ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio	**Case No. 2011-1 - 2126**
Plaintiff-Appellant,	**On Appeal from the Montgomery County Court of Appeals, Second Appellate District**
vs.	
Donny A. Howard	**Court of Appeals Case No. 24680**
Defendant-Appellee.	

MEMORANDUM IN SUPPORT OF JURISDICITON OF APPELLANT, STATE OF OHIO

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EXPLANATION OF WHY THIS FELONY CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents this Court with a critical constitutional issue concerning felony sentencing for sex offenders: Is the increased penalty passed by S.B. 97, prescribed by the Adam Walsh Act (AWA) and codified in R.C. 2950.99, retroactively applied to an offender's conduct of violating his registration duties when the conduct that caused the violation occurred after January 1, 2008, the effective date of the statute? The State submits that the answer is no.

The court of appeals held that when a sex offender violates his or her registration duties and is charged with failure to register, verify or notify, the penalty that must be applied to the new charge is the penalty that was in effect at the time the offender was originally classified and notified of his registration duties and not the penalty in effect at the time the offender violated these duties. In other words, the court of appeals held that the increased penalties were retroactively being applied to the offender's offense for failure to notify. The court of appeals erred.

A violation of the registration requirements is a new, separate offense. And the new increased penalties in R.C. 2950.99 are not being retroactively applied when the offender's criminal conduct occurs after the effective date of the statute. Ohio has thousands of registered sex offenders, whose duties arose under Megan's Law, and most of which often violate their registration duties. As a result, it is not uncommon or improper for the General Assembly to increase the penalty for these violations. Ohio's AWA, as was Megan's Law, was enacted to protect public safety against sex offenders and the legislature increased the penalties for failure to comply with the registration requirements as a result – just like it did before in 2003 through S.B. 5– that passed constitutional muster. R.C. 2950.02; *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110.

This issue has been a problem in Ohio. Ohio courts are reversing mandatory felony sentences for new felony offenses committed when an offender violates his or her registration duties, even when the criminal conduct occurred after the effective date of S.B. 97. See *State v. Campbell*, 8th Dist. No. 95348, 2011-Ohio-2281, *State v. Grunden*, 8th Dist. No. 95909, 2011-Ohio-3687 and *State v. Gilbert*, 8th Dist. No. 95084, 2011-Ohio-1928, all citing *State v. Page*, 8th Dist. No. 94369, 2011-Ohio-83, ¶16 (Stewart, J. dissenting), Sup.Ct. No. 11-0305, jurisdiction of the Ohio Sup. Ct. denied, motion for reconsideration pending; *State v. Johnson*, 2nd Dist. No. 24029, 2011-Ohio-2069, Sup. Ct. No. 11-0819, jurisdiction denied; *State v. Alexander*, 2nd Dist. No. 24119, 2011-Ohio-4015, Sup.Ct. No. 11-1427, jurisdiction denied, both citing *State v. Milby*, 2nd Dist. No. 23798, 2010-Ohio-6344, Sup.Ct. No. 11-0292, jurisdiction denied.

The problem: Ohio courts are misinterpreting the decisions of this Court in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, *State v. Gingell*, 128 Ohio St.3d 444, 2011-Ohio-1481, and *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108. However, these decisions only addressed the retroactive application of S.B. 10 when designating a ***classification*** to an offender based upon when the offender committed his original sex offense. This Court has **not** addressed what ***penalty,*** pursuant to S.B. 97 and codified in R.C. 2950.99, should apply to an offender's new offense of failure to abide by the duties imposed by their classification.

This significant issue has not been addressed by this Court, and this Court's recent decisions have made this issue the next immediate question to be addressed. Mandatory felony sentences of repeat sex offenders are being reversed. This issue must be addressed by this Court now.

STATEMENT OF THE CASE

On June 3, 2010, Appellant Donny A. Howard was charged by indictment with one count of failure to notify (underlying offense F1, rape), a felony of the first degree, in violation of R.C. 2950.05. On September 17, 2011, Howard entered a no contest plea to the offense, as charged in the indictment. On October 28, 2010, the trial court sentenced Howard to a mandatory minimum of three years in prison. On June 13, 2011, Howard filed an untimely notice of appeal and a motion for a delayed appeal. The State objected. On July 13, 2011, this Court allowed Howard's delayed appeal.

