IN THE SUPREME COURT OF OHIO

08-1624

IN RE: D.S.,
A MINOR CHILD

On Appeal from the
Allen County Court of Appeals
Third Appellate District

C.A. Case No. CA2007-058

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**MEMORANDUM IN SUPPORT OF JURISDICTION OF MINOR CHILD-APPELLANT D.S.**

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JUERGEN A. WALDICK #0030399
Allen County Prosecutor
(COUNSEL OF RECORD)

Allen County Prosecutor's Office
204 N. Main Street, Suite 302
Court of Appeals Building
Lima, Ohio 45801
(419) 228-3700
(419) 222-2462 – Fax

COUNSEL FOR STATE OF OHIO

OFFICE OF THE OHIO PUBLIC DEFENDER

BROOKE M. BURNS #0080256
Assistant State Public Defender
(COUNSEL OF RECORD)

8 East Long Street - 11th Floor
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 – Fax
brooke.burns@opd.ohio.gov

COUNSEL FOR MINOR CHILD
APPELLANT D.S.

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

D.S.'s constitutional right to be protected from ex post facto laws, retroactive laws, and cruel and unusual punishments was violated when he was classified as a Tier III juvenile sex offender registrant under Ohio's newly enacted Senate Bill 10 (hereinafter "S.B. 10"). And while this Court has examined whether Ohio's pre-S.B. 10 sex offender registration statutes were constitutional, the constitutionality of Ohio's newly enacted version of the federal Adam Walsh Act has not yet been addressed by this Court. See *State v. Cook*, 83 Ohio St.3d 404, 409, 1998-Ohio-291; *State v. Williams*, 88 Ohio St.3d 513, 2000-Ohio-428.

The Third District Court of Appeals relied primarily on this Court's decision in *Cook* in affirming D.S.'s classification as a juvenile sex offender registrant. However, Ohio's sex offender registration laws have been substantially revised on more than one occasion in the years since *Cook* was released. And, as Justice Lanzinger pointed out when she compared the then current version of the sex offender law to the one at issue in *Cook*, the current sex offender registration laws are more complicated and restrictive than those at issue in *Williams* and *Cook*. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶¶ 45 (internal citations omitted and emphasis added) (Donovan and O'Connor, JJ, concurring). Justice Lanzinger also noted that, "while protection of the public is the avowed goal of R.C. Chapter 2950, we cannot deny that sever obligations are imposed upon these classified as sex offenders." Id. at ¶46. Now sexual predators and habitual offenders must register their residences and employment for the rest of their lives, with this information being available to all. Id. Thus, the stigma attached to sex offenders is significant and the potential for ostracism and harassment exists. Id. Justice Lanzinger concluded that, "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." Id. The *Wilson* opinion was released prior to the enactment of S.B. 10 which implemented even more onerous restrictions and obligations on sex offenders.

Ohio's courts have come to varying conclusions regarding Ohio's newly enacted S.B. 10. See, e.g., *William Sigler v. State of Ohio* (Aug. 11, 2008), Richland C.P. No. 07CV1863, unreported (S.B. 10 is unconstitutional as applied to persons whose crimes predated its enactment); *State of Ohio v. Evans* (May 9, 2008), Cuyahoga C.P. No. CV-08 646797, unreported (S.B. 10 violates the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution); *State v. Clabo* (Feb. 15, 2008), Clermont C.P. No. 2000 CR 00174 (Adam Walsh Act does not violate Ohio's prohibition of retroactive laws); and *Sewell v. State* (May 28, 2008), Hamilton C.P. No. SP0700035 (The requirements of S.B. 10 are minimus and necessary to protect the public). And the Ninth District Court of Appeals, like the Third District in the present case, found S.B. 10 to be unconstitutional. See *In re G.E.S.* (Aug. 14, 2008), Summit App. No. DL06-08-003813.

Further, the Alaska Supreme Court recently found that while Alaska's sex offender registration and classification provisions may not have violated the Ex Post Facto Clause of the United States Constitution, Alaska's version of the Adam Walsh Act did violate the Ex Post Facto Clause of the Alaska Constitution because the laws had a punitive effect. *Doe v. Alaska* (July 25, 2008), 2008 Alas. LEXIS 109.

D.S.'s appeal presents a substantial constitutional question. And with thousands of Ohio residents having S.B. 10 retroactively applied to their offenses, the issue of whether the law may be constitutionally applied to those whose offenses predate its enactment is of great public and general interest. Furthermore, this Court's acceptance and hearing of *State v. Ferguson*,

Cuyahoga App No. 88450, 2007-Ohio-2777, Case No. 07-1427 is indicative of the importance of determining whether Ohio's sex offender registration laws are constitutional. Thus, this Court should accept D.S.'s appeal to give guidance to Ohio courts in applying the provisions in Ohio's newly enacted S.B. 10. At the very least this Court should hold this appeal for a decision in *Ferguson*.

## STATEMENT OF THE CASE AND FACTS

On January 23, 2005, D.S. was adjudicated delinquent for three counts of rape, each felony of the first degree if committed by an adult. He was committed to the Ohio Department of Youth Services ("DYS") for minimum, concurrent terms of one year, maximum to his twenty-first birthday. On August 1, 2007 D.S. was classified as a Tier III juvenile sex offender registrant, with a duty to report to the Sheriff in his county of residence every 90 days for life.

D.S. appealed his classification, raising six assignments of error. Of those six errors, five raised constitutional questions. See *In the Matter of D.S.*, Allen App. No. 2007-058, 2008-Ohio-3234. The Third District affirmed D.S.'s classification, following this Court's opinion in *State v. Cook*, 83 Ohio St.3d 404, 409, 1998-Ohio-291 and *State v. Williams*, 88 Ohio St.3d 513, 2000-Ohio-428, and found that it was "not persuaded that the Ohio Supreme Court would view the issues of criminality and punishment as applied to R.C. 2950 et. seq. in the *Cook* and *Williams* decisions any different with regard to the provisions of S.B. 10," and overruled each of D.S.'s assignments of error.

## PROPOSITION OF LAW I

**The application of S.B. 10 to persons who committed their offenses prior to the enactment of Senate Bill violates the Ex Post Facto Clauses of the United States Constitution. Article I, Section 10 of the United States Constitution.**

Article I, Section 10 of the United States Constitution prohibits any legislation that "changes the punishment, and inflicts greater punishment, than the law annexed to the crime, when committed." *Miller v. Florida* (1987), 482 U.S. 423, 429. Ex post facto laws are prohibited to ensure that legislative acts "give fair warning to their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham* (1981), 450 U.S. 24, 28-29. The retroactive application of S.B. 10 to offenses that occurred before January 1, 2008 violates the Ex Post Facto Clause of the United States Constitution.

