ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: AARON K. VON	)	CASE NO. 15-0619
	)	On appeal from the Trumbull County Court of Appeals No. 2013-T-0085
	)	Trumbull County Common Pleas Court Case No. 2012 CV 2284

****

MEMORANDUM IN SUPPORT OF JURISDICTION

****

DENNIS WATKINS (#0009949)
Trumbull County Prosecuting Attorney
LuWAYNE ANNOS (#0055651)
Assistant Prosecuting Attorney
160 High St. N.W., 4th Floor
Warren, Ohio 44481

Telephone: (330) 675-2426
Fax: (330) 675-2431
E-mail: psannos@co.trumbull.oh.us

Counsel for Appellant,
The State of Ohio

AARON K. VON
7777 McDowell St.
Masury, Ohio 44438

Appellee in Pro Se

FILED
APR 17 2015
CLERK OF COURT
SUPREME COURT OF OHIO

ORIGINAL

RECEIVED
APR 17 2015
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

PAGE(S)

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

STATEMENT OF THE CASE AND FACTS.....5

STATE'S PROPOSITION OF LAW NO. I:.....8

The registration termination procedure delineated in R.C. 2950.15 may not be retroactively applied to sex offenders who commit their crimes before January 1, 2008 and who are convicted and sentenced before that date.

STATE'S PROPOSITION OF LAW NO. II.....14

A statute which has not been found unconstitutional is not subject to the judicial remedy of severance.

CONCLUSION.....15

PROOF OF SERVICE.....16

APPENDIX

Appx. Page

Opinion of the Eleventh District Court of Appeals (March 16, 2015).....1

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

The public has a vested interest in keeping track of sex offenders. A recent decision by the Eleventh District Court of Appeals, if allowed to stand, will make that more difficult, perhaps just in the Eleventh District, or perhaps throughout the entire State of Ohio if other districts adopt the position that Megan's Law sex offenders are now at liberty to terminate their obligation to account for where they are living and working.

Ohio's Eleventh Appellate District has held that Megan's Law sex offenders - those who committed their offenses *prior* to January 1, 2008 – may now avail themselves to a benefit afforded post-2008 sex offenders- and have their registration obligations terminated under R.C. 2950.15, which was enacted as part of the Adam Walsh Act ("AWA") and codified under R.C. 2950 et seq. It is the State's position that this decision is completely at odds with this Court's holding in *State v. Williams,* 129 Ohio St.3d 344, 2011–Ohio–3374, 952 N.E. 2d 1108 (2011) which held that the AWA is only applicable to sexual offenders who are sentenced *after* January 1, 2008.

This case is one of public or great general interest because it opens the floodgates for Megan's Law sex offenders already living in the five counties comprising the Eleventh District to petition the lower courts to terminate their lawfully imposed obligation to register their addresses with the local sheriff's department. This ruling could potentially affect more than a hundred Megan's Law offenders in Trumbull County alone, thousands statewide if adopted by other districts. Moreover, the law abiding citizens of those five counties would hardly relish the idea of becoming the residential destination for convicted sex offenders who wish to shed their registration responsibilities.

As will be discussed *infra*, the sex offender in this case, Aaron Von, committed a sex offense in 1992 in Colorado. He was sentenced in 1997 to a year of imprisonment and under Colorado's version of Megan's Law, was ordered to register as a sex offender *for life.* After his release from confinement, Von relocated to Ohio. He dutifully continued registering, but in 2012, petitioned the Trumbull County Common Pleas Court, pursuant to R.C. 2950.15, to terminate his registration. The State of Ohio opposed arguing that R.C. 2950.15 could not be applied retroactively to Von because in *Williams,* supra, this Court held that the Adam Walsh Act is only applicable to sexual offenders sentenced *after* January 1, 2008. The trial court denied the petition in its entirety because "there was no provision to terminate one's status as a registered sex offender post-conviction. R.C. 2950, as amended, is not retroactive." The court below reversed the trial court for this conclusion. *In re Von,* 2013-T-0085, 2015-Ohio-943, 2015 WL 1138343, ¶1.

The two-judge majority of the Eleventh District concluded that the provisions of R.C. 2950.15 are not punitive, therefore *Williams* is not controlling as to the question of whether that statute applies retroactively to a sexual offender, such as Von, who committed his sexual offense prior to January 1, 2008. *Von,* at ¶ 15. As a result, Megan's Law offenders in five Ohio counties are now free to apply under R.C. 2950.15 to have their registration obligation terminated. The State submits this decision is in error, contrary to the plain intent of the non-retroactivity holding in *Williams,* and constitutes a clear and present danger to public safety if allowed to stand.

The decision by the Eleventh District completely disregards the straightforward language of R.C. 2950.15(A) which defines the adult sex offender eligible for registration termination as follows: "*** '[E]ligible offender' means a person who is convicted of, pleads guilty to, was convicted of, or pleaded guilty to a sexually oriented offense or child-victim oriented offense,

regardless of when the offense was committed, **and is a tier I sex offender**/child-victim offender or a child who is or was adjudicated a delinquent child for committing a sexually oriented offense or child-victim oriented offense, regardless of when the offense was committed, and is a public registry-qualified juvenile offender registrant." (Emphasis added).

No Megan's Law sex offender qualifies as a "tier I sex offender." In order to avail oneself of the termination privilege articulated in R.C. 2950.15 one must be a "tier I sex offender" which Von was not, nor is any other Megan's law offender. The Tier I, Tier II, and Tier III classifications are unique to the AWA and are a creation of the AWA. As Judge Grendell in her dissent writes, "[t]he trial court's judgment is wholly consistent with the position of the Ohio Supreme Court, that 'S.B. 10 [the Adam Walsh Act], 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'." *Von,* at ¶43 citing *Williams,* at ¶ 20. R.C. 2950.15 as written does not "grandfather in" Megan's Law offenders. Nevertheless, the Eleventh District Court of Appeals now holds that this Court's decision in *Williams* "is *not controlling* as to the question of whether that statute applies retroactively to a sexual offender, such as appellant, who committed his sexual offense prior to January 1, 2008." (Emphasis added) *Von,* at ¶15.

The Eleventh District quotes *Williams* saying that "R.C. 2950.03, for example, imposes registration requirements for offenders sentenced on or after January 1, 2008, *regardless of when the offense was committed."* (Emphasis added). *Von,* at ¶20, quoting *Williams* at ¶8. The State submits this language appears because it is possible to have committed an offense under Megan's Law, but not be sentenced until after Adam Walsh took effect. However, it appears that the Eleventh District interprets the phrase to open the R.C. 2950.15 termination option to additional

sex offenders sentenced before Adam Walsh became law. This misinterpretation then leads to the completely unsupportable conclusion that "[g]iven that the cited phrase infers that the date of the commission of the sexual crime is irrelevant to determining an offender's eligibility for termination relief, there is no dispute that the General Assembly intended for R.C. 2950.15 to be applied retroactively." *Von,* at ¶21. The Ohio General Assembly never had any such intent. The "regardless-of-when-the-offense-was-committed" language was not intended to apply to all registered sex offenders but only to those sentenced *after* 2008 even if they committed their sex offenses before 2008.

