

ORIGINAL

IN THE SUPREME COURT OF OHIO

Case No. 2011-1066

STATE OF OHIO	:	
Appellant	:	
-vs-	:	On Appeal from the
LINDELL W. BRUNNING, JR.	:	Cuyahoga County Court
Appellee	:	of Appeals, Eighth
		Appellate District Court
		of Appeals
		CA: 95376

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SUMMARY OF APPELLEE'S ARGUMENT

This is another in the line of cases addressing the application of this Court's watershed opinion in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753. The State advances three propositions of law, each of which (1) ignores the fact that the State concedes that at least one of Brunning's convictions was invalid and must be vacated even though it was the result of a guilty plea; (2) misconstrues the implications of this Court's recent decisions following *Bodyke*; and (3) sanctions prosecutions under an unconstitutional statutory regime.

In 1997, Brunning was classified as a sexually oriented offender under Megan's Law based on a 1983 conviction. (Tr. 26-27, 37.) After the Ohio General Assembly repealed Megan's Law and replaced it with 2007 Am. Sub. S.B. No. 10, commonly known as the Adam Walsh Act ("AWA"). Effective January 1, 2008, Brunning was reclassified as a Tier III offender by the Ohio Attorney General pursuant to the retroactive reclassification provisions of the AWA (R.C. 2950.031 and R.C. 2950.032).

On August 3, 2009 Brunning allegedly violated his registration and reporting duties pursuant to the AWA. In January 2010, the Cuyahoga County Grand Jury returned a three-count indictment charging failure to register in violation of R.C. 2950.06, failure to provide notice of change of address in violation of R.C. 2950.05, and tampering with government records in violation of R.C. 2913.42. In April 2010, Brunning entered into a plea agreement with the State to resolve this case. (Tr. 3-30.) As part of the agreement, Brunning pled guilty to the indictment in this case and the State and trial court expressly agreed that all three counts would merge for sentencing purposes as allied offenses of similar import.

This Court issued *Bodyke* on June 3, 2010. Five days later, Brunning appeared before the trial court for his sentencing hearing. (Tr. 31.) At the hearing, and prior to sentencing, his

counsel moved to dismiss the indictment pursuant to *Bodyke*. (Tr. 33-36.) The trial court denied the motion to dismiss and, completely disregarding the agreement that the counts would merge, proceeded to sentence Brunning to separate consecutive sentences totaling twenty-one years. (Tr. 36, 55.)

Brunning appealed to the Eighth District Court of Appeals, who vacated all three of his convictions under *Bodyke*. *State v. Brunning*, 8th Dist. No. 95376, 2011-Ohio-1936 (hereinafter, “Opinion Below”). Having sustained Brunning’s assignment of error concerning *Bodyke*, the Eighth District found that his assignment regarding breach of the agreement to merge his convictions was moot. *Id.* ¶ 14. With this appeal, the State argues that the failure to provide notice of change of address and tampering with government records convictions should not have been vacated. However, the State concedes that the failure to register conviction was properly vacated.

This Court need not address the State’s propositions of law.

This Court need not address the myriad of issues raised by the State’s appeal because Brunning’s plea is unquestionably invalid for another reason. During the plea colloquy, the trial court expressly advised Brunning that the three counts in the indictment would merge into a single conviction at sentencing. (Tr. at 4, 14.) However, at sentencing, the trial court imposed separate, consecutive sentences. (Tr. 55.) Because this error, by itself, requires Brunning’s plea to be vacated, this Court should decline to reach the issues raised by the State on appeal and simply remand the case to the trial court for further proceedings.

The State concedes that the Opinion Below correctly vacated Brunning’s failure to register conviction; therefore, the guilty plea to the other counts cannot stand.

If this Court chooses to address the State’s propositions, it should reject them. The State admits that the AWA is unconstitutional as applied to offenders like Mr. Brunning who were

originally classified under Megan's Law. In light of this settled law, the State concedes that the Eighth District correctly vacated Brunning's conviction for failure to register. (See Appellant's Merit Brief at 1, citing *State v. Gingell*, 128 Ohio St. 3d 444, 2011-Ohio-1481, 946 N.E.2d 192.) Failure to register is one of the three counts in the indictment to which Brunning pled guilty. Therefore, the lower court properly vacated his plea regardless of whether, considered independently, the convictions with respect to the other two counts are valid. But the State simply ignores the relationship between the failure to register conviction (which it is not challenging) and the other two counts in the indictment.

Proposition I fails because Brunning pled guilty to the indictment, not just the tampering count, and because a voluntary act is a prerequisite to criminal liability.

The Eighth District noted that the third count of the indictment—tampering—arises from the registration violations. (Opinion Below ¶ 10.) With its first proposition of law, the State contends that the conviction for tampering is independent of the registration-related offenses and should not have been vacated. This argument ignores the fact that Mr. Brunning resolved the case with a comprehensive plea agreement that included an indisputably invalid conviction as to the failure to register offenses alleged in count 1. The State cannot hold Brunning to a plea agreement when one of its terms was unquestionably invalid. This is true regardless of the independent validity of the tampering with records conviction.

In addition, the State's first proposition of law asks this Court to hold that the State can unlawfully compel a person to complete a form provided by the government, and then prosecute the person for tampering with government records (R.C. 2913.42). Mr. Brunning did not voluntarily complete the Sheriff's sex offender verification form; he did so pursuant to his reclassification under the registration provisions of the AWA—the very provisions that this Court found unconstitutional in *Bodyke*. Because the State's position conflicts with the basic

statutory requirements of criminal liability, the first proposition of law is meritless. *See* R.C. 2901.21(A)(1).

Proposition II fails because Brunning was prosecuted under the AWA, not Megan's Law.

The State's second proposition of law is also flawed. The State contends that it is irrelevant whether Mr. Brunning was charged under the AWA or Megan's Law because he could have been convicted under either regime. The State's argument fails to appreciate that Megan's Law was not in effect at the time of Brunning's alleged violation, that violations of Megan's Law and the AWA carry different consequences, and that there is no shortcut to a proper criminal prosecution.

First, offenders reclassified under the unconstitutional provisions of the AWA did not have a duty to register under any law at the time of the indictment in this case. *See State v. Beasley*, 8th Dist. No. 96806, 2011-Ohio-6650, ¶¶ 9-10. At the time of the alleged offense and the plea, the AWA was in effect, Megan's Law had been repealed, and this Court had not yet issued *Bodyke*. Moreover, *Bodyke* did not reenact, amend, or repeal the AWA, it simply severed the provisions retroactively applying the new registration requirements and reinstated the Megan's Law reporting requirements *prospectively*. Therefore, at the time of the alleged offense and plea in this case, no valid law existed requiring Mr. Brunning to register.

Second, even if *Bodyke* somehow retroactively resurrected Megan's Law during the pendency of Mr. Brunning's case, the State clearly understood that was prosecuting him for violations of the AWA, not Megan's Law. (Tr. 26-27.) And there is a significant difference between the statutes: the penalties for a violation of the AWA are more severe than the Megan's Law penalties. *Compare* former R.C. 2950.99 and current R.C. 2950.99. Accordingly, it matters

a great deal to Mr. Brunning whether he is charged under the AWA or Megan's Law, and due process entitles him to notice of the nature of the offenses charged and the potential penalties.

Third, fundamental principles of criminal liability require the State to prosecute under the extant and applicable statutory scheme. Therefore, even if this Court concludes that Brunning could have been prosecuted, the State did not indict Mr. Brunning under Megan's Law; the indictment charges him with violations of the AWA and he pled guilty to violating the AWA, not Megan's Law. Due process does not allow the State to prosecute under one statute and then, once that statute has been found unconstitutional as applied to the defendant, maintain the conviction based on a different statute.

Proposition III fails because of this Court's decision in Gingell and because the State concedes that Brunning's guilty plea and conviction must be vacated with respect to failure to verify.

The State's third proposition of law asks this Court to uphold a guilty plea to an indictment based on an unconstitutional statute. The State argues that Brunning waived his challenge to the constitutionality of the indictment by pleading guilty. The State admits that the failure to verify conviction was unconstitutional and must be vacated, but argues that the notice of change of address offense could have been based on Megan's Law and that the plea to the tampering with records count can be considered separately. These arguments are inconsistent with established case law and basic fairness.

In *Gingell*, this Court vacated a conviction based on a guilty plea to registration related offenses under the AWA because the AWA could not be applied to the defendant. *Gingell*, 128 Ohio St. 3d 444, 2011-Ohio-1481, 946 N.E.2d 192. Brunning's conviction is likewise the result of a guilty plea; therefore, if *Gingell* did not waive his right to challenge his plea and conviction, neither did Brunning.

Moreover, as discussed above, Brunning entered a guilty plea to all three counts in the indictment, and the same conduct underlies all of the charges. It was a packaged deal at the time of the plea. It would be unfair to ignore that fact now by severing the guilty plea to the tampering charge from the plea to the other two counts. Accordingly, even assuming for the sake of argument that count three of the indictment could be legally sustained, it was not error to vacate his plea with respect to the entire indictment. The first two counts were based on an unconstitutional statute and, thus, did not charge offenses. In the context of Brunning's guilty plea, the third count was inextricably linked to the first two; if it was proper to vacate his plea with respect to one count, then his plea to the other counts cannot stand either.

For all of the foregoing reasons, which are discussed in greater detail below, this case should be remanded to the trial court and the opinion of the Eighth District Court of Appeals should be affirmed.

STATEMENT OF THE CASE AND FACTS

In 1983, Lindell Brunning was convicted of rape and received an indefinite prison sentence of 10-25 years. (Tr. 26-27.) In 1997, the trial court classified Brunning as a sexually oriented offender under Ohio's Megan's Law. (Tr. 37.) Under Megan's Law, Mr. Brunning was required to verify his address annually for ten years and notify the Sheriff's Office of any change of address. *See* former R.C. 2950.05 and 2950.06. The failure to comply with these registration requirements were felonies of the third degree. *See* former R.C. 2950.99. There were no mandatory minimum prison terms for registration violations under Megan's Law.

The Ohio General Assembly subsequently replaced Megan's Law with Ohio's Adam Walsh Act, effective January 1, 2008, thereby altering the classification, registration, and notification scheme for convicted sex offenders. *See Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-

2424, 933 N.E.2d 753, at ¶ 20. As a part of this legislation, the General Assembly directed the Ohio Attorney General to reclassify Megan's Law offenders under this new scheme and applied the enhanced registration and notification scheme retroactively to the reclassified offenders. Pursuant to R.C. 2950.031 and 2950.032 of the Adam Walsh Act, the Ohio Attorney General reclassified Brunning as a Tier III sex offender under the AWA.

In January 2010, Brunning was indicted for failing to verify his address every 90 days as required by the AWA, failing to provide notice of a change of address, and tampering with a governmental record (i.e. failing to accurately report his address). The State is not challenging the Eighth District's decision to vacate Brunning's failure to verify conviction. (See Appellant's Merit Brief at 1, citing *Gingell*, 128 Ohio St.3d 444, 2011-Ohio-1481, 946 N.E.2d 192, ¶ 8.)

