

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2009-0088
Plaintiff-Appellee,	:	
	:	On Appeal from the Warren
vs.	:	County Court of Appeals
	:	Twelfth Appellate District
GEORGE WILLIAMS,	:	
	:	C.A. Case No. CA2008-02-029
Defendant-Appellant.	:	

**MEMORANDUM IN OPPOSITION TO JOINT MOTION FOR RECONSIDERATION AND/OR CLARIFICATION**

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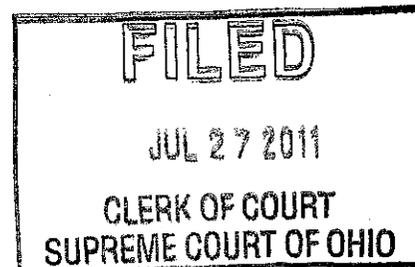
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**MEMORANDUM IN OPPOSITION TO JOINT MOTION FOR RECONSIDERATION  
AND/OR CLARIFICATION**

**I. Introduction.**

On July 13, 2011, this Court ruled that “2007 Am.Sub.S.B. No. 10, as applied to defendants who committed sex offenses prior to its enactment, violates Section 28, Article II of the Ohio Constitution, which prohibits the General Assembly from passing retroactive laws.” *State v. Williams*, Slip Opinion No. 2011-Ohio-3374, at syllabus. This Court’s ruling followed from its analysis of the bill, and its specific observation that “[f]ollowing the enactment of S.B. 10, all doubt has been removed: R.C. Chapter 2950 is punitive.” *Id.* at ¶15. The ruling is clear and unambiguous. A person whose crime was committed before July 1, 2007 is not subject to Senate Bill 10’s registration and classification requirements.

The State of Ohio and its amicus, the Ohio Attorney General (O.A.G.), request this Court to reconsider its opinion on the basis that they disagree with the majority’s finding that Senate Bill 10 constitutes punishment and cannot apply retroactively. (July 25, 2011 Joint Motion for Reconsideration and/or Clarification by Appellee State of Ohio and Amicus Curiae Ohio Attorney General, pp. 2-8).<sup>1</sup> The State and the O.A.G. also claim that this Court’s prior decisions mandate reconsideration or clarification. But they can make this unconvincing argument only by analyzing this Court’s prior cases in piecemeal fashion. When this Court’s prior decisions regarding retroactive legislation are taken as a whole, they support this Court’s

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<sup>1</sup> S.Ct. Prac. R. 11.2(C) forbids an amicus curiae from filing a motion for reconsideration. If the O.A.G., as the State’s amicus curiae, wanted to file a pleading with this Court regarding the *Williams* decision, the O.A.G. should have filed “a memorandum in support of a motion for reconsideration.” S.Ct. Prac. R. 11.2(C). In the interests of judicial economy, however, Mr. Williams waives any objection to the State’s and the O.A.G.’s impermissible “joint” motion for reconsideration.

decision in *Williams*, and entirely discredit the State's and the O.A.G.'s motion for reconsideration.

The test generally applied to a motion for reconsideration is whether the motion calls to the attention of the court an obvious error in its decision or raises an issue for the court's consideration that was either not considered at all or was not fully considered by the court when it should have been. *Matthews v. Matthews*, 5 Ohio App.3d 140, 450 N.E.2d 278, 1982 Ohio App. LEXIS 15785. This Court has cited *Matthews* approvingly with regard to the standard to be applied to a motion for reconsideration. *Oberlin Manor, Ltd. v. Lorain County Board of Revision et al.*, 69 Ohio St.3d 1, 1994-Ohio-500, 629 N.E.2d 1361. Furthermore, Sup.Ct. Prac. R. 11.2(B) states that a motion for reconsideration "shall not constitute a reargument of the case . . . ."

The joint motion for reconsideration does not point to an obvious error in this Court's decision in *State v. Williams*, nor does it raise an issue that was not considered, or was inadequately considered, in this Court's decision. The joint motion is really the State's and the O.A.G.'s assertion of unhappiness, and merely restates their arguments that Senate Bill 10 should apply retroactively. And the majority of this Court has already considered, and rejected, those arguments. *State v. Williams*, Slip Opinion No. 2011-Ohio-3374, at ¶10-22. Thus, because the joint motion for reconsideration fails to meet the requirements for obtaining reconsideration and/or clarification, the motion should be denied.

