

IN THE SUPREME COURT OF OHIO

|                      |                                   |
|----------------------|-----------------------------------|
| State of Ohio,       | :                                 |
|                      | : Case No. 2011-212               |
| Plaintiff-Appellee,  | :                                 |
|                      | : On Appeal from the              |
| v.                   | : Holmes County Court of Appeals, |
|                      | : Fifth Appellate District,       |
| Wesley Lloyd,        | : Case No. 09CA12                 |
|                      | :                                 |
| Defendant-Appellant. | :                                 |

**Amended Motion of Appellant Wesley Lloyd to Expand Briefing to  
Include Proposition of Law No. I**

Steve Knowling (0030974)  
Holmes County Prosecuting Attorney

Sean Mathew Warner (0075110)  
Assistant Prosecuting Attorney  
Counsel of Record

Holmes County Prosecutor's Office  
164 East Jackson Street  
Millersburg, OH 44654  
(330) 674-4841  
(330) 674-0183 - Fax  
swarner@co.holmes.oh.us

Counsel for Appellee, State of Ohio

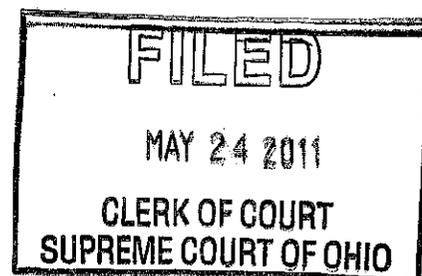
Office of the Ohio Public Defender

By: Stephen P. Hardwick (0062932)  
Assistant Public Defender

250 East Broad Street, Suite 1400  
Columbus, Ohio 43215

(614) 466-5394  
(614) 752-5167 - Fax  
stephen.hardwick@opd.ohio.gov

Counsel for Appellant, Wesley Lloyd



**TABLE OF CONTENTS**

|   | <u>Page No.</u> |
|---|-----------------|
| <b>I. Introduction .....</b>  | <b>1</b>        |
| <b>II. Procedural History.....</b>  | <b>2</b>        |
| <b>III. Discussion.....</b>   | <b>5</b>        |
| <b>A. This is the right case and the right time for this Court to determine whether its holding in <i>State v. Cook (1998)</i>, 83 Ohio St.3d 40, 419-20, continues to apply to Ohio's current sex offender notification statute.....</b>                                   | <b>5</b>        |
| <b>1. This Court's decision in <i>State v. Johnson</i>, 128 Ohio St.3d 107, 2010-Ohio-6301, calls into question the holding in <i>Cook</i> that a statute imposes strict liability merely because the statute requires an act and does not specify a mental state. ....</b> | <b>5</b>        |
| <b>2. Changes in the penalties attached to R.C. 2950.99 merit a new look at whether the statute is merely regulatory and therefore imposes strict liability.....</b>  | <b>6</b>        |
| <b>3. The Federal Law on which Ohio's statute is based states that its purpose is to catch those offenders who truly abscond, not those who make errors in the registration process. ....</b>   | <b>7</b>        |
| <b>4. The facts of this case are ideal for revisiting the now tenuous holding of <i>State v. Cook</i>. ....</b>   | <b>8</b>        |
| <b>5. Only this Court can resolve the issue because lower courts will follow <i>State v. Cook</i> until this Court directs otherwise. ....</b>  | <b>9</b>        |
| <b>B. Permitting the parties to brief the <i>Cook/Johnson</i> issue will not prevent this Court from reaching the merits of the proposition of law that this Court accepted.....</b>  | <b>10</b>       |
| <b>IV. Conclusion .....</b>   | <b>11</b>       |
| <b>Certificate of Service .....</b>   | <b>12</b>       |

