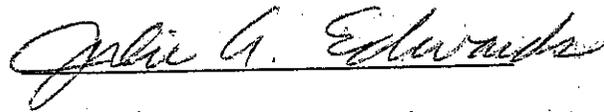
EDWARDS, P.J., CONCURRING OPINION

{¶89} I concur in the judgment of the majority. However, in the eighth assignment of error I would not find that appellant was required to move for acquittal on the basis that the State failed to prove he had a duty to register under Texas law in order to raise a sufficiency of the evidence claim on appeal.

{¶90} The Ohio Supreme Court has stated that a failure to timely file a Crim. R. 29(A) motion during jury trial does not waive an argument on appeal concerning the sufficiency of the evidence. *State v. Jones* (2001), 91 Ohio St.3d 335, 346, 744 N.E.2d 1163; *State v. Carter* (1992), 64 Ohio St.3d 218, 223, 594 N.E.2d 595. Because a conviction based on legally insufficient evidence constitutes a denial of due process, a conviction based upon insufficient evidence would almost always amount to plain error. *State v. Coe*, 153 Ohio App.3d 44, 790 N.E.2d 1222, 2003-Ohio-2732, ¶19. The rationale for requiring a criminal defendant to timely file a Crim. R. 29(A) motion at trial is to call the trial court's attention to the alleged insufficiency of the evidence and allow the trial court to correct the error. *Id.* at fn. 6.

{¶91} In the instant case, appellant's failure to raise the issue of the State's failure to prove he had a duty to register in Texas denied the trial court the opportunity to correct the error by directing a verdict at the close of the State's case, and prior to appellant taking the stand in his own case-in-chief.

Appellant then corrected the deficiency in the evidence himself by admitting that he had a duty to register in Texas following his 2005 conviction. Tr. 104-105. I therefore would find that appellant's conviction was not based on legally insufficient evidence.



Judge Julie A. Edwards

JAE/rad/rmn

IN THE COURT OF APPEALS FOR HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED
2010 DEC 30 AM 10:25
HOLMES COUNTY COURT
DORCAS L. MILLER, CLERK

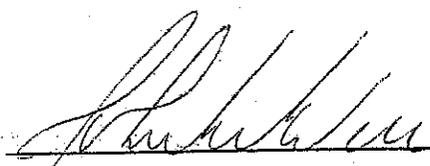
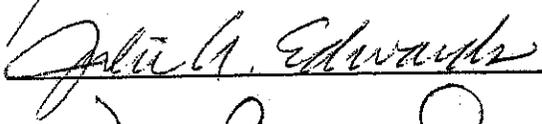
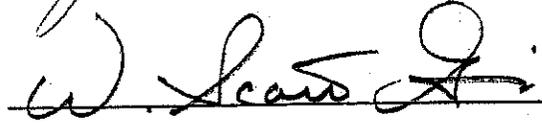
STATE OF OHIO
Plaintiff-Appellee
-vs-
WESLEY LLOYD
Defendant-Appellant

JUDGMENT ENTRY

Case No. 09 CA 12

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas, Holmes County, Ohio, is affirmed in part and reversed in part. Appellant's conviction and sentence under Count II are hereby vacated.

Costs to be split evenly between appellant and the State of Ohio.

JUDGES

EXHIBIT
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Y. Lloyd

FILED

**IN THE COURT OF COMMON PLEAS
HOLMES COUNTY, OHIO**

2009 SEP -3 AM 10:20
DORCAS L. MILLER, CLERK
COMMON PLEAS COURT
HOLMES COUNTY, OHIO

**STATE OF OHIO,
Plaintiff,**

vs.

**WESLEY LLOYD
DOB: 11/29, 1969.**

Defendant.

