

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

CASE NO. 11-2126

Plaintiff-Appellant,

On Appeal from the
Montgomery County
Court of Appeals,
Second Appellate District

vs.

DONNY A. HOWARD

**COURT OF APPEALS
CASE NO. 24680**

Defendant-Appellee.

APPELLANT'S REPLY BRIEF

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By **JOHNNA M. SHIA**
REG. NO. 0067685

Assistant Prosecuting Attorney
Montgomery County Prosecutor's Office
Appellate Division
Dayton-Montgomery County Courts Building
P.O. Box 972, 301 W. Third Street, 5th Floor
Dayton, Ohio 45422
(937) 225-4117

MARSHALL G. LACHMAN
REG. NO. 0076791
75 N. Pioneer Blvd.
Springboro, Ohio 45066

**ATTORNEY FOR
DONNY A. HOWARD
APPELLEE**

**ATTORNEY FOR STATE OF OHIO
APPELLANT**

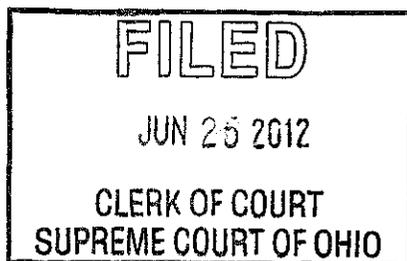
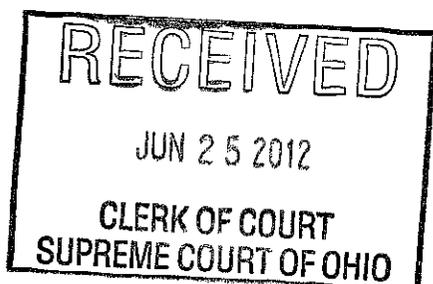


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REPLY ARGUMENT

The amended sentencing statute does not reach back and create any new liabilities with respect to a sex offender's Megan's Law classification. The liabilities created with a sex offender's Megan's Law classification have not changed with the enactment of S.B. 10. The degree of underlying sex offense – that created the registration duty - remains the same as well as the duty to register, verify and notify of a change of address. In 1998 and now, if a sex offender fails to abide by their registration duties, they can be charged with a new criminal offense. The penalty associated with a subsequent registration offense is not a part of a sex offender's obligations, liabilities or disabilities created by the sex offender classification.

The amended sentencing statute, enacted by S.B. 97, is applied prospectively to the new registration offense: the penalty in effect when the criminal act occurred, not the penalty in effect when the duty to register arose. It is not until a sex offender fails to abide by their registration duties that a new criminal offense occurs, if ever. To analogize, a person must abide by the law and if a person commits a criminal act, the penalty for having committed that criminal offense is not the penalty in effect at the time the law was enacted, but the penalty in effect at the time the criminal act occurred. The new penalty is a permissive, prospective legislative remedy to the increase in sex offender registration noncompliance. *See Blackburn v. State*, 50 Ohio St. 428, 438, 36 N.E. 18 (1893); *State v. Sargent*, 126 Ohio App.3d 557, 567, 710 N.E.2d 1170 (12th Dist. 1998).

Howard compares a sex offender classification to a community control sentence whereby when a defendant is sentenced to community control and is later revoked, the trial court must sentence the defendant to the term of incarceration in effect at the time the defendant committed his underlying offense for which the sanctions were issued. A sex offender classification,

however, is not part of the offender's sentence for the underlying sex offense conviction associated with the classification. A sex offender classification, rather, is a collateral consequence of that conviction.

In fact, Megan's Law permitted the trial court to reach back and classify sex offenders, years after the sentence for the underlying sex offense had been executed. *See State v. Cook*, 83 Ohio St.3d 404, 406, 1998-Ohio-291, 700 N.E.2d 570. Specifically, this Court has held in *State v. Cook*, 83 Ohio St.3d 404, 421, 700 N.E.2d 570, 584 (1998), "Even prior to the promulgation of the current version of R.C. Chapter 2950, failure to register was a punishable offense. *See* former R.C. 2950.99, 130 Ohio Laws 671. 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." Therefore, application of the increased penalty to a sex offender's registration offense is not increased punishment or a modification of a prior court order for the underlying sex offense.

Finally, the principles of retroactivity followed by this Court in its recent decisions concerning S.B. 10 are not disturbed by the proposition of law herein.

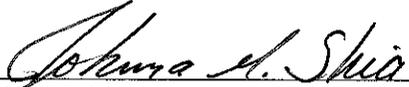
CONCLUSION

The new increased penalties in R.C. 2950.99 are not being applied retroactively to offenders classified under Megan's Law. The new increased penalties are being applied prospectively to an offender's new registration offense. The decision below must be reversed.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: _____


Johnna Shia
Reg. No. #0067685

COUNSEL FOR APPELLANT,
STATE OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by first class mail on this 22nd day of June, 2012, to the following: Marshall G. Lachman, 75 N. Pioneer Blvd., Springboro, Ohio 45066 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.


Johnna Shia
Reg. No. #0067685
COUNSEL FOR APPELLANT,
STATE OF OHIO