

[Cite as *State v. Hills*, 2002-Ohio-497.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 78546

STATE OF OHIO	:	
	:	
Plaintiff-appellee	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
CLAY HILLS	:	
	:	
Defendant-appellant	:	
	:	

DATE OF ANNOUNCEMENT	:	
OF DECISION	:	FEBRUARY 7, 2002

CHARACTER OF PROCEEDING	:	Criminal appeal from
	:	Cuyahoga County
	:	Court of Common Pleas
	:	Case No. CR-221,261

JUDGMENT	:	AFFIRMED.
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DATE OF JOURNALIZATION	:	
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APPEARANCES:

For plaintiff-appellee:	WILLIAM D. MASON
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	GAIL D. BAKER, Assistant
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For defendant-appellant:	JAMES A. DRAPER
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[Cite as *State v. Hills*, 2002-Ohio-497.]

KENNETH A. ROCCO, P.J.:

Defendant-appellant Clay Hills appeals from the trial court order that classified him as a sexual predator.

In his assignments of error, appellant (1) asserts the trial court's determination lacks an adequate foundation in the evidence presented, (2) takes exception to the trial court's allusion to certain scientific "studies" during its discussion of appellant's criminal record, (3) contends the timing of the classification hearing was improper, and (4) presents constitutional challenges to the statute pursuant to which the trial court proceeded.

This court concludes, however, that none of appellant's assignments of error have merit; therefore, the trial court's order is affirmed.

Appellant originally was indicted in this case in November 1987 on three counts as follows: (1) rape of a seven-year-old girl, R.C. 2907.02(A)(1)(b); (2) rape of an eight-year-old girl, R.C. 2907.02(A)(1)(b); and (3) gross sexual imposition upon the eight-year-old girl, R.C. 2907.05(A)(4). The first offense was alleged to have occurred in the summer of 1987; the second two offenses were alleged to have occurred sometime in 1986. Appellant entered a plea of not guilty to the charges and was assigned counsel to represent him.

Following several pretrial hearings, appellant entered into a plea agreement whereby, in exchange for his guilty plea to count one, the state would dismiss the other two counts. At the hearing, the trial court accepted appellant's guilty plea. The trial court then immediately sentenced appellant to a term of incarceration of five to twenty-five years.

In May 2000, the state filed a notice in the trial court advising it that the Ohio Department of Rehabilitation and Corrections ("ODRC") had recommended appellant "be adjudicated a Sexual Predator." Noting appellant had been scheduled for a parole hearing with a possible release date in September, the state requested a hearing on the matter pursuant to R.C. 2950.09(C).

The trial court responded by issuing notice a classification hearing would be conducted on June 15, 2001. In a separate journal entry, the trial court directed the warden of the institution in which appellant was incarcerated to "send an H.B. 180 packet" to the prosecutor. This packet included, but was not limited to, "the front of [appellant's] Master File, his Disciplinary Record and Institutional Summary Report, his Job and Lock Assignments, all certificates, his Security Classification Instrument, and all Presentence Evaluations and Reports." The trial court further ordered the prosecutor to provide copies of these materials to appellant's counsel.

Appellant's counsel subsequently filed a motion requesting the appointment of an independent psychological expert to examine appellant at the state's expense. Counsel also filed a motion to "dismiss" the forthcoming hearing on the basis the statute pursuant to which the trial court would be proceeding was unconstitutional. The state filed briefs in opposition to both motions.

On June 16, 2000 the trial court issued a journal entry denying appellant's motion for an independent psychological evaluation; however, the entry further ordered appellant referred to the court psychiatric clinic, thus necessarily postponing the hearing until the trial court received the evaluator's resulting report.

The trial court eventually conducted a hearing on July 26, 2000. Initially, the trial court noted appellant's motion to dismiss the proceedings was denied. It then noted for the record it had received the report from Dr. Aronoff of the court psychiatric clinic. The report was designated "Joint Exhibit A" and accepted into evidence by the parties by stipulation. The trial court concluded the prefatory matters by observing "all the preliminary information and data ha[d] been exchanged."

The prosecutor thereafter outlined the facts pertaining to the instant case. The prosecutor stated that the victims named in the indictment were appellant's nieces and that one of them also had witnessed appellant's anal rape of the other. To support these

statements, the prosecutor introduced into evidence a copy of the police report, which contained a "brief narrative of what the victims told [the officers] with regard to the actions of [appellant]." Included in the narrative were: (1) an additional recounting by the victims of other sexual incidents that had occurred for which appellant had not been indicted; and (2) a description of a conversation with the victims' mother, appellant's sister.

The prosecutor also introduced into evidence a "Pre-Parole Personality Evaluation" of appellant that had been prepared in 1994 by two psychologists employed by the Marion Correctional Institution's "Office of Psychological Service." Finally, the prosecutor referred to appellant's own "account of the [instant] offense" recently given by him to Dr. Aronoff.

In subsequently addressing the trial court, appellant's counsel challenged the reliability of the prosecutor's evidence and urged the trial court to rely upon Dr. Aronoff's report. Counsel explained the tests Dr. Aronoff had performed and pointed out that, based upon those tests, the doctor had concluded appellant was at "low risk" to re-offend.

After the parties had presented their cases, the trial court "[took] a moment to go through the[] reports." The trial court then set forth for the record the following: (1) the applicable burden of proof for the proceedings; (2) the public policy reasons

for the enactment of "H.B. 180"; and (3) the determinations it was required to make as the factfinder.

Thereafter, the trial court examined appellant's case in light of each of the statutory factors as follows:

\*\*\* A, the offender's age; he was 35 years old at the time of the offense.

The second, B, the offender's prior criminal record regarding all offenses, including sex offenses. This offender has a prior petty theft record in Cleveland Heights Court, and he was sentenced on June 21<sup>st</sup> of 1977. Also, a possession of criminal tools record in East Cleveland, where he had served one-and-a-half — six months to five years, but that was suspended and he was placed on two years probation and on March 19<sup>th</sup> of 1982, that probation was terminated.

There are not any prior sexual offenses, but I do want to note, and I know counsel is familiar with the literature regarding sexual offenders. Oftentimes they begin with theft offenses, robbery offenses, offenses of that nature which are crimes against trust, and they exhibit a lack of inhibition which sometimes escalates into sexual behavior, and I will take that into consideration. However, again, there are no prior sex offenses in this case.

The age of the victim, in this case, it is the Court's finding that there were actually two victims. There was a seven-year-old victim and a nine-year-old victim.

Even assuming again that the Court would take into consideration [defense counsel's] argument about the incident in the movie theater and the allegations by Pamela Robinson, the mother of the victim and sister of the defendant, that they have been sexually abused, even setting that aside that that wasn't proven, we don't have an evidentiary standpoint, assuming the argument again that the Court doesn't view those two as victims, I certainly make a finding on the record that to have a nine-year-old watch you engage in anal

intercourse with a seven-year-old, does designate them a victim; making them witness that sexual activity is enough.

We do have *allegations made on the record about other sexual conduct, but even with those not being proven, it's troubling to this Court* and I want to state for the record that *having a nine-year-old watching that activity is tantamount to having them engage in that activity. It's not something any nine-year-old should have to be a witness to.*

Also, we have E, whether the offender used drugs or alcohol to impair the victim or prevent the victim's resistance. That doesn't apply.

F, whether the offender completed any prior sentence and, if the prior sentence was a sex offense, whether the offender participated in available programs for sexual offenders. That did not occur in a prior offense, but the 1994 report does indicate that *this offender did attend, at Marion, some sexual counseling in a sex offender program for a long period of time* but it also states that the patient had difficulty in describing his progress in group and that he did not deal well with everyday life situations and stresses. So, *although he attended therapy, it doesn't appear as if that therapy session went very well.*

Then you go to G, any mental illnesses or disabilities of the offender. In one of the reports, the 1994 report before this Court, it indicates that the offender is passive-aggressive and has that *personality disorder*, and also engaged in *episodic aggressive behavior*.

