

ORIGINAL

IN THE SUPREME COURT OF OHIO
CASE NO. 2011-2126

STATE OF OHIO	:	
Plaintiff-Appellant	:	On Appeal from the Second Appellate
	:	District, Montgomery County, Ohio
v.	:	Case No. 24680
	:	
DONNY A. HOWARD	:	
Defendant-Appellee	:	

**BRIEF OF AMICUS CURIAE CUYAHOGA COUNTY PROSECUTOR'S
OFFICE ON BEHALF OF APPELLANT, STATE OF OHIO**

MATHIAS H. HECK, JR.
Montgomery County Prosecutor
JOHNNA M. SHIA (#0067685)
Assistant Prosecuting Attorney
P.O. Box 972
301 W. Third Street, 5th Floor
Dayton, Ohio 45422
(937) 225-4117

MASHALL G. LACHMAN (#0076791)
75 N. Pioneer Blvd.
Springboro, Ohio 45066
(937) 743-9443

COUNSEL FOR APPELLANT,
STATE OF OHIO

COUNSEL FOR APPELLEE,
DONNY HOWARD

WILLIAM D. MASON
Cuyahoga County Prosecuting Attorney
DANIEL T. VAN (#0084614)
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

COUNSEL FOR AMICUS CURIAE,
CUYAHOGA COUNTY PROSECUTOR'S OFFICE

RECEIVED
MAY 07 2012
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
MAY 07 2012
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE.....1

STATEMENT OF THE CASE AND RELEVANT FACTS3

LAW AND ARGUMENT.....4

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

CONCLUSION.....33

CERTIFICATE OF SERVICE34

TABLE OF AUTHORITIES

Cases

<i>Boswell v. State</i> , 12 th Dist. No. CA2010-01-006, 2010-Ohio-3134	25
<i>Calder v. Bull</i> (1798), 3 U.S. 386, 390.....	31
<i>Douglas v. State</i> , 878 N.E.2d 873 (Ind. App. 2007).....	16
<i>Green v. State</i> , 1st Dist. No. C-090650, 2011-Ohio-2933	25
<i>Kitze v. Virginia</i> , 23 Va.App. 213, 475 S.E.2d 830, 833 (1996)	16
<i>Landgraf v. USI Film Products</i> (1994), 511 U.S. 244, 269	30, 31
<i>Meinders v. Weber</i> , 604 N.W.2d 248, 259 2000 S.D. 2 (2000).....	17
<i>Pecorado v. Diocese of Rapid City</i> , 435 F.3d 870 (8 th Cir. 2006)	17
<i>Russell v. Gregoire</i> , 124 F.3d at 1088-1089.....	18
<i>Sewell v. State</i> , 181 Ohio App.3d 280, 2009-Ohio-872, 908 N.E.2d 995 (1 st Dist).....	25
<i>State v. Alexander</i> , 2 nd Dist. No. 24119, 2011-Ohio-4015	6
<i>State v. Bodyke</i> , 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753.....	3, 5, 6, 7, 8, 9, 10, 12, 14, 23, 24, 27, 28, 33
<i>State v. Bowling</i> , 1 st Dist. No. C-100323, 2011-Ohio-4946	13, 14
<i>State v. Caldero</i> , 8 th Dist. No. 96719, 2012-Ohio-11	10, 11
<i>State v. Campbell</i> , 8 th Dist. No. 95348, 2011-Ohio-2281, appeal not accepted by,	129
Ohio St.3d 1492, 2011-Ohio-5129, 954 N.E.2d 663	9
<i>State v. Cook</i> , 83 Ohio St.3d 404, 420-421, 700 N.E.2d 570 (1998).....	16
<i>State v. Costello</i> , 138 N.H. 587, 591, 643 A.2d 531 (1994)	31
<i>State v. Ferguson</i> , 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110	19, 20
<i>State v. Freeman</i> , 1 st Dist. No. C-100389, 2011-Ohio-4357.....	12, 13, 14
<i>State v. Gingell</i> , 128 Ohio St.3d 444, 2011-Ohio-1481, 946 N.E.2d 192	27, 28
<i>State v. Glaude</i> (Sept. 2, 1999), Eighth App. No. 73757	31
<i>State v. Goodballet</i> , 9 th Dist. No. 98 CO 15, 1999 WL 182514 (Mar. 30, 1999), 1999 WL 182514.....	26
<i>State v. Grunden</i> , 8 th Dist. No. 95909, 2011-Ohio-3687.....	9
<i>State v. Hampp</i> , 4 th Dist. No. 99CA2517 (July 17, 2000), 2000 WL 992139	25
<i>State v. Hanley</i> , 8 th Dist. No. 74323 (Aug. 26, 1999), 1999 WL 652045	26
<i>State v. Hayden</i> , 96 Ohio St.3d 211, 733 N.E.2d 502, 2002-Ohio-4169	25, 26
<i>State v. Howard</i> , 2 nd Dist. No. 24680, 2011-Ohio-5693.....	33, 34
<i>State v. Johnson</i> , 2 nd Dist. No. 24029, 2011-Ohio-2069	6
<i>State v. Milby</i> , 2 nd Dist. No. 23798, 2010-Ohio-6344.....	5, 6, 8
<i>State v. Morris</i> , 55 Ohio St.2d 101, 112, 378 N.E.2d 708 (1978).....	24
<i>State v. Muldrew</i> , 2 nd Dist. No. 24721, 2012-Ohio-1573	8
<i>State v. Page</i> , 8 th Dist. No. 94369, 2011-Ohio-83.....	2, 5, 8, 9, 10, 11, 32
<i>State v. Richey</i> , 10 th Dist. No. 09AP-36, 2009-Ohio-4487	21
<i>State v. Rimmer</i> , 9 th Dist. No. 97 CA 6795.....	26
<i>State v. Savors</i> , 7 th Dist. No. 09-CO-32, 2012-Ohio-1297	8
<i>State v. Smith</i> , 3 rd Dist. No. 5-07-23, 2008-Ohio-4778.....	18
<i>State v. Smith</i> , 4 th Dist. No. 97CA10, 1998 WL 470495 (July 20, 1998).....	17

<i>State v. Smith</i> , 8 th Dist. No. 94227, 2010-Ohio-5354.....	11, 18, 19
<i>State v. Smith</i> , 8 th Dist. No. 96582, 96622, 96623, 2012-Ohio-261	10
<i>State v. Smith</i> , 9 th Dist. No. 98 CA 7070	26, 32
<i>State v. White</i> , 162 N.C.App. 183, 196, 590 S.E.2d 448 (2004).....	17, 33
<i>State v. Williams</i> , 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108.....	12
<i>State v. Williams</i> , 2 nd Dist. No. 24452, 2012-Ohio-107	6, 7
<i>State v. Williams</i> , 88 Ohio St.3d 513, 728 N.E.2d 342 (2000)	16
<i>State v. Wilson</i> , 113 Ohio St.3d 382, 2007-Ohio-2202	20
<i>State v. Zerla</i> , 10 th Dist. No. 04AP-1087, 2005-Ohio-5077	26
<i>United Engineering & Foundry Co. v. Bowers</i> (1960), 171 Ohio St. 279, 282.....	30
<i>United States v. Hinckley</i> , 550 F.3d 926, 935-938 (10 th Cir. 2008)	33

Statutes

R.C. 2907.02.....	20
R.C. 2907.03.....	21
R.C. 2950.01(D).....	25
R.C. 2950.03.....	26
R.C. 2950.03(B)	26, 27
R.C. 2950.031.....	1, 20, 23
R.C. 2950.032.....	23
R.C. 2950.04.....	10, 19
R.C. 2950.07.....	19
R.C. 2950.081.....	19
R.C. 2950.09.....	16, 25
R.C. 2950.99.....	1, 4, 5, 8, 9, 10, 11, 12, 14, 15, 18, 20, 22, 23, 24, 28, 29, 30, 31, 32
R.C. 2950.99(A)	18, 22, 23