**Motion of Appellant Wesley Lloyd to  
Permit Briefing on Proposition of Law No. I**

**I. Introduction**

Appellant Wesley Lloyd very respectfully asks this Court to permit briefing on Proposition of Law No. I, which addresses the question of whether failing to perfectly comply with sex offender registration statutes is a strict liability offense. This is the right time to resolve this issue, and the right case with which to resolve it, for several reasons: first, this Court's decision in *State v. Johnson*, 128 Ohio St.3d 107, 2010-Ohio-6301, undermines the decision in *State v. Cook* (1998), 83 Ohio St.3d 40, on which lower courts continue to rely; second, changes to Ohio's sex offender statutes undermine the basis *Cook*; third, the federal Adam Walsh Law (on which Ohio bases its current scheme) disapproves of strict liability for registration offenses; and fourth, Mr. Lloyd preserved this issue and the facts of his case present a valid and serious trial question as to recklessness; fifth, only this Court can resolve the issue, as lower courts must continue to rely on *Cook* until this Court rules otherwise.

Mr. Lloyd is mindful that this Court has full discretion to limit briefing as it chooses. S.Ct. Prac. R. 3.6 (B)(1)(b). And he appreciates the opportunity to brief his Second Proposition of Law. He presents this motion only because he believes that receiving briefing on the First Proposition of Law would give this Court the opportunity to resolve an issue that is not only critical to this case, but that would give lower courts much-needed guidance as to how to apply both this Court's ruling in *Cook* and this Court's ruling in *Johnson*.

## **II. Procedural History**

As a result of a 1995 Texas conviction for the aggravated sexual assault of his then wife, Mr. Lloyd brought paperwork to the Auglaize County Sheriff's Office to explain his Texas conviction when he moved to Ohio in 2005. He registered there as a sexually oriented offender. 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.

Mr. Lloyd did not decide to move from Auglaize County to Holmes County until thirteen or fourteen days before the move in 2008. Mr. Lloyd testified that twelve days before he moved, he sent a letter to the Auglaize County Sheriff to inform him of the move. The Auglaize County Sheriff denies receiving the letter. The trial court found that the parties disputed whether the letter was sent, but that court did not resolve the dispute.

It is undisputed that Mr. Lloyd 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. An Auglaize County Sheriff's official conceded that he told Mr. Lloyd that he could not register in Holmes County until Mr. Lloyd personally returned to Auglaize County to complete paperwork, but no such requirement exists in Ohio law:

Q. And I want to make it clear, you told him that he could not register in Holmes County until he c[a]me in to see you?

A. Yes, sir. He has to register with us before he can register in another county.

T.p. 44. The deputy repeated that he told Mr. Lloyd that Mr. Lloyd had to personally appear in Auglaize County before registering in Holmes County.

T.p. 51 (“I told him he has to come in and change it.”). The deputy also admitted that it did not understand how the twenty-day deadline worked for defendants who did not know of a move that far in advance:

Q How is he going to supply the address 20 days in advance if he doesn’t know what that address is?

A I don’t know how that part of it works, sir. All I know he is supposed to give us an address 20 days before moving.

T.p. 51.

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 twenty days advance notice of the move. After a contested bench trial, the Holmes County Common Pleas Court convicted Mr. Lloyd of: 1) failing to register in Holmes County within three days of moving to that county, R.C. 2950.04(E); 2) failing to provide written notice of his intent to move to Holmes County to the Holmes County Sheriff at least twenty days in advance, R.C. 2950.04(E); and 3) failing to give Auglaize County notice at least twenty days in advance of his intent to move to Holmes County, R.C. 2950.05(F)(1). The trial court sentenced him to three years for each offense, to be run concurrently, but stayed that sentence pending appeal.

The court of appeals affirmed the first and third convictions, but vacated the second because it was based on Mr. Lloyd’s erroneous reclassification to

Tier III under the Adam Walsh Act. Opinion, ¶88. This Court granted a further stay of Mr. Lloyd's sentence, to remain in effect while this Court considers the case.

Mr. Lloyd presented this Court with five propositions of law:

Proposition of Law No. I:

The State must prove that a defendant acted recklessly to obtain a conviction for failure to register as a sexually oriented offender. R.C. 2901.21(B),<sup>1</sup> *State v. Johnson*, Slip Op. 2010-Ohio-6301, applied.