So certainly he carries those monikers.

Our psych clinic has run a series of assessments, that [defense counsel] has eloquently gone through, and has made various determinations that actually bode well for the Defendant, but at the end of the report they do say *the ultimate issue* of whether the Defendant should be adjudicated a sexual offender *is respectfully left for the Court to decide.* But I do take into consideration that he did seem to perform quite well on these

assessments as set forth, but he did have some mental illness and some problems.

Then you have to look at H, the nature of the offender's sexual activity with the victim and whether it was part of a demonstrated pattern of abuse. And certainly as set forth on the record, *this offender has indicated that when he abuses alcohol, he has a hard time curbing his desires* and he has a history, maybe even perhaps dating back to abusing his own sister while they were growing up, of engaging in *inappropriate sexual behavior with children*. That's, of course, of concern to this Court.

Then we have "I," whether the offender displayed or threatened cruelty. I think the very fact that the Defendant engaged in anal intercourse with a seven-year-old in the presence of a nine-year-old adds a *certain aspect of cruelty* because, again, you're victimizing the other person in the bedroom.

J, any additional behavioral characteristics that contribute to the conduct. For that I take into consideration we are talking about *the offender's niece and that she had a trust in the offender*.

*Even the incident report and the version of facts given by the Defendant indicate that the reason the Defendant was able to get into bed with the victim was that he was the victim's uncle and the victim trusted him.* And I believe there was some statement made that she was afraid of the dark or afraid of the night; not knowing that a heinous crime would ensue.

Taking into consideration *the totality of the factors, even despite the psychiatric report provided by Dr. Aronoff*, it is this Court's finding that Mr. Hills is a sexual predator.

(Emphasis added.)

The trial court entered judgment to that effect; appellant has timely appealed from the trial court's order. He presents five

assignments of error for review, which will be addressed in logical order.

Appellant's fourth assignment of error states:

THE TRIAL COURT ERRED WHEN IT REFUSED TO DISMISS THE PROCEEDING BECAUSE AN INDIVIDUAL'S PROTECTABLE LIBERTY INTEREST IN PRIVACY IS ENCUMBERED BY THE SEXUAL PREDATOR LABEL AND THE FACTORS LISTED AT R.C. §2950.09(B)(2) VIOLATE THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I OF THE OHIO CONSTITUTION, WHERE THE LEGISLATURE DID NOT PROVIDE TRIAL COURTS WITH GUIDANCE ON HOW THE CLASSIFYING FACTORS SHOULD BE APPLIED.

Appellant argues the statutory scheme set forth in R.C. 2950.01 *et seq.* violates constitutional guarantees of due process of law and equal protection under the law since it fails to provide sufficient guidance to the trial court regarding application of the factors listed in R.C. 2950.09(B)(2).

This precise issue, although differently phrased, previously has been addressed and rejected by this court in *State v. Steele* (Sept. 7, 2000), Cuyahoga App. No. 76205, unreported. It also has been addressed and rejected by the Twelfth District Court of Appeals in *State v. Wilson* (Nov. 3, 2000), Fayette App. No. CA99-09-024, unreported, cited with approval, *State v. Copeland* (Dec. 18, 2000), Cuyahoga App. Nos. 77333, 77500, 77501, 77502, 77517, unreported. See, also, *State v. Green* (Apr. 26, 2001), Cuyahoga App. No. 77771, unreported; *State v. McKinney* (Jan. 25, 2001),

Cuyahoga App. No. 77659, unreported; *State v. Gibson* (Dec. 7, 2000), Cuyahoga App. No. 76875, unreported.

Hence, appellant's fourth assignment of error is overruled.

Appellant's third assignment of error states:

THE TRIAL COURT ERRED WHEN IT DECIDED TO CONDUCT THE SEXUAL PREDATOR HEARING AGAINST THE APPELLANT WHERE THE APPELLANT WILL NOT BE RELEASED FROM PRISON FOR AT LEAST TEN YEARS IN VIOLATION OF THE REVISED CODE AND BOTH THE OHIO AND UNITED STATES CONSTITUTION (*SIC.*).

Appellant argues the timing of the classification hearing is constitutionally improper. This argument also previously has been addressed and rejected by this court. See, *State v. Steele, supra*; *State v. Green, supra*; *State v. Abelt* (May 31, 2001), Cuyahoga App. No. 77754, unreported.

Consequently, appellant's third assignment of error also is overruled.

Appellant's fifth assignment of error states:

R.C. §2950.09(C) VIOLATES THE DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I OF THE OHIO CONSTITUTION, BECAUSE A WRITTEN CHARGE WAS NOT PROVIDED TO THE APPELLANT.

Appellant argues the lack of written notice of the "evidence and reasoning" underlying ODRC's recommendation offends constitutional guarantees of procedural due process. This court, as it has previously, disagrees. See *State v. Copeland, supra*; *State v. McKinney, supra*.

Based upon the foregoing decisions of this court, appellant's fifth assignment of error also is overruled.

Appellant's second assignment of error states:

THE APPELLANT'S HEARING VIOLATED THE CONCEPTS OF SEPARATION OF POWERS BECAUSE THE TRIAL COURT RELIED ON EX PARTE KNOWLEDGE REGARDING "STUDIES" LINKING PETTY THEFT TO SEXUAL RECIDIVISM WHEN SUCH STUDIES WERE NOT PROVIDED TO COUNSEL.

Appellant asserts the trial court's reference to "literature regarding sexual offenders" in discussing his criminal record was so constitutionally improper as to render its ultimate decision reversible. Appellant's assertion lacks merit for three reasons.

First, the trial court gave no indication it actually *relied* upon such "literature" in making its decision. Second, the Ohio Supreme Court, itself, has referred to scientific "studies" as worthy of consideration in *State v. Eppinger* (2001), 91 Ohio St.3d 158 at 160-161. Cf., *State v. Krueger* (Dec. 19, 2000), Cuyahoga App. No. 76624, unreported. Third, despite the trial court's prefatory statement that appellant's counsel was "familiar" with such literature, appellant failed to object to the trial court's consideration of it. Hence, he has waived his argument with respect to this issue. *State v. Cook* (1998), 83 Ohio St.3d 404, 426; *State v. Williams* (1977), 51 Ohio St.2d 112.

Based upon the foregoing, appellant's second assignment of error is overruled.

Appellant's first assignment of error states:

[Cite as *State v. Hills*, 2002-Ohio-497.]

THE EVIDENCE IS INSUFFICIENT, AS A MATTER OF LAW, TO PROVE "BY CLEAR AND CONVINCING EVIDENCE" THAT APPELLANT "IS LIKELY TO ENGAGE IN THE FUTURE IN ONE OR MORE SEXUALLY ORIENTED OFFENSES."

Appellant argues the trial court's classification of him as a "sexual predator" lacks foundation in the evidence presented. He contends the state's evidence was inadequate to establish the likelihood of his future criminal sexual conduct. Based upon a review of the record, appellant's argument lacks merit.

R.C. 2950.09(B)(2) provides the factors a trial court is to consider in making a classification determination. Although many of the factors set forth "involve what may be considered 'old conviction data' which may be found in the court's file," the list is not designed to be exclusive. *State v. Eppinger*, *supra* at 164.

Rather, the trial court "shall consider *all* relevant factors." (Emphasis added.)

R.C. 2950.09(B), in the first instance, does not allocate which party has the burden of production of evidence to the trial court; nevertheless, the Ohio Supreme Court has declared it is the state's responsibility. *State v. Williams* (2000), 88 Ohio St.3d 513 at 533. Since the proceedings are not punitive but rather are both "civil in nature" and akin to "probation hearings," the Ohio Rules of Evidence do not strictly apply. *State v. Gowdy* (2000), 88 Ohio St.3d 387 at 398; *State v. Cook*, *supra* at 425. Consequently, the state sustains its burden by providing "clear and convincing evidence," *i.e.*, "that measure or degree of proof which will pro-

duce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established." *State v. Eppinger*, *supra* at 164, citing *Cross v. Ledford* (1954), 161 Ohio St. 469, 477.