Other Authorities

1972 H.B. No. 511.....	15
1996 H.B. 180	12, 15, 16, 17, 27
2003 Am. Sub. S.B. 5	18, 19
2004 H.B. 473	12, 18
2007 Am. Sub. S.B. 10	8, 12, 26, 27, 29, 30, 33
2007 Am. Sub. S.B. 97	4, 5, 8, 11, 12, 14, 15, 20, 22, 23, 24, 29
2011 H.B. No. 86	23

INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS CURIAE

The Second District Court of Appeals in *State v. Howard*, 195 Ohio App.3d 802, 2011-Ohio-5693, 961 N.E.2d 1196 (2nd Dist), held that Donny Howard, a Megan's Law offender could only be punished for registration violations pursuant to the version of R.C. 2950.99 in effect at the time of his conviction and classification rather than the law in effect at the time of his new registration offense. This not only restricted usage of the law in effect at the time of the registration offense but also had an implicit secondary effect of invalidating not only the 2007 Am. Sub. S.B. No. 97 amendments to R.C. 2950.99 but also every amendment to R.C. 2950.99 between 1997 and 2008.

This case was accepted on the issue of whether the felony sentencing statute R.C. 2950.99 is not applied retroactively when the conduct for which a defendant is convicted and sentenced occurred after the effective date of the statute or January 1, 2008.

The judges of the Cuyahoga County Court of Common Pleas preside over hundreds of sex offender registration cases each year. Over 300 cases were indicted in 2009 for violations of R.C. Chapter 2950. Over 300 cases were indicted again in 2010, and over a thousand Megan's Law offenders challenged their Adam Walsh Act classification through the petition process under R.C. 2950.031. In Cuyahoga County and throughout the State of Ohio there are Megan's Law offenders who are still required to report. While their Megan's Law classification, registration and community notification orders were restored, there is a dispute as to how the

Megan's Law offender can be punished. This issue has arisen multiple times in the Eighth District, beginning with the Eighth District's decision in *State v. Page*, 8th Dist. No. 94369, 2011-Ohio-83 and as recently in *State v. Smith*, 8th Dist. No. 96582, 96622, 96623, 2012-Ohio-261. The Eighth District has also looked at the felony level or the mandatory prison time to determine whether an offender had been "convicted under the Adam Walsh Act".

The Cuyahoga County Prosecutor's Office, as amicus curiae in support of the State of Ohio, submits that the decisions of the Second District Court of Appeals as well as the Eighth District Court of Appeals is in conflict with the First District Court of Appeals and the Fifth District Court of Appeals. As it stands, a Megan's Law offender who commits registration offenses in the counties of Belmont, Carroll, Champaign, Clarke, Columbiana, Cuyahoga, Darke, Greene, Harrison, Jefferson, Mahoning, Miami, Montgomery, Monroe and Noble will face different penalties from those faced by offenders in the counties of Hamilton, Ashland, Coshocton, Delaware, Fairfield, Guernsey, Hamilton, Holmes, Knox, Licking, Morgan, Morrow, Muskingum, Perry, Richland, Stark and Tuscarawas. Due to the large volume of registration violations that occur in Cuyahoga County and the large number of registered sex offenders in Cuyahoga County, the Cuyahoga County Prosecutor's Office has a compelling interest in the uniform application of R.C. 2950.99 across the State of Ohio that will hold sex offenders accountable for repeated violations of their registration duties.

Amicus curiae submits that the First District and the Fifth District correctly analyzed the issue, finding that this Court's decision in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753 and *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 852 N.E.2d 1108 do not require a holding that 2007 Am. Sub. S.B. No. 97 cannot be applied to offenders like Howard.¹ It is settled law that the General Assembly can enact laws which increase the penalties for criminal offense, and any such enactment does not violate constitutional principles if the new offense is committed after the enactment date. Offenders like Donny Howard can be punished under the version of 2950.99 in effect at the time of the new registration offense because the punishment for failing to register flows from a new violation of the law and not from a past sex offense. Amicus curiae urges reversal of the Second District's decision in *Howard*, 195 Ohio App.3d 802, 2011-Ohio-5693.

STATEMENT OF THE CASE AND RELEVANT FACTS

Amicus curiae adopts and incorporates by reference the Statement of the Case and Statement of the Facts as set forth by the Appellant, the State of Ohio, in its merit brief.

¹ Only this Court's decision in *Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374 is referred herein shorthand as "*Williams*".

LAW AND ARGUMENT

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

I. Punishment flows from a failure to register, a new violation of the statute, not from a past sex offense. Constitutional provisions are not violated if the current statute is applied to an act, i.e. new registration offense, committed subsequent to the enactment of the law.

This case involves whether the provisions of R.C. 2950.99 which provides the potential penalties for violating Ohio's sex offender registration laws, specifically the enhanced penalty provisions as amended through 2007 Am. Sub. S.B. No. 97 which went into effect the same day of January 1, 2008. This Court should hold that 2007 Am. Sub. S.B. No. 97 can be applied to Megan's Law offenders who commit new registration offenses on or after January 1, 2008 and adopt as syllabus law the following:

Even prior to the promulgation of the current version of R.C. Chapter 2950, failure to register was a punishable offense. [***] Thus, any such punishment flows from a failure to register, a new violation of the statute, not from a past sex offense. [***] [T]he punishment is not applied retroactively for an act that was committed previously, but for a violation of law committed subsequent to the enactment of the law.

See *State v. Cook*, 83 Ohio St.3d 404, 420-421, 700 N.E.2d 570 (1998).

Accordingly, the felony sentencing statute R.C. 2950.99 is not applied retroactively when the version of the statute in effect at the time a new registration offense is committed. If the new registration offense occurred after January 1, 2008 then the enhanced penalty provisions of R.C. 2950.99, 2007 Am. Sub. S.B. 97

applies, prospectively the version of R.C.2950.99, 2011 H.B. 86 applies for conduct occurring after September 30, 2011. If the registration offense occurred prior to January 1, 2008 then the former version of R.C. 2950.99 would apply.

II. Presumption of Constitutionality

While constitutional questions are reviewed *de novo* it must be noted that statutes enjoy a strong presumption of constitutionality and a legislative enactment of the General Assembly is presumed to be constitutional unless it is clear beyond a reasonable doubt that the legislative and constitutional provisions are clearly incompatible. *Cook*, at 409. Therefore, 2007 Am. Sub. S.B. No. 97 is presumed constitutional unless it is clear beyond a reasonable doubt that it is clearly incompatible with constitutional principles.

III. A Survey of the Inter-District Conflict, the Second, Seventh and Eighth Districts are in conflict with the First and Fifth Districts, with the Second District's holdings called into question.

In the Second, Seventh and Eighth Appellate Districts, Megan's Law offenders cannot be sentenced to the law in effect at the time a new registration offense is committed. The Second District rule developed from *State v. Milby*, 2nd Dist. No. 23798, 2010-Ohio-6344 and The Eighth District rule developed from *State v. Page*, 8th Dist. No. 94369, 2011-Ohio-83, appeal not accepted, 128 Ohio St.3d 1500, 2011-Ohio-2420, 947 N.E.2d 683.

In *Milby*, the Second District in applying *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, held the new penalty provisions could not apply to Milby because it was the Adam Walsh Act that increased the penalty for failure to notify to a first-

degree felony. *Milby*, at ¶31. The Second District affirmed *Milby*'s guilt, finding that his conduct violated an identical duty under Megan's Law, but remanded the matter for re-sentencing. *Id.* The holding set forth by the Second District *Milby* was followed in subsequent decisions by the Second District. See *State v. Johnson*, 2nd Dist. No. 24029, 2011–Ohio–2069 and *State v. Alexander*, 2nd Dist. No. 24119, 2011–Ohio–4015.