On November 3, 2011, the court of appeals affirmed Howard's conviction for failure to notify, but reversed his sentence and mandated that the trial court resentence Howard to a fifth degree felony. *State v. Howard*, 2nd Dist. No. 24680, 2011-Ohio-5693.

STATEMENT OF FACTS

In September of 2000, Howard was convicted of rape, sentenced to four years in prison and classified a sexually oriented offender under Megan's Law, requiring Howard to register, verify annually and notify the Sheriff of any change of address for a period of ten years from the date he was released from prison. (Docket #2) At that time, any failure to comply with his registration requirements was a felony of the fifth degree. Former R.C. 2950.99.

On January 1, 2008, Ohio's version of the Adam Walsh Act ("S.B. 10" and "S.B. 97") went into effect. A Tier structure was codified, whereby an offender is classified into a Tier based solely upon his conviction for the sex offense. Tier I offenders must register for fifteen years and must periodically verify their residence address with the sheriff on an annual basis. R.C. 2950.05(B)(3); R.C. 2950.06(B)(1). Tier II offenders must register for twenty-five years and periodically verify every 180 days. R.C. 2950.05(B)(2); R.C. 2950.06(B)(2). Tier III

offenders must register for the rest of their life and periodically verify every 90 days. R.C. 2950.05(B)(1); R.C. 2950.06(B)(3). Tier III offenders are also subject to community notification, under which the sheriff is required to notify the offender's neighbors and certain other persons in the community of, inter alia, the offender's residence, offense, and Tier III status. R.C. 2950.11. S.B. 97, passed as a result of the AWA, increased the penalties for which offenders would be subject if they fail to comply with their registration requirements. These penalties also went into effect on January 1, 2008.

Under S.B. 10, Howard was reclassified a Tier III sex offender based upon his rape conviction. A Tier III offender must register every 90 days and notify the Sheriff of any change of address, for life. R.C. 2950.05, R.C. 2950.06(B)(3), and R.C. 2950.07(B)(1).

On or about May 18, 2010, Howard failed to notify a change of his address, and was charged accordingly. Howard failed to comply with the notification requirement, and was properly convicted for that crime. At the time he committed the offense of failure to notify, the penalty was a first degree felony due to his prior conviction for rape, a felony of the first degree. R.C. 2950.99. On June 3, 2010, the State charged Howard by indictment with one count of failure to notify (underlying offense F1, rape), a felony of the first degree, in violation of R.C. 2950.05. On September 17, 2011, Howard entered a no contest plea to the offense, as charged in the indictment. On October 28, 2010, the trial court sentenced Howard to a mandatory minimum of three years in prison in accordance with R.C. 2950.99. However, at the time of his original classification, the penalty for failure to notify was a fifth degree felony. R.C. 2950.99. Therefore, the court of appeals reversed and remanded Howard's sentence, mandating that Howard receive a sentence for committing a fifth degree felony.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. I:

The felony sentencing statute R.C. 2950.99 is not applied retroactively when the conduct for which a defendant is convicted and sentenced occurred after the effective date of the statute or January 1, 2008.

The court of appeals held that the penalty to be applied to an offender's violation of registration duties is the penalty that was in effect at the time the offender was originally classified and not the penalty in effect at the time the offender committed the new offense. The court of appeals erred. The penalty that must apply is the penalty in effect at the time a defendant commits the criminal conduct for which he is charged.

In fact, "[t]he enhanced penalty provision of the AWA is not couched in terms of the new classifications. It refers only to "violations" of the reporting statutes, not to the type of Tier offender involved. Moreover, there is no question that the General Assembly could validly pass a law that prospectively enhances a penalty for repeat offenders." *State v. Page*, supra at ¶16 (Stewart, J. dissenting).

It is well established that statutes which enhance the penalty for repeat offenders based upon criminal conduct occurring prior to the passage of the enhancement provision do not constitute ex post facto or retroactive application of legislation because the enhancement provisions do not punish the past behavior, but merely increase the severity of the penalty imposed for criminal conduct that occurs after the passage of the enhancement legislation. *Blackburn v. State* (1893), 50 Ohio St. 428, 438, 36 N.E. 18; *State v. Sargent* (1998), 126 Ohio App.3d 557, 567, 710 N.E.2d 1170.