At a change of plea hearing, Brunning entered into a plea agreement with the State in which he agreed to plead guilty to all three charges in the indictment, as well as certain counts in another case. (Tr. 3-4, 11-14, 21-22.) As part of the plea agreement, the State agreed that all three counts in this case would merge for sentencing purposes. (Tr. 4.) The trial court approved this agreement on the record. (Tr. 4, 14.) The Court also advised Brunning that because of the merger, "the maximum penalty you're looking at on this case is between two to eight years." (Tr. 14.) Based on the representations of the State and the trial court regarding the plea agreement, Mr. Brunning pled guilty to all three charges. (Tr. 21-22.)

Brunning appeared for sentencing on June 8, 2010, just five days *after* this Court held, in *Bodyke*, that the retroactive reclassification provisions of the AWA (R.C. 2950.031 and 2950.032) were unconstitutional. (Tr. 31.) Based on the *Bodyke* decision, defense counsel argued that his client's prosecution under the AWA was invalid and requested dismissal of the charges. (Tr. 33-36.) The trial court denied the motion, ignored its prior admonition that the

maximum sentence Brunning could receive was eight years, and imposed a 21-year aggregate sentence for the three registration-related offenses. (Tr. 55.) The sentence was comprised of consecutive sentences of 8 years for failure to verify, 8 years for failure to provide notice of change of address, and 5 years for tampering with governmental records. (Tr. 55.) The trial court did not provide any reason for disregarding the plea agreement and its own prior representations regarding the merger of the three charges.

Brunning filed a timely appeal with the Eighth District, arguing, among other things, that his plea was invalid because it was induced by false promises by the State and the trial court, that his three registration related offenses should have merged, and that his convictions in this case must be vacated because “the law on which it is based, Ohio’s Adam Walsh Act, is unconstitutional as applied to appellant.”¹ The Eighth District resolved the case based on the latter issue and held that the first two issues were moot. Specifically, the Eighth District held that Brunning’s “reclassification under the AWA is contrary to the law,” that any registration-related violations under the AWA are likewise contrary to law, and that convictions predicated upon that unlawful reclassification must be vacated. (Opinion Below ¶¶ 11, 13.)

The State appealed.

LAW AND ARGUMENT

A. **Regardless of the resolution of the issues presented by the State, Brunning’s plea and convictions must be vacated and remanded for proceedings consistent with the plea agreement.**

There is a threshold issue in this case: Regardless of how this Court views the State’s arguments on appeal, Brunning’s plea was not knowing, voluntary and intelligent because it was

¹ The Eighth District affirmed Brunning’s convictions in the other case, Case No. CR-532822. (Opinion Below ¶ 23.)

conditioned upon false promises made by the State and the trial court. (Opinion Below ¶ 14.) Specifically, at the change of plea hearing, the State and the trial court expressly stated during the plea colloquy that all three of the offenses charged in the indictment would merge. (Tr. 4, 14.) At sentencing, however, the trial court imposed separate and consecutive sentences on all three counts. (Tr. 55.) Although the Eighth District noted that the trial court should have merged the sentences as promised, it chose to analyze the second assignment of error first, sustained that assignment, and declared the merger assignment moot without analysis. (Opinion Below at ¶ 14.)

A plea induced by a false promise by the State and the trial court cannot stand. *See State v. Vari*, 7th Dist. No. 07-MA-142, 2010-Ohio-1300, ¶¶ 24-30 (discussing *Santobello v. New York*, 404 U.S. 257, 261 (1971)). This Court has consistently upheld the rule in *Santobello* that a defendant who pleads guilty pursuant to an agreement with the State is entitled to the benefit of the bargain. *See, e.g., State v. Carpenter*, 68 Ohio St.3d 59, 623 N.E.2d 66; *State v. Dye*, 127 Ohio St.3d 357, 939 N.E.2d 1217. The same principle applies to promises by the trial court. *See Vari* ¶¶ 28-29 (discussing *Santobello*). Here, both the State and the trial court stated that the convictions would merge at sentencing. (Tr. 4, 14.) Brunning is thus entitled to remand for further proceedings. *Santobello* at 263.

Because Brunning's plea is unquestionably invalid on alternate grounds, it would be premature for this Court to address the State's propositions of law, which include several complex legal questions that were not fully developed in the lower courts. This Court should merely vacate the clearly invalid plea and remand for further proceedings, necessarily mooting the issues raised by the State's instant appeal.

B. Argument applicable to all three of the State's propositions of law.

At the heart of this case is whether it matters that Brunning “was indicted for a first-degree felony for a violation of the reporting requirements under the AWA.” *Gingell*, 128 Ohio St. 444, 2011-Ohio-1481, ¶ 8. Brunning’s position is that it matters a great deal that he was prosecuted under the AWA (as opposed to Megan’s Law). The State disagrees, ultimately arguing “no harm no foul.” The State correctly notes that *Bodyke* reinstated the Megan’s Law registration requirements for offenders who were originally classified under Megan’s Law and who were then reclassified by the Ohio Attorney General pursuant to the AWA. However, it also insists that *Bodyke*: (1) retroactively revived the Megan’s Law registration requirements for registration offenses committed while the AWA was unquestionably the only law in effect and (2) automatically converted the indictment charging Brunning under the AWA to a prosecution under Megan’s Law.

The State’s position is not supported by law. The first section of the State’s Merit Brief is captioned “background applicable to all propositions of law.” In response, Brunning will attempt to provide a complete picture of the context in which this case is to be decided.

1. Brunning was prosecuted under the AWA.

At the change-of-plea hearing, the State expressly asserted that this case is governed by S.B. 10, i.e., the AWA. (Tr. 26-27.) Moreover, this Court’s authority leaves “no doubt” that Brunning was prosecuted under the AWA. *Gingell*, 128 Ohio St.3d 444, 2011-Ohio-1481, 946 N.E.2d 192, ¶ 8. Like Brunning, the defendant in *Gingell* was initially classified under Megan’s Law, reclassified under the AWA, and then charged with a first-degree felony for violating his reporting requirements before this Court issued *Bodyke*. *Id.* “Since [Brunning] was charged

after his reclassification and before *Bodyke* there is no doubt that he was indicted for a first-degree felony for a violation of the reporting requirements under the AWA.” *Id.*

Furthermore, when it enacted the AWA, the Ohio General Assembly repealed Megan’s Law and directed the Ohio Attorney General to reclassify all Megan’s Law offenders under the AWA. *See Bodyke* ¶ 20. Brunning was reclassified as a Tier III sex offender under the AWA. Therefore, in January 2010 when Brunning was indicted in this case for allegedly violating his reporting requirements in August 2009, the only law governing sex offender registration was the AWA. *See State v. Beasley*, 8th Dist. No. 2011-Ohio-6650, ¶ 10 (citing *Bodyke* and explaining that the General Assembly repealed Megan’s Law when it enacted the AWA: “By legislative decree Megan’s Law reporting requirements no longer existed.”). Likewise, the AWA was the only registration law in effect in April 2010, when Brunning pled guilty in to the indictment in this case.² Accordingly, it is an indisputable fact that Brunning was prosecuted under the AWA; the State cannot argue that he was actually indicted or entered a guilty plea to charges based on Megan’s Law.

Finally, the State expressly concedes that Brunning’s conviction with respect to count 1—failure to verify address in violation of R.C. 2950.06—should be vacated because he was in fact prosecuted based on his unconstitutional reclassification under the AWA. (Appellant’s Merit Brief at 1, citing *Gingell* ¶ 8.) By admitting that Brunning’s failure to verify conviction must be vacated because it was predicated on an invalid reclassification under the AWA, the State necessarily concedes that Brunning was prosecuted pursuant to the AWA.

² This Court issued *Bodyke* on June 3, 2010. *Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753 (June 3, 2010).

2. Under *Bodyke*, Megan’s Law applies prospectively to offenders like Brunning.

The State seems to recognize that it prosecuted Brunning under the AWA, but argues that “Brunning remained accountable for providing a notice of change of address under Megan’s Law, which he did not meet.” Appellant’s Merit Brief at 5. In other words, the State contends that *Bodyke* reinstated Megan’s Law’s registration requirements *retroactively*. Neither *Bodyke* nor *Gingell* so hold. In *Bodyke*, this Court reinstated the Megan’s Law classification and reporting requirements for offenders who were originally classified under Megan’s Law and then reclassified by the Ohio Attorney General under the AWA. *Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 66 (“R.C. 2950.031 and 2950.032 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.”). *Bodyke* does not, however, indicate that reinstatement is to occur retroactively. Instead, *Bodyke* “reinstated” certain offenders’ registration requirements under Megan’s Law as of the date *Bodyke* issued.

The dictionary definition of “reinstate” is: “To place again in a former state, condition, or office; to restore to a state or position from which the object or person had been removed.” Black’s Law Dictionary Online, *reinstate*, <http://blackslawdictionary.org/reinstate/> (accessed Feb. 4, 2012). By definition, reinstatement is *prospective*, not retroactive. Thus, *Bodyke* held that Megan’s Law would govern the present and future registration requirements offenders like Brunning. See *Beasley* ¶ 10 (“It was not until the Ohio Supreme Court issued the *Bodyke* decision in June 2010 that the Megan’s Law reporting requirements were ‘reinstated.’”).

Bodyke did not resurrect the repealed provisions of Megan’s Law to apply them retroactively. Indeed, the retroactive resurrection of Megan’s Law obligations would suffer from serious constitutional flaws because, for many offenders, their verification dates under

Megan's Law differed from their verification dates under the AWA. Under the State's retroactive resurrection theory, Megan's Law offenders could be held liable for failing to report on a date required by Megan's Law even though Megan's Law was not in effect at that time.

Likewise, *Gingell* did not hold that the Megan's Law registration requirements apply retroactively to offenders like Brunning. While the State quotes dicta from the opinion stating that the defendant "remained accountable for the yearly reporting requirement under Megan's Law" the opinion also notes that compliance with Megan's Law "is not part of this case." *Gingell*, 128 Ohio St.3d 444, 2011-Ohio-1481, 946 N.E.2d 192, ¶ 8. Thus, this Court did not consider and resolve the issue of whether an offender's Megan's Law obligations were retroactively resurrected during the time period between Megan's Law repeal and this Court's decision in *Bodyke*.

3. Brunning cannot be prosecuted for a violation of the Megan's Law registration requirements during the time the AWA reclassification provisions were in effect.

The State contends that, unlike *Gingell*, whether Brunning complied with Megan's Law's notification requirements is part of this case. Because he was prosecuted under the AWA and the Megan's Law requirements do not apply retroactively, Brunning disagrees—i.e., whether he complied with Megan's Law is *not* part of this case.

To be clear, the issue the State presents is whether Brunning can be prosecuted for a violation of Megan's Law during a certain period of time. Namely, the period of time between January 1, 2008 and June 3, 2010—i.e., (1) **after** Megan's Law was repealed and replaced *in toto* by the AWA; (2) **after** Brunning was reclassified by the Ohio Attorney General pursuant to the reclassification provisions of the AWA; and (3) **before** this Court issued *Bodyke*.