CASE NO. 09CR001

JUDGMENT ENTRY

Docket: 09/03/09 - Sentencing Hearing held Defendant having been convicted by conviction after Bench Trial of one count of Failure to Register with the Holmes County Sheriff Within Three Days of Moving to Holmes County, a felony of the first degree, in violation of Revised Code 2950.04(E); one Count of Failing to Provide the Holmes County Sheriff with Written Notice of His Intent to Reside in Holmes County 20 Days Prior to Moving to Holmes County, a felony of the first degree, in violation of Revised Code 2950.04(E); and one Count of Failing to Provide the Sheriff of Auglaize County Written Notice of His Intent to Move to Holmes County 20 Days Prior to Moving to Holmes County, a felony of the first degree, in violation of Revised Code 2950.05(F)(1). Payment of financial sanctions waived. Defendant sentenced to three years in prison on each count. Sentences to be run concurrently. Credit for 2 days time served against his prison sentence as of and including the date of sentencing. Defendant's bond is released and Defendant is remanded to the custody of the Sheriff of Holmes County for execution of sentence. Defendant shall submit DNA sample to Sheriff within 72 hours. Defendant was advised of his/her appeal rights per Crim. R. 32. This is a final order.

Journalized: Journal 206, Page(s) 751-756

(Sections of the following Judgment Entry with , only apply if the is checked.)

- Change of Plea and Immediately Sentenced. See separate Order for Change of Plea.
- Sexual Offender Hearing and Designation. See separate Order.
- Forfeiture of Property Hearing. See separate Order.

I HEREBY CERTIFY THAT THIS IS A TRUE COPY TO THE ORIGINAL DOCUMENT ON FILE IN MY OFFICE, WITNESS MY HAND AND SEAL OF THE COMMON PLEAS COURT.

SEP -3 2009

EXHIBIT
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The Defendant, Wesley Lloyd, age 39, of Glenmont, Ohio stands before this Court having been convicted by conviction after Bench Trial of one count of Failure to Register with the Holmes County Sheriff Within Three Days of Moving to Holmes County, a felony of the first degree, in violation of Revised Code 2950.04(E); one Count of Failing to Provide the Holmes County Sheriff with Written Notice of His Intent to Reside in Holmes County 20 Days Prior to Moving to Holmes County, a felony of the first degree, in violation of Revised Code 2950.04(E); and one Count of Failing to Provide the Sheriff of Auglaize County Written Notice of His Intent to Move to Holmes County 20 Days Prior to Moving to Holmes County, a felony of the first degree, in violation of Revised Code 2950.05(F)(1).

Sentencing was had on September 3, 2009, with Defendant appearing in open court represented by counsel. The Office of the Prosecuting Attorney appeared on behalf of the State of Ohio.

Sentencing was had pursuant to CrimR 32. The Court considered all matters of record, including statements and testimony given at sentencing, any pre-sentence investigation report and any victim impact statement.

Prior to passing sentence, the Court has considered all relevant constitutional, statutory and procedural factors affecting the Defendant's sentence.

A court that imposes a sentence for a felony shall be guided by the overriding purposes of felony sentencing. The overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender. To achieve these purposes, the sentencing court shall consider the need for incapacitating the offender, deterring the offender and others from future crime, rehabilitating the offender and making restitution to the victim and the public for the offense. Ohio Revised Code Section 2929.11(A).

A sentence imposed for a felony shall be reasonably calculated to achieve the two overriding purposes of felony sentencing, commensurate with and not demeaning to the seriousness of the offender's conduct and its impact on the victim and consistent with

sentences imposed for similar crimes committed by similar offenders. Ohio Revised Code Section 2929.11(B)

In imposing this sentence, the Court has not considered the offender's race, ethnic background, gender or religion.