The Eleventh District's opinion raises a substantial constitutional question as well. When this Court holds that a statute is unconstitutional, severance may be appropriate. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470,, ¶ 94 (2006). This Court has never held that R.C. 2950.15 is unconstitutional. Neither has the Eleventh District. In fact, the two –judge majority thought it was *so* constitutional they applied to sex offenders not even referenced in the statute.

Nevertheless, the court below held, "even though many provisions of the Adam Walsh Act were declared unconstitutional as applied to offenders convicted of sex crimes that occurred prior to January 1, 2008, R.C. 2950.15 can be severed from those other provisions." *Von,* at ¶26. The State respectfully submits the Eleventh District majority committed constitutional error by severing a statutory provision which no court has ever found to be unconstitutional. The error was compounded by applying it retroactively to sex offenders who were not covered in the statute. The dissent correctly notes that the analysis as to severability is "fundamentally flawed." *Von,* at ¶48. It is also fundamentally dangerous when it permits convicted sex offenders to

disappear into the shadows when their convictions and whereabouts are supposed to be known to their neighbors, teachers and employers.

This Court's intervention in this matter is crucial. The Eleventh District opinion has extended a benefit reserved for AWA offenders to pre-AWA offenders, a result never intended by the General Assembly, or by this Court. This Court's silence on R.C. 2950.15 in *Williams* has been wrongly construed as a registration escape hatch for dangerous criminals. While the sex offenders win, the public loses its right to know where Megan's Law offenders live and work. The State respectfully requests this Court to accept jurisdiction in this case.

STATEMENT OF THE CASE AND FACTS

On January 29, 1997, Von was convicted in Colorado of one count of sexual assault of a child, a fourth-degree felony, and one count of sexual assault, a first-degree misdemeanor. The Colorado trial court sentenced him to a prison term of one year, and also placed him on probation for nine years. During the majority of the probation period, Von continued to reside in Colorado. *Von,* at ¶¶2, 43. Neither party disputes that as a result of his conviction, he was ordered to register as a sex offender for the rest of his life. *Von,* at ¶31.

In August 2011, Von moved to Ohio. Though not referenced in the lower court's opinion, according to his motion for preliminary injunction, he first moved to North Lima in Mahoning County where he was ordered to register as a "Sexually Oriented Offender or Child Victim, Offender." This designation was in error. His Colorado conviction required him to register for life and therefore he should have been labeled a sexual predator. Nevertheless, when Appellant moved to his present home in Trumbull County, he reported to the Trumbull County Sheriff's Office and signed a notification form designating him as a "Pre Adam Walsh (AWA) Sexual

Predator with an obligation to register "for a period of a Lifetime with verification every 90 days." Based on his registration requirement in Colorado, this was the proper designation.

Von filed his complaint to terminate his duty to register pursuant to R.C. 2950.15 in the Trumbull County Court of Common Pleas on October 5, 2012. That complaint does not reference Megan's Law or the Adam Walsh act, nor did it specify whether Von was registering as a Tier I, Tier II, Tier III offender, or under a Megan's Law designation. The court below correctly notes that in his motion for preliminary injunction, filed Nov. 15, 2012, Von sought to prevent the State from moving him from a Tier I to Tier III classification. *Von,* at ¶5.

Von's complaint to terminate was submitted pursuant to R.C. 2950.15, which was enacted as part of the 2007 AWA and took effect in Ohio on January 1, 2008. Prior to that date, Ohio's sexual offender statutory schemes did not contain provisions allowing a sexual offender to move for termination of registration requirements. *Von,* at ¶4.

The trial court granted Von's motion for preliminary injunction on Nov. 15, 2012, expressly holding that Von would suffer irreparable harm if his classification were modified prior to the issuance of a final ruling on his application to terminate. *Id.* at ¶5. Also as part of that typed, one-page entry, the trial court incorrectly hand-wrote "Petitioner to remain tier 1." *Von,* at ¶32.

In response to the application to terminate, the State asserted that R.C. 2950.15 does not apply to Von because his convictions for the sexual assaults predate the original enactment of Ohio's AWA statute. The State further asserted that R.C. 2950.15 could not be applied retroactively to Von because, in *Williams,* supra, this Court expressly held that the AWA is only applicable to sexual offenses committed after January 1, 2008. *Von,* at ¶6.

On July 15, 2013, the trial court issued its decision denying his application to terminate Von's registration obligations. As the basis for its judgment, the court correctly held that, since no procedure for the termination of a registration order had existed prior to 2008, Von was not eligible for any relief under R.C. 2950.15. *Von,* at ¶7. Von timely appealed that denial to the Eleventh District Court of Appeals.

On March 16, 2015, the court below reversed and remanded the case to the trial court. The purpose of the remand was to determine whether or not Von qualifies as a Tier I offender. *Von,* at ¶37. This part of the opinion, which affects Von and only Von, is unnecessary because despite the trial court's errant notation that Von "remain" a "tier 1" offender, he was clearly not an Adam Walsh offender. As the dissent correctly notes, "Von was convicted of sex offenses in 1997, long before the enactment of the Adam Walsh Act. Not only would it be unconstitutional to classify Von under the Adam Walsh Act, there is no evidence before this court that Von has ever been classified as a tier I offender." *Von,* at ¶47. The concurring opinion also states that "[A]ppellant's Tier I classification should be terminated; Appellant was subject to Megan's Law, as noted by the trial court, and R.C. 2950, as amended, does not apply retroactively to appellant." *Von,* at ¶40.

However, in addition to the remand for Von, the court also held that the AWA's provision for the termination of registration requirements for certain AWA Tier I offenders may be applied retroactively to Megan's Law offenders. The two-judge majority reached this decision holding that R.C. 2950.15 does not impose any new burdens or obligations on sex offenders, and therefore this Court's decision in *Williams* "is not controlling as to the question of whether that statute applies retroactively to a sexual offender, such as [Von] who committed his sexual offense prior to January 1, 2008." *Von,* at ¶15. It should be noted that the opinion does

not address *which* Megan's Law offenders qualify for this privilege. The court continued: "Given that the termination of registration requirements does not result in any new duties or burdens for the state, but only creates a possible benefit for eligible offenders, the constitutional prohibition against retroactive laws does not bar the enforcement of the legislature's intent that all Tier I sex offenders be afforded an opportunity to move for such relief, regardless of when the underlying offense took place. Accordingly, the trial court erred in denying appellant's application to terminate on the grounds that R.C. 2950.15 could not be applied retroactively." *Von*, at ¶ 29.