In addressing this issue, it is important to keep in mind that the AWA did not simply amend certain provisions of Megan’s Law, but rather repealed it in its entirety. *See Bodyke* ¶ 20 (“S.B. 10 repealed Megan’s Law and replaced it with a new retroactive scheme * * *.”); *Gingell*, ¶ 2. Megan’s Law was, and the AWA is, a unified statutory regime that comprehensively addresses the reporting and registration requirements applicable to sex offenders in Ohio. *See Bodyke* ¶¶ 7, 18-20 (explaining the history of Megan’s Law and the AWA as successive comprehensive schemes based on federal legislation aimed at creating national standards) *see also State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, ¶ 16 (holding that the AWA is punitive as opposed to remedial and therefore violates the *ex post facto* clause of the Ohio Constitution because “[t]he statutory scheme has changed dramatically” since the Court rejected the same challenge to Megan’s Law).

With the enactment of the AWA, Megan’s Law ceased to exist. Megan’s Law did not exist in August 2009 at the time of the alleged conduct at issue in this case. Megan’s Law did not exist when Brunning pled guilty in June 2010. Accordingly, at the time Brunning was indicted and pled guilty, the State could not have prosecuted Brunning under Megan’s Law.

Moreover, when Brunning was indicted and pled guilty, no valid law existed governing registration requirements for offenders reclassified by the Ohio Attorney General under the AWA. This is so for two reasons: (1) the AWA repealed and replaced Megan’s Law and (2) the AWA retroactivity provisions that established Brunning’s reporting requirements were unconstitutional. *See Bodyke* at syllabus; *see also Beasley*, 2011-Ohio-6650 ¶ 9-10 (holding that the defendant’s “Megan’s Law reporting requirements could not have existed as a matter of law” when he was charged with a reporting violation in 2008).

In *Bodyke*, this Court severed the AWA reclassification provisions as unconstitutional as applied to offenders reclassified by the Attorney General under the AWA and reinstated the Megan's Law registration requirements for such offenders. Obviously, *Bodyke*, decided on separation-of-powers grounds, did not re-enact Megan's Law. To the contrary, by employing the severance remedy, this Court preserved the vast majority of the AWA. Thus, strictly as a remedy for a constitutional violation, *Bodyke* reinstated the Megan's Law registration requirements imposed upon offenders who had been reclassified under the AWA *on a prospective basis*. *Bodyke* merely refined the AWA sex offender registration regime that now applies to all offenders. *Bodyke* did not make the Megan's Law requirements retroactive to a period in time when the AWA's reclassification provisions were still in effect. In other words, while Brunning is presently subject to the Megan's Law reporting requirements, these requirements took effect prospectively on June 3, 2010 with the release of the *Bodyke* decision.

Accordingly, Brunning cannot be prosecuted for a violation of Megan's Law requirements that were not reinstated until this Court held that the AWA was unconstitutional as applied to Brunning. The following chart illustrates Brunning's argument:

Time / Event	Source of the Duty to Register/Report for New Offenders	Source of the Duty to Register/Report for Brunning
1997 – Brunning is classified as a sexually oriented offender by the trial court.	Megan’s Law	Megan’s Law
2008 – Brunning is reclassified by the Ohio Attorney General as a Tier III offender pursuant to the retroactive reclassification provisions of the AWA.	AWA	None: the reclassification provisions of the AWA are unconstitutional. <i>See Bodyke.</i>
August 3, 2009 – Brunning allegedly violates his duty to provide notice of change of address.	AWA	None. <i>See Bodyke.</i>
April 20, 2010 – Brunning pleads guilty to the indictment in this case.	AWA	None. <i>See Bodyke.</i>
June 3, 2010 – This Court issues <i>Bodyke</i> .	AWA	Registration requirements previously established under Megan’s Law and reinstated by <i>Bodyke</i> .

C. In Response to Proposition of Law III³ (as Formulated by the Government):

A defendant who pleads guilty to an offense waives any defect in an indictment except for plain error.

With its third proposition of law, the State asks this Court to hold that “a guilty plea waives all defects in the indictment except for plain error.” (Appellant’s Merit Brief at 1.) In addition, however, the State asks this Court to hold that “an indictment does not fail to charge an offense merely because prosecution was initiated under AWA.” *Id.* This proposition of law challenges the Eighth District’s holding that the guilty plea was invalid because the indictment failed to charge an offense. (See Opinion Below at ¶ 12.) The State admits that the conviction in count 1 for failure to register must be vacated, but argues that Megan’s Law can serve as the basis for the failure to provide notice of change of address in count 2 and that the tampering with government records charge in count 3 is independent of any registration offense. Therefore,

according to the State, the indictment charges offenses and Brunning waived any defect in the indictment except for plain error when he pled guilty.

The State's arguments should be rejected for three reasons:

- 1. Waiver does not apply because it is undisputed that the indictment does not charge a failure to register offense.**

Brunning does not dispute the general rule: a defendant who pleads guilty waives defects in the indictment except for plain error. *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26. But there is an exception to the rule when the indictment does not charge an offense. *See* Ohio Crim. R. 12(C)(2). Citing Crim. R. 12(C)(2), the Opinion Below logically concludes that an indictment predicated on an unconstitutional statute does not charge an offense. (Opinion Below ¶ 12.) The State's response to this logic is that the Rule 12(C)(2) exception typically arises when the indictment omits an essential element of the crime. The scenario at bar goes well beyond omission of a single element of the crime—here, the indictment cannot charge a crime because it is predicated on an unconstitutional law.

Indeed, the State concedes that count 1 of the indictment does not charge a failure to register offense because, under *Gingell*, the AWA is unconstitutional as applied to Brunning. (Appellant's Merit Brief at 1.) This alone is sufficient to establish the Rule 12(C)(2) exception and undermine the State's waiver argument. Nonetheless, for all of the reasons discussed herein, Brunning asserts that the other counts in the indictment do not charge an offense. In sum, an indictment including one or more counts predicated on an unconstitutional law does not charge an offense and a guilty plea to the indictment does not waive that fundamental defect.

³ For the Court's convenience, Brunning will address the State's propositions of law in the order they appear in the State's brief.

2. *Gingell* precludes the State's argument that a guilty plea constitutes waiver.

More importantly, this Court has already vacated a registration-related conviction after a guilty plea. See *Gingell*, 128 Ohio St.3d 444, 2011-Ohio-1481, 946 N.E.2d 192, ¶¶ 3, 8.

Accordingly, this Court has rejected the State's argument that a guilty plea waives any defects in the indictment.

3. Whether the tampering count is defective is irrelevant.

Finally, the State argues that count 3 of the indictment, charging tampering with government records, is not defective. However, the State also admits that the plea and conviction with respect to count 1 of the indictment, charging failure to verify, was properly vacated in light of *Gingell*. (Appellant's Merit Brief at 1.) Brunning did not plead guilty to each count in a vacuum or independently. The parties engaged in plea bargaining, he and his attorney evaluated the entirety of his situation, and he ultimately made a decision to plead guilty to the indictment in this case. Furthermore, as part of the plea negotiations, both parties agreed that the three counts of the indictment would merge at sentencing. (Tr. 4, 14.) Therefore, there was no advantage to negotiating for dismissal of some of the counts when a guilty plea to one of the registration offenses—both felonies of the first degree—would almost certainly result in the same sentence. With all of this in mind, Brunning pled guilty in order to reach a global resolution. It would defy practical reality to assert that it is now possible to separate that plea into individual counts and then analyze it in a piecemeal fashion. Consequently, because the State admits that the conviction with respect to count 1 of the indictment has to be vacated, and because the three counts of the indictment and the plea thereto are clearly interrelated, it was proper to vacate the plea and conviction with respect to the entire indictment.

4. Summary of Proposition III: Brunning's guilty plea did not constitute a waiver of his challenge to the constitutionality of the indictment and the lower court properly vacated Brunning's convictions.

For all of the foregoing reasons, this Court should reject the State's third proposition of law. As this Court implicitly held in *Gingell*, a guilty plea does not waive the argument that the indictment fails to charge an offense because the law upon which the charges are predicated has been declared unconstitutional. Furthermore, the viability of the tampering with evidence charge (which Brunning addresses below in response to the State's first proposition of law) is irrelevant in light of the practical realities of plea bargaining and the guilty plea in this case. The plea and convictions were properly vacated because, as the State admits, at least one of the counts in the indictment was predicated upon an unconstitutional statute.

D. In Response to Proposition of Law I (as Formulated by the Government):

Even if the person does not have a legal obligation to complete the government record, a person can be convicted of tampering with records (R.C. 2913.42) if the person falsifies the government record.

1. The State's first proposition of law fails at the outset because it requires the Court to artificially divide Brunning's guilty plea on a count-by-count basis.

The State's first proposition assumes that the tampering conviction can be analyzed separately from the failure to register and failure to provide notice of change of address convictions. Brunning disagrees. Brunning entered into a comprehensive plea agreement with the State to resolve the entire indictment. (Tr. 3-30.) At sentencing the State and trial court blatantly ignored the agreement to merge the three convictions in this case, and the trial court imposed consecutive sentences totaling twenty-one years. (Tr. 55.) Furthermore, the State admits that Brunning's conviction with respect to failure to register must be vacated and is not challenging that aspect of the Eighth District's decision to reverse and remand. Thus, no matter

what this Court decides, this case will go back to the trial court for proceedings consistent with the undisturbed aspects of the Opinion Below.

With all of this in mind, the Eighth District's decision to vacate the tampering conviction is both reasonable and prudent. Indeed, the Opinion Below does not attempt to analyze separately the tampering charge—it simply notes that the tampering charge “stem[s] from the reporting violation,” and was therefore “based on the duty to register unlawfully imposed * * *.” (Opinion Below ¶ 10.) The State's first proposition, on the other hand, myopically suggests that this Court can and should ignore the context in which the guilty plea and conviction at issue arose and analyze the tampering conviction in a vacuum. The Court should decline this invitation to artificially divide the plea in this case.

2. Proposition I does not turn on Brunning's duty or lack thereof.

If this Court decides to address the State's first proposition of law, the primary issue must be clarified. The State articulates the issue as whether “a person can be convicted of tampering with records (R.C. 2913.42) if the person falsifies a government record” regardless of whether the person has “a legal obligation to complete the government record[.]” (Appellant's Merit Brief at 13.) This is not the primary issue. Brunning's argument is that the State may not unlawfully compel him to provide information on a government record, and then prosecute him for failing to provide accurate information on a government record. While the distinction between the State's and Brunning's statement of the issue may appear subtle, it is important.

Based on the State's articulation of the issue, there are two possibilities when a person provides false information on a government record, both of which lead directly to criminal liability: (1) the person has a duty to provide information or (2) the person has no duty to provide information, but voluntarily elects to do so anyway.

The State fails to recognize that there is a third possibility that cannot result in criminal liability: (3) the person has been unlawfully compelled to provide information. Brunning's situation falls squarely within the third possibility that was ignored by the State.

First, a person who *does* have a duty to provide information to the government can obviously be prosecuted for providing false information. This is clearly not the scenario at bar. As discussed throughout this brief, it is Brunning's position that he did *not* have a duty to register on the date and in the manner charged in the indictment. More importantly for purposes of this proposition, the State is assuming for the sake of argument that Brunning was not required to register. (Appellant's Merit Brief at 13.)

Second, according to the State, if one does *not* have a duty to provide information on a government record, but does so anyway, that person can be prosecuted for providing false information. As asserted by the State, "[c]riminal liability for Brunning's act of falsifying a verification form * * * does not require a legal duty to act." (Appellant's Merit Brief at 13.) The State provides several examples that fit nicely within its proposed scenario: providing false information on an application for government benefits such as: (1) a driver's license; (2) a vehicle registration; (3) a permit; (4) worker's compensation; (5) unemployment benefits; or (6) other government aid. (Appellant's Merit Brief at 16.) Brunning agrees with the State—a person who provides false information on an application for government benefits can certainly be prosecuted for tampering with a government record.