**II. *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 525 N.E.2d 805; *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, 700 N.E.2d 570; and *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110.**

Citing to *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 525 N.E.2d 805, and *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, 700 N.E.2d 570, the State's and the O.A.G.'s

main argument is that Senate Bill 10 may be applied retroactively because no defendant *ever* has a reasonable expectation of finality relating to his or her past felonious conduct. (Joint Motion for Reconsideration and/or Clarification by Appellee State of Ohio and Amicus Curiae Ohio Attorney General, pp. 2-7). But in *Cook*, this Court stated that “*except with regard to constitutional protections against ex post facto laws, felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.*” (Emphasis added.) *State v. Cook*, 83 Ohio St.3d at 412. See also *State ex rel. Matz v. Brown*, 37 Ohio St.3d at 281 (“The General Assembly having the power to enact laws, and . . . having enacted laws within certain limitations, and persons having conformed their conduct and affairs to such state of the law, the General Assembly is prohibited, estopped, from passing new laws to reach back and create new burdens . . . not existing at the time.”). (Internal citation omitted.) Accordingly, if new legislation relates to past felonious conduct, and the new legislation is determined to be punitive and therefore violative of Ohio’s Retroactivity Clause, the new legislation may not be imposed retroactively. See discussion *infra* at 4-6. Furthermore, in *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, this Court addressed the reasonable-expectation-of-finality portion of the analysis and explained that the argument failed in terms of Senate Bill 5 *because the record was devoid of “any evidence that would support a reasonable conclusion that Ferguson was likely to have his classification removed.”* (Emphasis added.) *State v. Ferguson*, 2008-Ohio-4824, at ¶34. (See also George Williams’s Merit Brief, pp. 30-31).

Unlike *Ferguson*, and in the instant case, in May 2007, Mr. Williams had a reasonable expectation that his classification and attendant requirements would have lasted a finite period of ten years. (See George Williams’s Merit Brief, pp. 31-32). In May 2007, the law stated that someone whose crime occurred with a set of facts such as Mr. Williams’s, he or she would have

been labeled a sexually oriented offender. *Id.* See also former Ohio Rev. Code Ann. § 2950.09(B)(3) (amended January 1, 2008); former Ohio Rev. Code Ann. § 2950.09(B)(4) (The State had to prove by clear and convincing evidence that the defendant was a sexual predator.). The trial court found Mr. Williams to be amenable to community control. (January 31, 2008 Sentencing Hearing Transcript, p. 8). The only other offense that Mr. Williams had committed was a petty theft as a juvenile. *Id.* Furthermore, the alleged victim to the crime in the case sub judice was pregnant at the time that Mr. Williams had been sentenced. *Id.* at p. 7. And the alleged victim, along with her family, wanted the no-contact order lifted, and wanted Mr. Williams to be able to have contact with the child. *Id.* Yet, through the enactment of Senate Bill 10, Mr. Williams is subject to 25 years of reporting requirements—increasing his additional time to register as a sex offender by over 100%. Thus, as the majority of this Court found, the only conclusion is that the retroactive application of Senate Bill 10 conflicts with Section 28, Article II of the Ohio Constitution. And the joint motion disturbingly fails to give this Court an accurate accounting of its precedent.