As the First District Court of Appeals noted when addressing a similar issue regarding a sentencing enhancement, "[the statute] is not violative of the constitutional prohibition against ex

post facto laws because it is not 'retrospective,' i.e., it does not 'change * * * the legal consequences of acts completed before its effective date,' but simply mandates an enhanced penalty for acts committed after the effective date of the provision if the defendant has previously been convicted[.]" *State v. Clark* (Aug. 5, 1992), 1st Dist. No. C-910541 (internal citations omitted).

Likewise, a statute which permits a court to enhance a penalty for a subsequent crime based upon an offender's prior criminal conviction, like DUI or DV, is not a separate, additional sentence imposed for the earlier prior offense and does not violate Double Jeopardy Clauses of State and United States Constitutions, since the offender is not subjected to duplicate punishment for the earlier offense. See *Sargent*, supra.

So, in comparison, the offender is not being punished for having committed the original sex offense for which they were required to register, but the offender is being punished for committing a new, separate offense when he or she fails to comply with the registration requirements. Therefore, the penalty that must apply is the penalty in effect when the new offense is committed.

In fact, Ohio's AWA, as was Megan's Law, was enacted to protect public safety against sex offenders and the legislature increased the penalties for failure to comply with the registration requirements as a result – just like it did before in 2003 through S.B. 5 – that passed constitutional muster. R.C. 2950.02; *State v. Smith*, 3rd Dist. No. 5-07-23, 2008-Ohio-4778; *State v. Richey*, 10th Dist. No. 09AP-36, 2009-Ohio-4487 (punishment for the failure to register offense "flows not from the past sex offense, but from the failure to adhere to [the] registration requirements, a new violation." citing *State v. Cook*, 83 Ohio St.3d 404, 421, 1998-Ohio-291, 700 N.E.2d 570; *Smith v. Doe* (2003), 538 U.S. 84, 101-02, 123 S.Ct. 1140, 1152, 155 L.Ed.2d

164 (noting that criminal prosecution for failure to comply with sex offender registration requirements is separate from the prosecution of the original sex offense); *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110. These new increased penalties applied to any violation of registration requirements after July 31, 2003, the effective date of the statute. Likewise, the new, increased penalties passed by S.B. 97 should apply to any violation of registration requirements after January 1, 2008.

What's more, this Court's decisions in *Bodyke*, *Gingell*, and *Williams* do not address this issue, but Ohio courts have been misinterpreting these decisions and reversing felony sentences. In June of 2010, during the pendency of his appeal, this Court decided *Bodyke* which struck down as unconstitutional R.C. 2950.031 and 2950.032, which required the AG to reclassify sex offenders who have already been classified by court order under former law. Id. at ¶60-61. This Court remedied the constitutional violation by severing R.C. 2950.031 and 2950.032. Id. at ¶66. Those provisions "may not be applied to offenders previously adjudicated by judges under Megan's Law, and the ***classifications*** and community-notification and registration orders imposed previously by judges are reinstated." Id. (Emphasis added) *Bodyke* addressed the retroactive application of S.B. 10 as it pertained to an offender's sex offender ***classification*** and did not address this issue.

Although this Court accepted jurisdiction to hear this exact issue in *Gingell*, this Court did not directly address this issue. During the pendency of Gingell's appeal, this Court decided *Bodyke*, and after applying *Bodyke* to Gingell's classification, which reinstated Gingell's prior classification under Megan's Law, this Court held that *Gingell* did not violate any registration duties and reversed his conviction. This Court reversed Gingell's conviction solely on the authority of *Bodyke*. Once Gingell's ***classification*** was restored to a sexually oriented offender,

which only required annual verification for ten years, Gingell could not be convicted for failure to verify his address within the 90 day period for which he was charged. Therefore, *Gingell* did not address this issue.

Nor did this Court address this issue in *Williams*. This Court held, "When we consider all of the changes enacted by S.B. 10 in aggregate, we conclude that imposing the current ***registration requirements*** on a sex offender whose crime was committed prior to the enactment of S.B. 10 is punitive. Accordingly, we conclude that S.B. 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." Id. at ¶20. (Emphasis added).