Other facts will be brought to the Court's attention in the Argument portion of this Memorandum.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

STATE'S PROPOSITION OF LAW NO. I: The registration termination procedure delineated in R.C. 2950.15 may not be retroactively applied to sex offenders who commit their crimes before January 1, 2008 and who are convicted and sentenced before that date.

The Eleventh District Court erred as a matter of law in holding that Megan's Law sex offender registrants are free to avail themselves to an Adam Walsh Act privilege of terminating their previously imposed duty to register their whereabouts.

It is well-settled law that neither the Ohio, nor the federal constitution, forbids statutes from having a beginning and an end, even when the enactment of the new statute "discriminate[s] between the rights of an earlier and a later time." *State ex rel. Lemmon v. Ohio Adult Parole Authority*, 78 Ohio St. 3d 186, 188, 1997-Ohio-223, 677 N.E. 2d 347. R.C. 2950.15, entitled "Motion requesting court to terminate duty to comply with registration requirements," has a "beginning," and that beginning was January 1, 2008, when Ohio's version of the AWA became law. Granted, the ability to terminate one's registration duties constitutes a

"perk" not available to Megan's Law offenders; but such distinctions are by law both permissible and inevitable.

Moreover, there is a plethora of authority from this Court stating that if a new law is meant to be applied retroactively, said retroactivity must be apparent from the four corners of the statute: "A statute must clearly proclaim its own retroactivity to overcome the presumption of prospective application. Retroactivity is not to be inferred. *Kelley v. State* (1916), 94 Ohio St. 331, 338–339, 114 N.E. 255. If the retroactivity of a statute is not expressly stated in plain terms, the presumption in favor of prospective application controls. *Bernier v. Becker* (1881), 37 Ohio St. 72, 74. Moreover, the General Assembly is presumed to know that it must include expressly retroactive language to create that effect, and it has done so in the past." *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶ 15 (2007). No such proclamation was made in R.C. 2950.15, and the Eleventh District was wrong to infer that it was.

The enactment of Am. Sub.S.B. No. 2 in 1996 provides a good analogy to the issue at bar. S.B. 2 completely revamped Ohio's sentencing guidelines. Perhaps the most striking difference between pre- and post- S.B. 2 sentencing statutes was the almost complete elimination of indefinite prison sentences. Pre-S.B. 2 offenders filed multiple mandamus actions against Ohio's Adult Parole Authority arguing for their release because certain prisoners would be incarcerated longer than post-S.B.2 offenders convicted of the same crimes. This Court found no error in this outcome:

"[T]he refusal of the General Assembly to retroactively apply the differing provisions of Am.Sub.S.B. No. 2 to persons convicted and sentenced before July 1, 1996 did not violate their rights to equal protection and due process under the Fourteenth Amendment to the United States Constitution. '[T]he 14th Amendment does not forbid statutes and statutory changes to have a

beginning, and thus to discriminate between the rights of an earlier and later time.' *Sperry & Hutchinson Co. v. Rhodes* (1911), 220 U.S. 502, 505, 31 S.Ct. 490, 491, 55 L.Ed. 561, 563; *State v. Rush* (1991), 305 S.C. 113, 115, 406 S.E.2d 355, 356 ('[E]qual protection is not offended by treating those who committed DUI offenses prior to the effective date of the amendment differently from those who committed offenses after that date.'). This holding comports with the conclusions of appellate courts that have addressed the constitutionality of this aspect of Am.Sub.S.B. No. 2. *State v. Fannin* (Feb. 11, 1997), Franklin App. No. 96APA07-935, unreported, 1997 WL 65529; *State v. Jefferson* (May 24, 1996), Richland App. No. 95-CA-7, unreported, 1996 WL 3636547." *State ex rel. Lemmon v. Ohio Adult Parole Auth.*, supra, at 188.

It should be most troubling to this Court that the majority opinion references decisions in *Williams* and *State v. Bodyke,* 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E. 2d 753 (2010), but ignores the core holding in each: It is unconstitutional to retroactively apply the AWA to Megan's Law offenders. This Court will recall that when the AWA became law and the Ohio Attorney General's Office began notifying Megan's Law offenders of their new duties to register pursuant to the AWA, sex offenders lined up in droves to challenge the constitutionality of the AWA. They wanted no part of the more onerous registration requirements which, in many cases, caused them to register more often and for longer periods of time.

This Court stated in *Bodyke,* "[w]e are persuaded that the AWA is substantially different from Megan's Law." *Id.* at ¶33. This Court described those differences as follows: "Offenders who had registered before December 1, 2007, were to be reclassified as Tier I, II, or III sex offenders according to the new statutes. Id. Tiers are assigned solely by reference to the offense. See R.C. 2950.01(E), (F), and (G). The entire reclassification process is administered by the attorney general, with no involvement by any court. There is no individualized assessment. No

consideration is given to any of the other factors employed previously in classification hearings held pursuant to Megan's Law. Id. As a result, the trial court is stripped of any power to engage in independent fact-finding to determine an offender's likelihood of recidivism. Expert testimony is no longer presented; the offender's criminal and social history are no longer relevant." *Id.* at ¶22. This Court found that the AWA provision articulated in R.C. 2950.31 and R.C. 2950.32 violated the separation-of-powers doctrine because it permitted the Ohio Attorney General's Office to reclassify judicially classified Megan's Law offenders as Tier I, Tier II, or Tier III offenders and cause their registration requirements to change with the reclassifications. *Id.* at ¶¶60-62,67.

In its opinion, the two-judge majority erroneously states, "[s]ince the provisions of 2950.15 are not punitive in nature, *Williams* is not controlling as to the question of whether the statute applies retroactively to a sexual offender, such as appellant, who committed his sexual offense prior to January 1, 2008." *Von,* at ¶15. This Court did not jettison R.C. 2950.15 when it held: "R.C. Chapter 2950 is punitive. The statutory scheme has changed dramatically since this court described the registration process imposed on sex offenders as an inconvenience 'comparable to renewing a driver's license.' *Cook,* 83 Ohio St.3d at 418, 700 N.E.2d 570. And it has changed markedly since this court concluded in *Ferguson* [120 Ohio St. 3d 7 (2008)] that R.C. Chapter 2950 was remedial." *Williams*, at ¶ 16. This Court has explained: "The use of 'title,' 'chapter,' 'section,' 'division, and 'subdivision' is uniform throughout the Revised Code. As used in the Ohio Revised Code, the word 'section' unambiguously refers to a decimal-numbered statute only." *State v. Porterfield*, 106 Ohio St.3d 5, 2005-Ohio-3095, 829 N.E.2d 690, ¶ 16 (2005). By stating that "Chapter 2950" is punitive, this Court included R.C. 2950.15, a

decimal-numbered statute contained therein. Therefore, though the section may appear beneficial to selected sex offenders, this Court still found the entire chapter punitive.

As a result, it cannot be retroactively applied to pre-2008 sex offenders. "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."* (Emphasis added). *Williams* at ¶21. Hence, R.C. 2950.15 cannot be applied retroactively to any Megan's Law offenders, including Von.

