[Cite as *State v. Omiecinski*, 2009-Ohio-1066.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 90510

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

PATRICK OMIECINSKI

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-492609

BEFORE: Boyle, P.J., Sweeney, J., and Celebrezze, J.

RELEASED: March 12, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY J. BOYLE, P.J.:

{¶ 1} Defendant-appellant, Patrick Omiecinski, appeals from a judgment of the Cuyahoga County Court of Common Pleas adjudicating him a sexually oriented offender and sentencing him to four years in prison. For the following reasons, we affirm.

{¶ 2} In February 2007, Omiecinski was indicted on nine counts, including six counts of sexual battery, in violation of R.C. 2907.03, and three counts of unlawful sexual conduct with a minor, in violation of R.C. 2907.04. Omiecinski pled guilty to three counts of sexual battery, and pursuant to the plea agreement, all other counts were nolled.

{¶ 3} In September 2007, the trial court found that Omiecinski was not a sexual predator or habitual sexual offender, but did find that he was a sexually oriented offender. The trial court then sentenced Omiecinski to two years on count one, one year on count four, and one year on count five, and ordered that they be served consecutive to one another, for an aggregate sentence of four years in prison. The trial court also informed Omiecinski that he would be subject to five years of postrelease control and "advised" him that, as of January 2008, he would be classified as a Tier III offender under the Adam Walsh Act ("AWA").

{¶ 4} It is from this judgment that Omiecinski appeals, raising three assignments of error for review:

{¶ 5} "[1.] The trial court erred in sentencing appellant to consecutive sentences which were contrary to law.

{¶ 6} "[2.] The appellant's plea was not knowingly, intelligently, and voluntarily given when he was not informed of the consequences of his guilty plea.

{¶ 7} "[3.] The application of the Adam Walsh Act is an ex post facto application, undermining the will of the judiciary and denying appellant of his right to due process guaranteed by the Ohio and United States Constitutions and the Ex Post Facto Clause of Section 10, Article I, of the United States Constitution and Section 28, Article II, of the Ohio Constitution."

Consecutive Sentences

{¶ 8} In his first assignment of error, Omiecinski argues that his consecutive sentences were contrary to law. He maintains that the trial court failed to "conduct an adequate analysis" under R.C. 2929.11 or 2929.12. We disagree.

{¶ 9} At the outset, we note that Omiecinski did not object to his sentence. In *State v. Payne*, 114 Ohio St.3d 502, _15-17, the Ohio Supreme Court explained:

{¶ 10} "Typically, if a party forfeits an objection in the trial court, reviewing courts may notice only '[p]lain errors or defects affecting substantial rights.' Crim.R. 52(B). Inherent in the rule are three limits placed on reviewing courts for correcting plain error.

{¶ 11} "'First, there must be an error, i.e., a deviation from the legal rule. *** Second, the error must be plain. To be "plain" within the meaning of Crim.R. 52(B), an error must be an "obvious" defect in the trial proceedings. *** Third, the error must have affected "substantial rights." We have interpreted this aspect of the rule to mean that the trial court's error must have affected the outcome of the trial.' *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. Courts are to notice plain error 'only to prevent a manifest miscarriage of justice.' *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶ 12} "The burden of demonstrating plain error is on the party asserting it. See, e.g., *State v. Jester* (1987), 32 Ohio St.3d 147, 150. A reversal is warranted if the party can prove that the outcome 'would have been different absent the error.' *State v. Hill* (2001), 92 Ohio St.3d 191, 203." (Parallel citations omitted.)

{¶ 13} Here, Omiecinski does not raise plain error and, thus, does not show us how the outcome would have been different absent the alleged error. Nonetheless, we will review Omiecinski's sentence under a plain error analysis.

{¶ 14} Appellate courts review sentences by applying a two-prong approach set forth by the Ohio Supreme Court in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. See *State v. Nolan*, 8th Dist. No. 90646, 2008-Ohio-5595, _8. First, we must determine whether the sentence is clearly and convincingly contrary to law. Id. If it is not contrary to law, then we must decide if the sentencing court abused its discretion when sentencing the defendant. Id. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶ 15} Prior to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, unless certain findings were made by the trial court, a defendant was entitled to a presumption of the minimum sentence and a presumption of concurrent sentences. *Foster* at _44, citing R.C. 2929.14(B), (C), and (E). In *Foster*, however, the Ohio Supreme Court declared these statutory subsections unconstitutional. Id. at paragraphs one and three of the syllabus. Post-*Foster*, a court is no longer required to engage in the judicial fact-finding exercise formerly mandated by these statutes; therefore, a defendant is no longer entitled to a

presumption of the shortest prison term or concurrent sentences. Id. at paragraphs two and four of the syllabus. Moreover, post-*Foster*, a court is vested with the discretion to sentence a defendant to any sentence allowable by law under R.C. 2929.14(A). Id. at paragraph seven of the syllabus.

{¶ 16} Even after *Foster*, trial courts must still consider R.C. 2929.11 and 2929.12. However, "where the trial court does not put on the record its consideration of R.C. 2929.11 and 2929.12, it is presumed that the trial court gave proper consideration to those statutes." *Kalish*, supra, at _18, fn. 1.

{¶ 17} The trial court sentenced Omiecinski within the statutory range for each conviction and made them consecutive to one another, as permitted within the statutory framework. Thus, Omiecinski's sentence was not contrary to law.

{¶ 18} In the sentencing entry, the trial court noted that it considered "all required factors under law." At the hearing, it stated that it considered the presentence investigation report, the psychiatric clinic report, and letters from Omiecinski's friends and family. It stated that it was particularly bothered by the fact that Omiecinski had said that he knew what he was doing was wrong, yet he continued to do it. The trial court also found it troubling that Omiecinski was in a position of authority over the victim as her soccer coach. Thus, Omiecinski's sentence was not arbitrary, unreasonable, or unconscionable.

{¶ 19} Accordingly, we find no plain error since Omiecinski's sentence was neither contrary to law nor an abuse of discretion. His first assignment of error is overruled.