The Ex Post Facto Clause of the United States Constitution prevents the legislature from abusing its authority by enacting arbitrary or vindictive legislation aimed at disfavored groups. See *Miller v. Florida*, 482 U.S. at 429. However, the Ex Post Facto Clause applies only to criminal statutes. *California Dept. of Corrections v. Morales* (1995), 514 U.S. 499, 504. The United States Supreme Court has declined to set out a specific test for determining whether a statute is criminal or civil for purposes of applying the Ex Post Facto Clause. Id. at 508-509. But the Court has recognized that determining whether a statute is civil or criminal is a matter of statutory interpretation. *Helvering v. Mitchell* (1938), 303 U.S. 391, 399; *Allen v. Illinois* (1986), 478 U.S. 364, 368.

This Court has used the "intent-effects test" to delineate between civil and criminal statutes for the purposes of an ex post facto analysis of sex-offender statutes. *State v. Cook* (1998), 83 Ohio St.3d 404, 415-417. The United States Supreme Court has applied the same test. *Kansas v. Hendricks* (1997), 521 U.S. 346.

When applying the intent-effects test, a reviewing 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." *United States v. Ward* (1980), 448 U.S. 242, 248-249. But even if the General Assembly indicated an intention to establish a civil penalty, a statute will be determined to be criminal if "the statutory scheme [is] punitive either in purpose or effect as to negate that intention." Id.

The Intent of S.B. 10: In the intent prong of the analysis, a reviewing court must determine whether the General Assembly's objective in promulgating S.B. 10 was penal or remedial. A court must look to the language and purpose of the statute in order to determine legislative intent. *State v. S.R.* (1992), 63 Ohio St.3d 590, 594-595.

In *Cook*, this Court concluded that former R.C. Chapter 2950 was not intended to be punitive, because the purpose of R.C. 2950 was to promote public safety and bolster the public's confidence in Ohio's criminal and mental health systems. *Cook*, 83 Ohio St.3d at 417.

While S.B. 10's changes to former R.C. Chapter 2950 have not deleted the language stating that "the exchange or release of [information required by the law] is not punitive," but the purpose of the new statute has changed. Under former R.C. Chapter 2950 and the provisions in R.C. 2152.82-85 of the Juvenile Code, an individual's classification and registration requirements were tied directly to the individual's ongoing threat to the community. But under the new statutory scheme, an individual's registration and classification obligations depend only upon the offense of conviction or adjudication. Thus, the statutory scheme has been transformed from a "narrowly tailored" solution (*Cook*, at 417) to a punitive statutory scheme that does not consider the offender's risk to the community or likelihood of reoffending. Contrary to former R.C. Chapter 2950—which permitted a trial court to classify a defendant as a sexual predator, a

habitual sexual offender, or a sexually oriented offender only after conducting a hearing and considering numerous factors—S.B. 10 assigns sex offenders who have been classified as an offender registrant to one of the three tiers based solely on their offense.

Additionally, the formal attributes of a legislative enactment—such as the manner of its codification and the enforcement procedures that it establishes—are probative of legislative intent. *Smith v. Doe* (2003), 538 U.S. 84, 94. Because the legislature elected to place S.B. 10 squarely within Title 29, Ohio's Criminal Code, the enforcement mechanisms established by S.B. 10 are criminal in nature. Furthermore, the failure of an individual to comply with the registration, verification, or notification requirements of S.B. 10 subjects the offender to criminal prosecution and criminal penalties. R.C. 2950.99. See, also, *State v. Williams*, 114 Ohio St.3d 103, 2007-Ohio-3268, at ¶10; *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶43-49, (Lanzinger, J., concurring in part and dissenting in part) ("I dissent from the majority's labeling of sex-offender-classification proceedings as civil in nature.")

The Effect of S.B. 10: Even if this Court were to determine that the General Assembly intended S.B. 10 to operate as a remedial act, it has a "punitive effect so as to negate a declared remedial intention." *Allen v. Illinois*, 478 U.S. at 369. When assessing the punitive effects of a particular statute, the United States Supreme Court has suggested that a reviewing court consider, whether the regulatory scheme is analogous to a historical form of punishment; whether it creates an affirmative disability or restraint; whether it promotes the traditional aims of punishment; whether it is rationally related to a non-punitive purpose; and whether it is excessive in relation to its allegedly non-punitive purpose. *Smith v. Doe*, 538 U.S. at 97.

S.B. 10 imposes burdens on defendants and juvenile delinquents that have historically been regarded as punishment and operate as affirmative disabilities and restraints. For example,

each time a Tier III offender registers, the sheriff may forward the updated information to neighbors, school superintendants and principals, preschools, daycares, and all volunteer organizations where contact with minors may occur. R.C. 2950.11(A)-(F). All of the various organizations are authorized to disseminate the information, and the information is available to any member of the public upon request. R.C. 2950.11(A)-(F).

S.B. 10 also furthers the traditional aims of punishment: retribution and deterrence. *Smith*, 538 U.S. at 102. By placing an offender into a tier that is based solely on the offense committed, and without determining whether the offender is likely to commit another sexual offense in the future, the General Assembly is attempting to prospectively deter the commission of sexually oriented offenses. *Roper v. Simmons* (2005), 543 U.S. 551, 571-572. The automatic placement of an offender into a tier without determining whether the offender is likely to reoffend is also a form of retribution. *Tison v. Arizona* (1987), 481 U.S. 137, 180-181 ("Retribution...has as its core logic the crude proportionality of "an eye for an eye.").

Accordingly, because S.B. 10 is criminal in nature and has a punitive effect, this Court needs to determine whether S.B. 10's enactment is constitutional under federal law. A law falls within the ex post facto prohibition if it meets two critical elements: first, the law must be retrospective, applying to events occurring before its enactment; and second, the law must disadvantage the offender affected by it. *Miller v. Florida*, 482 U.S. at 430. A law is retrospective if it "changes the legal consequences of acts completed before its effective date." Id. at 431, citing *Weaver*, 450 U.S. at 31. As to the second element, the United States Supreme Court explained that it is "axiomatic that for a law to be ex post facto it must be more onerous than the prior law." Id. (Internal citation committed). See, also *State v. Brewer*, 86 St. 3d 160, 163,

1999-Ohio-146 (requiring an offender to register every 90 days for life is "more onerous" than requiring an offender to register every year for a period of ten years).

S.B. 10 is Retrospective: The General Assembly has mandated that S.B. 10 be applied retroactively to every offender or delinquent child who has been convicted or adjudicated delinquent for a sexually oriented offense and found to be a sex offender registrant. R.C. 2950.031(A)(1). See, also, R.C. 2950.07(C)(2).

S.B. 10 Disadvantages D.S.: Prior to the enactment of S.B. 10, and at the time the offenses for which D.S. was committed to DYS, the juvenile court had the discretion to determine whether D.S. was a juvenile offender registrant, and if so, into which registration category he should be placed. Former R.C. 2152.83. However, under S.B. 10, D.S. is automatically placed into "Tier III" and must register every 90 days for the rest of his life. R.C. 2152.83, 2950.04, 2950.041, 2950.05, and 2950.06.