It is most troubling that the Eleventh District's opinion, as written, does not specify which Megan's Law offenders may benefit from this retroactive application. The statute references only "tier I offenders," and that leaves wide open the question as to whether this new privilege extends just to those previously labeled sexually oriented offenders, habitual sexual offenders or sexual predators under Megan's Law. As discussed earlier in the Memorandum, the two-judge majority parsed out the phrase "regardless of when the offense was committed" and construed that as an open invitation to an unspecified category or categories of Megan's Law offenders to terminate their registration obligations. This was error and makes the new holding by the Eleventh District wholly unworkable.

To apply AWA's termination proceedings to Megan's Law offenders trial judges will now be forced to decide who qualifies as a "tier I offender" and re-label them accordingly. This is exactly what the AWA was designed to prohibit. "The former categories of sexually oriented offender, habitual sex offender, and sexual predator no longer exist, nor is the court required to

hold classification hearings as before. Instead, offenders are classified as Tier I, Tier II, or Tier III sex offenders (or child-victim offenders) based solely on the offender's offense. R.C. 2950.01. Specified officials are required to notify existing offenders of their duties and new tier classification. R.C. 2950.03, 2950.031, and 2950.032. Significantly for our purposes here, under the AWA *judges no longer have discretion to determine which classification best fits the offender.*" *Bodyke,* at ¶¶ 21-22. Therefore, to comply with *Von,* trial judges in Eleventh District must violate *Bodyke,* a scenario which this Court should find untenable.

As the court below correctly notes, Von was ordered by the State of Colorado to register as a sexual offender for the "remainder of his natural life." C.R.S.Sec. 16-22-113, *Von* at ¶31. Under R.C. 2950.09(A), an out-of-state sexual offender convicted of a nonexempt sex offense, and who is required to register for life as a sex offender in the state where he was convicted, "is *automatically classified as a sexual predator in Ohio.*" (Emphasis added). *Logue v. Leis*, 169 Ohio App.3d 356, 2006-Ohio-5597, 862 N.E.2d 900, ¶ 4. Again, there is no judicial discretion permitted here. The now-repealed R.C. 2950.09 permitted a court to determine that an out-of-state offender is not a sexual predator if he proves that the registration requirement of the foreign jurisdiction is not "substantially similar" to Ohio's sexual-predator classification, *Id.* But that argument was not advanced by Von in the trial court.

To conclude, the court below erred by extracting the "regardless-of-when-the-offense-was-committed" language from R.C. 2950.15, and improperly holding that Megan's Law offenders were entitled to an AWA option to terminate registration requirements. Given that the statute requires the registrants to be "tier I" offenders before application to terminate can be made, this decision runs contrary to legislative intent and this Court's holdings in *Bodyke* and *Williams.* Review is required to correct this error.

<u>STATE'S PROPOSITION OF LAW NO. II:</u> A statute which has not been found unconstitutional is not subject to the judicial remedy of severance.

As stated previously, a rather bizarre component to the Eleventh District's opinion is that it "severed" R.C. 2950.15. *Von,* at ¶¶26-30. Though the court's analysis of this procedure as it relates to R.C. 2950.15 is extensive, said analysis is – as described by the dissent – "fundamentally flawed." *Von,* at ¶48.

"When this court holds that a statute is unconstitutional, severance may be appropriate. R.C. 1.50." *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 94. Under R.C. 1.50, the statute in question must be held "invalid" before severance is required. The two-judge majority never held that R.C. 2950.15 is unconstitutional or invalid. To the contrary, the opinion broadens the scope of the statute to cover even more sex offenders than General Assembly intended.

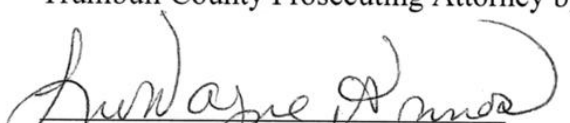
Moreover, this Court set forth a tripartite test in 1927 –which is still good law – for determining whether a statute can be severed: "(1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?" *Geiger v. Geiger,* 117 Ohio St. 451, 466 (1927). The decision by the Eleventh District fails this test because in order to sever, it is necessary to expand the eligible offenders from "tier I" offenders to include Megan's Law offenders, the apparent intended beneficiaries of the severance. The adding of such terms is impermissible under *Geiger.*

The Eleventh District majority committed constitutional error in severing R.C. 2950.15 without finding it unconstitutional or invalid. The application of the doctrine of severance is so flawed it must be corrected by this Court.

CONCLUSION

The public has a legitimate interest in knowing when sex offenders move in next door, drive through their neighborhoods, or seek employment where they work. This Court has an interest in upholding the prospective application of all aspects of the AWA. The Eleventh District incorrectly extended the option of registration termination to offenders excluded from R.C. 2950.15. The decision cannot be squared with this Court's decisions in *Bodyke* and *Williams.* As such, jurisdiction and review are warranted in this case.

Respectfully submitted,
DENNIS WATKINS (#0009949)
Trumbull County Prosecuting Attorney by:



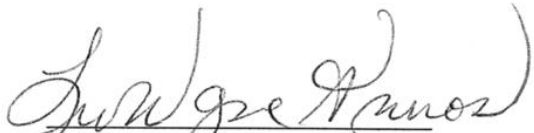
LuWAYNE ANNOS (#0055651)
Assistant Prosecuting Attorney
160 High St. N.W.
Warren, Ohio 44481

Phone: (330) 675-2426
Fax: (330) 675-2431

COUNSEL FOR APPELLANT,
THE STATE OF OHIO

PROOF OF SERVICE

I do hereby certified that a copy of the foregoing Memorandum was sent by ordinary U.S. Mail to Aaron K. Von,* Appellee, 7777 McDowell St., Masury, Ohio, 44438, and to Atty. Timothy Young, Director, Office of the Ohio Public Defender, 250 E. Broad St., Suite 1400, Columbus, Ohio, 43215-9308, on this 15th Day of April, 2015.



LuWAYNE ANNOS(#0055651)
Assistant Prosecuting Attorney

*Licensed trial and appellate counsel for Appellee, Timothy E. Bellew (Registration No. 67573), is currently subject to an interim default suspension by this Court. See, Ohio Supreme Court Case No. GEN2014-2175. No other attorney has filed a notice of appearance in this case.

APPENDIX

COA- email
T. Bellew
L. Annos - hdel

FILED
COURT OF APPEALS
MAR 16 2015
TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

IN RE: AARON K. VON : **OPINION**

: **CASE NO. 2013-T-0085**

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2012-CV-02284.

Judgment: Reversed and remanded.

Timothy E. Bellew, P.O. Box 427, Girard, OH 44420 (For Appellant).

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Appellee).

THOMAS R. WRIGHT, J.