Crim.R. 11 - Guilty Plea

{¶ 20} In his second assignment of error, Omiecinski argues that the trial court erred when it accepted his guilty plea because it failed to comply with Crim.R. 11. Specifically, Omiecinski contends that his plea was not knowingly, voluntarily, and intelligently entered into because although the trial court "advised" him at his sentencing hearing that he would be classified as a Tier III offender under the AWA, it failed to inform him at his plea hearing.

{¶ 21} Under Crim.R. 11(C), a trial court may not accept a guilty plea from a criminal defendant in a felony case without first addressing the defendant personally and informing him of the effect of the plea and determining that he understands the consequences of the guilty plea. The trial court must substantially comply with those requirements of Crim.R. 11 that do not involve the waiver of a constitutional right. *State v. Ballard* (1981), 66 Ohio St.2d 473, 476. "Substantial compliance means that under the totality of the circumstances the defendant subjectively understands the implications of his plea and the rights he is waiving." *State v. Nero* (1990), 56 Ohio St.3d 106, 108.

{¶ 22} At Omiecinski's plea hearing, with respect to his sexually oriented offender classification, the trial court informed him that by pleading guilty to sexual battery, he would automatically be classified as a sexually oriented offender. In addition, the trial court told Omiecinski that he could be classified as a habitual sexual offender or sexual predator. The trial court explained the registration and reporting requirements of all three classifications. With respect to possibly being classified as a sexual predator, the trial court stated, "[i]f you are classified as a sexual predator, sir, you will have to report for the rest of your life every 90 days. Do you understand that?" The trial court then explained the consequences of failing to register and report. The trial court asked Omiecinski, "[k]nowing all that, is it still your intention to plead guilty here today?" He replied, "[y]es, ma'am."

{¶ 23} After reviewing the transcript of the plea hearing, it is clear that the trial court provided accurate information to Omiecinski regarding classification and registration as it existed at the time he entered into his plea. Omiecinski, however, argues that this was not sufficient and that the trial court should have informed him of his future obligations under the AWA as enacted by S.B. 10. We disagree.

{¶ 24} Prior to S.B. 10 (Ohio's Adam Walsh Act), trial courts were not obligated to inform a sex offender of the registration and notification

requirements of the former R.C. Chapter 2950 before accepting a plea. See *State v. Perry*, 8th Dist. No. 82085, 2003-Ohio-6344, _9; *State v. Dotson*, 12th Dist. No. CA2007-11-025, 2008-Ohio-4965, _28; *State v. Isaac*, 2d Dist. No. CA03-CA-91, 2004-Ohio-4683, _33; *State v. O'Neill*, 7th Dist. No. 03MA188, 2004-Ohio-6805, _36. As the court in *State v. Cupp*, 2d Dist. Nos. 21176, 21348, 2006-Ohio-1808, _10, explained:

{¶ 25} "We have described the registration and notification requirements as collateral consequences of a defendant's guilty plea to a sex offense. *State v. Condron* (Mar. 27, 1998), 2d Dist. No. 16430, ('Because Megan's laws are not punitive, the registration and notification requirements are collateral consequences of a defendant's guilty plea.'). Therefore, a trial court is not obligated to inform a defendant about these requirements before accepting his plea, and its failure to do so does not render the plea invalid. *State v. Abrams* (Aug. 20, 1999), 2d Dist. No. 17459."

{¶ 26} Thus, we must determine if S.B. 10 altered R.C. Chapter 2950 such that the statute is now punitive, rather than remedial.[1] If so, then a trial court's

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[1]Whether S.B. 10 is punitive rather than remedial is directly related to the question of whether it violates the Ex Post Facto Clause of the United States Constitution or the Retroactivity Clause of the Ohio Constitution. Omiecinski raises the Ex Post Facto issue in his third assignment of error. Although we determine that this question is premature as it applies to him (see infra), we must address it as it relates to his second assignment of error; i.e., whether he knowingly and voluntarily pled guilty.

failure to fully explain the registration and notification requirements of R.C. Chapter 2950 may render his plea invalid.

Ohio's Adam Walsh Act - Punitive Versus Remedial

{¶ 27} We note at the outset that this court, as well as several other appellate districts, has addressed the issue of whether the changes to R.C. Chapter 2950 under S.B. 10 have altered the statute such that it is now punitive, rather than remedial (whether discussing it in the context of an Ex Post Facto violation or otherwise). Each one (including this court) has determined that R.C. Chapter 2950, as modified by S.B. 10, remains remedial in nature and not punitive. See, e.g., *State v. Rabel*, 8th Dist. No. 91280, 2009-Ohio-350, citing *State v. Ellis*, 8th Dist. No. 90844, 2008-Ohio-6283; *State v. King*, 2d Dist. No. 08-CA-02, 2008-Ohio-3594; *State v. Gant*, 3d Dist. No. 1-08-11, 2008-Ohio-5198; *In re Kristopher W.*, 5th Dist. No. 2008 AP030022, 2008-Ohio-6075; *Montgomery v. Leffler-State of Ohio*, 6th Dist. No. H-08-011, 2008-Ohio-6397; *State v. Byers*, 7th Dist. No. 07CO39, 2008-Ohio-5051; *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076; and *State v. Williams*, 12th Dist. No. CA2008-02–029, 2008-Ohio-6195.

{¶ 28} S.B. 10 modified R.C. Chapter 2950 ("Megan's Law") so that it would be in conformity with the federal AWA.[2] The changes made to R.C. Chapter

[2]All sections of S.B. 10 did not become effective on the same date. Sections 1 to 3

2950 by S.B. 10 altered the sexual offender classification system. Under pre-S.B. 10, depending on the crime committed and the findings by the trial court at the sexual classification hearing, an offender who committed a sexually oriented offense could be labeled a sexually oriented offender, a habitual sex offender, or a sexual predator. See former R.C. 2950.09. Each classification required registration and notification requirements.