## PROPOSITION OF LAW II

**The application of S.B. 10 to persons who committed their offense prior to the enactment of S.B. 10 violates the Retroactively Clause of the Ohio Constitution. Article II, Section 28 of the Ohio Constitution.**

Article II, Section 28 of the Ohio Constitution provides that "the general assembly shall have no power to pass retroactive laws." *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 106. Ohio's Constitution affords its citizens greater protection against retroactive laws than does the Ex Post Facto Clause of the United States Constitution. *Van Fossen*, 36 Ohio St.3d at 105, fn. 5 ("[Ohio's Constitution of 1851 provides a] much stronger prohibition than the more narrowly constructed provision in Ohio's Constitution of 1802. Article VIII, Section 16 of th[e 1802] Constitution stated: "No ex post facto law, nor any law impairing the validity of contracts,

shall ever be made," merely reflecting the terms used in Article I, Section 10 of the United States Constitution.").

In considering whether a particular law may be applied retrospectively, a reviewing court must first determine whether it should apply the rule of statutory construction or immediately engage in the constitutional review of the statute. *Van Fossen*, at 105. The issue of whether a statute may constitutionally be applied retrospectively does not arise unless there has been a prior determination that the General Assembly has specified that the statute so apply. Id. When "there is no clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment." *Kiser* v. *Coleman* (1986), 28 Ohio St.3d 259, 262. Therefore, since the General Assembly has mandated that S.B. 10 be applied retroactively, further review is necessary.

When the General Assembly has ordered that a new law be applied retroactively, a reviewing court must determine whether the new law affects a person's substantive rights. *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 137. A statute is substantive—and therefore unconstitutional if applied retroactively—if the statute "impairs or takes away vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligation or liabilities as to a past transaction, or creates a new right." *Cook*, 83 Ohio St.3d at 411.

Before S.B. 10 came into effect, the juvenile court had discretion in determining what level D.S. would be classified, if any at all. This allowed the court to consider D.S.'s progress in treatment and whether he was at risk for reoffending. S.B. 10 has taken away the court's ability to make this decision, and has required D.S. to register as a sex offender for the rest of his life.

The retroactive application of S.B. 10 has been considered by several courts throughout Ohio. The Cuyahoga Court of Common Pleas recently declared S.B. 10 unconstitutional because the law violates both the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution. *State of Ohio v. Evans* (May 9, 2008), Cuyahoga C.P. No. CV-08 646797. The court found that S.B. 10 satisfies both prongs of the intent effect test as it has a retroactive and punitive effect on individuals whose offenses were committed prior to its enactment. The court distinguished S.B. 10 from this Court's holding in *Cook* in part because of S.B. 10's failure to afford sex offender registrants the opportunity to submit evidence contradicting the perceived risk of future harm on the community.

Likewise, the Richland County Court of Common Pleas found S.B. 10 to be unconstitutional as retroactively applied to an adult sex offender registrant whose classification was changed from the least dangerous sex offender classification to the most dangerous Tier III classification. *William Sigler v. State of Ohio* (Aug. 11, 2008), Richland C.P. No. 07CV1863. The court followed this Court's reasoning in *Cook* and found that the legislatively imposed changes on offenders like Mr. Sigler are not purely remedial, but punitive in nature, and violate both the Ex Post Facto Clause of the United States Constitution as well as the Retroactivity Clause of the Ohio Constitution.

## PROPOSITION OF LAW III

**The application of S.B. 10 violates the United States Constitution's prohibition against cruel and unusual punishments. Eighth Amendment to the United States Constitution.**

The Eighth Amendment to the United States Constitution prohibits the infliction of cruel and unusual punishment. The right flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States* (1910), 217 U.S. 349, 367. By protecting even those convicted of heinous crimes, the Eighth Amendment

reaffirms the duty of the government to respect the dignity of all persons. *Simmons*, 543 U.S. at 560.

The prohibition against cruel and unusual punishments must be "interpreted according to its text by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design." Id. "To implement this framework [the Court] ha[s]... affirmed the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual." Id. at 561, quoting *Trop v. Dulles* (1958), 356 U.S. 86, 100-101 (plurality opinion).

Under S.B. 10's classification system, if the court finds that a child is to be a juvenile sex offender registrant, the court is then without discretion to determine which classification level should be assigned to him. D.S. admitted to committing a sex offense when he was fourteen years old. This made him subject to discretionary registration. However, under S.B. 10, once the court found him to be a juvenile sex offender registrant, he was automatically placed into Tier III which requires him to register every 90 days for the rest of his life. 2950.04, 2950.041, 2950.05, and 2950.06. The General Assembly's directive that a boy, who was adjudicated delinquent for offenses he committed when he was fourteen, must register as a sex offender for the rest of his life, is not only excessive, but cruel and unusual punishment.

When it comes to laws that involve sex offenders, the passions of the majority must be tempered with reason. Joseph Lester, *The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 Akron L. Rev. 339, 340 (2007). "Overborne by a mob mentality for justice, officials at every level of government are enacting laws that effectively exile convicted sex offenders from their midst with little contemplation as to the appropriateness or constitutionality of their actions." Id. Politicians across the country have approved almost every measure that

deals with sex offenders in order to appear strong on crime. Id. "Given that the sex-offender lobby is neither large nor vocal, it is up to the courts to protect the interests of this disenfranchised group." Id. at 340, citing *Cal. Dep't of Corr. v. Morales* (1995), 514 U.S. 499, 522 (Stevens, J., dissenting).

A lifetime registration period for a person who committed a juvenile sex offense as a fourteen-year-old boy is extreme and disproportionate to the crime. Further, implementation of S.B. 10 to D.S.'s case is particularly cruel because juveniles have an inherent amenability to rehabilitation. "The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." Id. at 570.

## PROPOSITION OF LAW IV

**A juvenile court has no authority to classify a juvenile, adjudicated delinquent for a sex offense, as a juvenile sex offender registrant when the statutory provisions governing such a hearing was repealed at the time in which the hearing was conducted.**

On July 26, 2007 the juvenile court found that D.S. was to be classified as a juvenile sex offender registrant. On August 1, 2007, the court classified him as a Tier III registrant under S.B. 10. However, beginning on July 1, 2007, the juvenile court was without jurisdiction to conduct a classification hearing or to find D.S. to be a juvenile sex offender registrant with a duty to comply with R.C. 2950.04, 2950.041, 2950.05, and 2950.06 because those Ohio Revised Code sections did not exist.

S.B. 10, 127th General Assembly, Sections 2, 3, and 4 (2007). Section 2 mandates that:

> *Existing sections* [* * *] 2151.23, [* * *], 2152.83, [* * *], 2950.04, 2950.041, 2950.05, 2950.06, [* * *] of the Revised Code *are hereby repealed.*

(Emphasis added). And, Section 3 provides:

> *The amendments to sections* [* * *] **2151.23**, [* * *] **2152.83**, [* * *] **2950.04**, **2950.041**, **2950.05**, **2950.06**, [* * *] of the Revised Code that are made by Sections 1 and 2 of this act, [* * *] *shall take effect on January 1, 2008.* [* * *].