Clearly, the trial court is the trier of fact in sexual classification hearings. On appeal, therefore, this court's role is to determine whether the weight of the evidence supports the trial court's decision. *State v. Cook*, *supra* at 426; *State v. Childs* (Apr. 19, 2001), Cuyahoga App. No. 78076, unreported. Decisions that are supported by competent, credible evidence will not be reversed by a reviewing court as being against the manifest weight of the evidence. *Seasons Coal v. Cleveland* (1984), 10 Ohio St.3d 77; *State v. Cook*, *supra*; *State v. Steele*, *supra*. Moreover, this court must be mindful that the weight to be given the evidence and the credibility of the witnesses are matters *primarily* for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

A review of the record in this case reveals the trial court's decision was supported properly. Moreover, it is clear that in reaching its decision, the trial court conducted a hearing that, in many respects, closely approximated what the supreme court in *Eppinger* has proposed as the "model" for "procedure."

At the trial court's request, the prosecutor and defense counsel identified on the record those portions of the case file

that both "relate[d] to the factors set forth in R.C. 2950.09(B)(2)" and were "probative of the issue of whether [appellant] is likely to engage in the future in one or more sexually oriented offenses." The trial court insured this record was preserved clearly and accurately for purposes of appeal. Additionally, the trial court permitted each party to "present expert opinion" by written report to assist it in its determination. Finally, the trial court considered each listed statutory factor and discussed on the record the particular evidence and factors upon which it relied in making its determination regarding the likelihood of appellant's recidivism.

The trial court relied particularly on the evidence that appellant had victimized not one, but both, of his nieces over a period of time. Moreover, appellant's participation in a sexual offender program in prison had not resolved his problem; rather, it indicated appellant suffered from a continuing "personality disorder." Finally, the trial court noted Dr. Aronoff had conceded in his report the "ultimate issue" of appellant's classification was for the court to decide.

The trial court acted within its prerogative to assign less weight to Aronoff's assessment of appellant's potential for recidivism. First, Aronoff's assessment was deficient in that it failed either to consider the question of whether appellant had a predilection to incest or to assign any significance to the fact

that appellant had no access to little girls while incarcerated. Second, appellant's narrative to Aronoff of how the arrest in the instant case came about was notable.

Despite being indicted on two separate counts relating to his "older niece," appellant refused to acknowledge to Aronoff any wrongdoing in this regard; he denied anything had "happened" between them. Furthermore, in describing the incident with his younger niece, appellant related that while babysitting, he lay down on the bed with her to comfort her because she was "scared of the dark," then "got carried away" and "humped her and got [his] jollies off." Appellant admitted his other niece "must of seen what happened."

These statements are particularly enlightening as to predicting appellant's future conduct when compared to the police report and the psychological assessment performed in 1994. In the police report, both victims indicated appellant had molested them on more than the three occasions for which he had been indicted. Appellant's sister made similar accusations. However, in discussing his future plans with the psychologists, appellant indicated his sister was "the only support that he ha[d]" and therefore he planned "to stay with his sister if paroled." The psychologists concluded appellant had unrealistic expectations, had not fully accepted responsibility for his actions, was "socially and emotionally immature," and possessed the potential for "episodic aggressive

behavior"; thus, he had a continuing "need" for counseling in programs for sexual offenders.

In short, based upon the evidence presented in this case, this court cannot find the trial court's determination was unsupported.

*State v. Cook, supra; State v. Malinowski* (Sept. 6, 2001), Cuyahoga App. No. 78626, unreported; *State v. Bouyer* (Aug 23, 2001), Cuyahoga App. No. 78547, unreported; *State v. Vintson* (June 7, 2000), Cuyahoga App. No. 78382, unreported; *State v. Childs, supra; State v. Steele, supra; State v. Wilson, supra; cf. State v. Miller* (May 17, 2001), Cuyahoga App. No. 78032, unreported; *State v. Grimes* (Apr. 12, 2001), Cuyahoga App. No. 78496, unreported.

Therefore, appellant's first assignment of error is overruled.

The trial court's order is affirmed.

**[Cite as *State v. Hills*, 2002-Ohio-497.]**

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas 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.

PRESIDING JUDGE  
KENNETH A. ROCCO

FRANK D. CELEBREZZE, JR., J. CONCURS.

ANNE L. KILBANE, J., CONCURS IN PART  
AND DISSENTS IN PART WITH SEPARATE  
OPINION.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) 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(E) 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(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 78546

STATE OF OHIO	:	
	:	CONCURRING
Plaintiff-Appellee	:	
	:	AND
-vs-	:	DISSENTING OPINION
	:	
CLAY HILLS	:	
	:	
Defendant-Appellant	:	

DATE: FEBRUARY 7, 2002

ANNE L. KILBANE, J., CONCURRING IN PART AND DISSENTING IN PART:

On this appeal of the order of Judge Bridget McCafferty, I concur separately with the majority's resolution of assignments of error three and four, but dissent on assignments two and five, and find assignment of error one moot.

**I. Constitutional Arguments in Assignments Three, Four, and Five.**

I agree with the majority that, in *State v. Steele*,<sup>1</sup> we addressed and rejected the issues raised in assignments of error three and four, and can find that case persuasive. The *Steele* panel found that a defendant's ability to request a determination that he is no longer a sexual predator eliminated any perceived unfairness in holding a sexual predator hearing sometimes years in

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<sup>1</sup>(Sept. 7, 2000), Cuyahoga App. No. 76205, unreported.

advance of that person's release from prison, and that the factors of R.C. 2950.09(B)(2) provided sufficient guidance to satisfy the "rational relationship" test of substantive due process. It found that the rational relationship test applied because the defendant had not identified a fundamental right in jeopardy, and then found that the factors were sufficiently related to the goal of public safety so as not to be arbitrary.

Opinions of the Ohio Supreme Court in *State v. Cook*<sup>2</sup> and *State v. Williams*<sup>3</sup> reject an assertion that R.C. 2950.09 must be narrowly tailored to protect a convicted offender's fundamental privacy right because the conviction information is already a matter of public record, and one cannot have a privacy right in preventing the dissemination of already public information.<sup>4</sup> The *Williams* Court also found, for purposes of an equal protection challenge, that R.C. Chapter 2950 does not implicate a fundamental constitutional right.<sup>5</sup> While the guidelines of R.C. 2950.09(B) are subject to criticism because the application of certain factors (e.g., the offender's age) can be viewed as either mitigating or aggravating the likelihood of recidivism regardless of the evidence presented, they are not so arbitrary that they deny due process

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<sup>2</sup>(1998), 83 Ohio St.3d 404, 700 N.E.2d 570.

<sup>3</sup>(2000), 88 Ohio St.3d 513, 728 N.E.2d 342.

<sup>4</sup>*Cook*, 83 Ohio St.3d at 413-414, 419, 700 N.E.2d at 579, 583; *Williams*, 88 Ohio St.3d at 525-526, 728 N.E.2d at 355-356.

under the less exacting standard afforded to non-fundamental interests.<sup>6</sup>

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<sup>5</sup>*Id.* at 531, 728 N.E.2d at 359.

<sup>6</sup>*Fabrey v. McDonald Village Police Dept.* (1994), 70 Ohio St.3d 351, 353-354, 639 N.E.2d 31, 33-34.