{¶ 29} S.B. 10 abolished those classifications. The new provisions leave little, if any, discretion to the trial court in classifying an offender. See R.C. 2950.01. Instead, the statute requires the trial court to classify an offender based solely on his or her conviction. Depending on what crime the offender committed, they are placed in Tier I, Tier II, or Tier III. R.C. 2950.01(E)-(G). The tiers dictate what the registration and notification requirements are. Tier I is the lowest tier. A Tier I sex offender must register once annually for 15 years, but there are no community notification requirements. Tier II requires registration every 180 days for 25 years, but it also has no community notification requirements. Tier III, the highest tier and similar to the old sexual predator finding, requires registration every 90 days for life, and the community notification may occur every 90 days for life. See R.C. 2950.07.

(and certain other provisions), became effective on July 1, 2007. The remaining portions became effective on January 1, 2008. See Am.Sub.S.B. 10, Final Bill Analysis.

Former R.C. Chapter 2950

{¶ 30} In *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, the Ohio Supreme Court addressed whether former R.C. Chapter 2950, as applied to conduct prior to the effective date of the statute, violated the Ohio Constitution's prohibition on retroactive laws and the Ex Post Facto Clause of the United States Constitution. The Supreme Court noted that former R.C. Chapter 2950 sought to "protect the safety and general welfare of the people of this state," which was a "paramount governmental interest." Id. at 417. It held that because the statute was remedial rather than punitive, the registration provisions of former R.C. Chapter 2950 did not violate the Ohio Constitution's ban on retroactive laws. Id. at 413. The Supreme Court reasoned that in light of the statute's remedial nature, and because there was no clear proof that the statute was punitive in its effect, the registration and notification provisions of former R.C. Chapter 2950 did not violate the Ex Post Facto Clause of the United States Constitution. Id. at 423.

{¶ 31} Two years later, in *State v. Williams*, 88 Ohio St.3d 513, 2000-Ohio-428, the Ohio Supreme Court addressed whether the registration and notification provisions of former R.C. Chapter 2950 amounted to double jeopardy. The Supreme Court held that because former R.C. Chapter 2950 was "neither 'criminal,' nor a statute that inflicts punishment," former R.C. Chapter

2950 did not violate the Double Jeopardy Clauses of the United States and Ohio Constitutions. Id. at 528. Subsequently, in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, the Ohio Supreme Court reiterated that "the sex-offender-classification proceedings under [former] R.C. Chapter 2950 are civil in nature[.]" Id. at _32.[3]

{¶ 32} Former R.C Chapter 2950 was amended by S.B. 5 in 2003. The amendments required that the designation "predator," and the concomitant duty to register, remain for life; required sex offenders were to register in three different counties (that is, county of residence, county of employment, and county of school) every 90 days (as opposed to registering only in their county of residence); and the community notification requirements were expanded.

{¶ 33} Recently, in *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio 4824, the Ohio Supreme Court addressed whether the S.B. 5 amendments, as applied to conduct prior to the effective date of the statute, violated the Ex Post Facto

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[3]In *Wilson*, Justice Lanzinger, in a concurring in part and dissenting in part opinion (joined by Justice O'Conner and Judge Donavan), opined: "While protection of the public is the avowed goal of R.C. Chapter 2950, we cannot deny that severe obligations are imposed upon those classified as sex offenders. All sexual predators and most habitual sex offenders are expected, for the remainder of their lives, to register their residences and their employment with local sheriffs. Moreover, this information will be accessible to all. The stigma attached to sex offenders is significant, and the potential exists for ostracism and harassment, as the *Cook* court recognized. Id., 83 Ohio St.3d at 418. Therefore, I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions." *Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶45-46.

Clause of the United States Constitution and the Ohio Constitution's prohibition on retroactive laws. Once again, noting the civil, remedial nature of the statute, the Supreme Court held that the S.B. 5 amendments to former R.C. Chapter 2950 neither violated the retroactivity clause of the Ohio Constitution nor the Ex Post Facto Clause of the United States Constitution. Id. at _36, 40, and 43.[4]

S.B. 10 - Ohio's Adam Walsh Act

{¶ 34} To determine if the amendments set forth in S.B. 10 are punitive in nature, and not civil or remedial, we shall turn to the "intent-effects" test used by the Ohio Supreme Court in *Cook*. Id. at 415. First, we must determine if the legislature intended the statute to be punitive or remedial. If the intent is found to be remedial, then we must determine if the statute has such a punitive effect that it negates its remedial intent. Id. at 418, citing *Allen v. Illinois* (1986), 478 U.S. 364.

[4]Again in *Ferguson*, Justice Lanzinger dissented and was joined by Justices Pfeifer and Stratton. Discussing the S.B. 5 amendments, Justice Lanzinger stated that R.C. Chapter 2950 has evolved from a remedial statute to a punitive one, that the registration requirements are not merely "collateral to a criminal conviction," and that it violates the Ex Post Facto Clause of the United States Constitution. She pointed out that "S.B. 5 applies to all sex offenders, without regard to their future dangerousness." Id. at _59. She also noted that "[t]he reporting requirements themselves are exorbitant; S.B. 5 requires sexual predators to engage in perpetual quarterly reporting to the sheriff of the county in which they reside, work, and go to school, even if their personal information has not changed. *** And meriting heaviest weight in my judgment, S.B. 5 makes no provision whatever for the possibility of rehabilitation. Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation. Prior to S.B. 5, a sexual predator had the opportunity to remove that label." Id. at _60.

{¶ 35} Upon reviewing S.B. 10, we find that the legislature's intent in enacting the statute was civil, not punitive. "A court must look to the language and the purpose of the statute in order to determine legislative intent." *Cook* at 416. S.B. 10 is devoid of any language indicating an intent to punish. To the contrary, and just as the Ohio Supreme Court found in *Cook* with regard to former R.C. Chapter 2950, the legislature has expressly declared that the intent of S.B. 10 is "to protect the safety and general welfare of the people of this state," which is "a paramount governmental interest"; and that "the exchange or release of [information required by this law] is not punitive." R.C. 2950.02; *Cook* at 417. In fact, the language in former R.C. Chapter 2950, which the Supreme Court in *Cook* relied on to find that the legislature's intent was remedial, is almost identical to the language used in S.B. 10.