(Emphasis added). Section 4 provides that "Sections 1 to 3 of this act shall take effect on July 1, 2007." S.B. 10, 127th General Assembly, Section 4 (2007). Therefore, as of July 1, 2007, Section 2 of S.B. 10—which repeals the former code sections that provide the court jurisdiction to conduct a juvenile sex offender classification hearing and the code sections that provide the duties of a juvenile sex offender registrant—was in effect. S.B. 10, 127th General Assembly, Section 2 (2007). And the General Assembly ordered that these code sections were not to take effect until January 1, 2008. S.B. 10, 127th General Assembly, Section 3 (2007).

Therefore, on July 26, 2007 and August 1, 2007, the juvenile court could not have determined that D.S. was a juvenile sex offender registrant because there was no such law in effect at that time. Because the General Assembly was clear in its instructions regarding courts' applications of S.B. 10, the statutes must be applied as written.

The cornerstone of statutory construction is legislative intent. *State v. Jordan* (2000), 89 Ohio St.3d 488, 491. In order to determine legislative intent, a court must first look to the language of the statute. *Columbus City School District Bd. Of Edn. v. Wilkins*, 101 Ohio St.3d 112, 2004-Ohio-296, at ¶26. A court must examine a statute in its entirety rather than focus on an isolated phrase to determine legislative intent. *Massillon City School Dist. Bd. of Edn. v. Massillon*, 104 Ohio St.3d 518, 2004-Ohio-6775. But, if the statutory language is clear and unambiguous, the court need not resort to the rules of statutory construction. *Storer Communications, Inc. v. Limbach* (1988), 37 Ohio St.3d 193, 194; *Sears v. Weimer* (1944), 143 Ohio St.312, paragraph five of the syllabus. "An unambiguous statute is to be applied, not

interpreted." *Vought Industries, Inc. v. Tracy*, 72 Ohio St.3d 162, 265, 1995-Ohio-281. To interpret language that is already plain is to legislate, which is not a function of the court. *Sears*, 143 Ohio St. at 316.

And while this Court has found that as a general rule "a repealing clause of a statute which is to take effect in the future will not be effective until the statute itself is in operation," this Court has also held that there is an exception to that rule: "Modern commentators have endorsed the proposition that a repealer and the amendatory enactment take effect simultaneously *unless the legislature expresses a contrary intention.*" *Cox. v. Ohio Dep't of Transp.* (1981), 67 Ohio St.2d 501, 507; *State v. Hall* (Feb. 5, 1986), 9th Dist. No. 3883 at *4. (Emphasis added).

In S.B. 10, the Ohio General Assembly illustrated its contrary intention to the general rule that code sections' repeal and amendments take place simultaneously in sections 2, 3, and 4. Section 2 of S.B. 10 provides that 74 enumerated code sections are "hereby repealed." Section 4 provides that Sections 1 to 3 of this act shall take effect on July 1, 2007." And Section 3 provides that "[t]he amendments to [the 74 sections contained in Section 2] that are made by Sections 1 and 2 of this act, the enactment of [5 enumerated sections] of the Revised Code by Section 1 of the act, and the repeal of [4 enumerated sections] of the Revised Code by Section 2 of this act *shall take effect on January 1, 2008.*" (Emphasis added). Section 3 also provides that the "amendments to [8 enumerated sections] of the Revised Code that are made by Sections 1 and 2 of this act and the enactment of [5 enumerated sections and 1 new section] of the Revised Code by Section 1 of this act shall take effect on July 1, 2007."

The canon, expressio unius est exclusion alterius, (expression of one thing suggests the exclusions of others) is relevant here, and supports that the General Assembly specified—in direct and express terms—which code sections were to be repealed on January 1, 2008. See

*Myers v. City of Toledo*, 110 Ohio St.3d 218, 2006-Ohio-4353, ¶24. These specific provisions are limiting; thus, the direct and express terms provide that the legislature intended what it plainly enacted: that the 74 Revised Code sections were repealed on July 1, 2007, and that the amendments to those sections were effective on January 1, 2008.

Why the legislature provided the hiatus was not for the court of appeals to decide, because "[t]o interpret language that is already plan is to legislate, which is not a function of the court." *Weimer*, 143 Ohio St. 312 at 316. See, also, *Storer Communications*, 37 Ohio St.3d at 194; *Vought*, at 165.

The legislature mandated that former R.C. 2151.23, 2152.83, 2950.04, 2950.041, 2950.05, 2950.06, and 71 other code sections, which are not at issue here, be repealed on July 1, 2007. And the legislature intended those sections to take effect on January 1, 2008. As such, on the date that the court found D.S. to be a juvenile sex offender registrant, the juvenile court had no jurisdiction to conduct the hearing. Therefore, the court's finding that D.S. is a juvenile sex offender registrant is void and must be vacated.

## CONCLUSION

This Court should accept D.S.'s appeal because it raises substantial constitutional questions, involves a felony, and is of great public and general interest. At the least, this Court should grant jurisdiction and hold D.S.'s appeal for a decision in *Ferguson*.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

BROOKE M. BURNS (0080256)
Assistant State Public Defender
(COUNSEL OF RECORD)

## CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing **Memorandum in Support of Jurisdiction of Minor Child-Appellant D.S.** was served by ordinary U.S. Mail, postage-prepaid, this 14th day of August, 2008 to the office of Juergen Waldick, Allen County Prosecutor, Allen County Administration Building, 20 South Second Street, 4th Floor, Newark, Ohio 43055.

BROOKE M. BURNS #0080256
Assistant State Public Defender
Counsel of Record

COUNSEL FOR MINOR
CHILD-APPELLANT D.S.

#283932

IN THE SUPREME COURT OF OHIO

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|---|---|---|
| IN RE: D.S.,<br>A MINOR CHILD | : | |
| | : | On Appeal from the<br>Allen County Court of Appeals<br>Third Appellate District |
| | : | C.A. Case No. CA2007-058 |

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**APPENDIX TO**

**MEMORANDUM IN SUPPORT OF JURISDICTION OF MINOR CHILD-APPELLANT D.S.**

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Attachment not scanned

**IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO**

**ALLEN COUNTY**

**IN THE MATTER OF:** **CASE NUMBER 1-07-58**

**DARIAN J. SMITH,** **J O U R N A L**

**ALLEGED DELINQUENT CHILD,** **E N T R Y**

**APPELLANT.**

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For the reasons stated in the opinion of this Court rendered herein, the assignments of error are overruled, and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs to appellant for which judgment is rendered and the cause is remanded to that court for execution.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently herewith directly to the trial judge and parties of record.