The majority in *Howard* concluded the penalty at the time of Howard's sex offense classification which was a felony of the fifth degree applies. *Howard*, at ¶12. However, recently the *Milby* decision was called into question by the lead opinion of *State v. Williams*, 2nd Dist. No. 24452, 2012-Ohio-107. The lead opinion expressed the following view:

In this writer's opinion, *Milby* is incorrect. [***]

Before 2008, Ohio's sexual offender registration and notification law (SORN) was based on the federal Megan's Law. After Congress replaced Megan's Law, Senate Bill 10 was enacted "to revise Ohio's Sex Offender Registration and Notification Law and conform it to recently enacted requirements of federal law contained in the Adam Walsh Child Protection and Safety Act of 2006." Am.Sub . S.B. No. 10, Preamble. Known as Ohio's Adam Walsh Act (AWA), S.B. 10 went into effect on January 1, 2008, and made subject offenders' registration and notification duties generally more onerous.

Like *Williams*, the defendant in *Milby* had been classified under Megan's Law and was reclassified under the AWA. In 2009, the defendant was convicted for violating the AWA's change-in-residence-address notification duty. This Court's decision noted that in *State v. Bodyke*, 126 Ohio St.3d 266, 2010–Ohio–2424, decided in June 2010, the Ohio Supreme Court struck down as unconstitutional the AWA's reclassification provisions, saying that they "may not be applied to offenders previously adjudicated by judges under Megan's Law," and the Court reinstated "the classifications and community-notification and registration orders imposed previously by judges." *Id.* at ¶ 66. This

Court noted that the AWA did not change the Megan's Law notification duty. But, the decision said, the AWA did increase the penalty for a violation. Based on Bodyke, this Court held that the AWA's higher penalty could not be imposed on the defendant. And the case was remanded so that the defendant could be resentenced under Megan's Law.

Chapter 2950 of the Revised Code contains the SORN law. Section 2950.99 contains the penalties for violations. While S .B. 10 amended those sections in Chapter 2950 describing the registration and notification duties, it was separate legislation that amended section 2950.99. Senate Bill 97 “modified the penalties for violations of the Sexual Offender Registration and Notification Law.” Am.Sub.S.B. No. 97, Preamble. Although it went into effect on the same day as S.B. 10, S.B. 97 cannot properly be considered part of that legislation. Furthermore, Bodyke never cited section 2950.99, saying nothing about penalties. Williams has always had the notification duty. Because his sentence is for a 2009 offense—well after S.B. 97's amendments to the penalty provision went into effect—it appears that the current penalty provision should apply to Williams. Indeed, other districts would hold that it applies to him. [***]

Williams, 2nd Dist. No. 24452, 2012-Ohio-107, ¶ 15-18 (Hall, J. lead opinion).

The concurring opinion expressed the following view:

Defendant Williams was previously classified under Megan's Law. His reclassification to conform to the Adam Walsh Act and its requirements was unconstitutional. In consequence of that, Williams remains classified pursuant to Megan's Law, and the penalties for his failure to comply with the registration requirements Megan's law imposes are the penalties Megan's Law prescribed for those classified pursuant to it.

That is not to say that the General Assembly cannot impose more onerous penalties for crimes not yet committed. Instead, per Bodyke, Williams' Megan's Law adjudication, being a final order, governs the penalties available for Williams' violation of Megan's Law, and the penalties prescribed by the Adam Walsh Act provisions are available only for those properly classified pursuant to that legislation, and Williams was not.

Id., ¶ 19 (Donovan, P.J., concurring) (citations omitted, emphasis added). See also *State v. Muldrew*, 2nd Dist. No. 24721, 2012-Ohio-1573. *Milby* and the line of cases that follow have melded 2007 Am. Sub. S.B. 10 and 2007 Am. Sub. S.B. 97, one in the same and made both unconstitutional. The cases did not distinguish the bills as separate legislative enactment, instead identified them in general as the Adam Walsh Act. Instead the opinion in *Williams*, 2nd Dist. No. 24452, 2012-Ohio-107, viewed the Megan's Law adjudication, presumed a final order, to be the source of penalties. *Milby* was recently cited by the Seventh District in *State v. Savors*, 7th Dist. No. 09-CO-32, 2012-Ohio-1297, ¶37.

The precedent of the Eighth District developed in a similar fashion. In *State v. Page*, 8th Dist. No. 94369, 2011-Ohio-83, appeal not accepted, 128 Ohio St.3d 1500, 2011-Ohio-2420, 947 N.E.2d 683, the Eighth District vacated the conviction of a sexual predator for failing to verify. Although required to complete a 90-day verification under both Megan's Law and the Adam Walsh Act, the majority in *Page* held that Page's conviction was based on an unlawful reclassification. *Page*, ¶12. The majority held that *Bodyke* required that offenders like Page be subject only to the "reporting requirements, and penalties for violating these requirements, of sexual predators pursuant to Megan's Law." *Page*, at ¶12. The dissent in *Page* disagreed finding that the issue was not whether "Page violated his statutory duty to verify his address every 90 days, but whether *Bodyke* somehow affects the AWA's sentence enhancements for repeat offenders like Page." *Page*, ¶16 (Stewart, J. dissenting). The dissent determined that the "penalty provision of [R.C. 2950.99] is

not couched in terms of the new classifications. It refers only to ‘violations’ of the reporting statutes, not to the type of tier offender involved. Moreover, there is no question that the General Assembly could validly pass a law that prospective enhances a penalty for repeat offenders. The majority in *Page*; however, concluded that *Bodyke* did apply, vacated Page’s conviction and held that Page could only be sentenced under Megan’s Law. *Page*, ¶12.

In *State v. Grunden*, 8th Dist. No. 95909, 2011-Ohio-3687, appeal accepted, 131 Ohio St.3d 1410, 2012-Ohio-136, 959 N.E.2d 1055, held for Sup. Ct. Case No. 2011-1066, *State v. Brunning* the court vacated Grunden’s four year sentence for violating his registration obligations. The court agreed that his convictions were void and that convictions arising from reporting violations under the AWA are contrary to law. The *Grunden* court maintained that “the fact remains that a violation of that duty [to register] can carry a significantly harsher penalty under the AWA than it would under Megan’s Law. Compare R.C. 2950.99 (AWA) with former R.C. 2950.99 (Megan’s Law).” *Grunden*, at ¶9. The same result occurred in *State v. Campbell*, 8th Dist. No. 95348, 2011-Ohio-2281, appeal not accepted by, 129 Ohio St.3d 1492, 2011-Ohio-5129, 954 N.E.2d 663, appeal accepted on reconsideration by, 130 Ohio St.3d 1479, 957 N.E.2d 1170, 2011-Ohio-6124. The *Campbell* court referenced that under Megan’s Law, the defendant could not be subjected to a mandatory prison time, although the felony level remained the same. *Campbell*, at ¶14.

In *State v. Caldero*, 8th Dist. No. 96719, 2012-Ohio-11, appeal accepted by, 131 Ohio St.3d 1509, the Eighth District continued to implicate that at the time of Caldero's offense Megan's Law had been repealed and could not serve as the basis for Caldero's conviction, despite a preliminary injunction requiring Cuyahoga County to enforce Megan's Law. *Caldero*, ¶10, fn. 1. The Eighth District held that Caldero was indeed convicted under the Adam Walsh Act because he was convicted of a third degree felony rather than a fifth degree penalty.