{¶ 36} Having found that the legislative intent of S.B. 10 is not punitive, we must now turn to the question of whether the *effect* of the legislation negates its intent. We agree with the thorough reasoning of the Third, Seventh, Ninth, and Twelfth Appellate Districts on this issue – that it does not. See *Gant*, supra; *Byers*, supra; *In re G.E.S.*, supra; and *Williams*, supra.

{¶ 37} As the Seventh District noted in *Byers*, the registration requirements under S.B. 10 "are more involved" than the requirements in the former R.C. Chapter 2950 that were discussed in *Cook*. Id. at _33. Nonetheless,

the Ohio Supreme Court continues to uphold the more restrictive amendments to the statute. We agree that "[w]hile some may view [Justice Lanzinger's] reasoning to be persuasive and logical, we must follow the Supreme Court's decision in *Cook* and the majority decision in *Wilson* that offender classification is civil in nature and the registration requirement is still de minimus; *Cook* and *Wilson* are still controlling law." Id. at _37.

{¶ 38} The *Byers* court further stated:

{¶ 39} "Senate Bill 10's R.C. Chapter 2950 may not be the narrowly tailored dissemination of information that was contemplated by *Cook*. However, as stated above, *Cook* is still controlling law and as of *Wilson*, the Supreme Court was still of the opinion that sex offender classification was still remedial and not punitive. *** Admittedly, Senate Bill 10 does make some changes to the classification procedure. It changes the classification types from sexually oriented offender, habitual sex offender, and sexual predator to Tier I, Tier II and Tier III. It also provides a more systematic determination of what offenses fall into what classification. Lastly, it increases the registration period. Tier I is 15 years, while a sexually oriented offender would only have been 10 years. Tier II is 25 years, while a habitual sex offender was 20 years. Tier III is a lifetime registration requirement, which sexual predator has always been. But those changes do not clearly indicate that *Wilson* and *Cook* are no longer controlling

and that the sexual offender classification system is now punitive rather than remedial." Id. at _55.

{¶ 40} We agree with the Seventh District's reasoning and further note that one day after it released *Byers*, the Ohio Supreme Court released *Ferguson*, upholding the S.B. 5 amendments to R.C. Chapter 2950 (which were even more restrictive than those discussed in *Cook* and *Wilson*). *Ferguson* adds to the strength of the Seventh District's reasoning that the Supreme Court will likely uphold the changes to R.C. Chapter 2950, under S.B. 10, as it has continually upheld prior versions.

{¶ 41} This court further agrees with the Second District that it is unlikely that the Ohio Supreme Court will find difficulty with the AWA after its *Cook* decision or that the United States Supreme Court will find it unconstitutional after *Smith v. Doe* (2003), 538 U.S. 84 (upheld Alaska's version of Megan's Law). *State v. King*, 2d Dist. No. 08-CA-02, 2008-Ohio-2594, _13.

{¶ 42} Accordingly, we conclude that S.B. 10, which sets forth Ohio's version of the AWA, is civil and nonpunitive. Since the AWA is not punitive, just as under the former statute, the trial court was not required to explain the registration requirements to Omiecinski at his plea hearing.

{¶ 43} Finally, the trial court did inform Omiecinski at his plea hearing that if he was classified as a sexual predator, he would have to report every 90

days for the rest of his life. Omiecinski still pled guilty. Under S.B. 10, he would be classified as a Tier III offender. As a Tier III offender, he still will have to report every 90 days for life. Thus, we do not see how Omiecinski was prejudiced in any way by the trial court's failure to inform him at his plea hearing that he would be subject to the AWA in the future.

{¶ 44} Omiecinski's second assignment of error is overruled.

Ex Post Facto Challenge Premature

{¶ 45} In his third assignment of error, Omiecinski argues that the Adam Walsh Act violates the Ex Post Facto Clause. Although the trial court "advised" Omiecinski at his sentencing hearing that he would be classified as a Tier III offender under the AWA, it adjudicated him a sexually oriented offender under the former R.C. Chapter 2950. Because Omiecinski has not been classified under the AWA, his constitutional challenge is premature. *In re: R.P.*, 9th Dist. No. 23967, 2008-Ohio-2673, _5; *State v. Worthington*, 3rd Dist. No. 9-07-62, 2008-Ohio-3222, _9.

{¶ 46} Accordingly, Omiecinski's three assignments of error are overruled. The judgment of the Cuyahoga County Court of Common Pleas is affirmed.

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

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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

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MARY J. BOYLE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
JAMES J. SWEENEY, J., DISSENTS IN PART WITH SEPARATE OPINION

JAMES J. SWEENEY, J., DISSENTING IN PART:

{¶ 47} Although I concur in part with the majority's decision, I dissent with respect to the majority's resolution of appellant's constitutional challenge of Ohio's version of The Adam Walsh Child Protection and Safety Act of 2006 ("AWA") being applied to him. For the reasons that follow, I find merit to appellant's third assignment of error, where he asserts that the retroactive application of the AWA is unconstitutional as applied to him.

{¶ 48} In this case, the trial court determined, after hearing evidence, that appellant was not a sexual predator and, therefore, not subject to cumbersome

lifetime registration and reporting requirements. However, at his sentencing, the trial court informed appellant that amendments to the law that would take effect January 1, 2008 would apply to him. The amendments would simply negate the prior judicial determination (i.e., that defendant did not likely pose a threat of committing sexually oriented crimes in the future) and automatically reclassify appellant, based upon the fact of his conviction, to a Tier III offender.

{¶ 49} A Tier III offender is subject to extensive lifetime registration and reporting requirements as well as residency restrictions. It is readily apparent that the reclassification of appellant from a sexually oriented offender to a Tier III offender clearly created new obligations, imposed more duties, or attached a new disability, in respect to appellant's conditions for being convicted of a sexually oriented offense.

I. Fiscal Pressure on States to Implement Provisions of the AWA.

{¶ 50} Congress enacted The Adam Walsh Child Protection and Safety Act of 2006 (the "Walsh Act") on July 27, 2006. 42 U.S.C. §16901 (2006). Title I of the Walsh Act contains the Sex Offender Registration and Notification Act ("SORNA"). 42 U.S.C. §16901. The Walsh Act provides that any jurisdictions, including the states, that do not substantially implement the Walsh Act, with its registration and notification requirements, into their respective laws by July 27, 2009, "shall not receive 10 percent of the funds that would otherwise be allocated

for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.)." 42 USCS §16925(a). In short, non-complying jurisdictions will lose ten percent of their current federal funding. Id.