**[Cite as *State v. Hills*, 2002-Ohio-497.]**

I must dissent, however, from the majority's conclusion that we have adequately addressed the procedural due process challenge raised in Hills' fifth assignment of error, and would find that he was not provided adequate notice of the charges against him, nor was he provided any reasonable statement of the evidence upon which those charges were based. For defendants convicted and sentenced prior to January 1, 1997, who are still imprisoned and subject to classification, R.C. 2950.09(C) requires the Ohio Department of Rehabilitation and Correction ("ODRC") to submit a recommendation directly to the sentencing or successor judge, who then determines whether a hearing shall be held based upon that recommendation. If the judge decides to hold a sexual predator hearing, R.C. 2950.09(C)(2)(b) states that he "shall give the offender and the prosecutor who prosecuted the offender for the sexually oriented offense, or that prosecutor's successor in office, notice of the date, time, and place of the hearing." The statute does not require that a defendant be given any information concerning the nature of the charges or the evidence upon which the State intends to rely, despite the fact that such notice is constitutionally necessary even in the most informal proceedings.<sup>7</sup> Notice of the date, time, and place of the hearing is insufficient.

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<sup>7</sup>See, e.g., *Goss v. Lopez* (1975), 419 U.S. 565, 581, 95 S.Ct. 729, 740, 42 L.Ed.2d 725, 739 (temporary school suspension requires "notice of the charges \*\*\* and \*\*\* an explanation of the evidence the authorities have \* \* \*"); *Cleveland Bd. of Edn. v. Loudermill* (1985), 470 U.S. 532, 546, 105 S.Ct. 1487, 1495, 84 L.Ed.2d 494, 506 (*Goss* notice required before public employee's pretermination

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hearing, even though employee is entitled to a full post-deprivation hearing).

**[Cite as *State v. Hills*, 2002-Ohio-497.]**

Some judges have suggested that constitutionally effective notice is achieved when the defendant is provided with a copy of the ODRC recommendation along with notice of the date, time, and place of the hearing.<sup>8</sup> This does not address the statute's facial infirmity, because there is no statutory requirement that the defendant be provided with this recommendation or any other information beyond date, time, and place. Nevertheless, I am willing to consider the possibility that judges may impose the procedures necessary for constitutional compliance, and that a facial due process challenge might fail on the theory that the statute need not expressly provide all aspects of due process, and judges can ensure compliance by requiring further protections. Because an analysis of the procedures employed in this case reveals that the judge did not remedy the statute's deficiencies, the statute was unconstitutionally applied, and thus there is no reason to reach the broader issue of its facial validity.

On May 15, 2000, the Cuyahoga County Prosecutor's office, on behalf of the State, filed a motion entitled "State's Request for Pursuit of Sexual Predator Adjudication." The motion stated, in relevant part, as follows:

Now comes the State of Ohio, \* \* \* having received notice of the recommendation by the Department of Rehabilitation and Corrections that this defendant be adjudicated a Sexual Predator, notifies this Honorable

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<sup>8</sup>See *State v. McKinney* (Jan. 25, 2001), Cuyahoga App. No. 77659, unreported ("Appellant obviously had a copy of the corrections department's recommendation \* \* \*").

Court that the State has reviewed this case and believes that the available evidence supports such a recommendation. Therefore, the State requests this Court to return the defendant \* \* \* for a hearing pursuant to [R.C.] 2950.09(C).

It does not appear that the State served Hills with a copy of this motion.<sup>9</sup> On May 18, 2000, the judge issued an order that stated as follows:

Defendant is hereby ordered back to this jurisdiction from Belmont Correctional Institution for a sexual predator hearing on June 15, 2000 at 2:00 p.m.  
Sheriff to transport.

This journal entry indicates that notice was sent to the sheriff, but does not indicate that notice was sent to Hills. On May 19, 2000, the day after ordering the sheriff to return Hills

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<sup>9</sup>The propriety of such a motion under R.C. 2950.09(C) has not been challenged, although two questions immediately arise from its filing; (1) how did the prosecutor receive notice of the ODRC recommendation, and (2) what evidence did the prosecutor have access to at that time to support an allegation that Hills satisfied the definition of a sexual predator? Subsequent questions would involve the propriety of the prosecutor's *ex parte* attempt to influence the judge's determination whether to schedule a hearing -- not only whether the motion is statutorily allowed, but whether the prosecutor is allowed to present it to the judge without notice to the defendant.

for a scheduled hearing, the judge journalized an "Order to Forward Inmate File to Prosecutor" which stated, in relevant part, as follows:

The Warden of the Belmont Correctional Institution is ordered to send an H.B. 180 packet to [the Cuyahoga County Prosecutor's Office] forthwith on this defendant, including, but not limited to the front of his master file, his disciplinary record and institutional summary report, his job and lock assignments, all certificates, his security classification instrument, all presentence and postsentence reports, and all psychological evaluations and reports. \* \* \* If a hearing is scheduled, the State is ordered to provide the defense attorney with a copy of these records.

This journal entry indicates that a copy was sent to Hills, although it references only the **possibility** of a hearing when, in fact, it had already been scheduled. Despite these oddities, the Cuyahoga County Public Defender's Office apparently received notice of the proceedings,<sup>10</sup> and on May 30, 2000, moved for the appointment of a psychological expert and to dismiss on constitutional grounds, including those stated in this appeal.

Even if one overlooks the technical issues raised by these proceedings and assumes that Hills received notice of the scheduled hearing, requested or acceded to the apparent appointment of the Cuyahoga County Public Defender as his attorney, and was given access to his institutional file, this is still insufficient to

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<sup>10</sup>It is unclear how the Public Defender's office received notice of the proceedings, or how it was appointed to represent Hills. The Public Defender did not represent Hills in the underlying criminal case.

comply with procedural due process because he was not given notice of the evidence upon which the State intended to rely.

In *State v. Gowdy*,<sup>11</sup> the Ohio Supreme Court recognized the importance of procedural protections in sexual predator proceedings, and found it was plain error for a judge to conduct a classification hearing at a defendant's sentencing without first notifying him that such a hearing would take place.<sup>12</sup> The Court found it "imperative that counsel have time to adequately prepare for the hearing" and that "[d]efendants must have notice of the hearing in order to 'have an opportunity to testify, present evidence, call and examine witnesses and expert witnesses, and cross-examine witnesses and expert witnesses \*\*\*.'"<sup>13</sup> This opportunity to prepare must include an opportunity to discover the State's evidence, or the right to cross-examine witnesses or to

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<sup>11</sup>(2000), 88 Ohio St.3d 387, 727 N.E.2d 579.

<sup>12</sup>*Id.* at 398, 727 N.E.2d at 589.

<sup>13</sup>*Id.*, quoting R.C. 2950.09(B)(1).

present evidence in defense will be hollow, and the facial grant of "notice and an opportunity to be heard" will be meaningless.

The scope of process due a defendant involves consideration of three factors: (1) the private interest affected; (2) the risk of erroneous deprivation and the value of additional safeguards; and (3) the governmental interest in the proceeding at issue and the burdens of additional procedures.<sup>14</sup> The protection necessary is intimately related to the importance of the right at issue, not only with respect to the "degree of potential deprivation[,] " but also its length.<sup>15</sup> While the Ohio Supreme Court found that criminal protections were unnecessary in *Cook*, and that no fundamental rights were at issue in *Williams*, it nonetheless recognized in *Gowdy* that the decisions made in sexual predator hearings "will have a profound impact on a defendant's life."<sup>16</sup> Although the *Cook* court found that sexual predator proceedings were not part of the criminal trial, it compared them to probation revocation proceedings,<sup>17</sup> which traditionally require more stringent due process

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<sup>14</sup>*Mathews v. Eldridge* (1976), 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33.

<sup>15</sup>*Id.* at 341, 96 S.Ct. at 906, 47 L.Ed.2d at 37.