**JUDGES**

**DATED:** June 30, 2008

**COURT OF APPEALS**
**THIRD APPELLATE DISTRICT**
**ALLEN COUNTY**

**IN THE MATTER OF:** **CASE NUMBER 1-07-58**

**DARIAN J. SMITH,**

**ALLEGED DELINQUENT CHILD,** **O P I N I O N**

**APPELLANT.**

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**CHARACTER OF PROCEEDINGS: Appeal from Common Pleas Court, Juvenile Division.**

**JUDGMENT: Judgment affirmed.**

**DATE OF JUDGMENT ENTRY: June 30, 2008**

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**ATTORNEYS:**

**AMANDA J. POWELL**
**Assistant State Public Defender**
**Reg. #0076418**
**8 East Long Street – 11th Floor**
**Columbus, OH 43215**
**For Appellant.**

**CHRISTINA L. STEFFAN**
**Assistant Prosecuting Attorney**
**Reg. #00075260**
**204 North Main Street, Suite 302**
**Lima, OH 45801**
**For Appellee.**

**Shaw, P.J.**

{¶1} Delinquent-Appellant Darian J. Smith ("Darian") appeals from the July 26, 2007 Judgment Entry of the Court of Common Pleas, Allen County, Ohio, Juvenile Division classifying Darian as a Juvenile Sex Offender Registrant and Tier III Sex Offender.

{¶2} This matter stems from Darian's adjudication as delinquent for three counts of Rape, in violation of R.C. 2907.02(A)(1)(b) on January 18, 2006. Disposition occurred on February 16, 2006. The juvenile court ordered Darian committed to the legal care and custody of the Ohio Department of Youth Services ("DYS") for an indefinite term consisting of a minimum period of one year to a maximum period not to exceed his twenty-first birthday.

{¶3} Darian's commitment to DYS was stayed, however, pending successful treatment at the Juvenile Residential Treatment Center of Northwest Ohio. However, the juvenile court subsequently determined that there was not room for Darian at the Juvenile Residential Treatment Center of Northwest Ohio and committed him to DYS. On September 13, 2006 Darian was granted early release from DYS and placed at the Juvenile Residential Treatment Center of Northwest Ohio.

{¶4} On December 21, 2006 Darian was released from treatment. Two weeks prior to Darian's release, the juvenile court scheduled a juvenile sexual

offender classification pre-trial for January 24, 2007. The pre-trial conference on Darian's sex offender status was held on January 24, 2007. A second pre-trial conference was scheduled for April 4, 2007 in order to give Darian time to file a motion for a sexual offender classification evaluation. Darian failed to appear for the April 4, 2007 pre-trial and a bench warrant was issued for his arrest.

{¶5} Darian was subsequently arrested and his sexual offender classification examination was scheduled for May 3, 2007. A sexual offender classification hearing was held in three parts, on June 20, 2007, July 12, 2007 and August 1, 2007.

{¶6} We also note that during this time, Darian committed a violation of the terms of his parole, and admitted that violation on April 19, 2007. Based on this violation, Darian's parole was revoked and he was committed to DYS for a minimum period of thirty days to a maximum period not to exceed his attainment of twenty-one years of age.

{¶7} On July 26, 2007 the juvenile court found that Darian should be classified as a Juvenile Sex Offender Registrant. The matter was subsequently scheduled for a hearing on August 1, 2007 so that the Court could explain Darian's duties to register. At the August 1, 2007 hearing, Darian was again determined to be a Juvenile Sex Offender. Moreover, Darian was designated a Tier III Sex Offender under the new version of R.C. 2150.01.

{¶8} Darian now appeals asserting six assignments of error.

**ASSIGNMENT OF ERROR I**

**THE TRIAL COURT ERRED WHEN IT CLASSIFIED DARIAN S. AS A JUVENILE OFFENDER REGISTRANT BECAUSE IT DID NOT MAKE THAT DETERMINATION UPON HIS RELEASE FROM A SECURE FACILITY, IN VIOLATION OF R.C. 2152.83(B)(1). (JUNE 20, 2007, T.PP 1-70); (JULY 12, 2007, T.PP 1-14); (AUG. 1, 2007, T.PP. 1-12). (A-13)-(A-17).**

**ASSIGNMENT OF ERROR II**

**THE ALLEN COUNTY JUVENILE COURT ERRED WHEN IT CLASSIFIED DARIAN S. AS A JUVENILE OFFENDER REGISTRANT BECAUSE AS OF JULY 1, 2007, THERE EXISTED NO STATUTORY AUTHORITY TO CONDUCT A JUVENILE SEX OFFENDER CLASSIFICATION HEARING. (JULY 12, 2007, T.PP 1-14); (AUG. 1, 2007, T.PP. 1-12). (A-13)-(A-17).**

**ASSIGNMENT OF ERROR III**

**THE RETROACTIVE APPLICATION OF SENATE BILL 10 VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION AND THE RETROACTIVITY CLAUSE OF SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION. SECTION 10, ARTICLE I OF THE UNITED STATES CONSTITUTION AND SECTION 28, AND ARTICLE II OF THE OHIO CONSTITUTION. (AUG. 1, 2007, T.PP. 1-12). (A-13)-(A-18).**

**ASSIGNMENT OF ERROR IV**

**THE RETROACTIVE APPLICATION OF SENATE BILL 10 VIOLATES THE SEPARATION OF POWERS DOCTRINE THAT IS INHERENT IN OHIO'S CONSTITUTION. (AUG. 1, 2007, T.PP. 1-12). (A-13)-(A-18).**

**ASSIGNMENT OF ERROR V**

**THE APPLICATION OF SENATE BILL 10 VIOLATES THE UNITED STATE'S [SIC] CONSTITUTION'S PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISMENTS [SIC].**

**EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION. (AUG. 1, 2007, T.PP. 1-12). (A-13)-(A-18).**

**ASSIGNMENT OF ERROR VI**

**THE RETROACTIVE APPLICATION OF SENATE BILL 10 VIOLATES THE DOUBLE JEOPARDY CLAUSE OF THE UNITED STATES CONSTITUTION AND THE RETROACTIVITY CLAUSE OF SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION, FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION; SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION. (AUG. 1, 2007, T.PP. 1-12). (A-13)-(A-18).**

*First Assignment of Error*

{¶9} In his first assignment of error, Darian argues that the trial court erred because his classification as a sexual offender did not occur at disposition or upon his release from a secure facility.

{¶10} If a delinquent is not classified as a juvenile sex offender registrant pursuant to R.C. 2152.82 at the time of disposition, he may be classified pursuant to the procedures articulated in R.C. 2152.83. R.C. 2152.83 provides in pertinent part as follows:

> **(B)(1) The court that adjudicates a child a delinquent child, on the judge's own motion, may conduct at the time of disposition of the child or, if the court commits the child for the delinquent act to the custody of a secure facility, may conduct at the time of the child's release from the secure facility, a hearing for the purposes described in division (B)(2) of this section if all of the following apply:**
>
> **(a) The act for which the child is adjudicated a delinquent child is a sexually oriented offense *****

**(b) The child was fourteen or fifteen years of age at the time of committing the offense.**

**(c) The court was not required to classify the child a juvenile sex offender registrant under section 2152.82 of the Revised Code***.**

**{¶11}** As an initial matter, we note that the meaning of "at the time of *** release" as utilized in R.C. 2152.83(B)(1) has not been addressed frequently by the Ohio courts, nor is it specifically defined in the Ohio Revised Code.

