

NO.

IN THE SUPREME COURT OF OHIO

12-1514

APPEAL FROM  
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO  
NO. 97636

STATE OF OHIO  
Plaintiff-Appellant

-vs-

STEVEN C. DAVIS  
Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

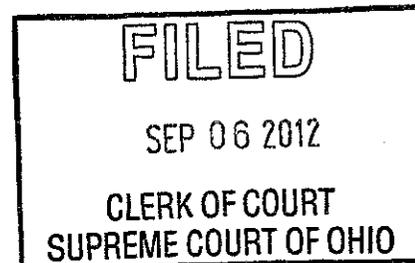
Counsel for Plaintiff-Appellant

William D. Mason (#0037540)  
Cuyahoga County Prosecutor

**DANIEL T. VAN (#0084614)**  
**JAMES M. RICE (#0083990)**  
Assistant Prosecuting Attorneys  
1200 Ontario Street, 8<sup>th</sup> Floor  
Cleveland, Ohio 44113  
(216) 443-7800  
dvan@cuyahogacounty.us *email*  
jmrice@cuyahogacounty.us *email*

Counsel for Defendant-Appellee

**CULLEN SWEENEY (#0077187)**  
Assistant Public Defender  
310 Lakeside Avenue, Suite 200  
Cleveland, Ohio 44113



**TABLE OF CONTENTS**

EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL  
CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC OR GENERAL  
INTEREST.....1

STATEMENT OF THE CASE AND FACTS.....2

LAW AND ARGUMENT.....4

Proposition of Law: Because the General Assembly can enact laws that  
increase the penalty for crimes, the version of R.C. 2950.99 in effect at  
the time of the registration offense applies, not the version in effect at  
the time the sex offender was originally classified.

CONCLUSION .....8

SERVICE .....9

**Appendix**

*State v. Davis*, 2012-Ohio-3570

**EXPLANATION OF WHY THIS CASE INVOLVES A SUBSTANTIAL  
CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC OR  
GENERAL INTEREST**

In *State v. Davis*, 8<sup>th</sup> Dist. No. 97636, 2012-Ohio-3570, the Eighth District followed its decisions in *State v. Page*, 8<sup>th</sup> Dist. No. 94369, 2011-Ohio-83 and *State v. Smith*, 8<sup>th</sup> Dist. Nos. 96582, 96622, 96623, 2012-Ohio-261 and held that a Megan's Law offender, who commits a registration violation, cannot be subject to the version of R.C. 2950.99 in effect at the time of the offender's registration offense.

This case presents the following substantial constitutional questions and issues of great public or general interest: whether the enhanced penalty provisions contained in R.C. 2950.99 as amended through Am. Sub. S.B. 97 apply to Megan's Law offenders. The proposition of law has also been determined to be in conflict with decisions of the First and Fifth Appellate District. See Sup. Ct. Case No. 2012-0375, *State v. Smith*. Moreover, this issue was accepted on discretionary review in Sup. Ct. Case No. 2011-2126, *State v. Howard*. Oral argument in *Howard* is scheduled for August 22, 2012. The State would ask this Court to accept review in this case and stay the briefing schedule pending the resolution of Sup. Ct. Case No. 2011-2126, *State v. Howard*.

The Eighth District's decision in *State v. Davis*, 8<sup>th</sup> Dist. No. 97636, 2012-Ohio-3570 which is contrary to the First District's decision in *State v. Bowling*, 1<sup>st</sup> Dist. No. C-100323, 2011-Ohio-4946 and *State v. Freeman*, 1<sup>st</sup> Dist. No. C-100389, 2011-Ohio-4357, follows its decisions which applied *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424 and *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374.

Thus the legal conclusion by the Eighth is that application of R.C. 2950.99, Am. Sub. S.B. 97 to Davis violates the Separation of Powers Doctrine and the Retroactivity Clause of the United States Constitution. The State contends; however, that application of R.C. 2950.99, Am. Sub. S.B. 97 to Davis violates neither Separation of Powers nor does it violate the Retroactivity Clause.

The State has sought conflict certification in this case. In the alternative to conflict certification the State would ask that this court exercise discretionary review to review the merits of the following proposition of law:

**Because the General Assembly can enact laws that increase the penalty for crimes, the version of R.C. 2950.99 in effect at the time of the registration offense applies, not the version in effect at the time the sex offender was originally classified.**

The State would ask this Court to accept review in this case and stay the briefing schedule pending the resolution of Sup. Ct. Case No. 2011-2126, *State v. Howard*. In accepting this case, this Court would ensure that any holding in *Howard* would apply to Davis's case.