The most recent case decided by the Eighth District was *State v. Smith*, 8th Dist. No. 96582, 96622, 96623, 2012-Ohio-261. The trial court allowed the State to prosecute George Smith under Megan's Law, resulting in a conviction for failing to register pursuant to R.C. 2950.04. However, the trial court applied *Page*, 8th Dist. No. 94369, 2011-Ohio-83 and held that it could not sentence Smith to a mandatory prison sentence as required under the S.B. 97 version of R.C. 2950.99. While Smith appealed his conviction, the State cross-appealed the sentence. The Eighth District affirmed Smith's conviction and sentence. (Smith's registration offense occurred post-*Bodyke*). The State subsequently sought a discretionary appeal and certified conflict in *Smith*, both of which are pending in this Court.

The *Smith* case illustrates a compelling argument for enhanced sentences based upon repeat violations of the Ohio's registration laws. Smith was classified a sexual predator in 2001 as a result of a 1985 conviction for rape. Smith was previously convicted for a 2007 registration violation and the conviction was affirmed by the Eighth District Court of Appeals. See *State v. Smith*, 8th Dist. No.

94227, 2010-Ohio-5354. However, Smith failed to acknowledge his duty to register. When he was originally released from prison in 2004, he signed his registration forms “under duress”. *State v. Smith*, 8th Dist. No. 96582, 96622, 96623, 2012-Ohio-261, ¶7. Smith subsequently returned to prison as a result of the 2007 violation. When Smith was about to be released around September 1, 2010, Smith “was adamant that he did not want to sign the PRC reporting orders” and the “SORN Form”. *Id.* at ¶4. Smith did not report to the Cuyahoga County Sheriff’s Office upon his release from prison around September 1, 2010 and did not report as of the date of his arrest, over one month later on October 27, 2010. *Id.* at ¶8. Smith subsequently utilized his refusal to sign the SORN documents, as a basis for reversing his conviction due to insufficient evidence. The Eighth District rejected the argument and affirmed Smith’s conviction. *Id.* at ¶21.

The premise of the Eighth District is that a Megan’s Law offender, can only be subject to the reporting requirements, and penalties for violating these requirements pursuant to Megan’s Law. *Page*, at ¶12. Under *Caldero* like *Howard* the only penalty an offender like Howard can face for future registration offenses is a felony of the fifth degree.

The Eighth District like the Second District is that R.C. 2950.99, 2007 S.B. 97 have combined to form the Adam Walsh Act. This essentially generalizes all legislative amendments to R.C. Chapter 2950, effective January 1, 2008 as the “Adam Walsh Act”, and anything prior as “Megan’s Law”. But this generalization had the secondary effect of invalidating more than the 2007 Am. Sub. S.B. No. 97

amendments, but also invalidated the 2004 H.B. 473 amendments to R.C. 2950.99 as well as the 2003 S.B. This constrained Howard only to the 1996 H.B. No. 180 version of R.C. 2950.99. Effectively, *Bodyke* was used to invalidate five legislative amendments to R.C. 2950.99.

While 2007 Am. Sub. S.B. No. 97 went into effect the same day as many provisions of 2007 Am. Sub. S.B. No. 10, it is a separate legislative enactment, 2007 Am. Sub. S.B. No. 97 cannot be generalized as an unconstitutional component of the “Adam Walsh Act”. This fact was correctly recognized by the First and Fifth Appellate Districts.

The First District Court of Appeals and the Fifth District Court of Appeals approached the issue differently, first addressing whether *Bodyke* even required a declaration that R.C. 2950.99 as amended through 2007 Am. Sub. S.B. No. 97 was unconstitutional. These decisions also took into account this Court’s holding in *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108.

The First District in *State v. Freeman*, 1st Dist. No. C-100389, 2011-Ohio-4357 held:

‘A statute is retroactive if it penalizes conduct that occurred before its enactment.’ A statute that ‘does not ‘change *** the legal consequences of acts completed before its effective date,’ but simply mandates an enhanced penalty for acts committed after the effective date of the provision,’ is not retrospective.

The penalty provisions contained in current R.C. 2950.99 became effective January 1, 2008. Freeman pleaded guilty to failing to notify the sheriff of an address change on or about October 15, 2009. Although Freeman’s duty to register stemmed from his sex offense, his failure to notify the sheriff of an address change was a new offense that he had committed after the effective date of current R.C. 2950.99’s

penalty provision. Therefore, current R.C. 2950.99 was not applied retroactively to Freeman's conduct.

The Ohio Supreme Court's decision in *State v. Williams* does not require a different result. [***]

[***]

Williams dealt with the imposition of Senate Bill 10's more stringent registration requirements. The instant case deals with the imposition of current R.C. 2950.99's penalty provisions of Freeman, who committed his failure-to-notify offense after the effective date of that statute. Although current R.C. 2950.99 has the same effective date as Senate Bill 10, it was not enacted as part of Senate Bill 10. It was enacted as part of Senate Bill 97, which, among other things, modified the penalties for violations of the sex-offender registration and notification laws.

State v. Freeman, 1st Dist. No. C-100389, 2011-Ohio-4357, ¶¶ 14-22 (footnotes omitted, emphasis added).

Likewise, the First District in *State v. Bowling*, 1st Dist. No. C-100323, 2011-Ohio-4946 held:

As we pointed out in *Freeman*, "Williams dealt with the imposition of Senate Bill 10's more stringent registration requirements upon an offender who had committed his sex offense prior to its enactment." See *Freeman*, supra at ¶ 21. The instant case deals with the imposition of current R.C. 2950.99's penalty provisions on *Bowling*, who committed his failure-to-notify offense after the effective date of that statute. Although current R.C. 2950.99 has the same effective date as Senate Bill 10, it was not enacted as part of Senate Bill 10. It was enacted as part of Am.Sub.S.B. 97 ("Senate Bill 97"), which, among other things, modified the penalties for violations of the sex-offender registration and notification laws. See *Freeman*, supra at ¶ 21.

Bowling had committed a sex offense and had been classified under Megan's Law as a sexual predator. Pursuant to that classification, he was required to register as a sex offender every 90 days for life and to notify the sheriff of any change in his address. Senate Bill 10 did not affect *Bowling's* duty to notify the sheriff of a change of address. *Bowling* committed his failure-to-notify offense on or about May 1, 2009, well after the effective date of current R.C. 2950.99. *Bowling* had

an ongoing duty to notify the sheriff of any change of address. He failed to do so. Bowling's sentence was based on his failure-to-notify offense, which occurred after R.C. 2950.99's effective date. The third assignment of error is overruled.

State v. Bowling, 1st Dist. No. C-100323, 2011-Ohio-4946, ¶¶ 21-29 (emphasis added).

The Fifth District in *Dunwoody*, 5th Dist. No. CT11-0029, 2011-Ohio-6360 held:

We find the issue in this case to be parallel to *State v. Freeman*, Hamilton App. No. C-100389, 2011-Ohio-4357. We concur with our brethren from the First District wherein they stated the following at ¶ 21-22:

[***]

“Freeman had committed a sex offense and had been classified as a sexually oriented offender under Megan's Law. Pursuant to that classification, he was required to annually register as a sex offender for ten years and to notify the sheriff of any change in his address. There is no evidence that Freeman was reclassified under Senate Bill 10 or that Senate Bill 10 affected Freeman's reporting duties. Freeman committed his failure-to-notify offense on or about October 15, 2009, well after the effective date of current R.C. 2950.99. Freeman had an ongoing duty to notify the sheriff of any change of address. He failed to do so. Freeman's sentence was based on his failure-to-notify offense, which occurred after R.C. 2950.99's effective date.”

State v. Dunwoody, 5th Dist. No. CT11-0029, 2011-Ohio-6360, ¶¶ 32-42. See also *State v. Benoke*, 5th Dist. No. 2011CA00194, 2012-Ohio-1180, ¶13 citing *Cook*, 83 Ohio St.3d 404.