Williams was indicted for unlawful sexual conduct with a minor in November of 2007, however, his criminal conduct occurred prior to the indictment. Williams was sentenced after January 1, 2008, the effective date of S.B. 10, and classified as a Tier II offender. The Court found that Williams should have been ***classified*** under Megan's Law, which was in effect at the time Williams committed his original sex offense for which he would be required to register as a sex offender. This Court remanded the case back to the trial court to hold a sex offender classification hearing under Megan's Law, the law in effect at the time Williams committed his original sex offense. This Court did not address this issue in *Williams*.

Finally, a sentence is contrary to law and void if a trial court fails to comply with a statutory sentencing mandate. *State v. Bezak,* 114 Ohio St.3d 94, 2007-Ohio-3250, 868 N.E.2d 961. This Court addressed felony sentencing in *State v. Kalish,* 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, and held that appellate courts are required to apply a two-step approach when reviewing felony sentences: "First, they must examine the sentencing court's compliance

with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." *Kalish* at ¶4.

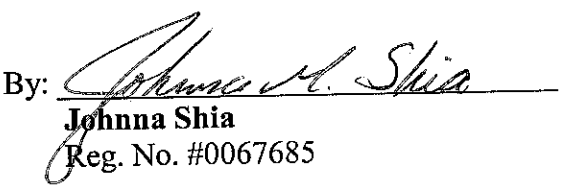
The court of appeals was required to review the sentencing statute in effect at the time an offender committed his criminal conduct for which he was convicted (failure to notify) and sentence him accordingly. Failure to do so is contrary to law.

CONCLUSION

For the reasons discussed above, the State of Ohio requests that this Court accept jurisdiction in this felony case so that this important constitutional issue will be reviewed on the merits and the disparate application of this Court's decisions can be resolved in Ohio.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: 
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support was sent by first class mail on this 16th day of December, 2011, to the following: Marshall G. Lachman, 75 N. Pioneer Blvd., Springboro, Ohio 45066 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

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App A

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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 24680
v.	:	T.C. NO. 10CR1682
DONNY A. HOWARD	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

. . . . . .

OPINION

Rendered on the 3rd day of November, 2011.

. . . . . .

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. . . . . .

DONOVAN, J.

This matter is before the Court on the Notice of Appeal of Donny A. Howard, filed June 13, 2011. Howard appeals from his conviction and sentence for failure to notify, in violation of R.C. 2950.05(A) and (F)(1).

In September, 2000, Howard was convicted of rape, a felony of the first degree, and he received a four year sentence. The trial court designated Howard as a habitual sex offender[1], pursuant to Ohio's version of the federal Megan's Law, which was adopted by Ohio in 1996, and codified by Am.Sub.H.B. No 180, 146 Ohio Laws, Part II, 2560, 2601. See, *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, ¶ 6. The trial court also ordered community notification for a period of 20 years.

In 2006, the Adam Walsh Child Protection and Safety Act was passed by Congress, which divided sex offenders into three tiers based solely upon the offense committed. *Bodyke*, ¶ 18. In 2007, the Ohio General Assembly enacted 2007 Am.Sub.S.B. No. 10, which replaced Megan's Law with the Adam Walsh Act ("AWA"). *Bodyke*, ¶ 20. The law required the Ohio Attorney General to reclassify existing offenders based on the tier system and to notify them of the reclassification. *Bodyke*, ¶ 22. Pursuant to the AWA, Howard was reclassified as a Tier III sex offender.

On June 3, 2010, Howard was charged by indictment with failure to notify, a felony of the first degree, for failing to provide notice of his change of residence address to the sheriff at least 20 days prior to that change, a requirement imposed upon Howard as a Tier III sex offender. Howard pled no contest, and at the time the trial court advised him that it must impose a mandatory sentence, since Howard had a previous conviction for a felony of the first degree (rape). The State noted that it did not oppose the minimum sentence for Howard. The trial court sentenced Howard to a mandatory minimum three-year term on October 28, 2010.

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[1]We note that Howard and the State erroneously assert that Howard was originally classified as a sexually oriented offender.

Along with his Notice of Appeal, Howard filed a Motion for Leave to File Delayed Appeal, based upon this Court's recent decision in *State v. Milby*, Montgomery App. No. 23798, 2010-Ohio-6344, and we granted leave for his untimely appeal over the State's objection.