{¶1} This accelerated-calendar appeal is from a final judgment of the Trumbull County Court of Common Pleas, overruling appellant, Aaron K. Von's, application to terminate his registration requirements under Ohio's sexually-oriented offender law. Appellant claims that, as a "Tier I" offender, he is eligible for the requested relief as R.C. 2950.15 retroactively applies to him. For the following reasons, the trial court's conclusion that R.C. 2950.15 does not apply retroactively to appellant regardless of his "tier" classification is reversed.

{¶2} On January 29, 1997, appellant was convicted in Colorado of one count of sexual assault of a child, a fourth-degree felony, and one count of sexual assault, a first-degree misdemeanor. The Colorado trial court sentenced him to a prison term of one

Mandate Issued: Common Pleas

ORIGINAL

year, and also placed him on probation for nine years. During the majority of the probation period, appellant continued to reside in Colorado and attended a sexual offender treatment program.

{¶3} In February 2005, appellant moved to Taos, New Mexico, where he lived and worked for approximately six years. In August 2011, he moved to his present home in Trumbull County, Ohio. At each place appellant resided, he continued to periodically register as a sexual offender with the county sheriff.

{¶4} After living in Trumbull County for 14 months, appellant filed an application to terminate his ongoing registration requirements. This application was submitted pursuant to R.C. 2950.15, which was enacted as part of the 2007 Adam Walsh Act and took effect on January 1, 2008. Prior to that date, Ohio's sexual offender statutory schemes did not contain provisions allowing a sexual offender to move for termination of registration requirements.

{¶5} Although not stated in his application to terminate, appellant maintained in subsequent submissions to the trial court that he qualifies as a Tier I sexual offender under the current Ohio statutory scheme. While his application was pending, he also moved the trial court for a preliminary injunction to stop the state from taking any steps to change his sexual offender classification from Tier I to Tier III. The trial court granted this motion, expressly holding that appellant would suffer irreparable harm if his classification were modified prior to the issuance of a final ruling on his application to terminate.

{¶6} In answering the application to terminate, the state asserted that R.C. 2950.15 does not apply because appellant's convictions for the sexual assaults predate the original enactment of the statute. The state further asserted that R.C. 2950.15 could

not be applied retroactively to appellant because, in *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, the Supreme Court of Ohio expressly held that the Adam Walsh Act is only applicable to sexual offenses committed after January 1, 2008.

{¶7} After appellant submitted a reply brief on the "retroactivity" issue, the trial court issued its decision denying his application to terminate his registration obligations. As the basis for its judgment, the court held that, since no procedure for the termination of a registration order had existed prior to 2008, appellant was not eligible for any relief under R.C. 2950.15.

{¶8} Appellant raises a single assignment of error for review:

{¶9} "The trial court erred when it found that R.C. 2950.15 does not apply to convictions prior to the date of the underlying conviction, and dismissed Appellant's conviction [*sic*], without considering the merits of the application."

{¶10} Pursuant to R.C. 2950.15(B), a sexual offender has been granted the right to move a common pleas court to terminate his obligation to comply with registration requirements. However, under division (A) of the statute, the offender is only eligible for this relief if, inter alia, he is a Tier I sexual offender. In this case, no final determination was ever made regarding whether appellant is a Tier I sexual offender for purposes of R.C. 2950.15. Instead, the trial court based its decision to deny appellant's motion solely upon the conclusion that the statute could not be applied retroactively. Therefore, the scope of this opinion will be limited to the specific ruling issued by the trial court.

{¶11} As noted above, in contending that R.C. 2950.15 could only be applied to sexual offenses committed subsequent to January 1, 2008, the state relied heavily upon the Ohio Supreme Court's holding in *Williams*, *supra*. Even though the trial court did not expressly cite *Williams* in its analysis, the judgment contained a categorical statement

that R.C. Chapter 2950, as amended in the Adam Walsh Act, "is not retroactive." Under his sole assignment, appellant argues that the state's reliance upon *Williams* is misplaced. According to appellant, the application of the Supreme Court's standard for retroactivity to R.C. 2950.15 actually supports the conclusion that all Tier I offenders can move to terminate registration requirements regardless of when the sexual offense was committed.

{¶12} In *Williams*, the primary question before the Ohio Supreme Court was the general effect of the Adam Walsh Act upon the application of sexual offender laws: i.e., did the new Act change the nature of the statutory scheme from purely remedial to punitive? In answering this query in the affirmative, the Supreme Court did not focus on any particular statute. Furthermore, the Court's ultimate decision was set forth in broad terms: "2007 Am.Sub.S.B. No 10 [the Adam Walsh Act], 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*, 129 Ohio St.3d at the syllabus.

{¶13} Nevertheless, in reaching this conclusion, the Supreme Court specifically limited its analysis to four alterations in the statutory scheme: (1) the new classification system for sexual offenders, including Tier I, Tier II, and Tier III; (2) the new procedure for determining an offender's classification; (3) the additional reporting and registration requirements; and (4) the increased duration of those requirements. *Id.* at ¶7, 16-19. As to the latter two changes, the Supreme Court emphasized that retroactive application was impermissible because the Adam Walsh Act had the effect of placing new burdens or obligations upon defendants in regard to sexual offenses committed in the past. *Id.* at ¶19.

{¶14} The *Williams* opinion does not refer to R.C. 2950.15. Unlike the statutes governing a sexual offender's classification and the imposition of reporting/registration requirements, R.C. 2950.15 does not impose any new burdens or obligations upon an offender for his prior sexual crimes. Rather, the statute essentially provides a means for a sexual offender to rid himself of prior burdens or obligations; i.e., a Tier I offender can have his registration requirements terminated.

{¶15} Notwithstanding the broad language of the *Williams* syllabus, the "retroactivity" analysis in the *Williams* opinion only addressed those parts of the Adam Walsh Act that were punitive in nature. Since the provisions of R.C. 2950.15 are not punitive in nature, *Williams* is not controlling as to the question of whether that statute applies retroactively to a sexual offender, such as appellant, who committed his sexual offense prior to January 1, 2008.

{¶16} "It is well-settled that statutes are presumed to apply prospectively unless expressly declared to be retroactive. R.C. 1.48; *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 105, * * *. It is also settled that the General Assembly does not possess an absolute right to adopt retroactive statutes. Section 28, Article II of the Ohio Constitution prohibits the retroactive impairment of vested substantive rights. See *State v. LaSalle*, 96 Ohio St.3d 178, 2002 Ohio 4009, * * *, ¶13. However, the General Assembly may make retroactive any legislation that is merely remedial in nature. See *State ex rel. Slaughter v. Indus. Comm.* (1937), 132 Ohio St. 537, 542, * * *.

{¶17} "As noted in *Van Fossen* and *LaSalle*, we have distilled these principles into a two-part test for evaluating whether statutes may be applied retroactively. First, the reviewing court must determine as a threshold matter whether the statute is expressly made retroactive. *LaSalle*, 96 Ohio St.3d at 181, * * *, citing *Van Fossen*, 36

Ohio St.3d 100, * * *, at paragraphs one and two of the syllabus. The General Assembly's failure to clearly enunciate retroactivity ends the analysis, and the relevant statute may be applied only prospectively. Id. If a statute is clearly retroactive, though, the reviewing court must then determine whether it is substantive or remedial in nature. *LaSalle* at 181, * * *." *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, ¶9-10.