### **STATEMENT OF THE CASE AND FACTS**

The relevant facts were summarized by the Eighth District in *State v. Davis*, 8<sup>th</sup> Dist. No. 97636, 2012-Ohio-3570:

{¶2} In 2004, Davis pled guilty to sexual battery and gross sexual imposition and was sentenced to five years probation. Pursuant to Ohio's sex offender registration system then in effect, former Chapter 2950 (Ohio's Megan's Law), Davis was classified as a sexually oriented offender, the least restrictive classification under Megan's Law. As a sexually oriented offender, he was required to comply with the registration framework provided in Megan's Law, including annual registration for ten years. Additionally, he was subject to the penalties under Megan's Law for noncompliance.

[\*\*\*]

{¶4} In 2011, Davis was charged with failing to provide notice of change of address under R.C. 2950.05(F)(1). The indictment also provided a furthermore specification that Davis was previously convicted of a violation of his reporting and registration duties.

{¶5} Davis filed a motion to dismiss the indictment pursuant to the Ohio Supreme Court's holdings 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, 952 N.E.2d 1108, which held that the AWA was unconstitutional as applied to individuals like Davis who were previously classified under Megan's Law. The motion also requested alternate relief pursuant to this court's holding in *State v. Page*, 8th Dist. No. 94369, 2011-Ohio-83, that the AWA penalties do not apply to individuals such as Davis because Megan's Law offenders can only be subject to Megan's Law penalties.

{¶6} After a hearing on Davis's motion, the trial court denied his motion to dismiss the indictment and denied the request for alternate relief, relying on the First District's decision in *State v. Freeman*, 1st Dist. No. C-100389, 2011-Ohio-4357, rather than this court's decision in *Page*.

{¶7} Thereafter, Davis pled no contest to the indictment. The trial court found him guilty of failure to provide notice of change of address, in violation of R.C. 2950.05(F)(1), and the furthermore specification. The trial court sentenced him to a mandatory three-year prison term pursuant to the current version of R.C. 2950.99. Davis was granted an appellate bond during the pendency of this appeal.

*Davis*, 8th Dist. No. 97636, 2012-Ohio-3570, ¶2-7.

The Eighth District reversed following recent decisions from the court. *Davis*, ¶9. The majority recognized the conflict and noted that the issue had been accepted for review by this Court. *Id.* at ¶10. The concurring opinion, while following, Eighth District case law expressed the opinion that the analysis set forth

in *State v. Freeman*, 1<sup>st</sup> Dist. No. C-100389, 2011-Ohio-4357. *Davis*, ¶12 (Stewart, J. concurring).

### LAW AND ARGUMENT

**Proposition of Law: Because the General Assembly can enact laws that increase the penalty for crimes, the version of R.C. 2950.99 in effect at the time of the registration offense applies, not the version in effect at the time the sex offender was originally classified.**

The State submits that Davis can be subjected to the law in effect at the time of his registration offense as opposed to the law in effect at the time he was classified under Megan's Law.

Davis committed a new offense entirely, and that offense occurred after the January 1, 2008 amendment to R.C. 2950.99. The law that applies to Davis' new offenses is the law that was in effect when he committed them. As the First District has recognized:

The penalty provisions contained in current R.C. 2950.99 became effective January 1, 2008. Freeman pled 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 provisions.* Therefore, current R.C. 2950.99 was not applied retroactively to Freeman's conduct.

*State v. Freeman*, 1<sup>st</sup> Dist. No. C-100389, 2011-Ohio-4357, ¶ 18 (emphasis added). See also *State v. Bowling*, 1<sup>st</sup> Dist. No. C-100323, 2011-Ohio-4946, ¶24 and *State v. Dunwoody*, 5<sup>th</sup> Dist. No. CT11-0029, 2011-Ohio-6360.

The State submits that the First District's reasoning in *Freeman* correctly analyzes R.C. 2950.99 in the context of *Williams*:

The Ohio Supreme Court's decision in *State v. Williams* does not require a different result. Williams had been indicted in November 2007 for unlawful sexual conduct with a minor. He had pleaded guilty on December 14, 2007. During the plea colloquy, the trial court had indicated that Williams would not be subject to reporting requirements. On January 1, 2008, Senate Bill 10's new tier classifications for sexual offenders became effective. Williams was sentenced on February 1, 2008. He moved to be sentenced under the Megan's Law version of R.C. Chapter 2950 that was in effect at the time he had committed his offense. The trial court applied Senate Bill 10's classification scheme and labeled Williams a Tier II sex offender. Williams's classification was upheld by the appellate court.