### **III. Section 10, Article I of the United States Constitution versus Section 28, Article II of the Ohio Constitution.**

The joint motion also attempts to garner votes for reconsideration by arguing that the majority of this Court “conflated” the Retroactivity Clause analysis in the *Williams* decision. (Joint Motion for Reconsideration and/or Clarification by Appellee State of Ohio and Amicus Curiae Ohio Attorney General, pp. 4-7). It is the State and the O.A.G., however, and not this Court, that have confused and conflated the concepts regarding Section 10, Article I of the United States Constitution and Section 28, Article II of the Ohio Constitution. Ohio’s Retroactivity Clause affords all of the same protections as the United States Ex Post Facto Clause—i.e., prohibiting the retroactive application of punitive legislation. See *State v.*

*Robinette*, 80 Ohio St.3d 234, 238, 1997-Ohio-343, 685 N.E.2d 762 (Although Ohio may provide broader protection for individual rights under its own state constitution, when a provision in the Ohio Constitution is similar to a provision in the United States Constitution, the protections are coextensive.). The difference between the two, however, is that Ohio's Retroactivity Clause affords Ohio's citizens the *added* protection of disallowing retroactive legislation if that legislation "impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction." (Internal citation omitted.) *Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, ¶6, 847 N.E.2d 414.

In their joint motion for reconsideration, the State and the O.A.G. inexplicably attempt to argue that this Court is not allowed to cite to United States Supreme Court precedent when reviewing whether a specific piece of legislation constitutes punishment. Indeed, such an argument blatantly ignores this Court's prior cases dealing with retroactive litigation. In *State v. Ferguson*, 2008-Ohio-4824, this Court made the following statements before concluding that Senate Bill 5 did not violate Ohio's Retroactivity Clause:

*Ohio retroactivity analysis does not prohibit all increased burdens; it prohibits only increased punishment.* In distinguishing between the two, we are mindful that the Supreme Court has noted that "*whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the 'sting of punishment,'*" *Kurth Ranch*, 511 U.S. at 777, 114 S.Ct. 1937, 128 L.Ed.2d 767, fn. 14, quoting *United States v. Halper* (1989), 490 U.S. 435, 447, 109 S. Ct. 1892, 104 L. Ed. 2d 487, fn. 7, and that a statutory scheme that serves a regulatory purpose "is not punishment even though it may bear harshly upon one affected." *Flemming v. Nestor* (1994), 363 U.S. 603, 614, 80 S.Ct. 1367, 4 L.Ed.2d 1435. "[C]onsequences as drastic as deportation, deprivation of one's livelihood, and termination of financial support have not been considered sufficient to transform an avowedly regulatory measure into a punitive one." *Doe v. Pataki* (C.A.2, 1997), 120 F.3d 1263, 1279.

Thus, notwithstanding the sequela of the classification and the amended provisions of R.C. Chapter 2950, we do not conclude that the amended statute violates the retroactivity clause of the Ohio Constitution.

(Emphasis added.) *State v. Ferguson*, 2008-Ohio-4824, at ¶39-40. See also *State v. Williams*, Slip Opinion No. 2011-Ohio-3374, at ¶45 (O'Donnell, J., dissenting) (same). Accordingly, a statute that is determined to be punitive may not be retroactively applied, as such an application violates Ohio's Retroactivity Clause. And because the United States Supreme Court has issued numerous decisions on the subject, such caselaw may certainly be used in this Court's analysis of whether a new piece of legislation is punitive and violative of Ohio's Constitution. Separate and apart from legislation being punitive, this Court may also determine that if the statute at issue "impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction," *Smith v. Smith*, 2006-Ohio-2419, at ¶6, the retroactive application of the legislation would still violate Ohio's Retroactivity Clause.

Indeed, Mr. Williams argued, and the majority of this Court agreed, that Senate Bill 10 adversely affects Mr. Williams's substantive right to due process and the prohibition against double jeopardy, along with imposing upon him additional obligations. The fact that the State and the O.A.G. are not well versed in the differences and the similarities between the Ohio and United States Constitutions is not a proper basis for a motion for reconsideration.