Brunning notes, however, that there is an obvious and critical distinction between an application for government benefits and the sex offender registry. Specifically, the person applying for government benefits does so voluntarily—he or she can freely choose whether or not to apply. In contrast, Brunning does not register as a sex offender voluntarily. He is required

to do so by law, and if he does not do so he will be criminally prosecuted. Accordingly, while Brunning agrees with the State's analysis of a scenario in which a person without a duty to provide information on a government record provides false information, he asserts that this scenario is irrelevant to resolving the primary issue presented in this proposition—whether a person who is unlawfully compelled by the government to provide information on a government document can be prosecuted for providing information that is allegedly false.

3. Brunning is not guilty of tampering because he did act voluntarily or pursuant to a legal duty.

Because the State misperceives the primary issue, its analysis misses the mark. First, it contends that the Eighth District added an element to the tampering statute—namely, a legal duty to provide information to the government. The Eighth District did not add a legal duty element to the statute, nor does Brunning suggest that such an element exists or should exist. As discussed above, the presence or absence of a legal duty is irrelevant to the resolution of the issue in this case. Put another way, the Opinion Below can be summarized as requiring the State to prove the person either voluntarily provided false information on a government record *or* provided false information on a government record pursuant to a legal duty. Brunning did neither.

Second, the State describes Brunning's conduct as "voluntary," and analogizes this case to the application for government benefits scenarios described above. Again, however, whereas the person who provides false information on an application for a government permit chose to apply voluntarily, Brunning provided information involuntarily.

In the Opinion Below, the Eighth District simply recognized that, under the circumstances of this case, the basic statutory requirements for criminal liability were absent. Aside from the specific elements of a particular criminal offense, Ohio law provides that a

person is not guilty of an offense *unless* “[t]he person’s liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing.” R.C. 2901.21(A)(1). Essentially, this provision requires that, for a person to be criminally liable, he or she must engage in a voluntary act or “fail to meet a prescribed duty.” R.C. 2901.21 (Notes from the Legislative Service Commission).

Although the Eighth District did not specifically cite R.C. 2901.21, its reasoning is perfectly consistent with that statute. It explained that “any tampering with evidence charge for falsifying documents stemming from the reporting violation, were based on the duty to register and verify *unlawfully* imposed * * *.” (Opinion Below ¶ 10, emphasis in original.) In other words, Brunning’s verification of his address with the Sheriff (the basis for the tampering charge) was both involuntary (he was ordered to do so under threat of criminal prosecution) and was not based on any obligation to meet a legally prescribed duty. Thus, since the basic prerequisites of criminal liability were absent, the Eighth District correctly vacated his conviction for tampering with records.

The State contends that R.C. 2901.21 supports the tampering conviction because “criminal liability in the tampering with records context should focus on the voluntary act of providing false information * * *.” (Appellant’s Merit Brief at 14.) Once again, the State analysis does not account for the fact that Brunning was not providing information—true or false—to the government voluntarily because he was compelled to provide the information even though he did not have a duty to do so. In the cases cited by the State in support of this argument, the defendant had a legal duty; Brunning did not. *See State v. Chintalapalli*, 88 Ohio St.3d 43, 723 N.E.2d 111 (2000); *State v. Elliot*, 104 Ohio App.3d 812, 817 663 N.E.2d 412 (10th Dist. 1995).

Finally, this case is not analogous to the “innocent escapee” cases cited by the State, in which a subsequent acquittal on the underlying charge is irrelevant to the elements of escape. In those cases, a criminal defendant was being lawfully detained while the charges against him or her were being resolved. Even if he or she is ultimately acquitted, a defendant cannot avoid criminal liability for escape from lawful custody. The legal analysis is different, however, when it is clear that, as in this case, the obligation that gave rise to the detention is itself unlawful.

A better analogy to an unlawfully imposed registration obligation is a violation of post-release control that was unlawfully imposed. See *State v. Pointer*, 193 Ohio App.3d 674, 2011-Ohio-1419, 953 N.E.2d 853; *State v. Renner*, 2d Dist. No. 24091, 2011-Ohio-502. Post-release control is a penalty imposed pursuant to a prior conviction, and the consequence of a violation of post-release control is prosecution for the crime of escape. *Id.* Similarly, the reporting and registration requirements for sex offenders are a penalty imposed pursuant to the conviction; the consequence of failing to report is criminal prosecution.

In *Renner*, the Second District Court of Appeals rejected the State’s argument that it could maintain a conviction for escape even though post-release control was not properly imposed. *Renner* ¶¶ 14-19; see also *Pointer* ¶ 28 (citing *Renner*). The Second District concluded that, because the trial court did not properly impose post-release control, the defendant was not subject to post-release control at the time he was charged with escape. *Renner* ¶ 19; *Pointer* ¶ 28. Likewise, in this case, the reporting and registration provisions of the AWA were unconstitutional as applied to Mr. Brunning at the time he was charged in this case. See *State v. Grunden*, 8th Dist. No. 95909, 2011-Ohio-3687 ¶ 13 (holding that the logic of *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 1, “applies equally where a

sentence is imposed for a conviction obtained as a consequence of an invalid reclassification under the AWA.”).

Put a different way, a secondary issue is the existence of a government document. It is axiomatic that the executive branch cannot do what is constitutionally prohibited. *See Bodyke*. In light of *Bodyke*, the government was constitutionally prohibited from prosecuting Brunning under the AWA for registration-related offenses. Under this Court’s authority, records cannot be taken from Megan’s Law offenders such as Brunning pursuant to the AWA. In other words, the government cannot obtain or retain a record of an unconstitutional registration. Therefore, the document at issue in this case was not a government document. Simply put, no legitimate government document is involved in this case.

E. In Response to Proposition of Law II (as Formulated by the Government):

State v. Bodyke does not require vacation of convictions where the conduct of the sex offender, classified under Megan’s Law, would have been a violation under both Megan’s Law and the Adam Walsh Act.

Brunning’s overarching response to the State’s second proposition is that there is no shortcut to a proper prosecution pursuant to an indictment charging offenses under a valid law. More specifically, he asserts three arguments:

- **No Law:** Brunning was not subject to any registration law at the time of the indictment and plea in this case; Megan’s Law had been repealed, the AWA provisions applicable to Brunning were declared unconstitutional in *Bodyke*, and *Bodyke* reinstated the Megan’s Law registration requirements prospectively;
- **Wrong Law, Different Penalties:** Even if the Megan’s Law registration requirements applicable to Brunning were reinstated retroactively, Brunning was prosecuted in this case under the AWA, and this distinction is meaningful because the penalties for an AWA violation differ from the Megan’s Law penalties;
- **Wrong Law:** Even if Brunning could be prosecuted under Megan’s Law and the offense conduct and penalties were identical to the AWA, he was actually prosecuted under the AWA and due process and double jeopardy preclude the

State from prosecuting under an unconstitutional statute and then maintaining the conviction under a different statute.

Brunning addressed the basic underpinnings of the first argument—“No Law”—above in § B. He will briefly reiterate these principles before addressing the State’s arguments that Megan’s Law applies.

1. No Law: No authority legally imposed a registration duty upon Brunning at the time of the indictment and plea in this case; therefore, whether he could have been prosecuted under Megan’s Law is irrelevant.

a. The State prosecuted this case under the AWA.

As discussed above in § B, Brunning was prosecuted under the AWA. This is evidenced by (1) *Gingell* ¶ 8, in which this Court noted that there was “no doubt” that a similarly-situated offender was prosecuted under the AWA; (2) the fact that the State concedes the failure to register conviction must be vacated pursuant to *Gingell*; and (3) the record, which clearly and consistently demonstrates the State and trial court’s understanding that this case is proceeding under the AWA. (*See, e.g., 26-27.*)

b. At the time of the alleged conduct, indictment, and plea in this case Brunning did not have a duty to register under any law.

This case arose: (1) after the AWA repealed Megan’s Law and, pursuant to the AWA, the Ohio Attorney General reclassified offenders like Brunning; and (2) before *Bodyke* declared that those reclassification provisions were unconstitutional as applied to Brunning. His position is that there was a gap in Ohio’s registration regime at that time as a result of the following chain of events:

- 1997: while serving his prison term, Brunning is classified by court order as a sexually oriented offender pursuant to Megan’s Law stemming from his 1983 conviction;
- January 1, 2008: the Ohio General Assembly enacts the AWA and it takes effect, repealing and replacing Megan’s Law in its entirety;

- 2008: Brunning is reclassified by the Ohio Attorney General as a Tier III offender pursuant to the reclassification provisions of the AWA;
- August 3, 2009: Brunning allegedly (1) fails to register in violation of the AWA, (2) fails to provide notice of change of address in violation of the AWA, and (3) tampers with government records;
- January 2010: Brunning is charged in a three count indictment with failure to register in violation of the AWA, failure to provide notice of change of address in violation of the AWA, and tampering with government records;
- April 2010: Brunning negotiates a combined plea agreement and pleads guilty to the indictment in this case and to several counts in another case;
- June 3, 2010: this Court issues *Bodyke*, declaring the reclassification provisions of the AWA unconstitutional, severing those provisions from the AWA, and reinstating the registration requirements from Megan's Law for effected offenders;

Based on this timeline of events, offenders like Brunning who were reclassified by the Ohio Attorney General pursuant to the AWA were registering under an unconstitutional law from the time they were reclassified until the issuance of *Bodyke*. Megan's Law had been repealed and replaced by the AWA, and there is no question the State and the offenders were operating under the AWA regime as opposed to Megan's Law.

In addition, in *Gingell* this Court applied *Bodyke* to vacate the conviction of an offender like Brunning. *Gingell*, 128 Ohio St.3d 444, 2011-Ohio-1481, 946 N.E.2d 192, ¶¶ 6-8. Specifically, the defendant in *Gingell* was originally classified as a sexually oriented offender under Megan's Law, was then reclassified under the AWA by the Ohio Attorney General as a Tier III offender, and then was indicted in 2008 for failure to register and failure to provide notice of change of address pursuant to the AWA. *Id.* ¶¶ 1-3. *Gingell* pled guilty to failure to register, and the other count was dismissed. *Id.* ¶ 3. He then appealed and, while the case was pending in this Court, *Bodyke* issued. *Id.* ¶ 4. Pursuant to *Bodyke*, this Court found that "there is no doubt that he was indicted for a first-degree felony for a violation of the reporting

requirements under the AWA[.]" and vacated Gingell's conviction. *Id.* ¶ 8. Thus, this Court vacated the conviction of an offender in the same position as Brunning—i.e., an offender who was reclassified under the AWA, prosecuted under the AWA, and pled guilty to AWA offenses pursuant to the provisions of the AWA declared unconstitutional in *Bodyke*.

It is significant that this Court vacated the conviction in *Gingell* because it establishes that Brunning could not be charged with registration-related offenses under the AWA.