The Court's analysis of the factors affecting the seriousness of the offense and likelihood of recidivism is:

Seriousness of Offense(s):

More Serious Factors (RC 2929.12(B)):

- The injury to the victim was worsened because of the physical or mental condition or age of the victim.
- The victim suffered serious physical, psychological or economic harm.
- The offender held a public office or position of trust and the offense was related to that office or trust.
- The offender's office or occupation required the offender to prevent or prosecute those committing the offense.
- Professional reputation, occupation or office facilitated the offense.
- Offense facilitated by offender's relationship with victim.
- Offense committed for hire as part of organized criminal activity.
- Offense motivated by prejudice based on race, ethnicity, gender, sexual orientation or religion.
- Any other factor:

Less Serious Factors (RC 2929.12(C)):

- The victim induced or facilitated this offense.
- The offender was strongly provoked.
- No physical harm to persons or property was expected or caused.
- There are substantial grounds for mitigation.
- Any other factor:

Weighing the seriousness factors, the Court finds that this/these offense(s) are - more serious/ - less serious.

Recidivism of Offender Factors.

Recidivism Likely (RC 2929.12(D)):

- Offender was out on bail before trial or sentencing, or under court sanction or under post-release control or parole when the offense was committed.
- Offender has prior adjudication of delinquency or history of criminal convictions.
- Offender has failed to respond favorably in the past to probation or parole.
- Offender has failed to acknowledge a pattern of drug or alcohol abuse that is related to this/these offense(s).
- Offender shows no genuine remorse.
- Any other factor:

Recidivism Not Likely (RC 2929.12(E)):

- Offender has not been adjudicated delinquent.
- Offender has no prior criminal convictions.
- Offender has been a law-abiding citizen for a number of years.
- The offense occurred under circumstances not likely to recur.
- The offender is genuinely remorseful.
- Any other factor:

Weighing the recidivism factors, the Court finds that recidivism is - more likely/ - less likely.

- (Felony of the first-degree or Felony of the second-degree) Pursuant to R.C. 2929.13(D), there is a presumption in favor of prison. The presumption - has - has not been overcome.

- Regarding financial sanctions the Court finds that the defendant is unable to pay financial sanctions.

It is therefore the Sentence of this Court that the Defendant shall:

- Payment of financial sanctions (fines, costs and/or restitution) is waived.

- Serve a stated prison term of 3 months years in the Lorain Correctional Institute at Grafton, Ohio or such other place as the Department of Rehabilitation and Corrections shall direct upon each count.

- Said sentences to be served - concurrently; - consecutively for a total prison sentence of **3 YEARS.**

Defendant is further notified that post-release control on a prison sentence is - optional/ - mandatory for - three/ - five years, as well as the consequences for violating conditions of post-release control imposed by the parole board.

If Defendant violates post-release control, he is warned that he may be required to serve an additional prison term of up to nine months for each violation up to a maximum of 1/2 of the sentence imposed by this Court.

If Defendant commits a new felony while on post release control, he may be required to serve a prison term of the time remaining on post-release control or 12 months, whichever is greater plus a consecutive sentence for the new felony. Defendant is ordered to serve as part of this sentence any term of post-release control imposed by the parole board, and any prison term for violation of that post-release control.

Defendant shall receive credit against any prison sentence for 2 days time served as of and including the date of sentencing.

- Defendant's bond is released and Defendant is remanded to the custody of the Sheriff of Holmes County for execution of sentence. Defendant shall submit DNA sample to Sheriff within 72 hours.

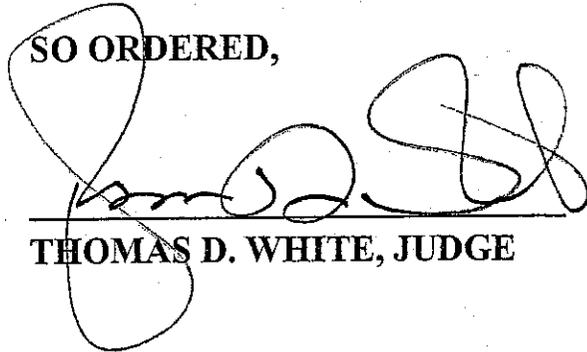
- Defendant was advised of his/her appeal rights per Crim. R. 32.