Next, the joint motion argues that, in the *Williams* decision, this Court's citation to Justice Lanzinger's dissent from the *Ferguson* opinion was in error because Justice Lanzinger's analysis and conclusion in *Ferguson* that Senate Bill 5 could not be applied retroactively was based on the United States Ex Post Facto Clause, not Ohio's Retroactivity Clause. (Joint Motion

for Reconsideration and/or Clarification by Appellee State of Ohio and Amicus Curiae Ohio Attorney General, p. 6). See also *Williams* at ¶12-14. The State's and the O.A.G.'s assertion regarding Justice Lanzinger's dissent in *Ferguson* is patently wrong. In *Williams*, the majority cites to ¶45-47 of Justice Lanzinger's dissent in *Ferguson*. *Williams* at ¶12-14. Following ¶45-47 of her dissent in *Ferguson*, Justice Lanzinger reviews both the intent of the General Assembly in enacting Senate Bill 5 and the effects of the changes that came about through Senate Bill 5. And in disagreeing with the majority's holding that the General Assembly intended Senate Bill 5 to be remedial, Justice Lanzinger states:

Even if I could be persuaded that there is an expressed intent to have these statutes applied retroactively, I cannot accept that the challenged amendments are “merely remedial” and do not impair vested, substantial rights. The General Assembly's stated intent—to protect the public—is not the only point to discuss in determining whether a statute is remedial. The punitive effect must be considered as well.

To begin with, the classification and notification statutes are part of our criminal code. This placement suggests a punitive intent. See *Kansas v. Hendricks* (1997), 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501. We have also held that a sex offender's failure to register under R.C. 2950.06(F) is itself a criminal offense. *State v. Williams*, 114 Ohio St.3d 103, 2007-Ohio-3268, ¶1, 868 N.E.2d 969. We have acknowledged that the simple registration process and notification procedures considered in *Cook* are now different. *Williams* at ¶9. And coming close to acknowledging the changed nature of the new statutory scheme, we stated, “While protection of the public is the avowed goal of R.C. Chapter 2950, we cannot deny that additional obligations are now imposed upon those classified as sex offenders.” (Emphasis added.) *Id.*

An offender's classification as a sexual predator is a direct consequence of the offender's criminal acts. We cannot say that registration duties are collateral to a criminal conviction—they exist only as a direct result of this type of conviction. As such, they are punitive. As Justice Stevens noted: “[A] sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty

is punishment.” *Smith v. Doe* (2003), 538 U.S. 84, 113, 123 S.Ct. 1140, 155 L.Ed.2d 164 (Stevens, J., dissenting). Simply calling a statutory scheme “regulatory” does not make it so. No one except those convicted of a sex offense must register, is subject to classification and community notification, or is confined by residency restrictions pursuant to R.C. Chapter 2950.

(Emphasis added in ¶51.) *State v. Ferguson*, 2008-Ohio-4824, at ¶51-53 (Lanzinger, J., dissenting). Indeed, Justice Lanzinger’s direct reference to Ohio’s Retroactivity Clause analysis in ¶51 of her dissent defeats the joint motion’s argument *in toto*.

After reviewing the intent of the legislature in enacting Senate Bill 5, Justice Lanzinger next analyzes the effects of Senate Bill 5. *State v. Ferguson*, 2008-Ohio-4824, at ¶54 (Lanzinger, J., dissenting). And it is in this portion of her dissenting opinion in *Ferguson* which references the factors contained in the *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144 decision. But in Justice Lanzinger’s conclusion that Senate Bill 5 is punitive in both its intent and effects, Justice Lanzinger states: “I respectfully dissent and would reverse the judgment of the court of appeals by holding that when applied retroactively, S.B. 5 amendments to R.C. Chapter 2950 violate the Ex Post Facto Clause of the United States Constitution *and Section 10, Article I and Section 28, Article II of the Ohio Constitution.*” (Emphasis added.) *State v. Ferguson*, 2008-Ohio-4824, at ¶62 (Lanzinger, J., dissenting).

Moreover, as already argued in Mr. Williams’s Merit Brief, Ohio’s Retroactivity Clause grants more protections than its federal counterpart. (George Williams’s Merit Brief, p. 29). See also discussion *supra* at 4-6. Indeed, even if Justice Lanzinger concluded that Senate Bill 5—a less draconian law than Senate Bill 10—violated the Ex Post Facto Clause of the United States Constitution, and only the Ex Post Facto Clause, the analysis and conclusion would most certainly apply in determining that Senate Bill 10 violates the Ohio Constitution.