Consequently, the source of his duty to register from January 1, 2008 until June 3, 2010 was not the AWA. And Megan's Law was not the source of his duty to register during that period either. As this Court thoroughly explained in *Bodyke*, when the Ohio General Assembly enacted the AWA, it repealed Megan's Law. *Bodyke* ¶ 20. Therefore, Megan's Law ceased to exist on January 1, 2008 and did not exist in 2009 when the alleged offense occurred, or in 2010 when Brunning was indicted and pled guilty. Furthermore, as discussed in greater detail above, this Court has never held that the Megan's Law requirements reinstated in *Bodyke* for offenders like Brunning were to be applied retroactively.

Accordingly, because neither Megan's Law nor the AWA could be applied to Brunning at the time of the alleged offense and plea, he did not have a duty to register at that time.

c. The State's arguments.

It is not surprising that this reality is unsatisfying to the State. In its first attempt to address the gap in the law, the State argues that the AWA both amended and repealed Megan's Law, the amendment was unconstitutional, and, therefore the repeal was invalid. This argument conflicts with the legislative history of the AWA. Both Megan's Law and the AWA arose from federal efforts to create a strict national approach to sex offender registration. *See Bodyke* ¶¶ 7, 18-20; *Gingell*, ¶ 2; *Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, ¶ 16.

Each is a comprehensive legislative scheme to address registration. *Bodyke* ¶¶ 4-6, 18.

Furthermore, the AWA did not merely tinker at the edges of Megan's Law; rather, it repealed Megan's Law and changed Ohio's reporting and registration scheme so significantly that this Court held that, whereas Megan's Law was a remedial statute, the AWA is punitive. *Williams* ¶ 16.

Thus, the AWA was far more than an amendment to Megan's Law. Furthermore, the AWA was not declared unconstitutional—this Court only held that the reclassification provisions were unconstitutional. *Bodyke* ¶¶ 60-61. Indeed, this Court also held that severance was the appropriate remedy because the reclassification provisions could be excised without interfering with the primary objectives of the law. *Id.* ¶¶ 65-66. Accordingly, *Bodyke* did not render the repeal of Megan's Law invalid.

In support of its argument, the State cites *State v. Sullivan*, 90 Ohio St.3d 502, 739 N.E.2d 788 (2001). In *Sullivan*, this Court stated “[w]hen a court strikes down a statute as unconstitutional, and the offending statute replaced an existing law that had been repealed in the same bill that enacted the offending statute, the repeal is also invalid unless it clearly appears that the General Assembly meant the repeal to have effect even if the offending statute had never been passed.” *Id.* syllabus ¶ 2. *Sullivan* does not apply here. This Court did not strike down the entire AWA; it merely declared the reclassification provisions unconstitutional and excised them from the statute.

The State's arguments pursuant to R.C. 1.58(A) also fail. Section 1.58(A) states that the “reenactment, amendment, or repeal of a statute does not * * *: (1) Affect the prior operation of the statute or any prior action taken thereunder; (2) Affect any * * * obligation or liability previously acquired, accrued, accorded, or incurred thereunder.” Section 1.58(A) establishes the

general rule that repealing a statute does not affect prior obligations or liabilities acquired under the prior statute. However, that general rule does not apply when there is an express legislative intent to the contrary. *See Tague v. Bd. of Trustees*, 61 Ohio St.3d 136, 138 (1980) (explaining that R.C. 1.58(A)(2) operates “unless a contrary legislative intent was expressly stated.”). In this case, the General Assembly expressly stated its intent to the contrary by explicitly replacing an offender’s prior obligations under Megan’s Law with new obligations under the AWA and then applying the new obligations retroactively. *See* R.C. 2950.031; R.C. 2950.032. Indeed, as this Court explained in *Bodyke*, the statutory purpose of the AWA was to create a unified statutory scheme for sex offender registration, and the reclassification provisions explicitly establish that that regime applies retroactively and replaces any and all Megan’s Law obligations for offenders like Brunning. Accordingly, the State’s R.C. 1.58(A) argument is a red herring.

d. Conclusion: Brunning was not subject to any reporting law at the time of the indictment and plea.

For the foregoing reasons, Brunning was not subject to either Megan’s Law or the AWA at the time of the indictment and plea in this case. Therefore, it is irrelevant whether Brunning could have been convicted under Megan’s Law. The Eighth District properly vacated his convictions.

2. Wrong Law, Different Penalties: Because the penalties for a violation of the AWA differ from the Megan’s Law penalties, the State must prosecute under the correct statutory regime even if the same conduct could support a conviction under either regime.

As discussed above, there is no doubt that the State prosecuted Brunning under the AWA. *See Gingell*, ¶ 8. The State argues that it makes no difference whether Brunning was prosecuted under the AWA or Megan’s law because the *registration duties* were the same. Even assuming *arguendo* that Brunning could have been prosecuted under Megan’s Law, the State’s argument

ignores the fact that the *registration penalties* were very different. While Brunning suspects the State will argue that Megan's Law offenders should be subjected to the enhanced penalties, this important question should not be addressed in the context of a wrongful prosecution under the AWA. Rather, the question of which penalty provisions apply to Megan's Law offenders should, like all legal issues, be litigated below.

Nevertheless, to the extent this Court elects to address this issue here, Brunning maintains that the enhanced penalty provisions cannot be applied to him. When Brunning was classified as a sexually oriented offender in 1997, the trial court imposed a 10-year registration obligation and any violation of that obligation was a fifth-degree felony. *Former R.C. 2950.99*. By 2009, when Brunning purportedly violated his enhanced registration obligations under the AWA, a violation of those enhanced obligations was a felony of the first degree. *R.C. 2950.99*. These enhanced penalty provisions were never intended to apply to Megan's Law offenders and cannot apply to them as a matter of constitutional law.

As an initial matter, it is clear that the General Assembly did not intend to the enhanced penalty provisions to apply to Megan's Law offenders because the General Assembly had repealed Megan's Law in its entirety. Given that Megan's Law had been repealed at the same time that the enhanced penalty provisions associated with the AWA were enacted, those enhanced penalty provisions are intrinsically related to the AWA registration scheme. Moreover, *R.C. 1.58* undermines any argument that the newly enhanced penalty provisions can be applied to Megan's Law offenders. If the State is correct that *1.58(A)(2)* applies, then it applies with equal force to the registration *obligation* that arose under the "prior operation of the statute" and to the *liability for* failing to adhere to that obligation that arose under the "prior operation of the state." When this Court "reinstat[e]" the Megan's Law classifications and "registration orders

imposed previously by judges, *Boydke*, 126 Ohio St. 3d at 281, it necessarily reinstated the criminal penalties associated with a violation of those orders, *State v. Page*, Cuyahoga App. No. 94369, 2011 Ohio 83, ¶ 12, *appeal not allowed by* 128 Ohio St. 3d 1500 and *reconsideration denied by* 129 Ohio St. 3d 1455.

Given that Megan's Law offender's registration obligations arise from reinstated court orders and *not* the existing versions of Chapter 2950, the present penalty provisions in R.C. 2950.99 cannot apply to them. As a Megan's Law offender, Lindell Brunning cannot violate a "prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code" because those are references to the AWA, the current statutory scheme in effect. If the General Assembly wishes to apply R.C. 2950.99 to Megan's Law offenders as well, it would need to do so explicitly.⁴ For instance, the General Assembly would have to amend R.C. 2950.99 to provide:

[W]hoever violates a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code *or a prohibition of those same sections as they existed prior to January 1, 2008 [the effective date of Senate Bill 10]*.

Additionally, the application of the enhanced penalty provisions to a Megan's Law offender would be unconstitutional for three reasons: 1) Mr. Brunning's registration order would be unconstitutionally modified; 2) the increased punishment would violate the Retroactivity Clause of the Ohio Constitution; and 3) the increased punishment would violate the Ex Post Facto Clause of the United States Constitution. As this Court held in *Bodyke*, the General Assembly violates the separation of powers doctrine when it "interferes with the judicial power by requiring the reopening of final judgments." 126 Ohio St. 3d at 278. Here, a trial court's registration order under Megan's Law carried a specific punishment for non-compliance; any

⁴ While such an amendment would certainly expand the reach of the enhanced penalty provisions to include Megan's Law offenders as matter of statutory law, Brunning does not concede that such an amendment would be constitutional.

increase in the punishment improperly interferes with that prior court order. A retroactive application of the enhanced penalty provisions would unconstitutionally increase the punishment for failing to comply with a *preexisting, continuous* registration obligation imposed more than 10 years earlier. *See generally Williams*, 129 Ohio St. 3d 344. To apply the enhanced penalty provisions to Brunning's noncompliance with his prior court-ordered classification under Megan's law would unconstitutionally modify his registration order and increase the punishment associated with his preexisting registration obligations.

3. Wrong Law: The State must prosecute under the correct statutory regime even if the same conduct could support a conviction under either regime and the potential punishment is the same.

Finally, it is important to keep in mind that the State does *not* argue that it can prosecute Brunning based on his unconstitutional reclassification as an AWA Tier III sex offender. It simply argues that Brunning would have been convicted even if he had been prosecuted based on his Megan's Law classification as a sexually oriented offender. However, Brunning's Megan's Law classification was not the basis for the indictment and there is no shortcut to a proper prosecution. Improper convictions cannot be sustained merely because the defendant could have been prosecuted differently. Due process does not allow the State to indict under one statute and then, once that statute has been found unconstitutional as applied to the defendant, maintain the conviction based on a different statute.

The State's argument fails to recognize that Mr. Brunning was never indicted for violating the registration requirements of Megan's Law. Section 10, Article I of the Ohio Constitution guarantees that:

[N]o person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury.

The right to indictment applies to all felonies. R.C. 2941.021. The right to indictment guarantees a defendant that a grand jury will have found probable cause to believe that every essential fact in the indictment exists. *State v. Headley*, 6 Ohio St.3d 475, 478-79, 453 N.E.2d 716 (1983) (State not permitted to amend indictment by specifying identity of drug because identity of drug was essential element of the charge of drug trafficking). This right is also part of the federal and state constitutional rights to due process. *State v. Vitale*, 96 Ohio App.3d 695, 701, 645 N.E.2d 1277 (1994). *Accord, Hewitt v. Helms*, 459 U.S. 460, 466 (1983) (where a state has created a liberty interest, it is constitutionally obliged to provide corresponding procedural protections),

Here, the essential facts necessary to indict Mr. Brunning for violating *Megan's Law's* registration requirements would have required the grand jury to review the specific obligations imposed upon Brunning pursuant to *Megan's Law*. There is no evidence that the grand jury was given any evidence involving these essential facts. Indeed, that the State and trial court only discusses Mr. Brunning's AWA reporting requirement implies that the grand jury did not consider evidence regarding Mr. Brunning's *Megan's Law* reporting requirements.

Accordingly, if this Court were to accept the State's suggestion that Mr. Brunning can nonetheless be guilty of Counts Two and Three as *Megan's Law* violations, this Court would have to substitute its judgment for that of the grand jury, in violation of the fundamental right to indictment.

Ultimately, the Eighth District's decision stands for the uncontroversial proposition that an unconstitutional classification cannot serve as the basis for a criminal prosecution. Several appellate districts have reached the same conclusion with respect to criminal prosecutions predicated on unconstitutional reclassifications under the AWA. *State v. Owens*, 2d Dist. No. 23820, 2010-Ohio-4923 ¶ 17; *State v. Godfrey*, 9th Dist. No. 25187, 2010-Ohio-6454 ¶¶ 5-7. The

issue of whether Brunning complied with his Megan's Law obligations was not before the Eighth District. Even if the State *could* prosecute Brunning for violating his registration obligations under Megan's Law, it has not done so. A conviction based on an unconstitutional classification cannot stand merely because the defendant may be subject to prosecution under a different statutory scheme.

