
Case Nos. 2019-1309 and 2019-1247

In the Supreme Court of Ohio

DISCRETIONARY APPEAL FROM THE
FRANKLIN COUNTY COURT OF APPEALS,
TENTH APPELLATE DISTRICT
CASE NOS. 17AP-251 & 17AP-252

HARMON LINGLE AND MARK GROSSER,
Plaintiff-Appellants,

v.

STATE OF OHIO ATTORNEY GENERAL DAVID YOST,
&
FRANKLIN COUNTY SHERIFF DALLAS BALDWIN,
Defendant-Appellees.

**MERIT BRIEF OF AMICI CURIAE
OHIO RATIONAL SEXUAL OFFENSE LAWS AND NATIONAL ASSOCIATION
FOR RATIONAL SEXUAL OFFENSE LAWS
IN SUPPORT OF NEITHER PARTY**

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IDENTIFICATION OF AMICI CURIAE AND SUMMARY OF ARGUMENT

Ohio Rational Sexual Offense Laws (Ohio RSOL) is the Ohio affiliated partner of the National Association for Rational Sexual Offense Laws (NARSOL). Both Ohio RSOL and NARSOL advocate for the reform and interpretation of sexual offense laws in ways that protect the rights of registered citizens while addressing legitimate public safety concerns. As part of that advocacy, they seek to provide the courts with reasoned analysis separated from unfounded and non-factual fears and concerns about registrants.

This case asks the Court to resolve a split between the Districts on the meaning of R.C. 2950.09(F)(2).¹ Under this provision, an out-of-state offender automatically classified as a sexual predator pursuant to R.C. 2950.09(A) may petition the court for a determination that they are not properly classified as a sexual predator under Ohio law. R.C. 2950.09(F)(1); *see also State v. Forsythe*, 2013-Ohio-3301 (Ohio App. 5 Dist. 2013), 996 N.E.2d 996 (2013). To succeed on this petition, the 2950.09(F) petitioner must make a threshold showing:

“that the requirement of the other jurisdiction that the offender . . . register as a sex offender until the offender’s . . . death is not substantially similar to a classification as a sexual predator for purposes of this chapter.” *Id.*

The question before the Court is how to properly interpret this statute – what, exactly, must be shown?

The lower courts have offered two different interpretations. In several cases, exemplified by *State v. Pasqua*, 157 Ohio App.3d 427 (Ohio App. 1 Dist. 2004), 2004-Ohio-2992, 811 N.E.2d 601 (2004), courts have read R.C. 2950(F)(2) as mandating that the court first determine

¹ As the Court is well-aware, this case concerns interpretation of the Ohio Megan’s law in place immediately prior to January 1, 2008, the effective date of the Ohio Adam Walsh Act. All statutory references contained herein are to that version. *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, N.E.2d 1108 (2011).

whether the out-of-state offense is “substantially equivalent” to a listed Ohio offense and then hold a hearing at which petitioner may demonstrate that he is not likely to commit a sexually oriented offense in the future. *Id.* at ¶ 22. In this case below, the 10th District broke with this line of cases – instead interpreting R.C. 2950(F)(2) as directing the Court to simply compare the registration requirement of the state of conviction with the mandatory, non-reviewable lifetime registration requirement for persons adjudicated a sexual predator in Ohio. *Lingle v. State*, 2019-Ohio-2928 at ¶ 32. Both sets of cases purport to rely on a “plain reading” of the statutory text. *See Pasqua*, 157 Ohio App.3d at ¶20; *Lingle*, 2019-Ohio-2928 at ¶ 32.

As shown below, however, neither of these interpretations is fully faithful to the statutory text nor is reasonably seen as expressive of the legislature’s intent. Rather, under R.C. 2950.09(F)(2) a petitioner is eligible for relief upon a showing by clear and convincing evidence that his out-of-state conviction and subsequent registration for life in the state of conviction does not indicate that he was adjudicated by that State to be a “sexual predator” as defined by Ohio law. This interpretation is faithful to the statutory text while fulfilling the legislature’s intent to require lifetime registration for sexually oriented offenders found likely to commit a future sexually oriented offense.