- This is a final order.

Clerk's Distribution List: Prosecuting Attorney, Defense Counsel, Defendant, Sheriff, Victim Advocate, Holmes County Adult Probation Department, - CSEA - Stark Regional

Community Corrections Center, - Bureau of Motor Vehicles, - Dept. of Rehabilitation and Corrections, Bureau of Sentence Computation and Board of Elections.

SO ORDERED,



Date: September 3, 2009

THOMAS D. WHITE, JUDGE

[] Copies distributed on 9-3-09, by .

IN THE COURT OF COMMON PLEAS
HOLMES COUNTY, OHIO

STATE OF OHIO :
 :
 Plaintiff :
 :
 -vs- : CASE NO. 09-CR-001
 :
 WESLEY LLOYD :
 :
 Defendant :

**STATE'S RESPONSE TO MEMORANDUM OF DEFENDANT WESLEY LLOYD
CONTRA THE STATE'S MOTION TO REVOKE BOND AND TERMINATE STAY**

PROSECUTING ATTORNEY
HOLMES COUNTY,
OHIO

Now comes the State of Ohio by and through Assistant Prosecuting Attorney Sean M. Warner to state its response to Defendant's Memorandum.

First, the State does not oppose this Court holding the warrant issued pursuant to the Judgment Entry dated January 25, 2011 until Defendant may be heard. The undersigned did have conversations with Defendant's counsel wherein the undersigned stated that the State did not oppose a grant of leave for Mr. Lloyd to file his Memorandum Contra. The undersigned cannot recall who was suppose to convey the information to the Court but concedes in any case that Mr. Lloyd qualifies for leave to plead under Civ. R. 60(B)(1) and (5) for mistake. Therefore, the State does not oppose Lloyd's request for leave to file his Memorandum Contra to the State's Motion to Revoke Bond and Impose Sentence.

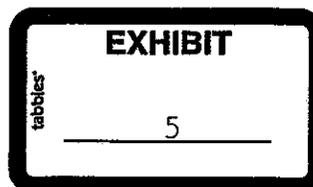


Exhibit 2

The State does, however, oppose Defendant Lloyd's request to stay execution of a sentence. Pursuant to Ohio Revised Code 2953.10 when an appeal is taken from a Court of Appeals to the Supreme Court, the Supreme Court has the same power and authority to suspend the execution of sentence during the pendency of the appeal and admit the defendant to bail as does the Court of Appeals. Therefore, Defendant Lloyd should properly be requesting a stay from the Supreme Court, if in fact, he files an appeal to the Supreme Court. Furthermore, pursuant to Ohio Revised Code 2949.05 entitled Execution of Sentence, when the judgment of a trial court is affirmed on appeal the trial court shall carry into execution the sentence or judgment which had been pronounced against the defendant. There is an exception, however, to the aforementioned rule stated in Ohio Revised Code 2949.03 which provides:

If a judgment of conviction by a court of common pleas is affirmed by a court of appeals and remanded to the trial court for execution of sentence and the person so convicted gives notice of his intention to file a notice of appeal to the supreme court, the trial court, on the filing of a motion by such person within three days after the rendition by the court of appeals of the judgment or reaffirmation, may further suspend the execution of the sentence or judgment imposed for a time sufficient to give such person an opportunity to file a notice of appeal to the Supreme Court. The sentence or judgment imposed, however, shall not be suspended more than thirty days for that purpose.

Thus, Defendant Lloyd's Motion to Stay execution fails on two grounds.