The conflict turns on the effect of *Bodyke* and *Williams* on R.C. 2950.99 as amended through 2007 Am. Sub. S.B. No. 97 and whether its application to Howard violates constitutional principles. Amicus curiae submits that *Bodyke* and *Williams* do not affect R.C. 2950.99. An independent review of 2007 Am. Sub. S.B. No. 97 would show that its amendments to R.C. 2950.99 are constitutional.

IV. The history of R.C. 2950.99 Prior to S.B. 97 and relevant decisions.

Before independently analyzing the constitutionality of the 2007 Am. Sub. S.B. No. 97 amendments to R.C. 2950.99, to offenders such as Howard, it is important to examine the history of R.C. 2950.99. Courts have examined amendments to R.C. 2950.99 before 2007 Am. Sub. S.B. No. 97 went into effect, and each time recognized that the penalty flows from the new registration offense and not the prior sex offense conviction.

Prior to “Megan’s Law” or the registration scheme introduced on July 1, 1997 through 1996 H.B. 180, Ohio had a system of registration for habitual sex offenders, that required offenders who have been convicted for sex offenses more than once to register with municipal police or with the county sheriff. This registration scheme which imposed certain registration duties, but offenders who violated their registration duties prior to July 1, 1997 could only be punished with misdemeanors and subsequent offenses could be punished with a felony of the fourth degree. See R.C. 2950.99, 1972 H.B. No. 511.

The enactment of 1996 H.B. 180 in addition to creating the new sexual predator classification scheme amended R.C. 2950.99 to allow sex offenders to be punished with fifth degree felonies rather than misdemeanors if the basis for their duty to register was a conviction for a felony sex offense. See generally, R.C. 2950.99, 1996 H.B. 180, eff. 7/1/97.²

² Howard appears to have been classified at the time the 1996 H.B. 180 version of R.C. 2950.99 was in effect.

The constitutionality of certain aspects of 1996 H.B. 180 was reviewed by this Court in *State v. Cook*, 83 Ohio St.3d 404, 700 N.E.2d 570 (1998) and *State v. Williams*, 88 Ohio St.3d 513, 728 N.E.2d 342 (2000). This Court in *Cook* held that retroactive application of R.C. 2950.09, the statute which provided for sexual predator classification hearings, did not violate the Ex Post Facto Clause of the United States Constitution or the Retroactivity Clause of the Ohio Constitution. This Court later considered other challenges to H.B. 180 in *Williams*, 88 Ohio St.3d 513.

This Court noted in *Cook* that:

Even prior to the promulgation of the [1996 H.B. 180 version] of R.C. Chapter 2950, failure to register was a punishable offense. [***] Thus, any such punishment flows from a failure to register, a new violation of the statute, not from a past sex offense. In other words, the punishment is not applied retroactively for an act that was committed previously, but for a violation of law committed subsequent to the enactment of the law.

State v. Cook, 83 Ohio St.3d 404, 420-421, 700 N.E.2d 570 (1998).

Courts in other jurisdictions have agreed that any punishment for violating the sex offender registration statutes come from a failure to register rather than the prior sex offense. See *Douglas v. State*, 878 N.E.2d 873 (Ind. App. 2007) (noting “the imposition of the registration requirement in this case is retrospective in that it would not have applied to Douglas on the day of his sex offense conviction. However, the consequence of violating the registration requirement is not retrospective, because the amended version of the statute was in effect when Douglas failed to register) also citing to *Kitze v. Virginia*, 23 Va.App. 213, 475 S.E.2d 830, 833 (1996)

(Because the punishment arises from a separate offense, the sex offender's failure to register, the punishment is prospective and does not punish him or her for past criminal activity).

Some of these jurisdictions relied on *Cook*. See *State v. White*, 162 N.C.App. 183, 196, 590 S.E.2d 448 (2004) citing *Cook* (also recognizing that "the fact that a violation of a civil regulatory provision such as the registration requirements leads to a harsh penalty is not pertinent to whether the registration requirements are additional punishments is not pertinent to whether the registration requirements are additional punishments for the previously-committed sex offense."), *Pecorado v. Diocese of Rapid City*, 435 F.3d 870 (8th Cir. 2006) (referencing *Cook* for proposition that punishment flowing from sex offender registration comes from a failure to register not from a past sex offense) and *Meinders v. Weber*, 604 N.W.2d 248, 259 2000 S.D. 2 (2000) (citing *Cook* and holding that any punishment flowing from the sex offender registration statutes come from a failure to register, not from the past sex offense).

In *State v. Smith*, 4th Dist. No. 97CA10, 1998 WL 470495 (July 20, 1998), a defendant argued that H.B. 180 was unconstitutional when applied to his sex offense. The defendant also complained "of the fact that he is subject to imprisonment for failure to comply with the requirements of the statutes," the Fourth District noted however,

that the crime of failing to register under the Act constitutes a separate offense. The fact that a prior conviction for sexual misconduct is an element of the 'failure to register' offense is of no consequence. It is hornbook law that no ex post facto problem occurs when the

legislature creates a new offense that includes a prior conviction as an element of the offense, as long as the other relevant conduct took place after the law was passed. The Supreme Court has recently suggested as much. See *United States v. Watts*, 519 U.S. 148, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997) .”

Smith, at *4 citing *Russell v. Gregoire*, 124 F.3d at 1088-1089.

The penalties for failing to register were not substantially amended until the 2003 Am. Sub. S.B. No. 5 amendments to R.C. 2950.99. Under these amendments, a sexually oriented offender whose underlying sex offense was a felony of the first, second, third degree or was aggravated murder or murder could be punished with a felony of the third degree for failing to register. And the same level felony if the underlying offense was a misdemeanor, fifth degree felony, or fourth degree felony. See R.C. 2950.99(A)(1)(a)(i),(ii), 2003 Am. Sub. S.B. No. 5 and 2950.99, 2004 H.B. No. 473. The amendments also contained enhanced penalties for repeat offenders, but it only affected sexually oriented offenders whose underlying offenses were misdemeanors, fifth degree felonies and fourth degree felonies. Even repeat offenders whose basis for registration was aggravated murder or murder could only be penalized with a third degree felony. See R.C. 2950.99(A)(1)(b)(i),(ii),(iii), 2003 Am. Sub. S.B. 5 and 2950.99, 2004 H.B. 473.

In *State v. Smith*, 3rd Dist. No. 5-07-23, 2008-Ohio-4778, the court of appeals discussed the S.B. 5 amendments and rejected the defendant's claim that the trial court violated the Ex Post Facto Clause in applying the 2004 amended version of R.C. 2950.99 that changed the penalty from a fifth degree felony to a third degree felony. “[A]t the time Smith committed his offense, the applicable penalty, under

R.C. 2950.99, was a felony of the third degree. This is not a situation where the penalty was changed after his criminal conduct occurred." *Id.* at ¶14. The *Smith* court further held that, "[t]he fact that the penalty changed from a felony of the fifth degree to a felony of the third degree does not mean that Smith did not receive notice. There are no guarantees that new laws will not be enacted or that laws will not be modified. It is every citizen's responsibility to know the law, and in fact, one is presumed to know the law." *Smith*, at ¶18.