The Ohio Supreme Court reversed Williams's tier classification under Senate Bill 10, holding that "2007 Am.Sub.S.B. No. 10, as applied to defendants who committed sex offenses prior to its enactment, violates Section 28, Article II of the Ohio Constitution, which prohibits the General Assembly from passing retroactive laws." The court concluded that Senate Bill 10's more stringent classification, registration, and community-notification provisions imposed "new or additional burdens, duties, obligations, or liabilities as to a past transaction" and created "new burdens, new duties, new obligations, or new liabilities not existing at the time" upon sex offenders who had committed their crimes prior to Senate Bill 10's enactment. The court held that Senate Bill 10's classification, registration, and community-notification provisions were punitive and could not constitutionally be retroactively applied to sex offenders who had committed their sex offenses before its enactment.

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. The instant case deals with the imposition of current R.C. 2950.99's penalty provisions on 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.

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. The second assignment of error is overruled.

*Freeman*, at ¶19-22 (internal citations omitted).

The new penalties of R.C. 2950.99 are not new liability based on Davis' sex offender classification. Instead the penalties are based on new violations of law, namely new registration offenses.

As noted by the dissent in *Page*, “[t]he enhanced penalty provision of the [AWA] is not couched in terms of the new classifications. It refers only to “violations” of the reporting statutes, not to the type of tier offender involved. Moreover, there is no question that the General Assembly could validly pass a law that prospectively enhances a penalty for repeat offenders.” *State v. Page*, 8<sup>th</sup> Dist. No. 94369, 2011-Ohio-83, ¶16 (Stewart, J. dissenting).

It is well-established that statutes which enhance the penalty for repeat offenders based upon criminal conduct occurring prior to the passage of the

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

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, such as Davis. In *State v. Cook*, 83 Ohio St.3d 404, 420-421, 700 N.E.2d 570 (1998) it was noted that:

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).

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).

Thus, even though this Court held that application of the Adam Walsh Act to Megan's Law offenders (those who were previously classified under Megan's Law or

those who committed their offenses prior to Adam Walsh Act's enactment), is unconstitutional, neither *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424 nor *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374 stand for the proposition that this Court must find that it is unconstitutional to apply R.C. 2950.99 as amended through S.B. 97 can be applied to Megan's Law offenders such as Davis who committed new registration offenses after S.B. 97's effective date.

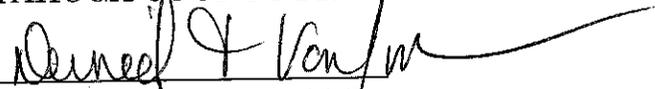
Because the penalties of R.C. 2950.99 relate to the commission of new registration offenses as opposed to the original sex offense, of R.C. 2950.99 in effect at the time of the registration offense applies, not the version in effect at the time the sex offender was originally classified.

### CONCLUSION

This Court should accept jurisdiction on this proposition of law to determine whether Davis should have been sentenced under the S.B. 97 version of R.C. 2950.99.

Respectfully Submitted,

WILLIAM D. MASON  
CUYAHOGA COUNTY PROSECUTOR

By:   
DANIEL T. VAN (#0084614)  
JAMES M. RICE (#0083990)

Assistant Prosecuting Attorneys  
The Justice Center, 8<sup>th</sup> Floor  
1200 Ontario Street  
Cleveland, Ohio 44113  
(216) 443-7800

**SERVICE**

A copy of the foregoing Memorandum in Support of Jurisdiction has been mailed this 5<sup>th</sup> day of September, 2012, to Cullen Sweeney, 310 Lakeside Avenue, 2<sup>nd</sup> Floor, Cleveland, Ohio 44113.

  
Assistant Prosecuting Attorney

[Cite as *State v. Davis*, 2012-Ohio-3570.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION  
No. 97636

---

**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**STEVEN C. DAVIS**

DEFENDANT-APPELLANT

---

**JUDGMENT:  
REVERSED AND REMANDED**

---

Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-549173

**BEFORE:** Keough, J., Stewart, P.J., and Kilbane, J.

**RELEASED AND JOURNALIZED:** August 9, 2012

**ATTORNEYS FOR APPELLANT**

Robert L. Tobik  
Chief Public Defender

BY: Cullen Sweeney  
Assistant Public Defender  
310 Lakeside Avenue  
Suite 200  
Cleveland, OH 44113

**ATTORNEYS FOR APPELLEE**

William D. Mason  
Cuyahoga County Prosecutor

BY: James M. Rice  
Assistant Prosecuting Attorney  
The Justice Center, 9th Floor  
1200 Ontario Street  
Cleveland, OH 44113

KATHLEEN ANN KEOUGH, J.:

{¶1} Defendant-appellant, Steven C. Davis (“Davis”), appeals his sentence. For the reasons that follow, we reverse his sentence and remand for resentencing.