Proposition of Law No. II:

A court should conduct an elemental comparison of an out-of-state offense when determining 1) whether the offense triggers the duty to register in Ohio under R.C. 2950.01, and 2) the punishment for failing to register in Ohio under R.C. 2950.99.

Proposition of Law No. III:

It is impossible for a defendant to comply with the sex offender registration and notice statutes when he does not know he will move until less than 20 days before the move and when law enforcement informs him that he cannot register.

Proposition of Law No. IV:

The State failed to prove that Mr. Lloyd had a duty to register under Megan's Law.

Proposition of Law No. V:

A conviction for failing to register or give notice of an address change as a Tier III offender must be vacated in light of *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424 even where SB10 did not change a defendant's registration requirements.

---

<sup>1</sup> "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."

This Court exercised its discretion to “limit[] issues in the case to be briefed” and agreed to hear only the Second Proposition of Law. S.Ct. Prac. R. 3.6 (B)(1)(b). Two justices voted to hear all of the propositions, and three justices voted to hear his third, fourth and fifth propositions of law, in addition to the second proposition of law. *State v. Lloyd*, --- Ohio St.3d. ---, 2011-Ohio-2055.

**III. Discussion**

**A. This is the right case and the right time for this Court to determine whether its holding in *State v. Cook (1998)*, 83 Ohio St.3d 40, 419-20, continues to apply to Ohio’s current sex offender notification statute.**

**1. This Court’s decision in *State v. Johnson*, 128 Ohio St.3d 107, 2010-Ohio-6301, calls into question the holding in *Cook* that a statute imposes strict liability merely because the statute requires an act and does not specify a mental state.**

| <p><b><i>State v. Cook (1998)</i>,<br/>83 Ohio St.3d 40, 419-20</b></p>  | <p><b><i>State v. Johnson</i>,<br/>128 Ohio St.3d 107,<br/>2010-Ohio-6301,<br/>paragraph two of the syllabus</b></p>   |
|--|--|
| <p>“There is no scienter requirement indicated in R.C. 2950.04. The General Assembly requires that offenders “shall register” pursuant to R.C. 2950.04(A). The act of failing to register alone, without more, is sufficient to trigger criminal punishment provided in R.C. 2950.99.</p> <p>Accordingly, we find that R.C. 2950.04 does not require scienter.</p> | <p>“R.C. 2901.21(B) does not supply the mens rea of recklessness unless there is a complete absence of mens rea in the section defining the offense and there is no plain indication of a purpose to impose strict liability.”</p> |

In its jurisdictional memorandum, the State correctly observed that *State v. Cook* held that violations of Ohio’s sex offender notification and registration regime are strict liability offenses. But *State v. Johnson* calls that holding into question, because *Johnson* takes a strict textual approach to R.C. 2901.21(B). Under that strict textual approach, the “complete absence mens rea in a section” (and only the “complete absence mens rea in a section”) triggers the recklessness element of R.C. 2901.21(B). By contrast, *Cook* held that the absence of a mens rea in a criminal statute ended the discussion. And although the statute at issue in *Cook* stated that offenders “shall register,” virtually all criminal statutes state that a person “shall” or that “no person shall” do a specific act. “The fact that the statute contains the phrase ‘No person shall’ does not mean that it is a strict criminal liability offense . . . . [T]here must be other language in the statute to evidence the General Assembly’s intent to impose strict criminal liability.” *State v. Moody*, 104 Ohio St. 3d 244, 2004-Ohio-6395, ¶16.

If both *Johnson* and *Cook* remain valid law, R.C. 2901.21(B) is rendered meaningless. Under *Cook*, any statute that includes no express mental state is automatically a strict liability offense, but under *Johnson*, only statutes that do not include an express mental state can trigger the reckless requirement of R.C. 2901.21(B).

There are no words in R.C. 2950.04, 2950.05 or 2950.99—the statutes in this case—that “specify any degree of culpability [or that] plainly indicate[] a purpose to impose strict criminal liability[.]” Accordingly, under *Johnson* and

*Moody*, the State must prove that the defendant acted recklessly in order to secure a conviction.