#### **IV. The State and the O.A.G. are asking that this Court reverse *Williams*.**

In the case sub judice, Mr. Williams asserted one proposition of law:

The retroactive application of Senate Bill 10 violates the Ex Post Facto and Due Process Clauses of the United States Constitution and the Retroactivity Clause of Section 28, Article II of the Ohio Constitution. Fourteenth Amendment to the United States Constitution; Section 10, Article I of the United States Constitution; and Sections 16 and 28, Articles I and II, respectively, of the Ohio Constitution.

(George Williams's Oct. 4, 2010 Merit Brief, p. 3). Mr. Williams presented this Court with a 35-page merit brief. Two amicus briefs were submitted on Mr. Williams's behalf. (See Oct. 4, 2010 Brief of Amici Curiae Cleveland Rape Crisis Center and Texas Association Against Sexual Assault in Support of Appellant; Oct. 4, 2010 Brief of Amicus Curiae American Civil Liberties Union of Ohio Foundation, Inc. in Support of Appellant). The State responded with a 12-page merit brief, and two amicus briefs. (State's Nov. 17, 2010 Merit Brief; Nov. 17, 2010 Brief of Amicus Curiae Franklin County Prosecutor in Support of Appellee; Nov. 22, 2010 Brief of Amicus Curiae Ohio Attorney General Richard Cordray in Support of Appellee). The O.A.G.'s amicus brief was 40 pages long, and the Franklin County Prosecutor's amicus brief was 49 pages long. Mr. Williams then filed a 17-page reply brief. (George Williams's Dec. 6, 2010 Reply Brief). Indeed, the issues that the State's and the O.A.G.'s joint motion are attempting to reargue have already been thoroughly briefed by the parties and reviewed by this Court.

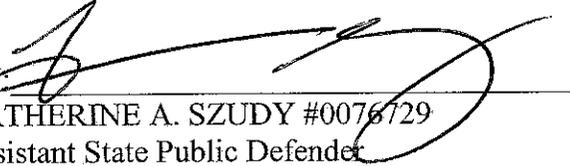
#### **V. Conclusion.**

Contrary to the State's and the O.A.G.'s assertions, this Court's opinion in *State v. Williams* correctly applies the previous decisions in *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 525 N.E. 2d 805; *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291; and *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824. Senate Bill 10 created a sex-offender registration

scheme that is no longer remedial and civil in nature. Sex-offender registration, as it functions under Senate Bill 10, is purely punitive and is in fact part of the original sentence. And this Court unambiguously stated that Ohio's Retroactivity Clause prohibits the retroactive application of Senate Bill 10. *Williams* at ¶15-21. The mere fact that the State and the O.A.G. disagree with this Court's decision is not a basis for filing a motion for reconsideration. See discussion supra at 1-2. Therefore, Mr. Williams requests that this Court summarily deny the joint motion for reconsideration/clarification.

Respectfully submitted,

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BY: 

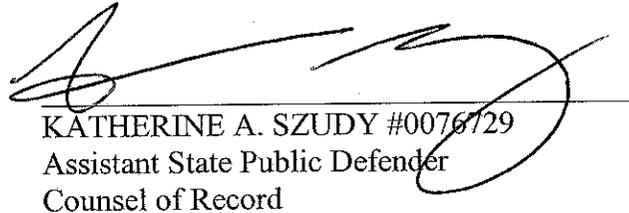
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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **GEORGE WILLIAMS'S MEMORANDUM IN OPPOSITION TO JOINT MOTION FOR RECONSIDERATION AND/OR CLARIFICATION** has been sent by regular U.S. mail, postage prepaid, to Michael Greer, Assistant Warren County Prosecutor, addressed to his office at the Warren County Courthouse, 500 Justice Drive, Lebanon, Ohio 45036; to Ron O'Brien, Franklin County Prosecuting Attorney, addressed to his office at 373 South High Street, 13<sup>th</sup> Floor, Columbus, Ohio 43215; and to Alexandra T. Schimmer, Solicitor General, addressed to her office at 30 East Broad Street, 17<sup>th</sup> Floor, Columbus, Ohio 43215, on this 27<sup>th</sup> day of July, 2011.



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