{¶18} In determining the General Assembly's intent under the first prong of the retroactivity test, the Ohio Supreme Court has focused upon the precise language used in the disputed statute. *See Id.* at ¶11-13; *Bielat v. Bielat*, 87 Ohio St.3d 350, 353-354 (2000). In relation to R.C. 2950.15, division (A) of the statute contains the dispositive wording:

{¶19} "(A) As used in this section and 2950.16 of the Revised Code, 'eligible offender' means a person who is convicted of, pleads guilty to, was convicted of, or pleaded guilty to a sexually oriented offense or child-victim oriented offense, *regardless of when the offense was committed*, and is a Tier I sex offender/child-victim offender or a child who is or was adjudicated a delinquent child for committing a sexually oriented offense or child-victim oriented offense, *regardless of when the offense was committed*, and is a public registry-qualified juvenile offender registrant." (Emphasis added.)

{¶20} In *Williams*, 2011-Ohio-3374, at ¶8, the Supreme Court concluded that the General Assembly intended for the new registration requirements in the Adam Walsh Act to be applied retroactively. In support of the point, the opinion noted: "R.C. 2950.03, for example, imposes registration requirements for offenders sentenced on or after January 1, 2008, *regardless of when the offense was committed.*" (Emphasis added.) *Id.*

{¶21} In stating which Tier I offenders are eligible to move for the termination of

their registration requirements. R.C. 2950.15(A) employs the same language which the *Williams* court referenced from R.C. 2950.03: i.e., "regardless of when the offense was committed." Given that the cited phrase readily infers that the date of the commission of the sexual crime is irrelevant to determining an offender's eligibility for termination relief, there is no dispute that the General Assembly intended for R.C. 2950.15 to be applied retroactively. Therefore, since the statutory language is sufficient to satisfy the first part of the retroactivity test, we must now address the issue of whether the provisions of the statute are substantive or remedial.

{¶22} "In *Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, * * *, ¶37, we stated that '(i)t is well established that a statute is substantive if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction, or creates a new right. *Van Fossen*, 36 Ohio St.3d at 107, * * *. Remedial laws, however, are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right.' See [*Bielat*, 87 Ohio St.3d at 352-353], quoting *Miller v. Hixson* (1901), 64 Ohio St. 39, 51, * * * ('The retroactivity clause nullifies those new laws that "reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time (the statute becomes effective)"' * * *)." *Williams*, at ¶9.

{¶23} As stated above, R.C. 2950.15 grants a Tier I sexual offender a remedy which never existed in the prior versions of this statutory scheme; i.e., the statute allows for the submission of a written request to terminate the offender's registration duties in light of his behavior over the preceding ten or more years. Although the trial court can ultimately deny the requested relief if it concludes that the offender has not carried his

burden of proof, the mere ability to file such a motion constitutes a new benefit. Based upon the general statement in *Williams* as to the distinction between substantive and remedial, the fact that R.C. 2950.15 bestows a new benefit could lead to a preliminary conclusion that the statute must be deemed substantive for purposes of the retroactivity analysis. However, in elaborating upon *Williams'* general statement, the Supreme Court has indicated that there can be instances in which the creation of a new statutory right will be considered remedial in nature:

{¶24} "But the creation of a new right – even a new substantive right – is not, by itself, enough to support a claim of unconstitutional retroactivity. We have held that a claim that a statute is substantive and hence unconstitutionally retroactive, 'cannot be based solely upon evidence that a statute retrospectively created a new right, but must also include a showing of some impairment, burden, deprivation, or new obligation accompanying that new right.' *Bielat*, 87 Ohio St.3d 350, * * *, paragraph two of the syllabus. The court must inquire 'whether the creation of rights in one party reciprocally impaired a right of the party challenging the retroactive law. In other words, substantive, retroactive legislation that unconstitutionally creates a new right also impairs a vested right or creates some new obligation or burden as well.' *Id.* at 359." *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, ¶46.

{¶25} In this case, the state is the party contesting the retroactive application of R.C. 2950.15. Yet, in delineating the entire procedure for considering and disposing of a motion/application to terminate, the statute does not place a new burden or obligation upon the state. Although the state is permitted to respond to the motion, the offender has both the burden of going forward with the evidence and the final burden of proof. R.C. 2950.15(H)(3). Thus, regardless of whether the new right created in the statute is

"substantive" in nature, that right is clearly not accompanied by the reciprocal imposition of a new burden or obligation. Under such circumstances, the *White* analysis dictates that the retroactive application of R.C. 2950.15 is permissible under Section 28, Article II of the Ohio Constitution.

{¶26} Furthermore, even though many provisions of the Adam Walsh Act were declared unconstitutional as applied to offenders convicted of sex crimes that occurred prior to January 1, 2008, R.C. 2950.15 can be severed from those other provisions. As a general proposition, a three-prong test is employed to determine if a single statute in an otherwise unconstitutional statutory scheme can be severed and still enforced:

{¶27} "'(1) Are the constitutional and the unconstitutional parts capable of separation so that each may be read and may stand by itself? (2) Is the unconstitutional part so connected with the general scope of the whole as to make it impossible to give effect to the apparent intention of the Legislature if the clause or part is stricken out? (3) Is the insertion of words or terms necessary in order to separate the constitutional part from the unconstitutional part, and to give effect to the former only?'" *State ex rel. Whitehead v. Sandusky Cty. Bd. of Commissioners*, 133 Ohio St.3d 561, 2012-Ohio-4873, ¶28, quoting *Geiger v. Geiger*, 117 Ohio St. 451, 466 (1927).

{¶28} As to the first two prongs of the "severance" test, this court reiterates that R.C. 2950.15 grants a Tier I sexual offender the ability to seek affirmative relief from the registration requirements. In this respect, the statute is clearly distinct from those parts of the Adam Walsh statutory scheme that impose greater registration requirements over longer time periods. Therefore, not only can R.C. 2950.15 stand separately from the other Adam Walsh provisions, but it is readily possible to give full effect to the statute, as intended by the General Assembly, even if the other disputed provisions cannot be

applied retroactively to pre-January 1, 2008 offenders. Finally, there would be no need to insert any new words into the statute in order for it to be applied properly.

{¶29} In enacting R.C. 2950.15 as part of the Adam Walsh statutory scheme, the General Assembly determined that there can be instances in which, after ten years of legal behavior, the risk posed by a Tier I sexual offender is so slight that the benefit of continued monitoring through the registration requirements is significantly outweighed by the state's financial burden. Given that the termination of registration requirements does not result in any new duties or burdens for the state, but only creates a possible benefit for eligible offenders, the constitutional prohibition against retroactive laws does not bar the enforcement of the legislature's intent that all Tier I sex offenders be afforded an opportunity to move for such relief, regardless of when the underlying offense took place. Accordingly, the trial court erred in denying appellant's application to terminate on the grounds that R.C. 2950.15 could not be applied retroactively.