A. Ohio's Compliance.

{¶ 51} In compliance with the federal mandate, Ohio's legislature enacted the AWA effective January 1, 2008. See S.B. 10. Section 3.[5] The Sex Offender Registration and Notification Provisions ("SORN") are set forth in Chapter 2950, et seq. of the Ohio Revised Code and amended the former version of the law that was commonly referred to as "Megan's Law." See former Ohio Revised Code Chapter 2950, et seq. The revisions included, inter alia, the AWA classification system whereby offenders are automatically classified into one of three tiers, depending solely upon the fact that they were convicted of one of many enumerated offenses.

[5]S.B. 10 is "AN ACT to amend sections 109.42, 109.57, 311.171, 1923.01, 1923.02, 2151.23, 2151.357, 2152.02, 2152.19, 2152.191, 2152.22, 2152.82, 2152.83, 2152.84, 2152.85, 2152.851, 2743.191, 2901.07, 2903.211, 2905.01, 2905.02, 2905.03, 2905.05, 2907.01, 2907.02, 2907.05, 2921.34, 2929.01, 2929.02, 2929.022, 2929.03, 2929.06, 2929.13, 2929.14, 2929.19, 2929.23, 2930.16, 2941.148, 2950.01, 2950.02, 2950.03, 2950.031, 2950.04, 2950.041, 2950.05, 2950.06, 2950.07, 2950.08, 2950.081, 2950.10, 2950.11, 2950.12, 2950.13, 2950.14, 2953.32, 2967.12, 2967.121, 2971.01, 2971.03, 2971.04, 2971.05, 2971.06, 2971.07, 5120.49, 5120.61, 5120.66, 5139.13, 5149.10, 5321.01, 5321.03, and 5321.051; to amend, for the purpose of adopting new section numbers as indicated in parentheses, sections 2152.821 (2152.811) and 2950.031 (2950.034); to enact new section 2950.031 and sections 2152.831, 2152.86, 2950.011, 2950.032, 2950.033, 2950.042, 2950.043, 2950.131, 2950.15, and 2950.16; and to repeal

{¶ 52} In March 2007, the Ohio Criminal Sentencing Commission noted a number of constitutional concerns that would arise in the event that the General Assembly opted to adopt the AWA provisions *retroactively.* See Ohio Criminal Sentencing Commission's memo to Adam Walsh Act Study Committee, Re: Implementation of the Adam Walsh Act dated March 23, 2007 (hereafter "Commission Memo"). Among them were potential violations of the protections against double jeopardy and ex post facto legislation, including the Retroactivity Clause of the Ohio Constitution, and a violation of the separation of powers doctrine.

1. Changes to Ohio's SORN[6] law.

{¶ 53} Under Megan's Law, courts were directed to classify offenders among three categories: sexually oriented offenders, habitual sexual offenders, and sexual predators. Subject to limited circumstances,[7] Ohio courts could not classify anyone a sexual predator, subjecting them to lifetime registration

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sections 2152.811, 2950.021, 2950.09, and 2950.091 of the Revised Code to revise Ohio's Sex Offender Registration and Notification Law and conform it to recently enacted requirements of federal law contained in the Adam Walsh Child Protection and Safety Act of 2006, to increase the penalties for certain violations of kidnapping, aggravated murder when a sentence of death or life without parole is not imposed, and murder when the victim of any of those offenses is less than 13 years of age and the offense was committed with a sexual motivation and require that those sentences be served under the Sexually Violent Predator Sentencing Law, and to declare an emergency." S.B. 10, synopsis.

[6] Sex Offense Registration and Notification Law.

[7] The label automatically attached upon conviction for a violent sexually oriented

requirements, without first holding a hearing and determining by clear and convincing evidence that he or she was likely to engage in one or more sexually oriented offenses in the future. See former R.C. 2950.09.

{¶ 54} Under Megan's Law, the sexually oriented offender label attached automatically. *State v. Hayden,* 96 Ohio St.3d 211, 2002-Ohio-4169, paragraph two of the syllabus. That label, although automatic, imposed the least restrictions in terms of both duration and frequency of registration. Former R.C. 2950.07(B)(3) (requiring annual verification of home address for a period of 10 years). Habitual sexual offenders were subject to annual registration for a period of 20 years, while sexual predators had to register every 90 days for life. Former R.C. 2950.07(B)(1) and (2); former R.C. 2950.06(B)(1) and (2); former R.C. 2950.04(C)(2).

{¶ 55} Under Megan's Law, the state bore the burden of proving, by clear and convincing evidence, that an offender was likely to commit a sexually oriented offense in the future. Megan's Law enumerated various factors for the court to consider when assessing whether the sexual predator label was appropriate. Former R.C. 2950.09(B)(2)(a) through (j).[8]

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offense or upon a conviction on a sexually violent predator specification.

[8]Under the AWA, the court now only considers these factors if it is inclined not to impose community notification upon a Tier III offender or those subject to community notification under R.C. 2950.11(F)(1)(a), (b), or (c). R.C. 2950.11(F)(2)(a)-(k). The statute provides that those who would not be subject to community notification under the old law

{¶ 56} One significant change under the AWA is the automatic application of the applicable tier label, including Tier III, based solely upon the fact of conviction. A Tier III offender is relegated to a lifetime of reporting and notification requirements, including *in person* registration every 90 days with potentially three different sheriffs.[9] This is true regardless of his or her actual propensity to reoffend because no consideration is given to the particular factual circumstances relevant to the offender. The AWA, inter alia, imposes further residency restrictions, increases the registration and notification requirements, and also increases the penalties for their violation.

{¶ 57} Consequently, it becomes the legislature, rather then the judiciary, that determines the appropriate classification for all offenders. In appellant's case, the legislature retroactively usurped the function formerly discharged by the court, with the effect of completely negating a prior judicial determination and its exercise of discretion.