<sup>16</sup>*Gowdy, supra.*

<sup>17</sup>*Cook*, 83 Ohio St.3d at 425, 700 N.E.2d at 587.

notice provisions than those provided here.<sup>18</sup> The importance of sexual predator proceedings is further underscored by the appointment of counsel to indigent defendants at State expense,<sup>19</sup> and the decision in *State v. Eppinger*,<sup>20</sup> which found that trial judges have discretion and, at times, the duty to appoint an expert at State expense to aid an indigent defendant.<sup>21</sup> The defendant's interest here in fact exceeds that of a probationer, because the sexual offender classification is not a punitive result of the offense, and thus cannot be described as merely a "conditional" interest.<sup>22</sup> Therefore, even if the defendant's constitutional interest in the

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<sup>18</sup>*Morrissey v. Brewer* (1972), 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, 33 L.Ed.2d 484, 499; *Gagnon v. Scarpelli* (1973), 411 U.S. 778, 782, 93 S.Ct. 1756, 1760, 36 L.Ed.2d 656, 662.

<sup>19</sup>R.C. 2950.09(B)(1).

<sup>20</sup>(2001), 91 Ohio St.3d 158, 743 N.E.2d 881.

<sup>21</sup>*Id.* at syllabus.

<sup>22</sup>*Morrissey*, 408 U.S. at 480, 92 S.Ct. at 2600, 33 L.Ed.2d at 494.

classification proceeding is not fundamental, it is nonetheless substantial, and requires considerable procedural protection.

Furthermore, the Ohio Supreme Court has admitted that sexual offender classification necessarily entails a high risk of error,<sup>23</sup> and that the consequences of error are, as stated in *Gowdy*, "profound." Therefore, in addition to the important interest at risk, the second factor cited in *Mathews* also weighs heavily in favor of increased procedural protections.<sup>24</sup> Although the State undoubtedly has an interest in protecting citizens from sexual recidivists, the third *Mathews* factor must also consider the State's interest in avoiding erroneous classifications, both to avoid burdening law enforcement administration,<sup>25</sup> and to ensure respect for the integrity of governmental actions by providing "basic fairness."<sup>26</sup> Without a showing that such procedures would

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<sup>23</sup>*Eppinger*, 91 Ohio St.3d at 163, 743 N.E.2d at 886.

<sup>24</sup>*Mathews*, 424 U.S. at 335, 343-346, 96 S.Ct. at 903, 907-908, 47 L.Ed.2d at 33, 38-40.

<sup>25</sup>*Eppinger*, 91 Ohio St.3d at 165, 743 N.E.2d at 888.

<sup>26</sup>*Morrissey*, 408 U.S. at 484, 92 S.Ct. at 2601-2602, 33 L.Ed.2d

impose a heavy burden on the State, the protection should be afforded.

[Cite as *State v. Hills*, 2002-Ohio-497.]

Once we have recognized the importance of the proceeding and the risk and consequences of error, it is not difficult to recognize the insufficiency of a bare notice that a classification hearing has been scheduled and the defendant will have the opportunity to be present and participate. Furthermore, it is insufficient simply to order that a defendant have the ability to review his institutional file. Proceedings of less import than these routinely call not only for notice of the charges, but for a statement of the evidence upon which the State intends to rely.<sup>27</sup> There should be no undue burden in requiring the State to identify the statutory factors it believes support the proposed classification and the evidence supporting the existence of those factors.

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<sup>27</sup>*Goss*, 419 U.S. at 581, 95 S.Ct. at 740, 42 L.Ed.2d at 739; *Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1495, 84 L.Ed.2d at 506.

[Cite as *State v. Hills*, 2002-Ohio-497.]

In support of the claim that this court has previously addressed and rejected this assignment of error, the majority cites *State v. Copeland*<sup>28</sup> and *State v. McKinney*.<sup>29</sup> To the extent that these cases, or any cited within them, have addressed and rejected the constitutional challenge here, I submit that they did so without analysis or upon such hollow reasoning that they have no persuasive value.<sup>30</sup> In *McKinney*, the only case that even attempted to discuss the issue, the court first rejected the claim that a purported sexual predator is entitled to more notice than merely allowing him to review his institutional file, stating that "[t]he opportunity to respond to the government's evidence does not require advance notice of the specific evidence upon which the state intends to rely."<sup>31</sup> The due process challenge, however, was ultimately overruled because he failed to demonstrate prejudice on the basis that he did not show "how the absence of more specific information has prejudiced his ability fairly to defend himself."

The opinions in *Goss*, *Loudermill*, *Mathews*, and *Gowdy*, among

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<sup>28</sup>(Dec. 18, 2000), Cuyahoga App. Nos. 77333, 77500, 77501, 77502, 77517, unreported.

<sup>29</sup>(Jan. 25, 2001), Cuyahoga App. No. 77659, unreported.

<sup>30</sup>This criticism applies with equal force to *State v. Green* (Apr. 26, 2001), Cuyahoga App. No. 77771, unreported, in which I concurred. I regret that judges of this district, including me, have tended to reject constitutional challenges to R.C. 2950.09 without adequate consideration. See *Copeland*, *supra* (separate opinion of Karpinski, J.).

<sup>31</sup>*McKinney*, *supra*.

others, completely refute the *McKinney* court's unsupported statement that "[t]he opportunity to respond to the government's evidence does not require advance notice of the specific evidence upon which the state intends to rely." In a proceeding of this gravity, a defendant is at least entitled to notice of the evidence and witnesses the State intends to present.<sup>32</sup> Moreover, a defendant in even the most limited constitutionally-protected proceedings generally is entitled to notice of the "charges or other reasons"<sup>33</sup> for the proposed action, a standard that at the very least requires "sufficient notice of the charges against him to allow preparation

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<sup>32</sup>See, e.g., *Morrissey*, 408 U.S. at 487-489, 92 S.Ct. at 2603-2604, 33 L.Ed.2d at 497-499 (evidence, witness identity, confrontation and cross-examination must be provided at preliminary hearing, which is followed by a final revocation hearing); see, also, *Sohi v. Ohio State Dental Bd.* (1998), 130 Ohio App.3d 414, 422-423, 720 N.E.2d 187, 192-193 (failure to identify allegedly mistreated patients was denial of adequate notice).

<sup>33</sup>R.C. 119.07. Although this is a statutory standard, there should be no dispute that it is constitutionally derived.

of a defense \*\*\*." <sup>34</sup> In order to have any substantive meaning, the concepts of notice and an opportunity to be heard must include an opportunity to prepare, and the opportunity to prepare a defense must be focused, at some level, by knowledge of the charges and evidence against which one is defending. A constitutionally sufficient hearing cannot be conducted before the backdrop of a Star Chamber.

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<sup>34</sup>*Sohi*, 130 Ohio App.3d at 422, 720 N.E.2d at 192.

[Cite as *State v. Hills*, 2002-Ohio-497.]

The *McKinney* court found that a defendant's access to the contents of the ODRC recommendation provided adequate notice of the evidence, despite the fact that the statute does not require the contents of that recommendation be provided to a defendant, and does not require the ODRC to submit anything more than a bald recommendation in the first place. As discussed *infra*, the Ohio Administrative Code contains no provisions governing the ODRC's execution of its duties under R.C. 2950.09. Nevertheless, according to the *McKinney* court, a defendant who has access to the ODRC's recommendation has adequate notice because he has "as much access to the department's reasoning as the court and the state." The apparent rationale underlying this bizarre position is that a defendant is not entitled to notice of the factual allegations and evidence the prosecutor will present against him because "the judge must determine all the relevant factors."<sup>35</sup> The State, it seems, is to have no clue upon what evidence it will rely until the judge relies on it. Such reasoning would be comical if it were not in practice.

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<sup>35</sup>McKinney at pg. 9.

**[Cite as *State v. Hills*, 2002-Ohio-497.]**

Further, there is no basis upon which to claim that merely giving a defendant the ability to review his institutional file is sufficient to allow preparation of a defense, when he is not informed what parts of that file the State intends to use in proving its case. One cannot simply tell the defendant that the determination will be based upon the factors of R.C. 2950.09(B)(2), which include "all relevant factors, including, but not limited to," those specifically listed, especially when one of the specific factors is "[a]ny additional behavioral characteristics that contribute to the offender's conduct."<sup>36</sup> Knowledge of potentially relevant factors does not substitute for knowledge of the factors the State actually considers relevant, and the evidence it believes supports their existence.