**{¶12}** The appellate courts that have addressed the requirements of R.C. 2152.83(B)(1) have frequently addressed cases dissimilar to the case at bar. See *In re Murdick,* 5th Dist. No. 2007CA00038, 2007-Ohio-6800 (the appellate court agreed with the trial court that it was without jurisdiction to conduct a juvenile sex offender hearing pursuant to R.C. 2152.83(B)(1) some eighteen months after the offender was released from a secure facility and almost a year after disposition. This determination, however, hinged on the fact that the offender had spent eighteen months in a treatment facility that did not qualify as a secure facility.[1]); *In re McAllister,* 5th Dist. No. 2006CA00073, 2006-Ohio-5554 (finding that a classification hearing held thirteen months after the juvenile was released from the secure facility did not meet the definition of "at the time of *** release").

[1] There appears to be no disagreement that the Juvenile Residential Treatment Center of Northwest Ohio qualifies as a secure facility.

{¶13} However, in *In re B.W.*, 2nd Dist. No. 1702, 2007-Ohio-2096, the Second District Court of Appeals addressed a situation similar to the present case. In *In re B.W.* the juvenile's classification hearing was held a little more than two months after his release from a secure facility, while the juvenile was still under DYS supervision on parole. The Second District held that the hearing was proper, holding as follows:

> **We cannot say that the trial court was unreasonable in holding the hearing in July. In other words, "at the time of the child's release from the secure facility" necessarily incorporates a short interval of time (here, two and a half months, and not thirteen) before jurisdiction is lost. Clearly, the legislature did not intend to mandate a classification simultaneous with release, but merely within a reasonable time given docket constraints and appropriate time for evaluations appurtenant to classification.**

*Id.* at ¶14.

{¶14} This court is inclined to adopt the analysis articulated in *In re B.W.* In the present case, Darian was released from the Juvenile Residential Treatment Center of Northwest Ohio on December 21, 2006. The initial pre-trial conference, docketed prior to his release on December 8, 2006, occurred on January 24, 2007, approximately one month after Darian's release from a secure facility. Between the initial pre-trial and the final order adjudicating Darian to be a Juvenile Sex Offender on July 26, 2007, six months elapsed. Slightly more than seven months elapsed between Darian's release from the Juvenile Residential Treatment Center of Northwest Ohio and his adjudication as a juvenile sex offender registrant.

{¶15} At the initial pre-trial conference, Darian requested time to have a sex offender classification evaluation completed. The juvenile court ordered a sexual classification evaluation at State expense, to be performed before the next pre-trial, scheduled for April 4, 2007. This evaluation was not completed prior to the April 4, 2007 pre-trial because Darian violated his parole by not attending counseling, going home, or attending school. In addition to violating his parole, Darian also did not show up for the April 4, 2007 pre-trial nor did he make himself available during that time frame for the sex offender classification evaluation.

{¶16} A bench warrant issued; and Darian was arrested on April 8, 2007. The juvenile court scheduled the sex offender classification examination for May 3, 2007. After the evaluation, the Classification Hearing was scheduled for June 20, 2007. Prior to the hearing, Darian subpoenaed seven different witnesses to testify on his behalf.

{¶17} The hearing was conducted, as scheduled, on June 20, 2003. A second hearing was set for July 3, 2007, but was continued at the request of the State. The hearing was rescheduled for July 12, 2007, which was conducted as scheduled. As noted earlier, the trial court entered a Judgment Entry on July 26, 2007 classifying Darian as a Juvenile Sex Offender Registrant.

{¶18} In this case, the majority of the delays in holding the classification hearing resulted from Darian's parole violation and failure to appear. Further

delay resulted from his motion for a sex offender classification examination. Once the examination was completed and Darian was detained, the matter proceeded quickly. As a result, in this case, we cannot say that the length of time after release was unreasonable under R.C. 2152.83. Moreover, we find that the matter was promptly commenced and concluded upon Darian's release from a secure facility. Accordingly, Darian's first assignment of error is overruled.

*Second Assignment of Error*

{¶19} In his second assignment of error, Darian argues that there was no sex offender registration law in effect at the time he was adjudicated a Juvenile Sex Offender Registrant because Senate Bill 10 of the 127th General Assembly had repealed the old version of the sex offender statutes before enacting the new versions.

{¶20} However, we find this interpretation is not supported by the plain language of Senate Bill 10. Senate Bill 10, Section 2 repeals the older versions of the law as follows:

> **That existing 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, 2152.821, 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 and sections 2152.811, 2950.021, 2950.09, and 2950.091 of the Revised Code are hereby repealed.**

{¶21} Section 2, as cited above, is deemed effective January 1, 2008 by Section 3 as follows:

> **The amendments to sections 109.42, 109.57, 311.171, 2151.23, 2152.02, 2152.19, 2152.191, 2152.22, 2152.82, 2152.821, 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, 2950.04, 2950.041, 2950.05, 2950.06, 2950.07, 2950.08, 2950.081, 2950.10, 2950.11, 2950.12, 2950.13, 2950.14, 2967.12, 2967.121, 2971.01, 2971.03, 2971.04, 2971.05, 2971.06, 2971.07, 5120.49, 5120.61, 5120.66, 5139.13, and 5149.10 of the Revised Code that are made by *Sections 1 and 2* of this act, the enactment of sections 2152.831, 2152.86, 2950.011, 2950.15, and 2950.16 of the Revised Code by Section 1 of the act, and the repeal of sections 2152.811, 2950.021, 2950.09, and 2950.091 of the Revised Code by Section 2 of this act shall take effect on January 1, 2008.**

(emphasis added).

{¶22} Furthermore, we note that although Section 4 makes Sections 1-3 effective on July 1, 2007, this does not change the effective dates contained in each individual section for the enactment and repeal of individual provisions.

{¶23} Therefore, all of the Ohio Revised Code portions repealed in Section 2 were repealed effective January 1, 2008, the same date that the new laws, as articulated in Section 1, became effective. The plain statutory language must

control. *Storer Communications, Inc. v. Limbach* (1988), 37 Ohio St.3d 193, 194. Accordingly, Darian's second assignment of error is overruled.

*Third, Fourth, Fifth, and Sixth Assignments of Error*

{¶24} For ease of discussion, we choose to address Darian's final four assignments of error together. In those assignments of error, Darian argues that the application of Senate Bill 10 violates various constitutional provisions, specifically 1) the retroactive application violates the ex post facto clause; 2) the retroactive application violates the separation of powers doctrine; 3) the application amounts to cruel and unusual punishment; and 4) the retroactive application amounts to double jeopardy.