{¶ 58} The AWA provides for a Tier III label for those convicted of certain "sexually oriented offenses," but includes among them convictions for an offense that lacks any sexual component or motivation. E.g., R.C. 2950.01(G)(1)(f) (Tier

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would not be subject to it now either.

[9]See, *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶45 (identifying numerous and significant amendments to R.C. Chapter 2950 from the version(s) reviewed by the Ohio Supreme Court in *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291 and *State*

III offenders include those convicted of kidnapping in "violation of division (B) of section 2905.01 of the Revised Code when the victim of the offense is under eighteen years of age and the offender is not a parent of the victim of the offense.")[10]

II. Appellant's Constitutional Challenges.

{¶ 59} In this case, appellant maintains that the application of the AWA to him is unconstitutional, in violation of the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution. Accordingly, this analysis is correspondingly limited to the issues raised by appellant.

{¶ 60} As set forth previously, the trial court conducted an evidentiary hearing at which it determined that appellant was not likely to commit sexually oriented offenses in the future. As such, the least restrictive label of sexually oriented offender was imposed upon him. At sentencing, appellant was informed

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v. Williams, 88 Ohio St.3d 513, 2000-Ohio-428).

[10] R.C. 2905.01(B) provides: "No person, by force, threat, or deception, or, in the case of a victim under the age of thirteen or mentally incompetent, by any means, shall knowingly do any of the following, under circumstances that create a substantial risk of serious physical harm to the victim or, in the case of a minor victim, under circumstances that either create a substantial risk of serious physical harm to the victim or cause physical harm to the victim:

"(1) Remove another from the place where the other person is found;

"(2) Restrain another of the other person's liberty;

"(3) Hold another in a condition of involuntary servitude."

that he would soon be reclassified, by operation of statutory amendments, as a Tier III offender. No one can seriously dispute that the automatic reclassification would impose greater duties, obligations, and restrictions upon appellant than were deemed necessary by a prior judicial determination.

A. Ohio Supreme Court has Yet to Address Whether the Retroactive Application of the AWA SORN Provisions Violate Either the Retroactivity Clause of the Ohio Constitution or the Ex Post Facto Clause of the United States Constitution.

{¶ 61} While the Ohio Supreme Court has upheld various versions of the law, it has yet to address the constitutional challenges appellant now asserts in relation to the AWA. While the majority predicts that the Ohio Supreme Court would uphold the constitutionality of the AWA based upon prior decisions addressing former versions of the statute, the provisions of the AWA now in place significantly differ from those versions of the law that the Ohio Supreme Court has previously addressed. E.g., *State v. Cook*, (1998), 83 Ohio St.3d 404*;* *State v. Hayden* (2002), 96 Ohio St.3d 211; *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202; *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824. Also, the Ohio Supreme Court has become increasingly divided over the constitutionality of the statutory provisions as they have been progressively amended. Id.

{¶ 62} In *Cook*, the Ohio Supreme Court reviewed the version of R.C. Chapter 2950, et seq., which became effective July 1, 1997. In *Cook*, the Court unanimously rejected constitutional challenges that alleged violations of the Ex

Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution. *Cook*, supra.

{¶ 63} In rejecting the challenge as being in violation of the Retroactivity Clause, the Court in *Cook* stated that many of the law's requirements were "directed towards officials rather than offenders"; the registration requirements were "'*de minimis*' procedural requirements that are necessary to achieve the goals of R.C. Chapter 2950"[11]; the "'harsh consequences [of] classification and community notification *** come not as *** a direct societal consequence of [the offender's] past actions.'"[12]; and the community notification involved the dissemination of public information. Id. at 411-414. Ultimately, the Court concluded the retroactive application did not affect any substantive rights. Id.

{¶ 64} In reference to the Ex Post Facto challenge, the Court in *Cook* found the legislature intended to create a remedial, not punitive, statute. Id. at 417. The Court based this finding on the following: "The General Assembly's purpose behind R.C. Chapter 2950 is to promote public safety and bolster the public's confidence in Ohio's criminal and mental health systems"; registration served the remedial purposes of protecting the public where the classification of the offender was determined by a court of law, and offenders were required to

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[11]The goal being identified as "community safety."

[12] Id., quoting, *State v. Lyttle* (Dec. 22, 1997), Butler App. No. CA97-03-060.

register with the sheriff's office in the county where they reside; the legislation was narrowly tailored because "the notification provisions apply automatically only to sexual predators [who are only labeled after an evidentiary hearing proving their likelihood to reoffend by clear and convincing evidence] or, at the court's discretion, to habitual sex offenders." Id.

{¶ 65} The AWA's amendments to the SORN law eliminated most of the protections highlighted by the Court's analysis in *Cook.*

{¶ 66} The Court in *Cook* proceeded to find that former Chapter 2950 was not punitive in effect. Id. at 418, applying guideposts of *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144.[13] In making this finding, the court reasoned: "The act of registration was a *de minimis* administrative requirement that was comparable to renewing a drivers' license and did not restrain the offender in any way; the burden of dissemination of information was placed on law enforcement; dissemination of, and public access to, public information to promote public protection is not historically viewed as punishment; the statutory provisions neither seek vengeance nor retribution but have the remedial purpose

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[13]"These guideposts include 'whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned * * *.'" Id., quoting *Kennedy*, Id., 372 U.S. at 168-169.

of public protection; punishment for failure to register flows from a new violation of the statute rather than the past sex offense and violation of the registration statutes was already a crime; the restrictions or requirements were not excessive in relation to the purpose of protecting the public where "sexual predators, classified as such by a court of law have the opportunity to submit evidence to prove that their label is no longer justified and thereby have the label and its obligations removed"[14] and the frequency and duration of registration were "commensurate with the level of recidivism and dangerousness of these respective classifications."

{¶ 67} Thus, the Ohio Supreme Court in *Cook* determined that the statutory provisions did not violate the Ex Post Facto Clause of the United States Constitution "because its provisions serve the remedial purpose of protecting the public." Id.

{¶ 68} Again, the revisions to the law affected by the enactment of the AWA removed several bases upon which the Court in *Cook* relied in resolving the constitutional issues before it.