The Ohio Supreme Court has made clear that R.C. 2950.09(B)(2) is not exhaustive, and the State's theory may include other factors.<sup>37</sup> Without some cognizable theory of both the factual and legal bases supporting the State's case, the purported sexual predator does not have a valid opportunity to defend not only against the record of his sexual offense history, but against any information in his criminal record, his institutional record, as well as unforeseen evidence of his behavioral characteristics gleaned from other sources, and to anticipate the listed and

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<sup>36</sup>R.C. 2950.09(B)(2)(j).

<sup>37</sup>*State v. Thompson* (2001), 92 Ohio St.3d 584, 588, 752 N.E.2d 276, 280.

unlisted factors the State will argue are relevant, as well as those the judge might raise *sua sponte*. Allowing access to files might be sufficient to allow a litigant to prepare a **case**; it is insufficient to allow preparation of a **defense**.

As noted, the *McKinney* decision ultimately found that the defendant had failed to show prejudice flowing from any constitutional violation, and denied his claim on that basis. While I agree that one ordinarily must assess the existence of prejudice in order to sustain a procedural due process challenge,<sup>38</sup> the burden of proving the existence of prejudice is not properly placed on the defendant, and proper analysis reveals that Hills has shown sufficient prejudice here.

Both Crim.R. 52 and Civ.R. 61 allow a judge to "disregard" errors that do not affect substantial rights, but neither rule addresses the standard for assessing prejudice when substantial rights are affected. Judges and commentators, however, have proposed that there are three possible standards for assessing whether error is harmless, all of which place the ultimate burden of persuasion upon the party benefitting from the error:

(a) that it is more probable than not that the error did not affect the judgment, (b) that it is highly probable that the error did not contribute to the judgment, or (c) that it is almost certain that the error did not taint the judgment.<sup>39</sup>

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<sup>38</sup>*Estes v. Texas* (1965), 381 U.S. 532, 542-543, 85 S.Ct. 1628, 1632-1633, 14 L.Ed.2d 543, 550.

<sup>39</sup>*McQueeney v. Wilmington Trust Co.* (C.A.3, 1985), 779 F.2d



[Cite as *State v. Hills*, 2002-Ohio-497.]

Moreover, because Hills claims denial of not only substantial, but constitutional, rights to procedural due process, we can affirm the judgment only if, pursuant to *Chapman v. California*,<sup>40</sup> the error is harmless beyond a reasonable doubt. *Chapman* clarified that, regardless of the perspective from which the standard was viewed, the beneficiary of the error must demonstrate a lack of prejudice, stating:

There is little, if any, difference between our statement in *Fahy v. Connecticut*<sup>41</sup> about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.<sup>42</sup>

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<sup>40</sup>(1967), 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-711.

<sup>41</sup>(1963), 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171, 173.

<sup>42</sup>*Id.*

[Cite as *State v. Hills*, 2002-Ohio-497.]

This standard is not confined to procedural rights denied at criminal trials, but is applied in parole and probation revocation proceedings found comparable to sexual offender classifications in *Cook*, *supra*, as well as in civil proceedings.<sup>43</sup> Furthermore, the decisions in *Cook*, *Gowdy*, and *Eppinger* establish the gravity of these proceedings, and thus show that constitutional violations cannot be ignored unless the State proves the error harmless beyond a reasonable doubt.

In *Gowdy*, *supra*, the Ohio Supreme Court found it plain error to hold a sexual predator hearing without notice to the defendant, and did not require a further showing of prejudice regardless of the fact that the defendant was present and had not shown any marked lack of familiarity with the record or inability to argue the issues.<sup>44</sup> Such an approach recognizes the prejudice inherent in denying a defendant any meaningful opportunity to muster a defense, and that the State must show these procedural deficiencies were harmless.

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<sup>43</sup>*United States v. Johns* (C.A.5, 1980), 625 F.2d 1175, 1176; *Burnette v. School Bd. of Virginia Beach* (C.A.4, 1976), 530 F.2d 124, 125.

<sup>44</sup>*Gowdy*, 88 Ohio St.3d at 398, 727 N.E.2d at 589.

[Cite as *State v. Hills*, 2002-Ohio-497.]

While I am aware that some cases assert a prejudice requirement as a component of a due process claim, the requirement does not go beyond the prejudice apparent here -- that the outcome of the proceeding was disputed, and that the defendant was prevented from preparing a defense. In *Watson v. Beckel*,<sup>45</sup> the court asserted a "substantial prejudice" requirement, but cited cases in which defendants admitted the charges against them, necessarily rendering the claimed errors harmless under any standard.<sup>46</sup> Neither *Watson* nor any case it cited undermines the State's duty to prove constitutional error harmless beyond a reasonable doubt, because that standard is met where the defendant admits the violations had no effect on the outcome of the proceedings.

Even if *Hills* was required to make a record showing prejudice, it would take little to do so here. A defendant who is notified of a sexual predator hearing and is denied a witness list or discovery of the evidence the State intends to use might readily show prejudice to his ability to prepare a defense; in this case, the request and denial of a witness list might have affected *Hills*' subsequent request for an expert, because he might have foregone the request if he knew the State would present no expert, and thus would have difficulty mustering a *prima facie* case.<sup>47</sup>

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<sup>45</sup>(C.A.10, 2001), 242 F.3d 1237.

<sup>46</sup>*Id.* at 1242.

<sup>47</sup>*State v. Krueger* (Dec. 19, 2000), Cuyahoga App. No. 76624, unreported.

I would sustain the fifth assignment of error.

## **II. The Judge's Consideration of Evidence Not in the Record.**

The majority states three reasons for denying Hills' second assignment of error, stating that the judge "gave no indication that [she] actually relied" on literature that was not in evidence in making her decision, that such reliance was acceptable even if it occurred, and that Hills waived error by failing to object to the judge's reliance on evidence outside the record at the hearing.

I disagree with all three contentions, and will address them in reverse order.

I agree that failure to object to the presentation of evidence ordinarily constitutes waiver, but this doctrine generally is applied to rulings on evidence made during the hearing or proceeding itself; in this case the judge referred to evidence outside the record in stating her ruling after the parties had made their presentations. By contrast, in *Cook*, the Ohio Supreme Court found waiver where the lawyer failed to object to the judge's reliance on a presentence investigation report, but noted that the judge and the lawyer engaged in discussion of the contents of the report.<sup>48</sup> The presentence report in *Cook* was definitely a part of the presentation of evidence; the judge's statements here were a part of her statement of ruling, and objection would have served no purpose. Lawyers will be surprised to learn that they must now

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<sup>48</sup>*Cook*, 83 Ohio St.3d at 424-426, 700 N.E.2d at 586-587.

interrupt a judge, who is announcing a ruling, to interpose objections, and judges equally dismayed to find they are constantly interrupted by lawyers who must ensure the preservation of error. Hills' objection here is to the judgment itself, not to an evidentiary ruling that occurred during the proceedings.

The majority next claims that the Ohio Supreme Court approved the *sua sponte* consideration of scientific literature on sexual offender recidivism in making sexual predator determinations. While I am in favor of judges educating themselves by reading the scientific literature associated with sexual offenders, violent predation, and recidivism, I cannot agree that a judge who claims to be familiar with that literature is entitled to interject that familiarity into a sexual predator proceeding as fact. Familiarity with the subject should be an aid to assessing and understanding the evidence, especially that provided by experts, analyzing it with respect to the factors of R.C. 2950.09(B)(2), and might also assist the judge in determining the weight that should be given particular factors. Under no circumstances, however, should a judge's knowledge be mistaken for evidence, or used as a substitute for evidence. While I agree with Justice Cook's criticism of the majority opinion on this point in *State v. Eppinger*,<sup>49</sup> the *Eppinger* court nonetheless did not approve the *sua sponte* introduction of

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<sup>49</sup>91 Ohio St.3d at 167-169, 743 N.E.2d at 889-890.

scientific literature as evidence to be considered in the absence of expert opinion on the issue.