This Court in *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, reviewed certain aspects of 2003 Am. Sub. S.B. 5, these aspects included the amendment to R.C. 2950.07 (providing for now removal of sexual predator classification), R.C. 2950.04 (new registration requirements requiring registration in county of residence, county where school is attended, and employment county), and R.C. 2950.081 (expanding publically available information). See *Ferguson*, at ¶8-10. The majority in *Ferguson* affirmed the retroactive application of these provisions of the S.B. 5 amendments to R.C. Chapter 2950. The dissent in *Ferguson* remarked the following changes in the registration law that transformed the simple registration system at issue in *Williams* and in *Cook*:

First, the label 'sexual predator' is now permanent for adult offenders, R.C. 2950.07(B)(1), whereas previously, offenders had the possibility of having it removed. Former R.C. 2950.09(D), Am.Sub.H.B. No. 180, 146 Ohio Laws, Part II, 2560, 2621–2623. Second, registration duties are now more demanding and therefore are no longer comparable to the inconvenience of renewing a driver's license, as *Cook* had analogized. *Cook*, 83 Ohio St.3d at 418, 700 N.E.2d 570. Persons classified as sex offenders must now personally register with the sheriff of the county in

which they reside, work, and go to school. R.C. 2950.04(A). Sexual predators must personally register with potentially three different sheriffs every 90 days, R.C. 2950.06(B)(1)(a), which is hardly comparable to the slight inconvenience of having one's driver's license renewed every four years. Third, community notification has expanded to the extent that any statements, information, photographs, or fingerprints that an offender is required to provide are public record and **121 much of that material is now included in the sex-offender database maintained on the Internet by the attorney general. R.C. 2950.081. In Cook, we considered it significant that the information provided to sheriffs by sex offenders could be disseminated to only a restricted group of people. Cook, 83 Ohio St.3d at 422, 700 N.E.2d 570. Fourth, new restrictions have been added to R.C. Chapter 2950. Enacted initially as part of Sub.S.B. No. 5, 125th General Assembly, approved July 31, 2003, R.C. 2950.031 prohibits all classified sex offenders, not just those convicted of sex offenses against children, from residing within 1,000 feet of any school premises. And fifth, a sheriff is now permitted to request that the sex offender's landlord or the manager of the sex offender's residence verify that the sex offender currently resides at the registered address. R.C. 2950.111(A)(1). According to R.C. 2950.111(C), '[a] sheriff or designee of a sheriff is not limited in the number of requests that may be made under this section regarding any registration, provision of notice, or verification, or in the number of times that the sheriff or designee may attempt to confirm, in manners other than the manner provided in this section, that an offender * * * currently resides at the address in question.'

Ferguson, ¶46 (Lanzinger, J., dissenting) citing to *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202.

V. R.C. 2950.99 As Amended Through S.B. 97

2007 Am.Sub. S.B. No. 97 had two primary effects in regards to penalties for registration offenses. 2007 Am.Sub. S.B. No. 97 amended R.C. 2950.99 and provided that registration offenses could be punished up to a first degree felony, depending on the basis for the offender's registration requirements. Some Megan's Law offenders were affected by this amendment, such as an offender who had been convicted of rape in violation of R.C. 2907.02 (increased penalty as first degree

felony) and others were not such as an offender who had been convicted in 2004 of sexual battery in violation of R.C. 2907.03 (felony level remains the same as third degree felony).

In *State v. Richey*, 10th Dist. No. 09AP-36, 2009-Ohio-4487, a defendant argued that enforcing felony penalties for registration violations, when his underlying sex offense was a misdemeanor, violated prohibitions against Cruel and Unusual Punishment. The Tenth District rejected Richey's arguments holding that:

Although appellant's sex offense triggered the registration requirements, punishment for failure to register violations flows not from the past sex offense, but from the failure to adhere to registration requirements, a new violation. *State v. Cook*, 83 Ohio St.3d 404, 421, 700 N.E.2d 570, 1998-Ohio-291. See also *Smith v. Doe* (2003), 538 U.S. 84, 101-02, 123 S.Ct. 1140, 1152, 155 L.Ed.2d 164 (noting that criminal prosecution for failure to comply with sex offender registration requirements is separate from the prosecution of the original sex offense). Thus, the trial court did not apply felony punishment, pursuant to R.C. 2950.99, to enhance penalties for appellant's 2006 sex offense; the felony punishment flows from appellant's subsequent and independent registration violation.

Richey, ¶ 19.

Richey notably recognizes that the potential penalties provided by R.C. 2950.9 flow from the failure to register and not the past sex offense and that criminal prosecution for failing to register is separate from the prosecution of the original sex offense.

New Felony Levels

The penalty provisions derived from the S.B. 97 amendments provided the following penalties:

NO PRIOR CONVICTIONS FOR R.C. 2950.04, 2950.041, 2950.05, 2950.06 per R.C. 2950.99(A)(1)(a)(i),(ii),(iii)		PRIOR CONVICTION OR PREVIOUSLY ADJUDICATED DELINQUENT FOR R.C. 2950.04, 2950.041, 2950.05, 2950.06 per R.C. 2950.99(A)(1)(b)(i),(ii),(iii)	
<i>Underlying Sex Offense/Child-Victim Offense Is:</i>	<i>Violation of R.C. 2950.04, 2950.041, 2950.05, 2950.06 is:</i>	<i>Underlying Sex Offense/Child-Victim Offense Is:</i>	<i>Violation of R.C. 2950.04, 2950.041, 2950.05, 2950.06 is:</i>
Aggravated Murder/Murder	F-1	Aggravated Murder/Murder	F-1
F-1	F-1	F-1	F-1
F-2	F-2	F-2	F-2
F-3	F-3	F-3	F-3
F-4	F-4	F-4	F-3
F-5	F-4	F-5	F-3
M	F-4	M	F-4

Mandatory Term of Incarceration

One of the provisions of R.C. 2950.99 as amended through 2007 Am. Sub. S.B. 97, provided for mandatory prison for repeat offenders. This provision provides as follows:

(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 is not restricted by division (B) of section 2929.14 of the Revised Code and shall not be reduced to less than three years pursuant to Chapter 2967. or any other provision of the Revised Code.

R.C. 2950.99(A)(2)(b), 2007 Am. Sub. S.B. 97.

Amicus curiae submits that both the provisions of R.C. 2950.99, 2007 Am. Sub. S.B. No. 97 that increased the level of punishment for registration violations, and the provisions that provide for a mandatory term of incarceration are valid legislative enactments. These provisions have been retained in the 2011 H.B. No. 86 amendments to R.C. 2950.99. This does not negate the necessity to answer the issue raised in this appeal, because the H.B. 86 amendments to R.C. 2950.99 still require mandatory prison for repeat offenders and the same punishments that were provided by 2007 Am. Sub. S.B. No. 97.

VI. Application of R.C. 2950.99 at the time of the new registration does not violate the Separation of Powers Doctrine

Applying *Bodyke*, 126 Ohio St.3d 266 to the issue does not answer the question in this case. This Court in *Bodyke* held that the reclassification provisions contained within R.C. 2950.031 and R.C. 2950.032 impermissibly required the Ohio Attorney General to review past decisions of the judicial branch, violating the separation-of-powers doctrine and require the attorney general to reclassify sex offenders whose classifications have already been adjudicated by a court and made subject to a final order. *Bodyke*, paragraphs two and three of the syllabus. As a remedy, the lead opinion in *Bodyke* severed only R.C. 2950.031 and R.C. 2950.032, and ordered the classifications and community-notification and registration orders

imposed by judges reinstated. *Bodyke*, ¶66. Strictly applying *Bodyke* to invalidate R.C. 2950.99, 2007 Am. Sub. No. 97 requires three presumptions:

- All Megan's Law offenders were classified by court order;
- Felony levels or penalties for violating registration requirements were a part of that court order.
- Applying the version of R.C. 2950.99, 2007 Am. Sub. S.B. 97 for registration violations committed after January 1, 2008 violates the Separation of Powers Doctrine for Megan's Law offenders.

At first glance *Bodyke* only prohibits the reclassification of sex offenders by the Ohio Attorney General. The General Assembly acted within their powers in amending the penalties of R.C. 2950.99 through 2007 Am. Sub. S.B. 97. The legislature has broad, plenary discretion in prescribing crimes and fixing punishments. *State v. Morris*, 55 Ohio St.2d 101, 112, 378 N.E.2d 708 (1978). “[A]t all times it is the power of the General Assembly to establish crimes and penalties.” *Id.* at 112-13. “[T]he power to define crimes and establish penalties rests with the General Assembly alone.” *Id.* at 113. As a result, even for offenders entitled to a reinstatement of their registration, classification and community notification under *Bodyke*, amicus curiae submits that the separation-of-powers doctrine could not provide a basis for holding the General Assembly violated the separation of powers doctrine by modifying the potential penalties for future violations of the registration statute.