{¶ 69} The legislature has amended Chapter 2950 since *Cook,* and the Ohio Supreme Court has continued to narrowly reject challenges to its

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[14]Id. at 422, citing former R.C. 2950.09(D)(1). Later amendments to the law deleted this provision, and those designated sexual predators by a court of law could no longer petition the courts to have the label, or its obligations, removed.

constitutionality, including those involving the Ex Post Facto Clause and the Retroactivity Clause. E.g., *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169; *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, dissent at ¶43-46 (three justices dissenting from majority's finding that classification hearings are civil in nature); *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824 (finding version of Chapter 2950, that became effective July 31, 2003, did not violate Retroactivity Clause of the Ohio Constitution or the Ex Post Facto Clause of the United States Constitution).[15]

{¶ 70} In March 2007, the Ohio Sentencing Commission expressed concerns to the Adam Walsh Act Study Committee about applying the AWA's SORN law retroactively and indicated it was "obvious that the AWA's application to Ohio troubled not only the Commission's defense attorneys, but also its judges, prosecutors, and victims' representatives." Commission Memo at p.1.

{¶ 71} Of concern was that the new provisions of the AWA deviated from prior versions of the law by tying the registration and notification provisions directly to the offense and removing judicial determinations. The Ohio Sentencing Commission repeatedly observed that the AWA is not the same law

[15] But see dissent by Justice Lanzinger, joined by Justices Pfeiffer and Lundberg Stratton, finding R.C. Chapter 2950 has evolved from remedial to punitive and, therefore, when applied retroactively violates both the Ex Post Facto Clause of the United States and Retroactivity Clause of the Ohio Constitution. Id. at ¶62.

that was analyzed and upheld by the Ohio Supreme Court in *Cook*. Id. at pp. 3-4.

{¶ 72} After comparing the provisions of the AWA to the prior versions of the law that have been held to be constitutional, I would find that the retroactive application of it to appellant violates both the Retroactivity Clause of the Ohio Constitution and the Ex Post Facto Clause of the United States Constitution.

B. Retroactivity Clause of the Ohio Constitution.

{¶ 73} Art. II, Section 28 of the Ohio Constitution provides: "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts, but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state."

{¶ 74} A retroactive statute "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Cincinnati v. Seasongood* (1889), 46 Ohio St. 296, 303, 21 N.E. 630.

{¶ 75} "[T]he pertinent distinction between an *ex post facto* law and a retroactive one is that *ex post facto* laws include statutes which increase the *punishment* of a prior *criminal* act, whereas retroactive laws include statutes

which '*** [attach] a new *disability* in respect to past *transactions* ***.'" (Emphasis added.) *State ex rel. Michaels v. Morse* (1956), 165 Ohio St. 599, 604 [60 O.O. 531]. "Retroactive laws are therefore a larger category than ex post facto laws, and comprise statutes imposing 'disabilities' as well as those imposing 'punishments.'" *State ex rel. Corrigan v. Barnes* (1982), 3 Ohio App.3d 40, 44. "A statute is retroactive if it penalizes conduct that occurred before its enactment." *State v. Williams,* 103 Ohio St. 3d 112, 113, 2004-Ohio-4747.

{¶ 76} Here, a trial court conducted an evidentiary hearing and made a factual determination that appellant was not likely to commit sexually oriented offenses in the future. Appellant was labeled a sexually oriented offender under Megan's Law, subject to annual reporting requirements for a period of 10 years. Upon reclassification, appellant became a Tier III offender, subject to, inter alia, residency restrictions, increased reporting and registration requirements every 90 days for lifetime. It is a matter of fact that appellant's reclassification imposes new duties, obligations, and restrictions upon him.

{¶ 77} The majority concludes that the AWA provisions do not violate the Retroactivity Clause because they are both civil and remedial in nature. The test, as set forth by the majority, is to determine: (1) whether the legislature intended the statute to be punitive or remedial and, if so, (2) whether the statute has such a punitive effect that it negates its remedial intent. *Cook*, supra at 418.

{¶ 78} The legislature stated its intentions in R.C. 2950.02, which include declarations "to protect the safety and general welfare of the people of this state." R.C. 2950.02(B). And "[t]he general assembly further declares that it is the policy of this state to require the exchange in accordance with this chapter of relevant information about sex offenders and child-victim offenders among public agencies and officials and to authorize the release in accordance with this chapter of necessary and relevant information about sex offenders and child-victim offenders to members of the general public as a means of assuring public protection and that the exchange or release of that information is not punitive." Id.

{¶ 79} I agree with the majority that the Ohio Supreme Court has found similar legislative declarations sufficient evidence of a remedial intent, which conclusion finds support in United States Supreme Court jurisprudence. *Cook*, supra; see, also, *Smith v. Doe* (2003), 538 U.S. 84, 123 S.Ct.1140 (finding Alaska's version of Megan's Law did not violate Ex Post Facto Clause of United States Constitution).

{¶ 80} The next inquiry is whether the intended remedial and civil provisions are nonetheless punitive in effect. In *Smith*, the United States Supreme Court made a similar inquiry in terms of an Ex Post Facto challenge to Alaska's version of Megan's Law (the "Act"). In finding that the Act was not

punitive in effect, the Court found significant that it did not subject respondents to an affirmative disability or restraint, there was no evidence that the Act led to substantial occupational or housing disadvantages that would not have otherwise occurred, the Act did not require in-person updates, and offenders were "free to move where they wish and to live and work as other citizens; and the regulatory scheme was not excessive with respect to the Act's purpose." Id. at 100-101.

{¶ 81} Conversely, the AWA does contain residency restrictions, permits landlords to terminate rental agreements, and allows certain governmental officials and property owners to pursue injunctive relief to remove offenders from their homes. See R.C. 2950.034 and 1923.02. Accordingly, offenders are not free to live where they chose. Also, the additional provisions permitting the termination of leases and injunctions to oust them from their homes imposes significant housing disadvantages upon offenders that would otherwise not exist.