First, Lloyd failed to file his motion within three days after the rendition by the Court of Appeals' judgment or reaffirmation. The Fifth Appellate District Court of Appeals rendered its opinion on December 30, 2010. Defendant Lloyd did not file any notice to this Court of his intention to appeal to the Supreme Court until January 25, 2011. Therefore, the exception to the Court's obligation to execute sentence upon affirmation on appeal has not been triggered as Defendant Lloyd failed to timely file his

PROSECUTING ATTORNEY
HOLMES COUNTY,
OHIO

Motion. Second, this Court is without power to suspend Defendant Lloyd's sentence for more than thirty days and that time has passed. Therefore, this Court's duty to execute sentence against Defendant imposed by Ohio Revised Code 2949.05 has been triggered, Defendant Lloyd's sentence should be executed immediately as his thirty day window for filing an appeal to the Ohio Supreme Court has passed, and he should be remanded to the custody of the Holmes County Sheriff's Dept.

Respectfully submitted,

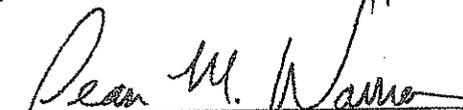


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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum was served upon Stephen P. Hardwick, Assistant Public Defender, at 250 E. Broad Street, Suite 1400, Columbus, Ohio 43215, by ordinary U.S. mail, this 1st day of February 2011.



Sean M. Warner
Assistant Prosecuting Attorney

Kellogg

IN THE COURT OF COMMON PLEAS
HOLMES COUNTY, OHIO

FILED

2009 JUN 10 PM 1:17

DORCAS L. MILLER, CLERK
COMMON PLEAS COURT
HOLMES COUNTY, OHIO

STATE OF OHIO :
 :
 Plaintiff :
 :
 -VS- :
 :
 WESLEY R. LLOYD :
 :
 Defendant :

CASE NO. 09-CR-001

STATE'S POST TRIAL BRIEF

Now comes the State of Ohio, by and through Prosecuting Attorney Steve Knowing, and submits its Post Trial Brief in the above captioned matter.

PROSECUTING ATTORNEY
HOLMES COUNTY,
OHIO

Respectfully submitted,

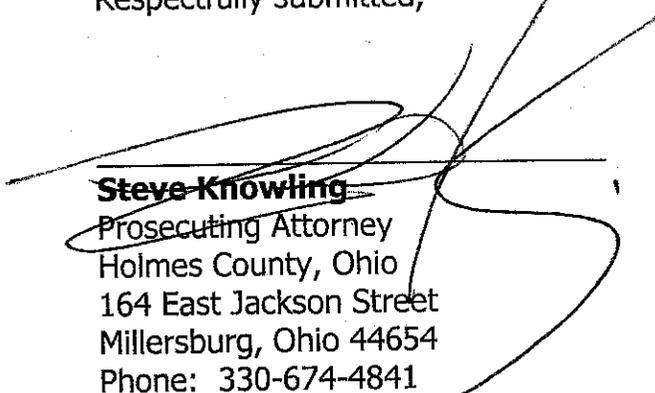

~~Steve Knowing~~
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EXHIBIT
tabbles
6

I. DEFENDANT IS A TIER III "SEXUALLY ORIENTED OFFENDER" AND AS SUCH IS REQUIRED TO REGISTER UNDER OHIO'S "SEX OFFENDER REGISTRATION AND NOTIFICATION" LAWS, OHIO REVISED CODE 2950.01 et seq.

- A. The Defendant was convicted in Texas of one count of Aggravated Sexual Assault (Texas Penal Code Chapter 22.021) on December 8, 1995 (State's Exhibit A). Texas PCC 22.021 provides in pertinent part (completed copy attached hereto as Exhibit 1):

22.021. AGGRAVATED SEXUAL ASSAULT (a) A person commits an offense:

(1) if the person:

(A) intentionally or knowingly:

(i) causes the penetration of the anus or sexual organ of another person by any means, without the person's consent

(ii) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or

(2) if:

(A) the person:

(ii) by acts or words places the victim in fear that death, serious bodily injury, or kidnapping will be imminently inflicted on any person;

(e) An offense under this section is a felony on the first degree.