STATEMENT OF FACTS

Amici curiae Ohio RSOL and NARSOL adopt the facts as listed in the Appellant’s Memorandum in Support of Jurisdiction. These facts are taken from the allegations in the pleadings, and, as this case was resolved by judgement on the pleadings below, are taken as true for purposes of this review. *See, e.g., Peterson v. Teodosio*, 34 Ohio St.2d 161, 165 (1973).

ARGUMENT

a. Background

Ohio Megan’s law defines a sexual predator as a person who has both committed a registerable sexually oriented offense and “who is likely to engage in the future in one or more sexually oriented offenses.” R.C. 2950.01(E). For persons convicted of a qualifying offense in Ohio, the second element – that they are likely to commit a future sexually oriented offense – is a judicially determined fact (either by plea, conviction, or separate finding). *See* R.C. 2950.09(A)–(C). In each case the finding must be made by “clear and convincing evidence” and, upon such finding, the now adjudicated sexual predator will be required to register for life in Ohio without possibility of removal. *See generally id.*; R.C. 2950.07(B) (length of registration).

In contrast, for persons convicted of a qualifying offense in a state other than Ohio, the statute does not require Ohio courts to determine in the first instance whether the individual is a “sexual predator” under Ohio law. *See* R.C. 2950.09(A). Instead, Ohio uses the registration requirements of the other State as a proxy – if the other State requires lifetime registration as a sex offender (which, under Ohio law, would indicate that the individual was a “sexual predator”)² then Ohio law automatically classifies that person as a sexual predator unless they successfully challenge that classification under R.C. 2950.09(F). *Id.* Under that section, the Petitioner may request the court to “enter a determination that the offender . . . is not an adjudicated sexual predator” in the state of Ohio. *Id.*

² Under Ohio law, lifetime registration for a single offense is imposed only upon determination that the individual is a “sexual predator.” *See generally* R.C. 2950.07.

b. Previous Interpretations of R.C. 2950.09(F)(2)

This case is before the Court because the lower courts disagree as to what, exactly, the petitioner must show under R.C. 2950.09(F)(2) to be eligible for relief from mandatory lifetime registration. Under the statute, to be eligible for relief the petitioner must show:

“by clear and convincing evidence that the requirement of the other jurisdiction that the offender or delinquent child register as a sex offender until the offender’s or delinquent child’s death is not substantially similar to a classification as a sexual predator for purposes of this chapter.” *Id.*

Upon making this threshold showing, the court “may enter a determination that the offender or delinquent child is not an adjudicated sexual predator [in Ohio] for purposes of the registration and other requirements of [the Ohio sex offender registry laws].” *Id.*

i. Pasqua and its progeny

The *Pasqua* court interprets this language as requiring the court to conduct a two-prong inquiry as to the threshold question of eligibility: 1) whether the individual has committed an offense in another State “substantially equivalent” to a qualifying Ohio offense; and 2) whether the individual is likely to commit a sexually oriented offense in the future. *Pasqua*, 157 Ohio App.3d at ¶22. As to the second prong, the statute entitles the petitioner to a hearing on the issue. *Id.*

Pasqua’s logic is clear. Under Ohio law, an out-of-state offense is a “sexually oriented offense” for purposes of registration in Ohio if the out-of-state offense is “substantially equivalent” to a registerable sexually oriented offense as defined in Ohio law. R.C. 2950.01(D)(1)(f). Ohio law then defines a “sexual predator” as a person who has both committed a registerable sexually oriented offense and who is “likely to engage in the future in one or more sexually oriented offenses.” R.C. 2950.01(E). Therefore, when looking to see whether the person is an “adjudicated sexual predator” under R.C. 2950.09(F)(2), the court must first determine if

the out-of-state offense is “substantially equivalent” to a qualifying offense in Ohio and *then* determine whether the individual is likely to engage in one or more future offenses (with the burden of proof laid upon the movant). *See Pasqua*, 157 Ohio App.3d at ¶¶ 19-22.