{¶ 82} "The Supreme Court has recognized that the 'right to remove from one place to another according to inclination' is 'an attribute of personal liberty' protected by the Constitution." *United States of America v. Torres*, 566 F.Supp.2d 591, 597 (W.D. Texas 2008), quoting *Williams v. Fears*, 179 U.S. 270, 274 (holding that Walsh Act amendments to Bail Reform Act violated Due Process Clause and Excessive Bail Clause of the United States Constitution). It

follows that the residency restrictions that are retroactively imposed on persons, like appellant, who were not previously subjected to them involve substantive rights.

{¶ 83} Also, unlike the statute at issue in *Smith*, the AWA imposes requirements that offenders register *in person* -- for some this could entail reporting to three different sheriff departments every 90 days for the rest of their life. R.C. 2950.06 and 2950.07. All tier offenders must submit a significant amount of personal information, which includes (but is not limited to) the following: their name and all aliases; date of birth, social security number and any alternate number used by the offender; the license plate number of every vehicle owned by, registered to, operated by, or available to the offender (including a description of where said vehicles are "habitually" kept); "any email addresses, internet identifiers, or telephone numbers registered to or used by the offender"; and "[a]ny other information required by the bureau of criminal identification and investigation." R.C. 2950.04(C).[16] With these sweeping provisions, particularly one determined at the whim of BCI, preclude any

[16]Compare with statutory provisions upheld in *Cook* where the court observed, "[o]ffenders must supply only their names, addresses, business addresses, photographs, fingerprints, and, in some instances, license plate numbers and a statement disclosing that they have been adjudicated a sexual predator or habitual sex offender. R.C. 2950.04(B) and (C); 2950.07." *Cook*, 83 Ohio St.3d at 421.

offender from fully and readily identifying the extent of information he of she is, or will be, required to disclose.

{¶ 84} A violation of these nebulous reporting requirements could result in significant felony criminal penalties, which are *directly* correlated to the sexually oriented offense(s) that serves as the basis of the registration. See, R.C. 2950.99. It should also be noted that the AWA heightens community notification provisions as well. See R.C. 2950.10(B) and 2950.11. Yet, there is no empirical data to indicate such cumbersome registration, reporting, and notification requirements are necessary to, or effective in, better achieving the legislative goals or from which it could be ascertained that they are not excessive with respect to the AWA's purpose.

{¶ 85} The dissenting opinion in the Ohio Supreme Court's decision in *Ferguson*, succinctly sets forth the evolution of the sexual registration and notification act provisions from remedial to punitive. *Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, ¶44-62 (dissenting opinion). The AWA's amendments to the law go beyond those at issue in *Ferguson,* and I do not agree with the majority's prediction that the Ohio Supreme Court would continue to uphold the constitutionality of it by applying its analysis of different versions of the law. Quite simply, the AWA is clearly not the same law that withstood constitutional

scrutiny by a unanimous court in *Cook,* and its drastically altered statutory provisions are an ill fit to the logic that supported the Court's holding in *Cook*.

{¶ 86} The changes in the law effected by the AWA and intended to retroactively impact appellant cannot be considered remedial rather than punitive in effect in his case. Appellant was subject to less restrictive registration, notification, and residency provisions by virtue of a judicial determination that he was not likely to engage in sexually oriented offenses in the future. Subsequently, and by virtue of his conviction alone, appellant was retroactively subjected to new burdens, duties, obligations, and liabilities concerning his conviction for a crime that serves as the basis of his registration and notification requirements. I would find the retroactive application of the AWA provisions to appellant violate the Retroactivity Clause of the Ohio Constitution.

C. Ex Post Facto Clause of the United States Constitution.

{¶ 87} "[A]ny statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto. The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused." *Beazell v. Ohio* (1925), 269 U.S. 167, 170.

{¶ 88} "The purpose of the Ex Post Facto Clause is to ensure that legislative acts 'give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.'" *Cook,* supra at 414, quoting *Weaver v. Graham* (1981), 450 U.S. 24, 28-29.

{¶ 89} The Ex Post Facto Clause applies only to criminal statutes. *Cook*, supra at 415. Accordingly, it must be determined whether the statute at issue is criminal or civil. Id. In addressing this concern under former versions of Ohio's

SORN laws, the Ohio Supreme Court applied the "intent-effects" test to ascertain whether the sex offender registration and notification statutes constituted civil or criminal statutes. Id., citing *Roe v. Office of Adult Probation* (C.A.2, 1997), 125 F.3d 47, 53-55; *Russell v. Gregoire* (C.A.9, 1997), 124 F.3d 1079; *Doe v. Pataki* (C.A.2, 1997), 120 F.3d 1263, 1274-1276; see, also, *Kansas v. Hendricks* (1997), 521 U.S. 346.

{¶ 90} "In applying the intent-effects test, this court must first determine whether the General Assembly, 'in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other' and second, where the General Assembly 'has indicated an intention to establish a civil penalty, *** whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.'" Id., quoting *United States v. Ward* (1980), 448 U.S. 242, 248-249, 100 S.Ct. 2636, 2641, 65 L.Ed.2d 742, 749.

{¶ 91} The General Assembly, through the provisions of the AWA, has expressly dictated which label applies to an offender that is correlated to, and determined solely by, his or her conviction(s). However, as set forth previously, the General Assembly expressed a remedial intent in the legislation. However, the stated purpose of protecting the public from those likely to reoffend is substantially undermined by the total removal of any discretion or consideration in applying the tier labels to a particular offender. The fact of conviction alone

controls the labeling process, but simply is not in and of itself indicative of a realistic likelihood of a person to recidivate. In addition, the severity of the potential penalty for violating the SORN provisions of the AWA depends upon the underlying offense that serves as the basis for the offender's registration or notification conditions. The provisions of the AWA at issue are found in the criminal section of the Ohio Revised Code, which, while not dispositive, is indicative of an intent to impose criminal punishment. *Mikaloff v. Walsh* (Sept. 4, 2007), N.D.Ohio No. 5:06-CV-96.

{¶ 92} Even if the intent to impose a civil penalty is accepted, the effect of applying its provisions retroactively to appellant is punitive as detailed above. For this reason, I believe the retroactive application of the AWA to appellant violates the Ex Post Facto Clause of the United States Constitution.