**2. Changes in the penalties attached to R.C. 2950.99 merit a new look at whether the statute is merely regulatory and therefore imposes strict liability.**

The R.C. 2950.99 penalties that this Court ruled on in *Cook* were very different than the law in place now. At the time, the highest penalty available was a fifth degree felony with a presumption of community control. R.C. 2950.99 (1998); R.C. 2929.13(D)(1).

If the State is correct that administrative offenses designed to “protect the public” impose strict liability, the degree of punishment is relevant. As the United States Supreme Court has held, penalties for strict liability offenses “commonly are relatively small, and conviction does no grave damage to an offender’s reputation.” *Morissette v. United States* (1952), 342 U.S. 246, 256.

At the time of *Cook*, the penalty for violating the registration statutes was, at most, twelve months in prison. R.C. 2950.99 (1998). The penalty is now up to ten years in prison. R.C. 2950.99 (2011). A prison term of ten years is not “relatively small.”

**3. The Federal Law on which Ohio’s statute is based states that its purpose is to catch those offenders who truly abscond, not those who make errors in the registration process.**

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 plain purpose was to implement the federal Adam Walsh Act, and that act requires the government to prove a “knowing” violation. Compare 18

U.S.C. § 2250(a)(3) with *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 [take several actions to effectuate the federal purposes of the Act and locate the offender]”).<sup>2</sup>

The public unquestionably faces a danger from sex offenders who abscond. But it faces no risk from a defendant like Mr. Lloyd, who, even viewing the facts in the best light most favorable to the state, merely notified the wrong sheriff at the wrong time in the wrong manner. In fact, when a Holmes County Sheriff’s Deputy arrested Mr. Lloyd a mere ten days after his arrival in that county, the deputy found Mr. Lloyd living where Mr. Lloyd had told the Auglaize County Sheriff that he would be.

**4. The facts of this case are ideal for revisiting the now tenuous holding of *State v. Cook*.**

In this case, local sheriff’s officials conceded that their forms did not comport with the changes in the law. T.p. 41. In addition, a deputy sheriff admits that he told Mr. Lloyd (incorrectly) that Mr. Lloyd had to personally appear in Auglaize County before Mr. Lloyd could register in Holmes County.

---

<sup>2</sup> << [http://www.ojp.usdoj.gov/smart/pdfs/final\\_sornaguidelines.pdf](http://www.ojp.usdoj.gov/smart/pdfs/final_sornaguidelines.pdf)>>

T.p. 43. Mr. Lloyd testified that twelve days before he moved, he sent a letter to the Auglaize County Sheriff to inform him of the move. The Auglaize County Sheriff denied receiving the letter. The trial court found that the parties disputed whether the letter was sent, but did not resolve the dispute.

When a defendant presents evidence that he relied on incorrect advice from law enforcement, he has, at a minimum, presented facts on which a factfinder could conclude that he did not act recklessly. When a defendant says he sent a letter, but the sheriff denies receiving it, the defendant presents a question that must be resolved by the factfinder.

All that Mr. Lloyd asks for under his first proposition of law is for a trial to determine these disputed facts under the standard of recklessness. If this Court adopts his proposition of law, Mr. Lloyd will be entitled only to a trial on the issue of recklessness, not to an automatic acquittal.

**5. Only this Court can resolve the issue because lower courts will follow *State v. Cook* until this Court directs otherwise.**

Lower courts are bound by this Court's rulings, and they generally will not revisit an issue that this Court has decided without clear guidance from this Court. For example, the Second District applied *Cook* even though that court saw that the reasoning of *Cook* had been undercut in a subsequent case. *State v. Stansell*, 2d Dist. No. 23630, 2010-Ohio-5756, ¶20 (asterisks in original):

In [*Cook*] the Supreme Court of Ohio found that failing to register under R.C. 2950.04 does not require a culpable mental state. . . . But, see *State v. Collins* (2000), 89 Ohio St.3d 524, 530, 2000-Ohio

231, in which the Supreme Court of Ohio seems to say that an intent to impose criminal liability without proof of mental culpability must be “plainly indicate[d] \* \* \* in the language of the statute.