Nor can it be said that the General Assembly violated the separation of powers doctrine by reopening a final judgment by modifying the potential penalties for future violations of the registration statute. Amicus curiae first notes that not all offenders

who were reporting under Megan's Law had a court ordered classification. This Court in *State v. Hayden*, 96 Ohio St.3d 211, 733 N.E.2d 502, 2002-Ohio-4169 in addressing constitutional challenges to a sex offender's classification discussed the actual requirements of a trial court in conducting a sexual predator hearing under the existing version of R.C. 2950.09. This Court held that, "if a defendant has been convicted of a sexually oriented offense as defined in R.C. 2950.01(D), and is neither a habitual sex offender nor a sexual predator, the sexually oriented offender designation attaches as a matter of law." *Hayden*, paragraph two of the syllabus. Therefore, there are instances of Ohio offenders who were classified by operation of law that were reclassified by the Ohio Attorney General. See for example *Green v. State*, 1st Dist. No. C-090650, 2011-Ohio-2933, *Sewell v. State*, 181 Ohio App.3d 280, 2009-Ohio-872, 908 N.E.2d 995 (1st Dist) and *Boswell v. State*, 12th Dist. No. CA2010-01-006, 2010-Ohio-3134³.

Even if some court orders provided notification to Megan's Law offenders of penalties that were associated with registration violations, this was beyond the scope of the trial court's duty under Megan's Law. This Court in *Hayden* held that a trial court was not required to conduct a hearing to determine whether a defendant is a sexually oriented offender and that Megan's Law. *Hayden*, paragraph two of the syllabus. Appellate courts have held that a trial court's finding that a defendant is a sexually oriented offender is superfluous. See *State v. Hampp*, 4th Dist. No. 99CA2517 (July 17, 2000), 2000 WL 992139 citing *State v. Hanley*, 8th

³ With respect to out-of-state offenders, penalties for registration offenses could differ in other states.

Dist. No. 74323 (Aug. 26, 1999), 1999 WL 652045, *State v. Smith*, 9th Dist. No. 98 CA 7070, unreported (June 23, 1999), *State v. Goodballet*, 9th Dist. No. 98 CO 15, 1999 WL 182514 (Mar. 30, 1999), 1999 WL 182514, *State v. Rimmer*, 9th Dist. No. 97 CA 6795, unreported (Apr. 29, 1998).

In *State v. Zerla*, 10th Dist. No. 04AP-1087, 2005-Ohio-5077 the trial court stated in its September 3, 2004 decision and entry, that “Defendant shall *NOT* be classified as a Sexual Predator. Defendant is classified as a Sexually Oriented Offender and shall be subject to the reporting requirements of that classification.” *Zerla*, ¶3. The defendant appealed the sexually oriented offender. Citing *Hayden*, the Tenth District noted that “[o]ther than ‘the ministerial act of rubber-stamping the registration requirement on the offender,’ the trial court plays no role in the imposition of the sexually oriented offender designation.” *Zerla* at ¶7 citing *Hayden*, at ¶16. The Tenth District rejected the defendant’s argument and noted that the “only actual judicial determination in the September 3, 2004 decision and entry is the trial court’s finding that defendant is not a sexual predator.” *Zerla* at ¶8. Likewise, any notification of penalties for future registration offense goes beyond what is required under R.C. 2950.03, both before January 1, 2008 and after January 1, 2008. For example R.C. 2950.03(B)(1), 2007 Am. Sub. S.B. 10 provides that certain designated persons:

shall inform the offender or delinquent child of the offender's or delinquent child's duty to register, to provide notice of a change in the offender's or delinquent child's residence address or in the offender's school, institution of higher education, or place of employment address, as applicable, and register the new address, to periodically verify the offender's or delinquent child's residence address or the offender's

school, institution of higher education, or place of employment address, as applicable, and, if applicable, to provide notice of the offender's or delinquent child's intent to reside, pursuant to sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code.

Notices require a sex offender be notified that the sex offender could face criminal prosecution for violating the registration duties. See R.C. 2950.03(B)(2), 2007 Am. Sub. S.B. 10. Compare to R.C. 2950.03(B)(1)(c), 1996 H.B. 180. Regardless of the punishment, a registered sex offender knows that the failure to register in compliance with R.C. Chapter 2950 could result in criminal prosecution. The specific punishment associated with future violations of the law are not part of the registration orders issued to sex offenders.

Even when a trial court enters a classification order, it is only the registration, classification and community notification that flow from it. *Bodyke* prohibits the reopening of the registration, classification and community notification orders. Criminal penalties for violating those registration duties are separate. Accordingly, *Bodyke* does not answer the issue.

VII. *State v. Gingell* does not control the outcome because it did not specifically invalidate penalty provisions, only conviction where failure to verify offense may have been based on an AWA 90-day verification as opposed to an annual Megan's Law verification

This issue in this appeal was originally accepted for review and considered in *State v. Gingell*, 128 Ohio St.3d 444, 2011-Ohio-1481, 946 N.E.2d 192. But *Gingell* was disposed for different reasons. After *Gingell* was accepted for review but before the oral argument, this Court released its decision in *Bodyke*. As a result, *Gingell* raised the issue during oral arguments as to whether he was even validly convicted.

See Oral Argument in Case No. 2010-0047, *State v. Ronald Gingell*, <http://www.OhioChannel.org/MediaLibrary/Media.aspx?fileId=128686>, last accessed May 2, 2012.

Gingell's case while originally accepted primarily upon the issue of the retroactivity of R.C. 2950.99 became about whether Gingell, who had been classified a sexually oriented offender and subjected to annual verification could be convicted for violating the 90-day verification requirement. *Gingell*, at ¶5. This Court reversed and remanded Gingell's case holding that:

Therefore, the current version of R.C. 2950.06, which requires Tier III sexual offenders to register every 90 days, does not apply to Gingell. Since Gingell 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. Because the application of the AWA was based upon an unlawful reclassification, we reverse the judgment of the court of appeals and vacate Gingell's conviction for a violation of the 90-day address-verification requirement of R.C. 2950.06." *Gingell*, at ¶8.

Gingell clearly prohibits requiring Megan's Law offenders to report under the increased reporting requirements. While this Court referred to Gingell's conviction indictment for a first degree felony for violating the reporting requirements under the AWA, this Court did not specifically hold that Gingell could not be indicted and subsequently convicted for a first degree felony for violating the reporting requirements under Megan's Law. In some respect this could be viewed as a factual statement: Gingell was indicted for a first degree felony and Gingell was indicted for violating the 90-day verification requirement under the Adam Walsh Act. Regardless, the conflict on the issue exists after *Gingell*.

VIII. Application of R.C. 2950.99 at the time of the new registration offense does not violate the Ex Post Facto Clause of the United States Constitution or the Retroactivity Clause of the Ohio Constitution

A strict reading of this Court's decision in *Williams*, 129 Ohio St.3d 344, indicates that only the application of 2007 Am. Sub. S.B. No. 10, as applied to defendants who committed sex offenses prior to its enactment violates the Retroactivity Clause of the Ohio Constitution. See *Williams*, syllabus. On its face *Williams* did not invalidate the amendments to R.C. 2950.99 through 2007 Am. Sub. S.B. 97. If one argues that *Williams* requires affordance of the Second District's decision in *Howard*, then the conclusion is application of R.C. 2950.99, 2007 Am. Sub. S.B. No. 97 to *Howard* violates the Retroactivity Clause of the Ohio Constitution.