The last question concerning this assignment is whether the judge actually relied on her personal knowledge of literature not in evidence when making her decision. After summarizing what she believed the literature stated concerning the effect of a general criminal record on a sex offender's likelihood of recidivism, the judge stated, "and I will take that into consideration." This statement cannot be understood as anything but an indication that the judge intended to rely on some uncited literature in making her decision. I agree that there is no indication the judge relied **solely** on this evidence, but the word "rely" does not require exclusivity. The judge absolutely indicated that she relied on the literature as evidence supporting the sexual predator determination, and I cannot agree that this conduct was appropriate.

Despite the fact that the judge relied on this extraneous "evidence," the circumstances here raise an issue of harmless error. The expert psychiatric report cited Hills' general criminal record as a factor increasing the likelihood of future sexual offenses and cited literature on which he relied, although the report did not include the judge's additional comments as to the literature's content. Despite the judge's comments, however, the expert report does in fact state the basic proposition employed in the judge's ruling -- that a general criminal record is a factor

increasing the likelihood of future sexual offenses. Because of this, it is tempting to consider the judge's comments harmless. I am unconvinced, however, because the judge's comments indicate a selective use of the evidence contained in the report, which stated two factors increasing the likelihood of future offenses and eight factors decreasing it. The judge apparently discounted the factors decreasing Hills' likelihood of re-offending, and used her knowledge of the literature to heighten the significance of one factor pointing toward re-offense. This selective reading of the literature not only ignored factors pointing away from a sexual predator finding, the judge also found that Hills' familial relationship was an aggravating factor, stating, "I take into consideration we are talking about the offender's niece and that she had a trust in the offender."

This finding conflicts with the psychiatric report, and the uncited literature the judge relied on earlier in her decision -- that report, and the literature upon which it relied, in fact indicated that an offender is less likely to re-offend if the object of the initial offense was a family member.<sup>50</sup> I cite this portion of the scientific literature not as evidence, but to point out the necessity of expert opinion and assistance in making sexual predator determinations, and the danger of allowing judges to

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<sup>50</sup>Hanson and Bussiere, Predicting Relapse: A Meta-Analysis of Recidivism Studies (1998), Vol. 66, No. 2, Journal of Consulting and Clinical Psychology, 348-362.

selectively draw on their own research into the issue without allowing the parties the opportunity to present and view the evidence to be considered and argue its significance. The expert report cited Hills' familial relationship with his nieces as a factor **decreasing** the likelihood of future offenses, but the judge decided to disregard this mitigating factor and use the same facts to substitute a different, aggravating factor in its place.

While such decisionmaking might be within the judge's discretion after full and open presentation of the evidence and argument from the parties, it is inappropriate for the judge to introduce the evidence and assign weight to it without allowing argument. Such introduction of evidence threatens the fundamental principle of an impartial tribunal; the consideration of evidence without input or argument contradicts the very purpose of the adversarial system. Therefore, I would sustain the second assignment of error and remand this case for further proceedings.

### **III. Sufficiency of the Evidence, Due Process, and the *Eppinger* "Model."**

Although I would find the first assignment of error moot, I feel it necessary to address the majority's statement that this proceeding approached the "model" suggested in *Eppinger*,<sup>51</sup> both with respect to the specific procedures employed here and the utility of the "model" itself. With all due respect to our state's highest

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<sup>51</sup>91 Ohio St.3d at 166, 743 N.E.2d at 888-889.

court, I first dispute the notion that the "model" proceedings outlined in *Eppinger* can be mere suggestions, rather than necessary components of a constitutionally adequate hearing. Moreover, I disagree with the entire tenor of *Eppinger*, which suggests something less than an adversarial proceeding at which the State is held to a burden of producing and proving, by clear and convincing evidence, that the defendant is likely to commit further sexual offenses. The idea that "the prosecutor and defense counsel should identify \*\*\* pertinent aspects of the defendant's criminal and social history" suggests something other than an adversarial proceeding in which the State is held to its burden, and *Eppinger's* statement that the judge may appoint an expert "to assist the trial court" apparently approves the appointment, at the defendant's request, of an "independent" expert to be used in aid of the State's case, when the State itself has taken no steps to obtain any expert opinion of its own.<sup>52</sup> The General Assembly could have created an administrative body to make independent, non-adversarial inquiry into the defendant's likelihood of committing future sexual offenses prior to any adversarial hearing, as other states have enacted such a scheme.<sup>53</sup> R.C. 2950.09, however, creates a purely

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<sup>52</sup>Hills' motion in this case actually requested appointment of an unnamed, "independent" expert rather than naming a defense expert whom he wished to employ, and the judge appointed an expert from the court psychiatric clinic.

<sup>53</sup>See, e.g., Mass.Laws 6-178K; N.Y.Correction Law 168-l, 168-n.

adversarial scheme for making this determination, and judges, prosecutors, and defense lawyers should not be advised otherwise, lest their roles be confused or compromised and the scheme thereby contaminated.

Furthermore, while I have suggested that an accused sexual predator might forego a request for an expert if he becomes aware that the State does not intend to present expert psychiatric testimony, such a decision is by no means easy. Many judges see no reason to require such evidence, and even if the State's case is found insufficient, many appellate judges seem willing, despite the principle of *res judicata*, to allow the State to continue prosecuting the defendant until it finally obtains a sexual predator determination that can be upheld on appeal.<sup>54</sup> On the other hand, if a defendant seeks and obtains a psychiatric assessment, he risks the substantial likelihood that the judge will ignore those portions of the report that do not support a sexual predator finding and magnify, even to the point of distortion, those that do, regardless of the totality of the report's contents or conclusions, and the report's mere existence can then be used as

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<sup>54</sup>See, e.g., *State v. Wilson* (Oct. 26, 2000), Cuyahoga App. No. 77530, unreported.

evidence to sustain the determination against a sufficiency challenge.

While I agree that the classification factors of R.C. 2950.09(B) facially satisfy substantive due process concerns,<sup>55</sup> I cannot agree that those factors can be constitutionally applied without expert guidance. A sexual predator determination without expert assistance, or in complete disregard of an expert's opinion, **is** an arbitrary application of those factors. Without expert assistance, a judge has no way of knowing how to apply R.C. 2950.09(B), and the list of factors becomes a meaningless rite in a standardless proceeding. The resulting heightened registration and notice requirements for what might be a near-random assortment of sexual offenders is a waste of law enforcement resources, just as the charade of classification is a waste of judicial resources. Less serious offenders might be targeted while the most dangerous predators are ignored, or the database itself might become so diluted that less attention is paid to all offenders.

Because I do not accept *Eppinger's* model, and because the procedures already outlined in this case violate constitutional guarantees, I cannot agree that this case presents any kind of

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<sup>55</sup>*Steele, supra.*

model to be followed in sexual predator hearings. As already noted, the proceedings were initiated by an *ex parte* motion from the prosecutor asking the judge to schedule a hearing and alleging that the evidence will show that Hills is a sexual predator, despite the fact that R.C. 2950.09 makes no provision for notice to either the prosecutor or the defendant until the judge decides whether to schedule a hearing. The record does not show that Hills was ever clearly notified of the charge or the scheduled hearing, but instead was notified only that his lawyer would have access to his institutional record if a hearing was scheduled -- although a hearing already had been scheduled. The State was not required to file any type of notice containing allegations it intended to prove, or outlining at any level the evidence it intended to use in support of those allegations. An expert witness was appointed at Hills' request, but his report was used to provide the evidence necessary to sustain a sexual predator finding, despite the fact that it found Hills' likelihood of recidivism was low.