See also *State v. Blanton* (10<sup>th</sup> Dist.), 184 Ohio App.3d 611, 2009-Ohio-5334, ¶26 (applying *Cook* to hold that registration statutes impose strict liability), and *State v. Beckley*, 8<sup>th</sup> Dist. No. 83254, 2004-Ohio-2977, ¶15 (applying *Cook* to hold that registration statutes impose strict liability).

Because this Court’s ruling in *Cook* was unequivocal, lower courts are unlikely to hold that this Court has overruled *Cook* by implication. Accordingly, Ohio courts will continue to apply the *Cook* standard instead of the *Johnson* standard until this Court rules otherwise.

**B. Permitting the parties to brief the *Cook/Johnson* issue will not prevent this Court from reaching the merits of the proposition of law that this Court accepted.**

Mr. Lloyd’s second proposition of law, which this Court accepted, addresses how what duties flow from Mr. Lloyd’s Texas conviction under Ohio law. Depending on this Court’s resolution of the issue, Mr. Lloyd’s conviction might be affirmed, he could be subject to a lesser degree of offense, or he might not be criminally liable at all. So it is possible that second proposition of law could render moot the *Cook/Johnson* issue that Mr. Lloyd asks to brief.

But the opposite is not true. Deciding the *Cook/Johnson* issue will not render moot the issue of how to interpret Mr. Lloyd’s Texas conviction. If this Court determines that the trial court failed to properly require the State to prove recklessness, then this case must be remanded for a new trial. At that

new trial, the parties will still need to know how what responsibilities and liabilities flow from Mr. Lloyd's Texas conviction. Accordingly, the issue of how to interpret Mr. Lloyd's Texas conviction will not be moot.

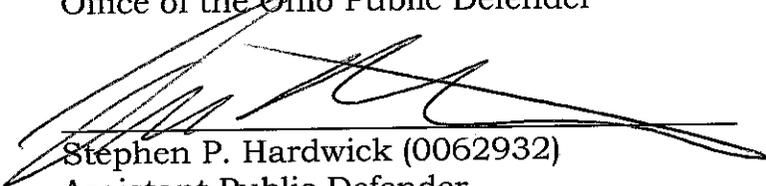
#### **IV. Conclusion**

This Court's decision in *Johnson*, as well as numerous other factors, call into question whether *Cook's* holding regarding strict liability applies to Ohio's current sex offender registration statute. The facts and procedural history of this case make it ideal to resolve the issue. And addressing the issue will not render moot the issue this Court already accepted.

Accordingly, Mr. Lloyd respectfully asks this Court to permit him to brief Proposition of Law No. I.

Respectfully submitted,

Office of the Ohio Public Defender



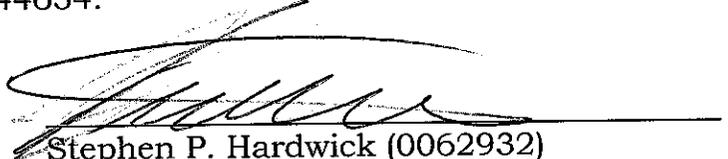
Stephen P. Hardwick (0062932)  
Assistant Public Defender  
Counsel of Record

250 East Broad Street, Suite 1400  
Columbus, Ohio 43215  
(614) 466-5394; (614) 752-5167 (Fax)  
stephen.hardwick@opd.ohio.gov

Counsel for Wesley Lloyd

### **Certificate of Service**

I certify that on May 24, 2011, a copy of the foregoing was sent by regular U.S. Mail, postage prepaid to the office of Sean Mathew Warner, Assistant Prosecuting Attorney, Holmes County Prosecutor's Office, 164 East Jackson Street, Millersburg, OH 44654.



Stephen P. Hardwick (0062932)  
Assistant Public Defender

#343434