{¶30} In claiming that the foregoing conclusion has the effect of overturning the *Williams* decision, the dissenting opinion does not address the fact that R.C. 2950.15 only creates a new right and does not impose any new burden or duty. Rather, the dissenting opinion simply restates the basic *Williams* holding that the Adam Walsh Act cannot be applied retroactively to a defendant who committed his sex offense prior to the act's enactment. By taking this approach to the "retroactivity" issue, the dissenting opinion fails to acknowledge that the focus of the *Williams* analysis was the punitive nature of many aspects of the Adam Walsh statutory scheme. Given that R.C. 2950.15 has no punitive effect upon the sexual offender or the state, it is not *Williams*, but rather *White* that controls. Thus, while there may be other reasons why appellant is not eligible for relief under R.C. 2950.15, retroactivity is not among them.

{¶31} The dissenting opinion also fails to acknowledge that, although the state asserted a "retroactivity" argument in its response to appellant's application at the trial level, it has essentially abandoned that argument before this court. In its answer brief, the state now maintains that the trial court should have dismissed the "termination" application on the grounds that appellant cannot qualify for the requested relief as a Tier I sexual offender. In support of this point, the state raises two arguments for review. First, citing *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, the state submits that, since the Ohio Supreme Court has held that sexual offenders who were originally classified under the pre-2008 classification system cannot be re-classified under the Adam Walsh system, appellant will always be designated in the future as either a sexually oriented offender, a habitual sexual offender, or a sexual predator. Second, the state contends that, even if appellant could be re-classified under the new Tier I/Tier II/Tier III system, he could not be designated a Tier I offender because, under Colorado law, he is required to comply with the "registration" requirement for the remainder of his life.

{¶32} As previously noted, appellant initially raised the "re-classification" issue in his motion for a preliminary injunction, which was filed approximately forty days after the submission of his application to terminate. In the motion, appellant moved the trial court to enjoin the State of Ohio from re-classifying him from a Tier I offender to a Tier III offender. On the same date the motion was submitted, the trial court issued a judgment granting a preliminary injunction. Concerning appellant's status, the judgment ordered that he was to remain a "Tier I" offender until further order of the court. The bottom of the judgment also contained a notation that the state did not oppose appellant staying a "Tier I" offender while the case remained pending.

{¶33} No other proceedings regarding appellant's classification were held prior to the issuance of the trial court's dismissal judgment. In that judgment, the court referenced the fact that a preliminary injunction was granted; however, no final decision was made as to appellant's status under either the "old" classification system or the new Adam Walsh system. Instead, the trial court based its decision to dismiss entirely upon its conclusion that R.C. 2950.15 could not be applied retroactively regardless of appellant's classification.

{¶34} Notwithstanding the fact that the trial court has not rendered a final ruling concerning appellant's status, the dissenting opinion addresses the merits of the point and concludes that appellant cannot invoke R.C. 2950.15 because he is not a Tier I sexual offender. In reaching this conclusion, the dissenting opinion relies in part upon information from the Ohio Attorney General's website that was not before the trial court when it granted the preliminary injunction. Moreover, the dissent does not expressly address the issue of whether, even though appellant cannot be re-classified under the Adam Walsh system for purposes of increasing his registration obligation, he can be re-classified by the trial court for purposes of determining his eligibility for relief under R.C. 2950.15.

{¶35} In *Bodyke*, 2010-Ohio-2424, the Supreme Court concluded that if a sexual offender has previously been classified under the classification system that was in effect prior to January 1, 2008, he could not be re-classified under the new "three-tier" system of the Adam Walsh Act. In reaching this conclusion, the *Bodyke* court did not make any reference to the procedure for terminating a Tier I offender's registration requirements under R.C. 2950.15. Instead, the court primarily focused upon the fact that, in allowing for the re-classification of prior sexual offenders for purposes of imposing longer and

more stringent registration requirements, the General Assembly granted the authority to re-classify to the state attorney general. This grant of authority violated the separation-of-powers doctrine because: (1) it essentially permitted the executive branch of the state government to review previous "classification" orders of the judicial branch; and (2) it mandated the re-opening of final judgments. *Id.* at the second and third paragraphs of the syllabus.

{¶36} Neither of the foregoing two concerns exists if, as part of the procedure for deciding a motion/application to terminate under R.C. 2950.15, a trial court re-classifies a pre-January 1, 2008 sexual offender under the new "three-tier" system. In regard to the "re-opening" concern, this court would emphasize that the re-classification of the offender for purposes of R.C. 2950.15 would have no effect upon his classification for all other purposes under R.C. Chapter 2950. In other words, the duration and nature of the offender's registration requirements would not be altered as a result of the limited re-classification. Thus, re-classification under R.C. 2950.15 would not affect the finality of the original "classification" determination. To the extent, neither *Bodyke* nor *Williams* prohibits a trial court from re-classifying a pre-January 1, 2008 sexual offender under the new "three-tier" classification system solely for the purposes of deciding the merits of a motion to terminate registration requirements.

{¶37} In reviewing the materials accompanying appellant's motion for a preliminary injunction, the trial court found the materials sufficient to warrant an interim order that appellant would be considered a Tier I sexual offender. Furthermore, the trial court never overruled the interim order. Thus, in light of our holding on the retroactivity issue, this case must be remanded so that the trial court can conduct a full hearing on the re-classification issue, as raised in the motion for a preliminary injunction, and then

issue a final ruling on appellant's status as a sexual offender for purposes of deciding his eligibility for relief under R.C. 2950.15. As part of this proceeding, the trial court may consider the state's new argument concerning appellant's proper classification under the "three-tier" system. In turn, if the trial court finds that appellant is a Tier I sexual offender, it can proceed to the final merits of the motion to terminate.

{¶38} Pursuant to the foregoing, the judgment of the Trumbull County Court of Common Pleas is reversed, and the case is hereby remanded for further proceedings consistent with this opinion.

TIMOTHY P. CANNON, P.J., concurs in judgment only with a Concurring Opinion,
DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

TIMOTHY P. CANNON, P.J., concurring in judgment only.

{¶39} I concur this matter should be remanded to the trial court for clarification of appellant's classification status. Appellant, by virtue of his incarceration in 1997, is subject to the requirements of Ohio's Megan's Law. Pursuant to Megan's Law, his status as an offender, for which he was required to register for life due to his Colorado conviction, automatically classified him as a sexual predator. There is, however, significant confusion between the parties, as well as between the lead opinion and dissent, as to the status of this case at the trial court level. This confusion, in my view, may stem from the preliminary injunction issued by the trial court; it is probable the trial court only intended to adopt a Tier I classification for appellant until it issued a determination on the merits of appellant's application. In the preliminary injunction order

there is a handwritten sentence which stands alone, stating: "Petitioner to remain tier I." There is an additional handwritten notation at the bottom of the order, stating: "No opposition by state of Ohio to defendant remaining tier I until determination of merits."