- B. Ohio Revised Code 2950.99(A)(1)(a)(ii) provides in pertinent part:

If the most serious sexually oriented offense... that was the basis of the registration, notice of intent to reside, change of address notification, or address verification requirement that was violated under the prohibition is a felony of the first, second, third or fourth degree if committed by an adult or a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the same degree as the most serious sexually oriented offense... that was the basis of the registration, notice of intent to reside, change of address notification, or address verification requirement that was violated under the prohibition, or if the most serious sexually oriented offense... that was the basis of the registration, change of address notification, or address verification requirement that was violated under the prohibition is a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the same degree as that offense committed in the other jurisdiction would constitute if committed in this State." (emphasis added)

- C. The "comparable category of offense" in Ohio is Rape in violation of Ohio Revised Code 2907.02(A)(2); "no person shall engage in sexual conduct with

another when the offender purposely compels the other person to submit by force or a threat of force”.

- D. Rape in violation of Ohio Revised Code 2907.02(A)(2) is a felony of the first degree. As such, the Defendant is classified as a Tier III “Sexually Oriented Offender” pursuant to Ohio Revised Code 2950.01(G)(1)(a).

II. TRIAL EVIDENCE

- A. Defendant originally registered as a “sexually oriented offender” in the State of Ohio in Auglaize County starting in 2005 after he was released from prison in Texas (State’s Exhibits E1-10). Defendant continued to register in Auglaize County, the most recent occasion being May 19, 2008 (State Exhibit E-8).

- B. Defendant moved to Holmes County no later than June 2, 2008

1. Defendant called the Auglaize County Sheriff’s Dept. on June 2, 2008 and spoke with Corrections Officer Neal Brincefield (T. 29-53). The Defendant told him that he as now living in Holmes County and provided him an address. The corrections officer advised the Defendant that he must come in personally and change his address in writing. The Defendant responded that he doesn’t know when he can make it back to Auglaize County.

2. Defendant’s Auglaize County residence was observed to be vacant by Auglaize County Detective Rusty Krugh (T. 53-64) on both June 2 and June 6, 2008.

3. Det. Krugh advised Holmes County Sheriff’s dispatcher Sgt. Eric Troyer on June 6, 2008 that the Defendant had moved to Holmes County at least by June 2, 2008 and that he was no longer at his Auglaize County address.

- C. Defendant was arrested at his Holmes County address by Holmes County Prosecutor’s Investigator Chuck DeFelice and Holmes County Sheriff’s Deputy Chris Schonauer on June 12, 2008.

1. The Defendant was released on bond on June 14, 2008.

2. Defendant appeared at the Auglaize County Sheriff’s Office on June 14, 2008 to register his new Holmes County address (see State’s Exhibit E-10).

3. Defendant appeared at the Holmes County Sheriff's Office on June 16, 2008 and registered his new address (see Defendant's Exhibit N).

- D. The Auglaize County Sheriff's Dept. did not receive any notification, written or otherwise, of a change of address from the Defendant at any time prior to the Defendant moving to Holmes County (T. 56).
- E. Defendant's only contact with the Auglaize County Sheriff's Dept. prior to moving to Holmes County was his phone call of June 2, 2008 to C.O. Brincefield. The Defendant did not appear in person at the Auglaize County Sheriff's Dept. until June 14, 2008 after his arrest and release from Holmes County.
- F. Prior to the Defendant moving to Holmes County the Auglaize County Sheriff did not receive anything in writing from the Defendant of his intention to change his residence to Holmes County, contrary to Defendant's allegation that he sent a letter dated May 21, 2008 (Defendant's Exhibit G) to the Auglaize County Sheriff. Further, the Defendant never mentioned such a letter in any conversations that he had with Auglaize County Sheriff's Office employees, including his June 2, 2008 phone conference with C.O. Brincefield.
- G. There is no evidence that the Defendant provided written notification to the Holmes County Sheriff of the Defendant's intention to move to Holmes County at any time prior to his move to Holmes County.
- H. The Defendant did not appear at the Holmes County Sheriff's Office to personally register his new address in Holmes County until after his arrest on June 12, 2008 (Defendant's Exhibit N).