Howard asserts one assignment of error as follows:

"THE TRIAL COURT ERRED IN CONVICTING APPELLANT OF A FIRST-DEGREE FELONY AND SENTENCING HIM ACCORDINGLY."

In *Bodyke*, the Ohio Supreme Court struck down as unconstitutional the reclassification provisions in the AWA, namely R.C. 2950.031 and 2950.032, which required the Attorney General to reclassify sex offenders pursuant to the tiered scheme. Id., ¶ 60-61. The Court severed those provisions from the AWA, and the provisions "may not be applied to offenders previously adjudicated by judges under Megan's Law, and the classifications and community-notification and registration orders imposed previously by judges are reinstated." Id., at ¶ 66.

Pursuant to *Bodyke*, as the State concedes, Howard's reclassification as a Tier III sex offender and the community-notification and registration orders attending that reclassification may not be applied, and his original classification as a habitual sex offender and the community-notification and registration orders attending that classification are reinstated.

Under the former R.C. 2950.05(A), Howard was required to provide written notice to the sheriff of a change of address at least 20 days prior to changing his address. Under the former R.C. 2950.99, the penalty for failure to notify was a felony of the fifth degree.

R.C. 2950.05 was amended by S.B. 10, which became effective on January 1, 2008,

and the new version at issue also required Howard to provide written notification to the sheriff at least 20 days prior to changing his address of residence. After the related amendment of R.C. 2950.99 (2007 Am.Sub.S.B. 97), the penalty for failure to notify was a felony of the first degree. R.C. 2950.99(A)(1)(a)(i).

In *State v. Milby*, which the State asks us to reconsider, this Court on similar facts held that because the prohibited conduct in failing to give the required prior notification did not change when R.C. 2950.05 was amended, the defendant had an ongoing duty that neither the amendment of that section nor the holding in *Bodyke* had changed. Accordingly, Milby could be found guilty for failure to notify, based upon the original classification to which he was reinstated. However, since the related amendment of R.C. 2950.99(A)(1)(a) changed the violation from a felony of the third degree to a first degree felony, of which Milby was convicted, this court reversed Milby's conviction and remanded the case for resentencing.

As in *Milby*, when Howard's original classification and registration requirements are applied, his conviction for failure to notify is not offended. There is no dispute that under former law, Howard was required to provide written notice of a change of address at least 20 days prior to changing his address of residence. See former R.C. 2950.05(A). However, the amendment of R.C. 2950.99 changed the penalty for failure to notify from a felony of the fifth degree to a felony of the first degree, based upon the penalty for the underlying offense of rape, and Howard was subject to a mandatory term of incarceration. As in *Milby*, the fact that Howard committed his offense of failure to notify after the effective date of S.B. 97 does not affect the outcome herein as the State asserts. Pursuant to *Milby*, we find that the trial court erred when it convicted Howard of a first degree felony and

sentenced him accordingly, instead of finding him guilty of a fifth degree felony. See also, *State v. Johnson*, Montgomery App. No. 24029, 2011-Ohio-2069; *State v. Alexander*, Montgomery App. No. 24119, 2011-Ohio-4015.

Since Howard's sole assigned error has merit, his sentence will be reversed and the matter remanded to the trial court for resentencing.

. . . . . .

FROELICH, J., concurs.

HALL, J., concurring in part and dissenting in part.

I agree that this case should be remanded to the trial court for re-sentencing, but conclude that the defendant should be sentenced for a felony of the third degree and not a fifth degree as determined by the majority. For clarity, I will refer to the various felony levels as F(5) through F(1)

Donny Howard's conviction for Rape, F(1), was in September 2000 and he was classified as a Habitual Sex offender under Ohio's version of Megan's Law. Sometime after Ohio's version of the Adam Walsh Act (AWA) went into effect on 1-1-2008, Howard was reclassified as a Tier III offender. The instant case stems from the June 3, 2010 charge of failure to notify the sheriff of a change of address.