{¶40} In the trial court entry that disposed of appellant's motion, it does not mention whether appellant's Tier I classification had been terminated. I agree with the dissent that appellant's Tier I classification should be terminated; appellant was subject to Megan's Law, as noted by the trial court, and R.C. 2950, as amended, does not retroactively apply to appellant. This would effectively defeat appellant's application because, as observed by the dissent, appellant should not be classified as a Tier I offender.

{¶41} To further complicate matters, there is some confusion regarding whether appellant has been classified as a "sexually oriented offender" or as a "sexual predator" under Megan's law. While the trial court resolved that appellant was subject to Megan's Law, it did not establish what the classification under that law should be.

{¶42} I concur with the decision to remand this case to allow the trial court to clarify the termination of appellant's Tier I status and, hopefully, to resolve what appellant's status is and should be under Megan's law.

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

{¶43} In the present case, Aaron K. Von filed an Application for Termination of Duty to Comply with Sex Registration Laws, pursuant to R.C. 2950.15, in the Trumbull County Court of Common Pleas. In January 1997, Von was convicted of Sexual Assault on a Child, a class 4 felony in violation of C.R.S. 18-3-405(1), and Sexual

Assault in the Third Degree, a class 1 misdemeanor in violation C.R.S. 18-3-404(1)(A), in the District Court of Arapahoe County, Colorado. Ohio Revised Code 2950.15 was enacted in 2007 as part of the Adam Walsh Child Protection and Safety Act. The trial court denied the Application on the grounds that "at the time of Von's conviction, there was no provision to terminate one's status as a registered sex offender post-conviction." The trial court's judgment is wholly consistent with the position of the Ohio Supreme Court, that "S.B. 10 [the Adam Walsh Act], 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." *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, ¶ 20. The majority reverses that judgment on the grounds that "the retroactive application of R.C. 2950.15 is permissible under Section 28, Article II of the Ohio Constitution." *Supra* at ¶ 25.

{¶44} Revised Code 2950.15 applies to offenders who have been classified as tier I sex offenders. Von has never been classified as a tier I sex offender. Under *Williams*, it would be unconstitutional to apply the Adam Walsh Act to him, as he committed his sex offenses prior to its enactment. As the State correctly points out, the statute is inapplicable to Von on its face. Accordingly, I respectfully dissent.

{¶45} Under the statute, "an eligible offender may make a motion to the court of common pleas * * * of the county in which the eligible offender resides requesting that the court terminate the eligible offender's duty" to register as a sexual offender. R.C. 2950.15(B). An "'eligible offender' means a person who is convicted of, pleads guilty to, was convicted of, or pleaded guilty to a sexually oriented offense or child-victim oriented offense, regardless of when the offense was committed, ***and is a tier I sex offender/child-victim offender*** * * *, regardless of when the offense was committed,

and is a public registry-qualified juvenile offender registrant." (Emphasis added.) R.C. 2950.15(A).

{¶46} In order to be an eligible offender, Von must be classified a tier I sex offender/child-victim offender. The tier I classification was created in 2007 by the above-mentioned Adam Walsh Act. The passage of the Adam Walsh Act abolished "[t]he former categories of sexually oriented offender, habitual sex offender, and sexual predator." *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, ¶ 21. As noted above, the Ohio Supreme Court has held that the provisions of the Adam Walsh Act cannot be applied to offenders who committed their offenses prior to its enactment. *Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, at ¶ 20.

{¶47} In the present case, Von was convicted of sex offenses in 1997, long before the enactment of the Adam Walsh Act. Not only would it be unconstitutional to classify Von under the Adam Walsh Act, there is no evidence that Von has ever been classified as a tier I sex offender. The evidence before this court, consisting of Notices of Registration Duties of Sexually Oriented Offender Or Child-Victim Offender issued between August 2011 and November 2012, variously classifies Von as "(Pre AWA) Sexually Oriented Offender" or "(Pre AWA) Sexual Predator."[1] Currently, Von is identified on the Ohio Attorney General's online registry of sex offenders as "(Pre AWA) Sexually Oriented Offender."
http://icrimewatch.net/offenderdetails.php?OfndrID=1550971&AgencyID=55149
(accessed March 4, 2015).

{¶48} The majority's analysis as to whether R.C. 2950.15 is severable from the Adam Walsh Act and, so, may be applied retroactively despite the holding of *Williams* is

1. The propriety of either classification is not properly before this court.

fundamentally flawed. An "eligible offender" for the purposes of R.C. 2950.15 must be a tier I offender, i.e., an offender classified under the Adam Walsh Act. Von has not been classified as a tier I offender and is constitutionally prohibited from being classified as such.

{¶49} The majority's position that Von could be reclassified as a tier I sex offender "solely for the purposes of deciding the merits of a motion to terminate registration requirements" is simply incredible. *Supra* at ¶ 36. The Ohio Supreme Court has stated unequivocally: "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." *Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, at the syllabus. R.C. 2950.15 was enacted as part of 2007 Am.Sub.S.B. 10. Von committed a sex offense prior to its enactment. R.C. 2950.15 does not apply to Von.

{¶50} Alternatively, to be an "eligible offender" under R.C. 2950.15, one must be a "tier I sex offender." R.C. 2950.15(A). Von is not and has never been a tier I sex offender. The statutory provisions for the reclassification of sex offenders who committed their offenses prior to the enactment of 2007 Am.Sub.S.B. No. 10 have been declared unconstitutional. *Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, at paragraphs two and three of the syllabus. R.C. 2950.15 cannot apply to Von.

{¶51} Neither the *Williams* decision nor the *Bodyke* decision countenances the retroactive application of the Adam Walsh Act on an "as applied" basis. Nothing in the Adam Walsh Act provides for the reclassification of sex offenders by trial court judges. Accordingly, the trial court's judgment must be affirmed and I respectfully dissent.

STATE OF OHIO	)	**IN THE COURT OF APPEALS**
	) **SS.**	
COUNTY OF TRUMBULL	)	**ELEVENTH DISTRICT**

IN RE: AARON K. VON

JUDGMENT ENTRY

CASE NO. 2013-T-0085

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is reversed, and this matter is remanded to the trial court for further proceedings consistent with the opinion.

Costs are taxed against appellee.

Thomas R Wright

JUDGE THOMAS R. WRIGHT

TIMOTHY P. CANNON, P.J., concurs in judgment only with a Concurring Opinion,

DIANE V. GRENDELL, J., dissents with a Dissenting Opinion.

FILED
COURT OF APPEALS

MAR 16 2015

TRUMBULL COUNTY, OH
KAREN INFANTE ALLEN, CLERK