{¶25} As an initial matter, with respect to the constitutionality of an enactment of the General Assembly, we note that the Ohio Supreme Court has previously held that

> **"[a]n enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 57 O.O. 134, 128 N.E.2d 59, paragraph one of the syllabus. "A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality." *Id.* at 147, 57 O.O. at 137, 128 N.E.2d at 63. "That presumption of validity of such legislative enactment cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution." *Xenia v. Schmidt* (1920), 101 Ohio St. 437, 130**

> **N.E. 24, paragraph two of the syllabus; *State ex rel. Durbin v. Smith* (1921), 102 Ohio St. 591, 600, 133 N.E. 457, 460; *Dickman*, 164 Ohio St. at 147, 57 O.O. at 137, 128 N.E.2d at 63.**

*State v. Cook*, 83 Ohio St. 3d 404, 409, 700 N.E. 2d 570, 1998-Ohio-291.

**{¶26}** In *State v. Cook*, 83 Ohio St. 3d 404, the Ohio Supreme Court addressed whether Ohio's newly enacted sex offender statutes violated the retroactivity clause of the Ohio Constitution or the ex post fact clause of the United States Constitution as applied to previously convicted defendants. The court found that they did not. In *State v. Williams*, 88 Ohio St.3d 513, 728 N.E.2d 342, 2000-Ohio-428 the Ohio Supreme Court further held that those sex offender statutes did not violate double jeopardy or equal protection provisions of the United States Constitution.

**{¶27}** To determine whether the *Cook* and *Willams* decisions are controlling here, we first address how Senate Bill 10 changed the sex offender registration statutes. Perhaps the most fundamental changes occur in R.C. 2950.01, which not only renames Ohio's sex offender classifications, but imposes different criteria for the imposition of the sex offender label.

**{¶28}** Prior to the imposition of Senate Bill 10, a sentencing court was required to determine whether sex offenders fell into one of the following classifications: (1) sexually oriented offender; (2) habitual sex offender; or (3) sexual predator. R.C. 2950.09; *State v. Cook*, 83 Ohio St. 3d at 407. When the

trial court made the determination that an offender should be classified as a sexual predator, the judge was to consider all relevant factors, including, but not limited to, all of the following enumerated in R.C. 2950.09(B)(3):

> **(a) the offender's . . . age;**
>
> **(b) The offender's . . . prior criminal or delinquency record regarding all offenses, including, but not limited to, all sexual offenses;**
>
> **(c) The age of the victim of the sexually oriented offense for which sentence is to be imposed . . .;**
>
> **(d) Whether the sexually oriented offense for which sentence is to be imposed . . . involved multiple victims;**
>
> **(e) Whether the offender . . . used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;**
>
> **(f) If the offender . . . previously has been convicted of or pleaded guilty to, or been adjudicated a delinquent child for committing an act that if committed by an adult would be, a criminal offense, whether the offender . . . completed any sentence or dispositional order imposed for the prior offense or act and, if the prior offense or act was a sex offense or a sexually oriented offense, whether the offender . . . participated in available programs for sexual offenders;**
>
> **(g) Any mental illness or mental disability of the offender. . .;**
>
> **(h) The nature of the offender's . . . sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;**
>
> **(i) Whether the offender . . . during the commission of the**

> **sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made, displayed cruelty or made one or more threats of cruelty;**
>
> **(j) Any additional behavioral characteristics that contribute to the offender's . . . conduct.**

R.C. 2950.09(B)(3)(a)-(j).

{¶29} "In classifying an offender as a sexual predator, the Revised Code requires the trial court to make this finding only when the evidence is clear and convincing that the offender is a sexual predator." *State v. Naugle,* 3rd Dist. No. 2-03-32, 2004-Ohio-1944 at ¶ 5 citing R.C. 2950.09(B)(4).

{¶30} Senate Bill 10 abolished the prior classifications contained in R.C. 2950.01, substituting new classifications. An example is the definition of a Tier 1 Sex Offender/ Child-Victim Offender, as follows:

> **(E) "Tier I sex offender/child-victim offender" means any of the following:**
>
> **(1) A sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any of the following sexually oriented offenses:**
>
> **(a) A violation of section 2907.06, 2907.07, 2907.08, or 2907.32 of the Revised Code;**
>
> **(b) A violation of section 2907.04 of the Revised Code when the offender is less than four years older than the other person with whom the offender engaged in sexual conduct, the other person did not consent to the sexual conduct, and the offender previously has not been convicted of or pleaded guilty to a violation of section 2907.02, 2907.03, or 2907.04 of the Revised Code or a violation of former section 2907.12 of the Revised**

**Code;**

**(c) A violation of division (A)(1), (2), (3), or (5) of section 2907.05 of the Revised Code;**

**(d) A violation of division (A)(3) of section 2907.323 of the Revised Code;**

**(e) A violation of division (A)(3) of section 2903.211, of division (B) of section 2905.03, or of division (B) of section 2905.05 of the Revised Code;**

**(f) A violation of any former law of this state, any existing or former municipal ordinance or law of another state or the United States, any existing or former law applicable in a military court or in an Indian tribal court, or any existing or former law of any nation other than the United States, that is or was substantially equivalent to any offense listed in division (E)(1)(a), (b), (c), (d), or (e) of this section;**

**(g) Any attempt to commit, conspiracy to commit, or complicity in committing any offense listed in division (E)(1)(a), (b), (c), (d), (e), or (f) of this section.**

**(2) A child-victim offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a child-victim oriented offense and who is not within either category of child-victim offender described in division (F)(2) or (G)(2) of this section.**

**(3) A sex offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any sexually oriented offense and who a juvenile court, pursuant to section 2152.82, 2152. 83, 2152.84, or 2152.85 of the Revised Code, classifies a tier I sex offender/child-victim offender relative to the offense.**

**(4) A child-victim offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any child- victim oriented offense and who a**

**juvenile court, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier I sex offender/child-victim offender relative to the offense.**

R.C. 2950.01.

{¶31} The section also provides similar definitions of Tier II and Tier III sex offenders, and leaves little, if any discretion in classification to the court that sentenced the offender. R.C. 2950.01(F), (G). Prior to Senate Bill 10, "in those cases where an offender is convicted of a violent sexually oriented offense and also of a specification alleging that he or she is a sexually violent predator, the sexual predator label attaches automatically. R.C. 2950.09(A). However, in all other cases of sexually oriented offenders, only the trial court may designate the offender as a predator, and it may do so only after holding a hearing where the offender is entitled to be represented by counsel, testify, and call and cross-examine witnesses. R.C. 2950.09(B)(1) and (C)(2)." *Cook*, 83 Ohio St. 3d at 407. Now, that discretion is more limited. The new law severely limits the discretion of the trial court in imposing a certain classification on offenders. Instead, the new law requires trial courts to merely place the offender into a category based on their offense.

{¶32} Senate Bill 10 also provides for the reclassification of all offenders who were classified prior to its enactment. R.C. 2950.031; R.C. 2950.032. This reclassification process affords no deference to the prior classification given by the

trial court. Rather, offenders are reclassified based solely on the new statutes as articulated in Senate Bill 10 which classify offenders based on the offense they committed.

{¶33} In *State v. Cook* (August 7, 1997), 3rd Dist. No. 1-97-21 this Court found Ohio's sex offender classification statutes to be unconstitutional. Specifically, this Court found that with respect to Cook, who committed his crimes before new sex offender legislation was effective, but was sentenced after, that sex offender statutes violated the Ohio Constitutional protection against retroactive laws.