III. STATUTE'S VIOLATED:

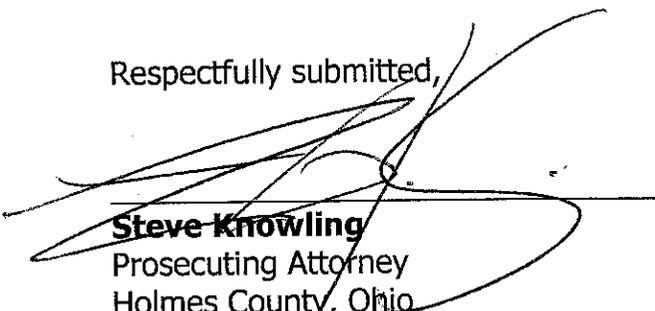
There are three charges pending against the Defendant as a result of the July 20, 2008 one count Indictment and the two count January 12, 2009 Bill of Information. For simplicity's sake the offenses are referred to as Count I and II of the Bill of Information and the separate Indictment being referred to as Count III.

- A. As to Count I the Defendant failed to register with the Holmes County Sheriff within three days of moving to Holmes County in violation of Ohio Revised Code 2950.04(E). The penalty for such violation is a felony of the first degree pursuant to Ohio Revised Code 2950.99(A)(1)(a)(ii). The Defendant did not dispute the fact that he did not timely appear at the Holmes County Sheriff's Office to register.

- B. As to Count II the Defendant failed to provide to the Holmes County Sheriff written notice of his intent to reside in Holmes County 20 days prior to moving to Holmes County in violation of Ohio Revised Code 2950.04(E). The penalty for this violation is a felony of the first degree pursuant to Ohio Revised Code 2950.99(A)(1)(a)(ii). Defendant did not dispute the fact that he did not timely provide written notice to the Sheriff of Holmes County.
- C. As to Count III the Defendant failed to provide to the Sheriff of Auglaize County written notice of his intent to move to Holmes County 20 days prior to moving to Holmes County in violation of Ohio Revised Code 2950.05(F)(1). The penalty for this violation is a felony of the first degree pursuant to Ohio Revised Code 2950.99(A)(1)(a)(ii). The evidence is undisputed that the Defendant moved to Holmes County no later than June 2, 2008. The Defendant's letter allegedly sent to the Auglaize County Sheriff was dated May 21, 2008 (the receipt of which was denied by the Auglaize County Sheriff's Dept.). Even if the Defendant's letter had actually been sent and subsequently misplaced by Auglaize County, it could not have been received 20 days prior to the Defendant changing his residence to Holmes County on June 2, 2008. In fact the Defendant conceded as much on cross-examination (T. 126)
- D. All three counts are strict liability offense designed and implemented for public safety and protection. Both of the statutory prohibitions violated by the Defendant {Ohio Revised Code 2950.04(E) and 2950.05(F)(1)} contain the classic strict liability language of "no person shall". No mental element of culpability is stated. Ohio Revised Code 2901.21(B) provides:

When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

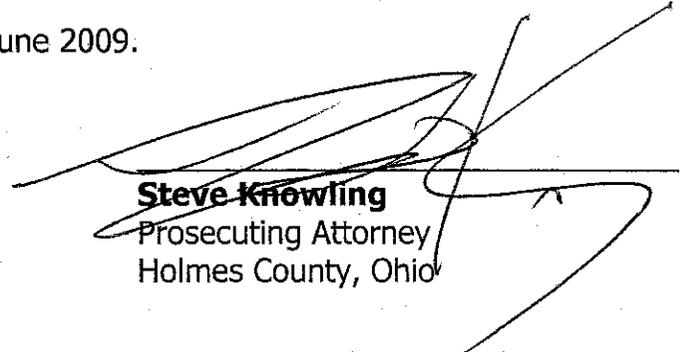
Respectfully submitted,



Steve Knowing
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Phone: 330-674-4841

CERTIFICATE OF SERVICE

The undersigned does hereby certify that he did serve a copy of the above Post Trial Brief upon Jeffrey Kellogg, Attorney for Defendant, by placing a copy in his drawer at the Clerk's Office, this 10th day of June 2009.