In sum, the Eighth District properly applied *Bodyke* to Brunning's prosecution under the AWA in holding that his unconstitutional reclassification could not serve as the basis for a criminal prosecution. Accordingly, given that it is beyond dispute that Brunning was prosecuted under the AWA, this Court should simply remand for further proceedings. It is premature to litigate the question of whether Megan's Law obligations apply when it is perfectly clear that Brunning was not prosecuted pursuant to those obligations.

CONCLUSION

WHEREFORE, based on the foregoing, Appellee Lindell Brunning prays that this Honorable Court reject the State's propositions of law and affirm the decision of the Eighth District Court of Appeals. More specifically, Brunning requests that this Court take one of the following actions, which are set forth in order of priority:

- remand this case to the trial court, without addressing the State's propositions of law, based on the State and trial court's clear violation of the plea agreement;
- remand this case to the trial court, without addressing the State's propositions of law, because it is undisputed Brunning's plea and conviction was invalid with respect to the failure to register offense, and the plea agreement cannot be analyzed in a piecemeal fashion;
- affirm the Opinion Below because no valid registration law applicable to Brunning was in effect at the time of the alleged offense and plea in this case;
- affirm the Opinion Below because Brunning was prosecuted under the AWA, which was unconstitutional as applied to Brunning at the time of the alleged offense and plea in this case;

- affirm the Opinion Below because the State's propositions of law are not meritorious for all of the reasons discussed above.

Respectfully submitted,


NATHANIEL J. MCDONALD, ESQ. 0062932
Assistant Cuyahoga County Public Defender

CERTIFICATE OF SERVICE

A copy of the foregoing Appellee's Merit Brief was served via ordinary U.S. Mail this 6th day of February, 2012 upon William D. Mason, 1200 Ontario Street, 9th floor; Cleveland, Ohio 44112.


NATHANIEL J. MCDONALD, ESQ.

APPENDIX

2950.031 Tier-classification of registered sex offenders.

(A)(1) At any time on or after July 1, 2007, and not later than December 1, 2007, the attorney general shall determine for each offender or delinquent child who prior to December 1, 2007, has registered a residence, school, institution of higher education, or place of employment address pursuant to section 2950.04, 2950.041, or 2950.05 of the Revised Code the offender's or delinquent child's new classification as a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender under Chapter 2950. of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008, the offender's or delinquent child's duties under Chapter 2950. of the Revised Code as so changed, and, regarding a delinquent child, whether the child is a public registry-qualified juvenile offender registrant.

(2) At any time on or after July 1, 2007, and not later than December 1, 2007, the attorney general shall send to each offender or delinquent child who prior to December 1, 2007, has registered a residence, school, institution of higher education, or place of employment address pursuant to section 2950.04, 2950.041, or 2950.05 of the Revised Code a registered letter that contains the information described in this division. The registered letter shall be sent return receipt requested to the last reported address of the person and, if the person is a delinquent child, the last reported address of the parents of the delinquent child. The letter sent to an offender or to a delinquent child and the delinquent child's parents pursuant to this division shall notify the offender or the delinquent child and the delinquent child's parents of all of the following:

(a) The changes in Chapter 2950. of the Revised Code that will be implemented on January 1, 2008;

(b) Subject to division (A)(2)(c) of this section, the offender's or delinquent child's new classification as a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender under Chapter 2950. of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008, the offender's or delinquent child's duties under Chapter 2950. of the Revised Code as so changed and the duration of those duties, whether the delinquent child is classified a public registry-qualified juvenile offender registrant, and the information specified in division (B) of section 2950.03 of the Revised Code to the extent it is relevant to the offender or delinquent child;

(c) The fact that the offender or delinquent child has a right to a hearing as described in division (E) of this section, the procedures for requesting the hearing, and the period of time within which the request for the hearing must be made.

(d) If the offender's or delinquent child's duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code is scheduled to terminate on or after July 1, 2007, and prior to January 1, 2008, under the version of section 2950.07 of the Revised Code that is in effect prior to January 1, 2008, a summary of the provisions of section 2950.033 of the Revised Code and the application of those provisions to the offender or delinquent child, provided that this division applies to a delinquent child only if the child is in a category specified in division (C) of section 2950.033 of the Revised Code.

(3) The attorney general shall make the determinations described in division (A)(1) of this section for each offender or delinquent child who has registered an address as described in that division, even if the offender's duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code is scheduled to terminate prior to January 1, 2008, under the version of section 2950.07 of the

2950.032 Tier-classification of incarcerated sex offenders.

(A)(1) At any time on or after July 1, 2007, and not later than December 1, 2007, the attorney general shall do all of the following:

(a) For each offender who on December 1, 2007, will be serving a prison term in a state correctional institution for a sexually oriented offense or child-victim oriented offense, determine the offender's classification relative to that offense as a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender under Chapter 2950. of the Revised Code as it will exist under the changes in that chapter that will be implemented on January 1, 2008, and the offender's duties under Chapter 2950. of the Revised Code as so changed and provide to the department of rehabilitation and correction a document that describes that classification and those duties;

(b) For each delinquent child who has been classified a juvenile offender registrant relative to a sexually oriented offense or child-victim oriented offense and who on December 1, 2007, will be confined in an institution of the department of youth services for the sexually oriented offense or child-victim oriented offense, determine the delinquent child's classification relative to that offense as a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender under Chapter 2950. of the Revised Code as it will exist under the changes in that chapter that will be implemented on January 1, 2008, the delinquent child's duties under Chapter 2950. of the Revised Code as so changed, and whether the delinquent child is a public registry-qualified juvenile offender registrant and provide to the department a document that describes that classification, those duties, and whether the delinquent child is a public registry-qualified juvenile offender registrant.

(c) For each offender and delinquent child described in division (A)(1)(a) or (b) of this section, determine whether the attorney general is required to send a registered letter to that offender or that delinquent child and delinquent child's parents pursuant to section 2950.031 of the Revised Code relative to the sexually oriented offense or child-victim oriented offense for which the offender or delinquent child is serving the prison term or is confined and, if the attorney general is required to send such a letter to that offender or that delinquent child and delinquent child's parents relative to that offense, include in the document provided to the department of rehabilitation and correction or the department of youth services under division (A)(1)(a) or (b) of this section a conspicuous notice that the attorney general will be sending the offender or delinquent child and delinquent child's parent the registered letter and that the department is not required to provide to the offender or delinquent child the written notice described in division (A)(2) of this section.

(2) At any time on or after July 1, 2007, and not later than December 1, 2007, except as otherwise described in this division, the department of rehabilitation and correction shall provide to each offender described in division (A)(1)(a) of this section and the department of youth services shall provide to each delinquent child described in division (A)(1)(b) of this section and to the delinquent child's parents a written notice that contains the information described in this division. The department of rehabilitation and correction and the department of youth services are not required to provide the written notice to an offender or a delinquent child and the delinquent child's parents if the attorney general included in the document provided to the particular department under division (A)(1)(a) or (b) of this section notice that the attorney general will be sending that offender or that delinquent child

and the delinquent child's parents a registered letter and that the department is not required to provide to that offender or that delinquent child and parents the written notice. The written notice provided to an offender or a delinquent child and the delinquent child's parents pursuant to this division shall notify the offender or delinquent child of all of the following:

- (a) The changes in Chapter 2950. of the Revised Code that will be implemented on January 1, 2008;
- (b) Subject to division (A)(2)(c) of this section, the offender's or delinquent child's classification as a tier I sex offender/child-victim offender, a tier II sex offender/child-victim offender, or a tier III sex offender/child-victim offender under Chapter 2950. of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008, the offender's or delinquent child's duties under Chapter 2950. of the Revised Code as so changed and the duration of those duties, whether the delinquent child is classified a public registry-qualified juvenile offender registrant, and the information specified in division (B) of section 2950.03 of the Revised Code to the extent it is relevant to the offender or delinquent child;
- (c) The fact that the offender or delinquent child has a right to a hearing as described in division (E) of this section, the procedures for requesting the hearing, and the period of time within which the request for the hearing must be made;
- (d) If the offender's or delinquent child's duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code is scheduled to terminate on or after July 1, 2007, and prior to January 1, 2008, under the version of section 2950.07 of the Revised Code that is in effect prior to January 1, 2008, a summary of the provisions of section 2950.033 of the Revised Code and the application of those provisions to the offender or delinquent child, provided that this division applies regarding a delinquent child only if the child is in a category specified in division (A) of section 2950.033 of the Revised Code.
- (3) The attorney general shall make the determinations described in divisions (A)(1)(a) and (b) of this section for each offender or delinquent child who is described in either of those divisions even if the offender's duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code is scheduled to terminate prior to January 1, 2008, under the version of section 2950.07 of the Revised Code that is in effect prior to that date, or the delinquent child is in a category specified in division (C) of section 2950.033 of the Revised Code, and the child's duty to comply with those sections is scheduled to terminate prior to January 1, 2008, under the version of section 2950.07 of the Revised Code that is in effect prior to that date. The department of rehabilitation and correction shall provide to each offender described in division (A)(1)(a) of this section and the department of youth services shall provide to each delinquent child described in division (A)(1)(b) of this section the notice described in division (A)(2) of this section, even if the offender's duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code is scheduled to terminate prior to January 1, 2008, under the version of section 2950.07 of the Revised Code that is in effect prior to that date, or the delinquent child is in a category specified in division (C) of section 2950.033 of the Revised Code, and the child's duty to comply with those sections is scheduled to terminate prior to January 1, 2008, under the version of section 2950.07 of the Revised Code that is in effect prior to that date. Section 2950.033 of the Revised Code applies regarding any offender described in division (A)(1)(a) or (b) of this section whose duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code is scheduled to terminate prior to January 1, 2008, under the version of section 2950.07 of the Revised Code that is in effect prior to that date and any delinquent child who is in a category specified in division (A) of section 2950.033 of the Revised Code and whose duty to comply with those sections is

scheduled to terminate prior to January 1, 2008, under the version of section 2950.07 of the Revised Code that is in effect prior to that date.

(B) If on or after December 2, 2007, an offender commences a prison term in a state correctional institution or a delinquent child commences confinement in an institution of the department of youth services for a sexually oriented offense or a child-victim oriented offense and if the offender or delinquent child was convicted of, pleaded guilty to, or was classified a juvenile offender registrant relative to the sexually oriented offense or child-victim oriented offense on or before that date, as soon as practicable, the department of rehabilitation and correction or the department of youth services, as applicable, shall contact the attorney general, inform the attorney general of the commencement of the prison term or institutionalization, and forward to the attorney general information and material that identifies the offender or delinquent child and that describes the sexually oriented offense resulting in the prison term or institutionalization, the facts and circumstances of it, and the offender's or delinquent child's criminal or delinquency history. Within fourteen days after being so informed of the commencement of the prison term or institutionalization and receiving the information and material specified in this division, the attorney general shall determine for the offender or delinquent child all of the matters specified in division (A)(1)(a), (b), or (c) of this section and immediately provide to the appropriate department a document that describes the offender's or delinquent child's classification and duties as so determined.