> **To the extent it imposes additional duties and attaches new disabilities to past transactions, the statute is retroactive and violates the Ohio Constitution. Thus, as applied to Cook, R.C. 2950.09 is a retroactive application of a legislative enactment and Cook cannot be required to register as a sexual predator. However, Cook can be required to register as a sexual offender, pursuant to the law in force at the time of his offense. Since R.C. 2950.09, if applied to Cook, violates the Ohio Constitution, we need not address the issue of whether it violates the ex post facto clause of the United States Constitution. Cook's second assignment of error is sustained.**

*State v. Cook*, supra, at *4.

{¶34} The Ohio Supreme Court reversed the decision of this Court, in *Cook*. In essence, the Ohio Supreme Court found that the sex offender registration statutes were remedial in nature and therefore, did not violate the ban on

retroactive laws as set forth in Section 28, Article II of the Ohio Constitution. The court reasoned as follows:

> **This court has held that where no vested right has been created, "a later enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, unless the past transaction or consideration * * * created at least a reasonable expectation of finality." *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281, 525 N.E.2d 805, 807-808.**
>
> ***
>
> **Under *Van Fossen* and *Matz,* we conclude that the registration and address verification provisions of R.C. Chapter 2950 are *de minimis* procedural requirements that are necessary to achieve the goals of R.C. Chapter 2950. As stated by the New Jersey Supreme Court in *Doe v. Poritz* (1995), 142 N.J. 1, 662 A.2d 367, "if the law did not apply to previously-convicted offenders, notification would provide practically no protection now, and relatively little in the near future. The Legislature reached the irresistible conclusion that if community safety was its objective, there was no justification for applying these laws only to those who offend or who are convicted in the future, and not applying them to previously-convicted offenders. Had the Legislature chosen to exempt previously-convicted offenders, the notification provision of the law would have provided absolutely no protection whatsoever on the day it became law, for it would have applied to no one. The Legislature concluded that there was no justification for protecting only children of the future from the risk of reoffense by future offenders, and not today's children from the risk of reoffense by previously-convicted offenders, when the nature of those risks were identical and presently arose almost exclusively from previously-convicted offenders, their numbers now and for a fair number of years obviously vastly exceeding the number of those who, after passage of these laws, will be convicted and released and only then, for the first time, potentially subject to community notification." *Id.* at 13-14, 662 A.2d at 373.**

> **Consequently, we find that the registration and verification provisions are remedial in nature and do not violate the ban on retroactive laws set forth in Section 28, Article II of the Ohio Constitution.**

*Cook*, 83 Ohio St. 3d at 412-413.

{¶35} The *Cook* Court also determined that Ohio's sex offender statutes did not violate the ex post facto clause of the United States Constitution, finding, after significant analysis, as follows:

> **R.C. Chapter 2950 serves the solely remedial purpose of protecting the public. Thus, there is no clear proof that R.C. Chapter 2950 is punitive in its effect. We do not deny that the notification requirements may be a detriment to registrants, but the sting of public censure does not convert a remedial statute into a punitive one. *Kurth Ranch,* 511 U.S. at 777, 114 S.Ct. at 1945, 128 L.Ed.2d at 777, fn. 14. Accordingly, we find that the registration and notification provisions of R.C. Chapter 2950 do not violate the *Ex Post Facto* Clause because its provisions serve the remedial purpose of protecting the public.**

*Cook*, 83 Ohio St. 3d at 423.

{¶36} In *Williams*, the Ohio Supreme Court addressed whether Ohio's sex offender statutes violated the double jeopardy clause. Relying on their holding in *Cook*, the court found that it did not, holding that

> **The Double Jeopardy Clause states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." Fifth Amendment to the United States Constitution; see, also, Section 10, Article I, Ohio Constitution. Although the Double Jeopardy Clause was commonly understood to prevent a second prosecution for the same offense, the United States Supreme Court has applied the clause to prevent a state from punishing twice, or from attempting a second time to criminally**

> **punish for the same offense. See *Kansas v. Hendricks,* 521 U.S. at 369, 117 S.Ct. at 2085, 138 L.Ed.2d at 519; *Witte v. United States* (1995), 515 U.S. 389, 396, 115 S.Ct. 2199, 2204, 132 L.Ed.2d 351, 361. The threshold question in a double jeopardy analysis, therefore, is whether the government's conduct involves criminal punishment. *Hudson v. United States* (1997), 522 U.S. 93, 101, 118 S.Ct. 488, 494, 139 L.Ed.2d 450, 460.**
>
> **This court, in *Cook,* addressed whether R.C. Chapter 2950 is a "criminal" statute, and whether the registration and notification provisions involved "punishment." Because *Cook* held that R.C. Chapter 2950 is neither "criminal," nor a statute that inflicts punishment, R.C. Chapter 2950 does not violate the Double Jeopardy Clauses of the United States and Ohio Constitutions. We dispose of the defendants' argument here with the holding and rationale stated in *Cook.***

*Williams,* 88 Ohio St.3d at 527-528.

{¶37} Moreover, this Court has followed the *Cook* holding, determining that Ohio's sex offender statutes did not amount to cruel and unusual punishment.

> **The Eighth Amendment to the United States Constitution and Section 9, Article I of the Ohio Constitution prohibit the imposition of cruel and unusual punishment. The Ohio Supreme Court, in *Cook,* 83 Ohio St.3d at 423, 700 N.E.2d 570, concluded that the registration and notification provisions of R.C. Chapter 2950 are not punishment or punitive in nature but, rather, are remedial measures designed to ensure the public safety. Thus, the protections against cruel and unusual punishments are not implicated.**

*State v. Keiber*, 3rd Dist. No. 2-99-51, 2000-Ohio-1666.

{¶38} We are not persuaded that the Ohio Supreme Court would view the issues of criminality and punishment as applied to R.C. 2950 et. seq. in the *Cook*

and *Williams* decisions any differently with regard to the provisions of Senate Bill 10.

{¶39} Finally, Darian argues that the law as enacted in Senate Bill 10 violates the separation of powers doctrine by limiting the discretion of the judiciary in classifying sex offenders. However, we note that the classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts. *Slagle v. State,* 145 Ohio Misc.2d 98, 884 N.E.2d 109, 2008-Ohio-593. Without the legislature's creation of sex offender classifications, no such classification would be warranted. Therefore, with respect to this argument, we cannot find that sex offender classification is anything other than a creation of the legislature, and therefore, the power to classify is properly expanded or limited by the legislature.

{¶40} For the foregoing reasons, Darian's third, fourth, fifth, and sixth assignments of error are overruled. The July 26, 2007 Judgment Entry of the Court of Common Pleas, Allen County, Ohio, Juvenile Division classifying Darian as a Juvenile Sex Offender Registrant and Tier III Sex Offender is affirmed.

***Judgment affirmed.***

**WILLAMOWSKI and ROGERS, JJ., concur.**

**r**