Steve Knowling
Prosecuting Attorney
Holmes County, Ohio

PROSECUTING ATTORNEY
HOLMES COUNTY,
OHIO

PENAL CODE CHAPTER 22 ASSAULTIVE OFFENSES

§ 22.021. AGGRAVATED SEXUAL ASSAULT. (a) A person commits an offense:

(1) if the person:

(A) intentionally or knowingly:

(i) causes the penetration of the anus or sexual organ of another person by any means, without that person's consent;

(ii) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or

(iii) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or

(B) intentionally or knowingly:

(i) causes the penetration of the anus or sexual organ of a child by any means;

(ii) causes the penetration of the mouth of a child by the sexual organ of the actor;

(iii) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;

(iv) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or

(v) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor; and

(2) if:

(A) the person:

(i) causes serious bodily injury or attempts to cause the death of the victim or another person in the course of the same criminal episode;

(ii) by acts or words places the victim in fear that death, serious bodily injury, or kidnapping will be imminently inflicted on any person;

(iii) by acts or words occurring in the presence of the victim threatens to cause the death, serious bodily injury, or kidnapping of any person;

(iv) uses or exhibits a deadly weapon in the course of the same criminal episode;

(v) acts in concert with another who engages in conduct described by Subdivision (1) directed toward the same victim and occurring during the course of the same criminal episode; or

(vi) administers or provides flunitrazepam, otherwise known as rohypnol, gamma hydroxybutyrate, or ketamine to the victim of the offense with the intent of facilitating the commission of the offense;

(B) the victim is younger than 14 years of age;

or

(C) the victim is an elderly individual or a disabled individual.

(b) In this section:

(1) "Child" has the meaning assigned by Section 22.011(c).

(2) "Elderly individual" and "disabled individual" have the meanings assigned by Section 22.04(c).

(c) An aggravated sexual assault under this section is without the consent of the other person if the aggravated sexual assault occurs under the same circumstances listed in Section 22.011(b).

(d) The defense provided by Section 22.011(d) applies to this section.

(e) An offense under this section is a felony of the first

PENAL CODE CHAPTER 22 ASSAULTIVE OFFENSES

degree.

(f) The minimum term of imprisonment for an offense under this section is increased to 25 years if:

(1) the victim of the offense is younger than six years of age at the time the offense is committed; or

(2) the victim of the offense is younger than 14 years of age at the time the offense is committed and the actor commits the offense in a manner described by Subsection (a)(2)(A).

Added by Acts 1983, 68th Leg., p. 5312, ch. 977, § 3, eff. Sept. 1, 1983. Amended by Acts 1987, 70th Leg., ch. 573, § 1, eff. Sept. 1, 1987; Acts 1987, 70th Leg., 2nd C.S., ch. 16, § 1, eff. Sept. 1, 1987; Acts 1993, 73rd Leg., ch. 900, § 1.01, eff. Sept. 1, 1994; Acts 1995, 74th Leg., ch. 318, § 7, eff. Sept. 1, 1995; Acts 1997, 75th Leg., ch. 1286, § 2, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 417, § 1, eff. Sept. 1, 1999; Acts 2001, 77th Leg., ch. 459, § 5, eff. Sept. 1, 2001; Acts 2003, 78th Leg., ch. 528, § 2, eff. Sept. 1, 2003; Acts 2003, 78th Leg., ch. 896, § 1, eff. Sept. 1, 2003.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 523, § 1.18, eff. September 1, 2007.