Upon receipt from the attorney general of a document described in this division that pertains to an offender or delinquent child, the department of rehabilitation and correction shall provide to the offender or the department of youth services shall provide to the delinquent child, as applicable, a written notice that contains the information specified in division (A)(2) of this section.

(C) If, on or after July 1, 2007, and prior to January 1, 2008, an offender is convicted of or pleads guilty to a sexually oriented offense or a child-victim oriented offense and the court does not sentence the offender to a prison term for that offense or if, on or after July 1, 2007, and prior to January 1, 2008, a delinquent child is classified a juvenile offender registrant relative to a sexually oriented offense or a child-victim oriented offense and the juvenile court does not commit the child to the custody of the department of youth services for that offense, the court at the time of sentencing or the juvenile court at the time specified in division (B) of section 2152.82, division (C) of section 2152.83, division (C) of section 2152.84, division (E) of section 2152.85, or division (A) of section 2152.86 of the Revised Code, whichever is applicable, shall do all of the following:

(1) Provide the offender or the delinquent child and the delinquent child's parents with the notices required under section 2950.03 of the Revised Code, as it exists prior to January 1, 2008, regarding the offender's or delinquent child's duties under this chapter as it exists prior to that date;

(2) Provide the offender or the delinquent child and the delinquent child's parents with a written notice that contains the information specified in divisions (A)(2)(a) and (b) of this section;

(3) Provide the offender or the delinquent child and the delinquent child's parents a written notice that clearly indicates that the offender or delinquent child is required to comply with the duties described in the notice provided under division (C)(1) of this section until January 1, 2008, and will be required to comply with the duties described in the notice provided under division (C)(2) of this section on and after that date.

(D)(1) Except as otherwise provided in this division, the officer or employee of the department of rehabilitation and correction or the department of youth services who provides an offender or a

delinquent child and the delinquent child's parents with the notices described in division (A)(2) or (B) of this section shall require the offender or delinquent child to read and sign a form stating that the changes in Chapter 2950. of the Revised Code that will be implemented on January 1, 2008, the offender's or delinquent child's classification as a tier I sex offender, a tier II sex offender, or a tier III sex offender, the offender's or delinquent child's duties under Chapter 2950. of the Revised Code as so changed and the duration of those duties, the delinquent child's classification as a public registry-qualified juvenile offender registrant if applicable, the information specified in division (B) of section 2950.03 of the Revised Code to the extent it is relevant to the offender or delinquent child, and the right to a hearing, procedures for requesting the hearing, and period of time within which the request for the hearing must be made have been explained to the offender or delinquent child.

Except as otherwise provided in this division, the judge who provides an offender or delinquent child with the notices described in division (C) of this section shall require the offender or delinquent child to read and sign a form stating that all of the information described in divisions (C)(1) to (3) of this section has been explained to the offender or delinquent child.

If the offender or delinquent child is unable to read, the official, employee, or judge shall certify on the form that the official, employee, or judge specifically informed the offender or delinquent child of all of that information and that the offender or delinquent child indicated an understanding of it.

(2) After an offender or delinquent child has signed the form described in division (D)(1) of this section or the official, employee, or judge has certified on the form that the form has been explained to the offender or delinquent child and that the offender or delinquent child indicated an understanding of the specified information, the official, employee, or judge shall give one copy of the form to the offender or delinquent child, within three days shall send one copy of the form to the bureau of criminal identification and investigation in accordance with the procedures adopted pursuant to section 2950.13 of the Revised Code, and shall send one copy of the form to the sheriff of the county in which the offender or delinquent child expects to reside and one copy to the prosecutor who handled the case in which the offender or delinquent child was convicted of, pleaded guilty to, or was adjudicated a delinquent child for committing the sexually oriented offense or child-victim oriented offense that resulted in the offender's or child's registration duty under section 2950.04 or 2950.041 of the Revised Code.

(E) An offender or delinquent child who is provided a notice under division (A)(2) or (B) of this section may request as a matter of right a court hearing to contest the application to the offender or delinquent child of the new registration requirements under Chapter 2950. of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008. The offender or delinquent child may contest the matters that are identified in division (E) of section 2950.031 of the Revised Code. To request the hearing, an offender or delinquent child who is provided a notice under division (A)(2) of this section shall file a petition with the appropriate court not later than the date that is sixty days after the offender or delinquent child is provided the notice under that division, and an offender or delinquent child who is provided a notice under division (B) of this section shall file a petition with the appropriate court not later than the date that is sixty days after the offender or delinquent child is provided the notice under that division. The request for the hearing shall be made in the manner and with the court specified in division (E) of section 2950.031 of the Revised Code, and, except as otherwise provided in this division, the provisions of that division regarding the service of process and notice regarding the hearing, the conduct of the hearing, the determinations to be made at the hearing, and appeals of those determinations also apply to a hearing requested under this division. If a hearing is requested as described in this division, the offender or delinquent child shall appear at the

hearing by video conferencing equipment if available and compatible, except that, upon the court's own motion or the motion of the offender or delinquent child or the prosecutor representing the interests of the state and a determination by the court that the interests of justice require that the offender or delinquent child be present, the court may permit the offender or delinquent child to be physically present at the hearing. An appearance by video conferencing equipment pursuant to this division has the same force and effect as if the offender or delinquent child were physically present at the hearing. The provisions of division (E) of section 2950.031 of the Revised Code regarding the effect of a failure to timely request a hearing also apply to a failure to timely request a hearing under this division.

If a juvenile court issues an order under division (A)(2) or (3) of section 2152.86 of the Revised Code that classifies a delinquent child a public-registry qualified juvenile offender registrant and if the child's delinquent act was committed prior to January 1, 2008, a challenge to the classification contained in the order shall be made pursuant to division (D) of section 2152.86 of the Revised Code.

Effective Date: 2007 SB10 07-01-2007

2950.06 Periodic verification of current residence address.

(A) An offender or delinquent child who is required to register a residence address pursuant to division (A)(2), (3), or (4) of section 2950.04 or 2950.041 of the Revised Code shall periodically verify the offender's or delinquent child's current residence address, and an offender or public registry-qualified juvenile offender registrant who is required to register a school, institution of higher education, or place of employment address pursuant to any of those divisions shall periodically verify the address of the offender's or public registry-qualified juvenile offender registrant's current school, institution of higher education, or place of employment, in accordance with this section. The frequency of verification shall be determined in accordance with division (B) of this section, and the manner of verification shall be determined in accordance with division (C) of this section.

(B) The frequency with which an offender or delinquent child must verify the offender's or delinquent child's current residence, school, institution of higher education, or place of employment address pursuant to division (A) of this section shall be determined as follows:

(1) Regardless of when the sexually oriented offense or child-victim oriented offense for which the offender or delinquent child is required to register was committed, if the offender or delinquent child is a tier I sex offender/child-victim offender, the offender shall verify the offender's current residence address or current school, institution of higher education, or place of employment address, and the delinquent child shall verify the delinquent child's current residence address, in accordance with division (C) of this section on each anniversary of the offender's or delinquent child's initial registration date during the period the offender or delinquent child is required to register.

(2) Regardless of when the sexually oriented offense or child-victim oriented offense for which the offender or delinquent child is required to register was committed, if the offender or delinquent child is a tier II sex offender/child-victim offender, the offender shall verify the offender's current residence address or current school, institution of higher education, or place of employment address, and the delinquent child shall verify the delinquent child's current residence address, in accordance with division (C) of this section every one hundred eighty days after the offender's or delinquent child's initial registration date during the period the offender or delinquent child is required to register.

(3) Regardless of when the sexually oriented offense or child-victim oriented offense for which the offender or delinquent child is required to register was committed, if the offender or delinquent child is a tier III sex offender/child-victim offender, the offender shall verify the offender's current residence address or current school, institution of higher education, or place of employment address, and the delinquent child shall verify the delinquent child's current residence address and, if the delinquent child is a public registry-qualified juvenile offender registrant, the current school, institution of higher education, or place of employment address, in accordance with division (C) of this section every ninety days after the offender's or delinquent child's initial registration date during the period the offender or delinquent child is required to register.

(4) If, prior to January 1, 2008, an offender or delinquent child registered with a sheriff under a duty imposed under section 2950.04 or 2950.041 of the Revised Code as a result of a conviction of, plea of guilty to, or adjudication as a delinquent child for committing a sexually oriented offense or a child-victim oriented offense as those terms were defined in section 2950.01 of the Revised Code prior to January 1, 2008, the duty to register that is imposed on the offender or delinquent child pursuant to

section 2950.04 or 2950.041 of the Revised Code on and after January 1, 2008, is a continuation of the duty imposed upon the offender prior to January 1, 2008, under section 2950.04 or 2950.041 of the Revised Code and, for purposes of divisions (B)(1), (2), and (3) of this section, the offender's initial registration date related to that offense is the date on which the offender initially registered under section 2950.04 or 2950.041 of the Revised Code.

(C)(1) An offender or delinquent child who is required to verify the offender's or delinquent child's current residence, school, institution of higher education, or place of employment address pursuant to division (A) of this section shall verify the address with the sheriff with whom the offender or delinquent child most recently registered the address by personally appearing before the sheriff or a designee of the sheriff, no earlier than ten days before the date on which the verification is required pursuant to division (B) of this section and no later than the date so required for verification, and completing and signing a copy of the verification form prescribed by the bureau of criminal identification and investigation. The sheriff or designee shall sign the completed form and indicate on the form the date on which it is so completed. The verification required under this division is complete when the offender or delinquent child personally appears before the sheriff or designee and completes and signs the form as described in this division.

(2) To facilitate the verification of an offender's or delinquent child's current residence, school, institution of higher education, or place of employment address, as applicable, under division (C)(1) of this section, the sheriff with whom the offender or delinquent child most recently registered the address may mail a nonforwardable verification form prescribed by the bureau of criminal identification and investigation to the offender's or delinquent child's last reported address and to the last reported address of the parents of the delinquent child, with a notice that conspicuously states that the offender or delinquent child must personally appear before the sheriff or a designee of the sheriff to complete the form and the date by which the form must be so completed. Regardless of whether a sheriff mails a form to an offender or delinquent child and that child's parents, each offender or delinquent child who is required to verify the offender's or delinquent child's current residence, school, institution of higher education, or place of employment address, as applicable, pursuant to division (A) of this section shall personally appear before the sheriff or a designee of the sheriff to verify the address in accordance with division (C)(1) of this section.

(D) The verification form to be used under division (C) of this section shall contain all of the following:

(1) Except as provided in division (D)(2) of this section, the current residence address of the offender or delinquent child, 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 verification or if the offender or delinquent child knows at the time of verification that the offender or delinquent child will be commencing employment with that employer subsequent to verification, 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 verification or if the offender or public registry-qualified juvenile offender registrant knows at the time of verification that the offender will be commencing attendance at that school or institution subsequent to verification, and any other information required by the bureau of criminal identification and investigation.

(2) Regarding an offender or public registry-qualified juvenile offender registrant who is verifying a current school, institution of higher education, or place of employment address, 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 and any other information required by the bureau of criminal identification and investigation.