Failure to notify was an F(5) when Howard was originally convicted of Rape in 2000. R.C. 2950.99. This level had been in effect since 1-1-97 with adoption of Ohio's Megan's law. Before that, the first offense of failure to comply with pre-Megan's Law registration requirements was a misdemeanor, and a subsequent offense was an F(4). Effective 1-1-04, failure to notify, when the basis for registration was for murder, or an F(1),(2) or (3), was modified to an F(3). R.C. 2950.99 (A)(1)(b)(I). As part of the adoption of Ohio's AWA,

R.C. 2950.99 was amended, effective 1-1-08. When the underlying felony that was the basis for the registration was an F(1) through F(4), failure to notify became a felony of the same degree as the basis for registration. Thus, in Howard's case, the underlying felony was an F(1), so the new offense was an F(1).

In *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, the Ohio Supreme Court struck down the reclassification provisions of the AWA, R.C. 2950.031 and 2950.032, and severed them from the remainder of the act. Registration requirements under Megan's Law were reinstated. Nothing in *Bodyke* had addressed or vacated the amended penalty provisions of R.C. 2950.99. Nevertheless, this court has held that the penalty section applicable for violation of reinstated Megan's law registration violations is the penalty that existed prior to adoption of the AWA. This court has held, in three cases, that where defendants have been improperly reclassified, a failure to notify conviction would still be upheld when the reinstated Megan's Law registration requirements were essentially the same as the improperly reclassified AWA requirements, but the violation is a pre-AWA F(3).

In *State v. Milby*, Montgomery App. No. 23798, 2010–Ohio–6344 the defendant was convicted of Rape in 1983. While still incarcerated in 2003, Milby was designated as a sexual predator. He was reclassified as a Tier III offender under the AWA. Eventually he was charged and convicted of failing to register at his new address during July 2009. This court said " * * * AWA did increase the penalty for failure to notify to a first-degree felony. That penalty may not be applied to Milby. Under the former law, violation of the reporting requirement was a felony of the third degree." Id ¶ 31. The case was remanded for resentencing as an F(3). I believe this conclusion was wrong. As stated, nothing in *Bodyke*,

had addressed or vacated the amended penalty provisions of R.C. 2950.99. But, *Milby* is part of the jurisprudence of this court and *stare decisis* precludes simply ignoring it.

In *State v. Johnson*, Montgomery App. No. 24029, 2011–Ohio–2069, Johnson had been designated a sexually oriented offender in 1994. His classification was changed to a Tier III under AWA. In 2009 he was charged with an F(1) failure to provide notice of his change of residence address. Johnson's case was also remanded for re-sentencing. This court said, "* * * per *Milby*, we find that the trial court erred when it convicted Defendant of a first degree felony and sentenced him accordingly, instead of finding Defendant guilty of a third degree felony." Again, I believe this result is incorrect but it follows *Milby*.

Finally, on similar facts, in *State v. Alexander*, Montgomery App. No. 24119, 2011-Ohio-4015, Alexander had been convicted of Rape, an F(1), and designated as a sexually oriented offender in 2004. He was reclassified under AWA in 2008 as a Tier III offender. He was charged with failing to notify the sheriff of his new address in 2010, an F(1). This court's decision, in which the undersigned concurred, stated " * * * [L]ike in *Johnson*, [and *Milby*] appellant should have been found guilty of a third-degree felony and not a first-degree felony."

Based on *Milby*, as followed in *Johnson* and *Alexander*, this court has held that when a failure to notify case is reversed after an improper AWA reclassification, the penalty for violation of failure to notify reverts to that penalty which was in effect before the "offending" AWA legislation, which was effective 1-1-08. Prior to enactment of AWA, the penalty for failure to notify for underlying F(1) through F(3)'s , was a felony of the third degree. Consequently, I would remand this case for re-sentencing of the defendant for a conviction of an F(3).

Copies mailed to:

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Hon. Timothy N. O'Connell

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IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 24680
v.	:	T.C. NO. 10CR1682
DONNY A. HOWARD	:	**FINAL ENTRY**
Defendant-Appellant	:	
	:	

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Pursuant to the opinion of this court rendered on the 3rd day of November, 2011, appellant's sentence is reversed and the matter is remanded to the trial court for resentencing consistent with this court's opinion.

Costs to be paid as stated in App.R. 24.

Mary E. Donovan
MARY E. DONOVAN, Judge

Jeffrey E. Froelich
JEFFREY E. FROELICH, Judge

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