In declaring 2007 Am. Sub. S.B. 10 unconstitutional for violating the Retroactivity Clause of the Ohio Constitution, this Court held:

In general, sex offenders are required to register more often and for a longer period of time. They are required to register in person and in several different places. R.C. 2950.06(B) and 2950.07(B). Furthermore, all the registration requirements apply without regard to the future dangerousness of the sex offender. Instead, registration requirements and other requirements are based solely on the fact of a conviction. Based on these significant changes to the statutory scheme governing sex offenders, we are no longer convinced that R.C. Chapter 2950 is remedial, even though some elements of it remain remedial. We conclude that as to a sex offender whose crime was committed prior to the enactment of S.B. 10, the act "imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction," *Pratte*, 125 Ohio St.3d 473, 2010-Ohio-1860, 929 N.E.2d 415, at ¶ 37, and "create[s] new burdens, new duties, new obligations, or new liabilities not existing at the time," *Miller*, 64 Ohio St. at 51, 59 N.E. 749.

No one change compels our conclusion that S.B. 10 is punitive. It is a matter of degree whether a statute is so punitive that its retroactive application is unconstitutional. *Cook*, 83 Ohio St.3d at 418, 700 N.E.2d 570. When we consider all the changes enacted by S.B. 10 in aggregate,

we conclude that imposing the current registration requirements on a sex offender whose crime was committed prior to the enactment of S.B. 10 is punitive. Accordingly, we conclude that S.B. 10, as applied to defendants who committed sex offenses prior to its enactment, violates Section 28, Article II of the Ohio Constitution, which prohibits the General Assembly from passing retroactive laws.

Williams, at ¶20-21.

Williams did not implicate an analysis under the Ex Post Facto Clause of the United States Constitution; however, both the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution will be discussed. This Court thoroughly analyzed R.C. Chapter 2950 to determine whether the S.B. 10 amendments transformed the law from civil-remedial to punitive. The holding in *Williams*, regarded which classification and registration scheme applied. The criminal provision providing penalties is a separate issue from the retroactivity of the classification, registration, and community notification scheme of 2007 Am. Sub. S.B. 10.

In conducting a retroactive analysis of R.C. 2950.99, one might argue that the criminal penalties provided by R.C. 2950.99 flow from the prior sex offense and not the new registration offense, since there would be no registration offense but for the prior sex offense. But a statute is not retroactive “merely because it is applied in a case arising from conduct antedating the statute’s enactment, * * * or upsets expectations based on prior law.” *Landgraf v. USI Film Products*, 511 U.S. 244, 269 (1994). Nor is a statute retroactive “merely because it draws on antecedent facts for a criterion in its operation.” *United Engineering & Foundry Co. v. Bowers*, 171 Ohio St. 279, 282 (1960). A law is “retroactive” only if “the new provision attaches new legal

consequences to events completed before its enactment.” *Landgraf*, 511 U.S. at 270. R.C. 2950.99 amends only the potential punishments for criminal offense. The potential punishment for violating registration laws is not a new consequence for the prior sex offense. It is only when a new crime that the potential penalty that becomes a consequence.

Likewise, the Ex Post Facto Clause states that “[n]o State shall * * * pass any * * * ex post facto Law.” An ex post facto law literally means “[a]fter the fact; by an act or fact occurring after some previous act or fact, and relating thereto.” *State v. Cook*, 83 Ohio St.3d 404, 414 (1998). “To violate the ex post facto clause, the law must be retrospective, such that it applies to events occurring before its enactment. It must also disadvantage the person affected by altering the definition of criminal conduct or increasing the punishment for the crime.” *State v. Glaude*, 8th Dist. No. 73757 (Sept. 2, 1999), 1999 WL 684813 citing *Lynce v. Mathis*, 519 U.S. 433 (1997). In effect, the Ex Post Facto Clause bars a law “that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed * * *.” *Calder v. Bull* (1798), 3 U.S. 386, 0 (1978). One might argue that the Ex Post Facto Clause is violated because Howard faces greater penalties for failing to register today than he did when he was originally classified. As the New Hampshire Supreme Court put it, this argument, “misconstrues the appropriate ex post facto analysis. In fact, the defendant is being prosecuted for an act, failure to register, that was itself an offense when the defendant committed it, which presents no problems of retrospectivity.” *State v. Costello*, 138 N.H. 587, 591, 643 A.2d 531 (1994) (in response

to defendant's argument that act of not registering was not illegal when defendant committed the sexual assault).

As implicated throughout amicus curiae's brief, amicus curiae submits that this Court should continue to recognize that punishment for registration violations flow from new violations of the law, not from the past sex offense. *Cook*, 83 Ohio St.3d 404, 420-421. See also *Page*, 8th Dist. No. 94369, 2011-Ohio-83, ¶16 (Stewart, J. dissenting), and *Smith*, 3rd Dist. No. 5-07-23, 2008-Ohio-4778, ¶14. While the conviction for a sex offense provides the duty to register and from that flows the specific classification, registration, verification and community notification requirements, any penalty faced by Howard flows from his failure to follow the law. This is perhaps analogous to the crime of having a weapon under disability. Convictions for a felony offense of violence or for a felony drug offense creates a disability. But punishment for possessing the firearm does not flow from felony drug offense, but from the commission of the new crime.

In this respect application of R.C. 2950.99, Am. Sub. S.B. No. 97 when applied to Howard's conviction does not violate the Retroactivity Clause of the Ohio Constitution or the Ex Post Facto Clause of the United States Constitution. For sex offenders who follow their registration requirements, R.C. 2950.99 only provides potential penalties.

CONCLUSION

At the time of Howard's classification he was classified under Megan's Law. The classification, registration and community notification that directly flow from the prior sex offense cannot be changed pursuant to *Bodyke*. Amicus curiae urges reversal of *State v. Howard*, 2nd Dist. No. 24680, 2011-Ohio-5693 and asks this Court to hold that penalties for violating Ohio's registration laws flow from the new registration offense and not the past sex offense, meaning that Howard was appropriately convicted of a felony of the first degree. As the North Carolina Court of Appeals noted, "The fact that a violation of a civil regulatory provision such as the registration requirements leads to a harsh penalty is not pertinent to whether the registration requirements are additional punishment for the previously-committed sex offense." *White*, 162 N.C.App. 183, 196. Civil regulatory provisions can rely upon criminal penalties to further its civil intent. See *United States v. Hinckley*, 550 F.3d 926, 935-938 (10th Cir. 2008). In *Williams*, 114 Ohio St.3d 103, 2007-Ohio-3268, 868 N.E.2d 969, this Court recognized that although the registration system at the time, "may have been enacted generally as remedial measures, [...] R.C. 2950.06 defines a crime: the offense of failure to verify current address.⁴ It does not implicate the constitutionality of the registration and notification process as a whole." *Id.*, ¶10. Accordingly despite the punitive nature of 2007 Am. Sub. S.B. No. 10, no error exists when the version of R.C. 2950.99 in effect

⁴ The same can be said that R.C. 2950.04 defines a crime of failure to register and R.C. 2950.05 defines a crime of failure to notify.

on the date of Howard's offense was applied. Amicus curiae urges reversal of the Second District's decision in *Howard*.

Respectfully Submitted,

WILLIAM D. MASON
Cuyahoga County Prosecutor

By: 

Daniel T. Van (#00846/14)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

*Counsel for Amicus Curiae
Cuyahoga County Prosecutor's Office*

CERTIFICATE OF SERVICE

A copy of the foregoing brief of amicus curiae Cuyahoga County Prosecutor in support of Appellant, State of Ohio urging reversal has been sent this 12 day of May, 2012 to Johnna M. Shia, Assistant Prosecuting Attorney, P.O. Box 972, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422 and Marshall G. Lachman, 75 N. Pioneer Blvd., Springboro, Ohio 45066.


Assistant Prosecuting Attorney