(E) Upon an offender's or delinquent child's personal appearance and completion of a verification form under division (C) of this section, a sheriff promptly shall forward a copy of the verification form to the bureau of criminal identification and investigation in accordance with the forwarding procedures adopted by the attorney general pursuant to section 2950.13 of the Revised Code. If an offender or public registry-qualified juvenile offender registrant verifies a school, institution of higher education, or place of employment address, or provides a school or institution of higher education address under division (D)(1) of this section, the sheriff also shall provide notice to the law enforcement agency with jurisdiction over the premises of the school, institution of higher education, or place of employment of the offender's or public registry-qualified juvenile offender registrant's name and that the offender or public registry-qualified juvenile offender registrant has verified or provided that address as a place at which the offender or public registry-qualified juvenile offender registrant attends school or an institution of higher education or at which the offender or public registry-qualified juvenile offender registrant is employed. The bureau shall include all information forwarded to it under this division in the state registry of sex offenders and child-victim offenders established and maintained under section 2950.13 of the Revised Code.

(F) No person who is required to verify a current residence, school, institution of higher education, or place of employment address, as applicable, pursuant to divisions (A) to (C) of this section shall fail to verify a current residence, school, institution of higher education, or place of employment address, as applicable, in accordance with those divisions by the date required for the verification as set forth in division (B) of this section, provided that no person shall be prosecuted or subjected to a delinquent child proceeding for a violation of this division, and that no parent, guardian, or custodian of a delinquent child shall be prosecuted for a violation of section 2919.24 of the Revised Code based on the delinquent child's violation of this division, prior to the expiration of the period of time specified in division (G) of this section.

(G)(1) If an offender or delinquent child fails to verify a current residence, school, institution of higher education, or place of employment address, as applicable, as required by divisions (A) to (C) of this section by the date required for the verification as set forth in division (B) of this section, the sheriff with whom the offender or delinquent child is required to verify the current address, on the day following that date required for the verification, shall send a written warning to the offender or to the delinquent child and that child's parents, at the offender's or delinquent child's and that child's parents' last known residence, school, institution of higher education, or place of employment address, as applicable, regarding the offender's or delinquent child's duty to verify the offender's or delinquent child's current residence, school, institution of higher education, or place of employment address, as applicable.

The written warning shall do all of the following:

- (a) Identify the sheriff who sends it and the date on which it is sent;
- (b) State conspicuously that the offender or delinquent child has failed to verify the offender's or public registry-qualified juvenile offender registrant's current residence, school, institution of higher education, or place of employment address or the current residence address of a delinquent child who is not a public registry-qualified juvenile offender registrant by the date required for the verification;

(c) Conspicuously state that the offender or delinquent child has seven days from the date on which the warning is sent to verify the current residence, school, institution of higher education, or place of employment address, as applicable, with the sheriff who sent the warning;

(d) Conspicuously state that a failure to timely verify the specified current address or addresses is a felony offense;

(e) Conspicuously state that, if the offender or public registry-qualified juvenile offender registrant verifies the current residence, school, institution of higher education, or place of employment address or the delinquent child who is not a public registry-qualified juvenile offender registrant verifies the current residence address with that sheriff within that seven-day period, the offender or delinquent child will not be prosecuted or subjected to a delinquent child proceeding for a failure to timely verify a current address and the delinquent child's parent, guardian, or custodian will not be prosecuted based on a failure of the delinquent child to timely verify an address;

(f) Conspicuously state that, if the offender or public registry-qualified juvenile offender registrant does not verify the current residence, school, institution of higher education, or place of employment address or the delinquent child who is not a public registry-qualified juvenile offender registrant does not verify the current residence address with that sheriff within that seven-day period, the offender or delinquent child will be arrested or taken into custody, as appropriate, and prosecuted or subjected to a delinquent child proceeding for a failure to timely verify a current address and the delinquent child's parent, guardian, or custodian may be prosecuted for a violation of section 2919.24 of the Revised Code based on the delinquent child's failure to timely verify a current residence address.

(2) If an offender or delinquent child fails to verify a current residence, school, institution of higher education, or place of employment address, as applicable, as required by divisions (A) to (C) of this section by the date required for the verification as set forth in division (B) of this section, the offender or delinquent child shall not be prosecuted or subjected to a delinquent child proceeding for a violation of division (F) of this section, and the delinquent child's parent, guardian, or custodian shall not be prosecuted for a violation of section 2919.24 of the Revised Code based on the delinquent child's failure to timely verify a current residence address and, if the delinquent child is a public registry-qualified juvenile offender registrant, the current school, institution of higher education, or place of employment address, as applicable, unless the seven-day period subsequent to that date that the offender or delinquent child is provided under division (G)(1) of this section to verify the current address has expired and the offender or delinquent child, prior to the expiration of that seven-day period, has not verified the current address. Upon the expiration of the seven-day period that the offender or delinquent child is provided under division (G)(1) of this section to verify the current address, if the offender or delinquent child has not verified the current address, all of the following apply:

(a) The sheriff with whom the offender or delinquent child is required to verify the current residence, school, institution of higher education, or place of employment address, as applicable, promptly shall notify the bureau of criminal identification and investigation of the failure.

(b) The sheriff with whom the offender or delinquent child is required to verify the current residence, school, institution of higher education, or place of employment address, as applicable, the sheriff of the county in which the offender or delinquent child resides, the sheriff of the county in which is located the offender's or public registry-qualified juvenile offender registrant's school, institution of higher education, or place of employment address that was to be verified, or a deputy of the appropriate

sheriff, shall locate the offender or delinquent child, promptly shall seek a warrant for the arrest or taking into custody, as appropriate, of the offender or delinquent child for the violation of division (F) of this section and shall arrest the offender or take the child into custody, as appropriate.

(c) The offender or delinquent child is subject to prosecution or a delinquent child proceeding for the violation of division (F) of this section, and the delinquent child's parent, guardian, or custodian may be subject to prosecution for a violation of section 2919.24 of the Revised Code based on the delinquent child's violation of that division.

(H) An offender or public registry-qualified juvenile offender registrant who is required to verify the offender's or public registry-qualified juvenile offender registrant's current residence, school, institution of higher education, or place of employment address pursuant to divisions (A) to (C) of this section and a delinquent child who is not a public registry-qualified juvenile offender registrant who is required to verify the delinquent child's current residence address pursuant to those divisions shall do so for the period of time specified in section 2950.07 of the Revised Code.

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Former R.C. 2950.99 (2003)

§ 2950.99 Penalties.

(A) Whoever violates a prohibition in section 2950.04, 2950.05, or 2950.06 of the Revised Code is guilty of a felony of the fifth degree 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 felony if committed by an adult, and a misdemeanor of the first degree 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 misdemeanor if committed by an adult. In addition to any penalty or sanction imposed for the violation, if the offender or delinquent child is on probation or parole, is subject to one or more post-release control sanctions, or is subject to any other type of supervised release at the time of the violation, the violation shall constitute a violation of the terms and conditions of the probation, parole, post-release control sanction, or other type of supervised release.

(B) If a person violates a prohibition in section 2950.04, 2950.05, or 2950.06 of the Revised Code that applies to the person as a result of the person being adjudicated a delinquent child and being classified a juvenile sex offender registrant or is an out-of-state juvenile sex offender registrant, both of the following apply:

(1) If the violation occurs while the person is under eighteen years of age, the person is subject to proceedings under Chapter 2152. of the Revised Code based on the violation.

(2) If the violation occurs while the person is eighteen years of age or older, the person is subject to criminal prosecution based on the violation.

2950.99 Penalty.

(A)(1)(a) 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:

(i) 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 aggravated murder or murder if committed by an adult or a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the first degree.

(ii) If 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 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 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, or, if 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.

(iii) If 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 notification, or address verification requirement that was violated under the prohibition is a felony of the fifth degree or a misdemeanor if committed by an adult or a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the fourth degree.

(b) If the offender previously has been convicted of or pleaded guilty to, or previously has been adjudicated a delinquent child for committing, a violation of a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code, whoever violates a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code shall be punished as follows:

(i) 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 aggravated murder or murder if committed by an adult or a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the first degree.

(ii) If 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 notification, or address verification requirement that was violated under the prohibition is a felony of the first, second, or third 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 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, or, if 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.

(iii) If 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 notification, or address verification requirement that was violated under the prohibition is a felony of the fourth or fifth 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 third degree.

(iv) If 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 notification, or address verification requirement that was violated under the prohibition is a misdemeanor if committed by an adult or a comparable category of offense committed in another jurisdiction, the offender is guilty of a felony of the fourth degree.

(2)(a) In addition to any penalty or sanction imposed under division (A)(1) of this section or any other provision of law for a violation of a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code, if the offender or delinquent child is subject to a community control sanction, is on parole, is subject to one or more post-release control sanctions, or is subject to any other type of supervised release at the time of the violation, the violation shall constitute a violation of the terms and conditions of the community control sanction, parole, post-release control sanction, or other type of supervised release.

(b) In addition to any penalty or sanction imposed under division (A)(1)(b)(i), (ii), or (iii) of this section or any other provision of law for a violation of a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code, if the offender previously has been convicted of or pleaded guilty to, or previously has been adjudicated a delinquent child for committing, a violation of a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code when the most serious sexually oriented offense or child-victim oriented offense that was the basis of the requirement that was violated under the prohibition is a felony if committed by an adult or a comparable category of offense committed in another jurisdiction, the court imposing a sentence upon the offender shall impose a definite prison term of no less than three years. The definite prison term imposed under this section, subject to divisions (C) to (I) of section 2967.19 of the Revised Code, shall not be reduced to less than three years pursuant to any provision of Chapter 2967. or any other provision of the Revised Code.

(3) As used in division (A)(1) of this section, "comparable category of offense committed in another jurisdiction" means a sexually oriented offense or child-victim 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, that is a violation of an existing or former law of another state or the United States, an existing or former law applicable in a military court or in an Indian tribal court, or an existing or former law of any nation other than the United States, and that, if it had been committed in this state, would constitute or would have constituted aggravated murder or murder for purposes of division (A)(1)(a)(i) of this section, a felony of the first, second, third, or fourth degree for purposes of division (A)(1)(a)(ii) of this section, a felony of the fifth degree or a misdemeanor for purposes of division (A)(1)(a)(iii) of this section, aggravated murder or murder for purposes of division (A)(1)(b)(i) of this section, a felony of the first, second, or third degree for purposes of division (A)(1)(b)(ii) of this

section, a felony of the fourth or fifth degree for purposes of division (A)(1)(b)(iii) of this section, or a misdemeanor for purposes of division (A)(1)(b)(iv) of this section.

(B) If a person violates a prohibition in section 2950.04, 2950.041, 2950.05, or 2950.06 of the Revised Code that applies to the person as a result of the person being adjudicated a delinquent child and being classified a juvenile offender registrant or an out-of-state juvenile offender registrant, both of the following apply:

(1) If the violation occurs while the person is under eighteen years of age, the person is subject to proceedings under Chapter 2152. of the Revised Code based on the violation.

(2) If the violation occurs while the person is eighteen years of age or older, the person is subject to criminal prosecution based on the violation.

(C) Whoever violates division (C) of section 2950.13 of the Revised Code is guilty of a misdemeanor of the first degree.

Amended by 129th General Assembly File No. 29, HB 86, § 1, eff. 9/30/2011.

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