Although the State is charged with the burden of proof, the proceedings were carried out as though Hills had the duty to disprove the State's case, the theory of which was not disclosed until the hearing and, even then, the State's case was bolstered by the judge's reliance on evidence and argument not in the record. Without notice of the evidence the State would rely on, Hills had no opportunity to prepare a defense. This opportunity is critical,

especially given the ambiguity of the factors the judge must consider in making the determination; for example, at the hearing the State argued that the difference between Hills' age in 1987, thirty-five years old, and that of his seven-year-old victim, was an aggravating factor that increased the likelihood of future offenses. Had the defense been aware of this theory prior to the hearing, it likely would have been able to prepare a persuasive argument (which was not presented at the hearing) that Hills' current age (49) is the relevant consideration, and is now a factor decreasing the likelihood of future offenses.<sup>56</sup>

No lawyer, doctor, or barber would fail to object if notified that a hearing had been scheduled to revoke his professional license and that, while one or two incidents might have triggered the proceeding, he would have to defend himself against not only an undisclosed prosecution, but against any evidence the decision maker was able to review and find relevant, regardless of whether it had been presented by a prosecutor at the hearing or simply offered as a matter of voluminous "public record." A lawyer would not be expected to defend his every action without specification, nor a barber every haircut, nor a doctor every patient treatment

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<sup>56</sup>One of the difficulties with R.C. 2950.09(B) is that the factors are stated in anticipation of proceedings involving current offenders; they must be reconsidered and adjusted when applied retroactively.

plan.<sup>57</sup> In fact, proceedings affecting professional licenses are accorded specific rights of notice and opportunity to prepare a defense that exceed those currently available to accused sexual predators.<sup>58</sup>

Sexual offender classifications should be closely scrutinized for due process compliance precisely because they involve distasteful defendants, not in spite of that fact. I respectfully submit that overzealous attempts to construe the unfortunate provisions of R.C. 2950.09(C) as constitutional lead to equally unfortunate results, and that honest assessment will not unleash waves of sexual predators upon unsuspecting citizens, but will instead help strengthen the law and provide increased protection. In that spirit, I feel it necessary to generally address the provisions of R.C. 2950.09(C).

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<sup>57</sup>*Sohi v. Ohio State Dental Bd.* (1998), 130 Ohio App.3d 414, 422-423, 720 N.E.2d 187, 192-193.

<sup>58</sup>R.C. 119.07; *Sohi*, *supra*.

[Cite as *State v. Hills*, 2002-Ohio-497.]

Sexual predator statutes have been enacted in all fifty states, the District of Columbia, and United States territories, spurred by the publicity of New Jersey's "Megan's Law" and the federal enactment of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program.<sup>59</sup> The federal act denies certain federal funding to states that fail to enact registration statutes, requires particular provisions, and generally mandates that states pass laws to identify and register sex offenders and "sexually violent predators," and that those placed in the latter category be subject to heightened registration requirements, including quarterly verification of residence information. The federal law defines "sexually violent predator" as "a person who has been convicted of a sexually violent offense **and** who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses."<sup>60</sup>

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<sup>59</sup>Section 14071, Title 42, U.S.Code.

<sup>60</sup>Section 14071(a)(3)(C), Title 42, U.S.Code.

**[Cite as *State v. Hills*, 2002-Ohio-497.]**

Although the federal act does not require slavish adherence to its terms, states that have adopted a scheme for "sexually violent predator" adjudication<sup>61</sup> generally define the term to include and require a finding of some type of "mental abnormality or personality disorder" before the defendant is classified as a sexual predator.<sup>62</sup> Moreover, these states also require professional psychiatric examinations prior to classification as a sexual predator.<sup>63</sup> The Ohio statute omits the psychiatric component of the definition,<sup>64</sup> and does not require a psychiatric examination before

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<sup>61</sup>At the time of this writing not all states have done so. Amendments to the federal act have required states to amend their own statutes to comply with new requirements, but the final deadline for such compliance has not passed.

<sup>62</sup>See, e.g., R.R.S.Neb. 29-4005(2)(d); Nev.Rev.Stat. 179D.430; N.C.Gen.Stat. 14-208.6(6); Pa.C.S. 42-9792; Vt.Stats. 13-5401(12).

<sup>63</sup>R.R.S.Neb. 29-4005(2)(a); Nev.Rev.Stat. 179D.510(2); N.C.Gen.Stat. 14-208.20(b); Pa.C.S. 42-9795.4; Vt.Stats. 13-5405(b).

<sup>64</sup>R.C. 2950.01(E).

an individual can be adjudicated a sexual predator, even though such an exam is now a discretionary part of the suggested model for such proceedings.<sup>65</sup>

The Ohio scheme does not create a new administrative body, although it does give the ODRC the additional administrative duty to identify incarcerated sexual offenders who were sentenced prior to January 1, 1997, and to determine whether each should be recommended for sexual predator proceedings. However, while the ODRC is required to make a "determination" before submitting its recommendation, the substance of the determination is rather nebulous, as is the identification of the "department" as the body responsible for making the determination -- most states that create administrative classification boards specify the qualifications of those who will sit on the board, but the Ohio statute practically allows the ODRC to assign determination and recommendation duties to anyone it employs, regardless of qualifications. The Ohio Administrative Code contains no regulations concerning the ODRC's policies for carrying out its duties under R.C. 2950.09(C)(1) and, even if it did, the ODRC is not required to submit details of its determination to the sentencing judge. Not only is the ODRC

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<sup>65</sup>*Eppinger*, 91 Ohio St.3d at 166, 743 N.E.2d at 888-889.

recommendation not required to have any meaningful content submitted by any qualified person, the judge is not statutorily required to show it to the defendant even if it did.

States that do not create a qualified administrative body to make classification determinations or recommendations (and even some that do) typically require local prosecutors to file petitions requesting judicial determination.<sup>66</sup> R.C. 2950.09(C), however, not only fails to require qualified personnel to make a useful recommendation, it omits the necessity of any pleading, petition, or complaint from a prosecuting attorney, instead creating a scheme in which the ODRC submits its recommendation not to the local prosecutor, but to the sentencing or successor judge. Whatever the General Assembly's purpose in omitting the local prosecutor from this process and, instead, requiring a direct submission to a judge, the results have been chaotic. As already discussed, the scheme denies defendants notice of the allegations and evidence the State expects to use in the event a hearing is scheduled. In addition, the judge's initial duty to determine whether a hearing is warranted confuses the roles of the prosecutor and the judge; regardless of whether this confusion can be harmonized with

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<sup>66</sup>Nev.Rev.Stat. 179D.510(1); R.I.Gen.Laws 11-37.1-6(b); W.Va.Code 15-12-2a(c).

constitutional separation of powers doctrines, and I believe it cannot, the omission of the prosecutor leads to awkward results.

In Hills' case, the Cuyahoga County Prosecutor filed a motion requesting the judge to schedule a sexual predator hearing, citing the ODRC recommendation. Such motions have become routine in the Cuyahoga County Common Pleas Court.<sup>67</sup> The difficulty with this practice, however, is that R.C. 2950.09(C) makes no provision allowing either party to file motions attempting to influence the judge's decision whether to schedule a hearing, and in fact makes no provision allowing notice of the ODRC recommendation to either party until the judge decides whether to schedule the hearing. The record here not only shows that the prosecutor somehow received notice of the ODRC recommendation, it indicates at the same time that Hills had no notice of the recommendation, and that the prosecutor petitioned the judge to schedule a hearing without service or notice to Hills. These questionable practices can be traced to the General Assembly's unfathomable decision to have the ODRC send its standardless recommendation to the judge instead of the prosecutor, and the Ohio judiciary's equally unfathomable efforts to ignore the constitutional blunders of that scheme.

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<sup>67</sup>See, e.g., *State v. Arthur* (Aug. 16, 2001), Cuyahoga App. No. 77770, unreported; *State v. Reese* (June 28, 2001), Cuyahoga App. No. 77953, unreported; *State v. Green* (Apr. 26, 2001), Cuyahoga App. No. 77771, unreported; *State v. Perry* (Nov. 16, 2000), Cuyahoga App. No. 77724, unreported.

I would reverse the judgment and remand for further proceedings.