{¶2} In 2004, Davis pled guilty to sexual battery and gross sexual imposition and was sentenced to five years probation. Pursuant to Ohio’s sex offender registration system then in effect, former Chapter 2950 (Ohio’s Megan’s Law), Davis was classified as a sexually oriented offender, the least restrictive classification under Megan’s Law. As a sexually oriented offender, he was required to comply with the registration framework provided in Megan’s Law, including annual registration for ten years. Additionally, he was subject to the penalties under Megan’s Law for noncompliance.

{¶3} In 2007, the Ohio General Assembly enacted Ohio’s Adam Walsh Act (“AWA”), repealing Megan’s Law and providing increased obligations and registration requirements to be applied retroactively to previously-registered sex offenders like Davis. Pursuant to the AWA, the Attorney General reclassified Davis as a Tier III sex offender. The AWA provisions increasing Davis’s registration duties and penalties for noncompliance went into effect on January 1, 2008. As a Tier III sex offender, Davis was required to verify his address every 90 days for life instead of once a year for ten years as a sexually oriented offender under Megan’s Law.

{¶4} In 2011, Davis was charged with failing to provide notice of change of address under R.C. 2950.05(F)(1). The indictment also provided a furthermore specification that Davis was previously convicted of a violation of his reporting and registration duties.

{¶5} Davis filed a motion to dismiss the indictment pursuant to the Ohio Supreme Court's holdings 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, 952 N.E.2d 1108, which held that the AWA was unconstitutional as applied to individuals like Davis who were previously classified under Megan's Law. The motion also requested alternate relief pursuant to this court's holding in *State v. Page*, 8th Dist. No. 94369, 2011-Ohio-83, that the AWA penalties do not apply to individuals such as Davis because Megan's Law offenders can only be subject to Megan's Law penalties.

{¶6} After a hearing on Davis's motion, the trial court denied his motion to dismiss the indictment and denied the request for alternate relief, relying on the First District's decision in *State v. Freeman*, 1st Dist. No. C-100389, 2011-Ohio-4357, rather than this court's decision in *Page*.

{¶7} Thereafter, Davis pled no contest to the indictment. The trial court found him guilty of failure to provide notice of change of address, in violation of R.C. 2950.05(F)(1), and the furthermore specification. The trial court sentenced him to a mandatory three-year prison term pursuant to the current version of R.C. 2950.99. Davis was granted an appellate bond during the pendency of this appeal.

{¶8} Davis appeals, raising as his sole assignment of error that the trial court erred when it sentenced him to the mandatory minimum sentence of three years under the AWA. He contends that he is not subject to the enhanced penalties of the AWA because he was originally classified under Megan's Law. The State maintains that Davis is subject to the current version of R.C. 2950.99, the law in effect at the time he committed the non-reporting offense, and thus he is subject to the enhanced penalties provisions.

{¶9} This court recently addressed this issue in *State v. Smith*, 8th Dist. Nos. 96582, 96622, 96623, 2012- Ohio-261, and held that the enhanced penalties under R.C. 2950.99 and the AWA do not apply to individuals who were originally sentenced under Megan's Law. *Id.* at ¶ 31-38.<sup>1</sup>

{¶10} Until the Ohio Supreme Court issues a definitive ruling on this issue or until it remedies the conflict among the districts, we are bound by the precedent of this court.<sup>2</sup> Accordingly, we sustain Davis's assignment of error, reverse his sentence, and remand the matter to the trial court to impose a sentence consistent with Megan's Law.

{¶11} Judgment reversed and remanded.

It is ordered that appellant recover from appellee costs herein taxed.

---

<sup>1</sup>This court certified that its decision in *Smith* is in conflict with the decisions of the First and Fifth Appellate Districts. See *State v. Freeman*, 1st Dist. No. C-100389, 2011-Ohio- 4357, *State v. Bowling*, 1st Dist. No. C-100323, 2011-Ohio-4946, and *State v. Dunwoody*, 5th Dist. No. CT11-0029, 2011-Ohio-6360. On May 23, 2012, the Ohio Supreme Court recognized that a conflict exists and has held the case for the decision in *State v. Grunden*, Supreme Court Case No. 2011-1553.

<sup>2</sup>The issue has been accepted for review by the Ohio Supreme Court in *State v. Howard*, Supreme Court Case No. 2011-2126.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, JUDGE

MARY EILEEN KILBANE, J., and  
MELODY J. STEWART, P.J., CONCURS IN JUDGMENT ONLY WITH SEPARATE  
OPINION

MELODY J. STEWART, P.J., CONCURRING IN JUDGMENT ONLY:

{¶12} I concur in the decision reached in this case because it follows this court's precedent. However, I remain convinced that the analysis set forth in *State v. Freeman*, 1st Dist. No. C-100389, 2011-Ohio-4357, and in my dissenting opinion in *State v. Page*, 8th Dist. No. 94369, 2011-Ohio-83, is correct — at least until the Ohio Supreme Court says otherwise.