Pasqua’s holding is correct in so far as it treats the out-of-state lifetime registration requirement as a proxy for adjudication as a sexual predator creating a rebuttable presumption that the out-of-state registration requirement is properly classified as a sexual predator. Nor, contrary to the 10th District’s argument in *Lingle*, does the *Pasqua* court “insert words” into R.C. 2950.09(F)(2) by holding that the statute gives the petitioner a right to a hearing on the issue of dangerousness. Rather, *Pasqua* recognizes that if the petitioner is required to prove that he is *not* a sexual predator, due process requires that he be granted a hearing to establish the essential fact he must prove. *See Lingle*, 2019-Ohio-2928 at ¶ 31 (arguing “[t]he *Pasqua* holding effectively inserted words into R.C. 2950.09(F)”); *Pasqua*, 157 Ohio App.3d at ¶¶ 23-24 (noting due process requirement for findings of fact).

Pasqua’s holding, though, fails to account for R.C. 2950.09(F)(2)’s requirement that the court *compare* the out-of-state lifetime registration requirement to “a classification as a sexual predator.” Instead, the *Pasqua* court reads R.C. 2950.09(F)(2) as giving the petitioner the opportunity to show *de novo* that he is not a sexual predator as defined under Ohio law. In doing so, *Pasqua* renders the directed comparison inoperative. *See State ex rel. Natl. Lime & Stone Co. v. Marion Cty. Bd. of Commrs.*, 152 Ohio St.3d 393, 2017-Ohio-8348, ¶14 (statutes should be interpreted in a “manner that will give effect to every word and clause, avoiding a construction that will render a provision meaningless or inoperative”). *Pasqua* does not insert words into the statute but removes them.

Pasqua's holding also fails to account for R.C. 2950.09(F)(1)(a)-(c). These subsections contain the conditions precedent for a petition under R.C. 2950.09(F)(2). One of these is that the petitioner must have committed a sexually oriented offense in another state (that is, an offense substantially equivalent to a (registerable) sexually oriented offense under Ohio law). R.C. 2950.09(F)(1)(b); R.C. 2950.01(D)(f). So R.C. 2950.09(F)(2) cannot require the petitioner to show that they have *not* committed a substantially equivalent out-of-state offense since the fact that he did so is a condition precedent to the petition itself. It is not clear what mechanism should be used to contest the fact of registration itself rather than automatic classification as a sexual predator pursuant to R.C. 2950.09(A). That issue is not presented in this case. However, *Pasqua* answers this question only at the expense of a logical inconsistency contrary to the text of the R.C. 2950.09(F).

ii. The 10th District's Opinion in Lingle

In its decision below, the 10th District takes issue with *Pasqua* on the basis that R.C. 2950.09(F) contains no provision for an evidentiary hearing on the issue of future dangerousness. *Lingle*, 2019-Ohio-2928 at ¶ 31. After finding there is no requirement for an evidentiary hearing, the 10th District then takes as its implicit assumption that R.C. 2950.09(F)(2) does not require *any* substantive findings of fact. Instead, it reads the statute as directing the courts to compare the *requirements* of registration in the state of conviction and Ohio. *See id.* at ¶31 (the court should note “which differences in the two state’s reporting requirements persuaded the court to conclude that the requirements were not substantially similar”). The 10th District thus reduces R.C. 2950.09(F)(2) to an “effects” test – since classification as a sexual predator results in lifetime registration in Ohio without opportunity for removal, if the state of conviction likewise requires

lifetime registration without opportunity for removal then the requirements are “substantially similar.” *See Lingle*, 2019-Ohio-2928 at ¶¶ 32-34.

While the 10th District correctly identifies that R.C. 2950.09(F)(2) requires a comparison (at least as a threshold question of eligibility for reclassification), it ultimately suffers the same flaw as the *Pasqua* analysis by rendering language of the statute inoperative. R.C. 2950.09(F)(2) does not direct the court to compare registration “requirements” – it directs the court to determine whether the requirement of the sending state is substantially similar to “a classification” as a sexual predator under Ohio law. Were the statute only to require the Court to determine whether the individual was required to register for life in the state of conviction, there would be no need to direct a comparison at all. The 10th District’s reading also ignores the import of the phrase “substantially similar.” Registration requirements are, or are not, for life and they do, or do not, allow for early removal. Under Ohio law, classification as a sexual predator requires registration for life with no possibility for removal. R.C. 2950.07(B)(1). If the 10th District’s reading were correct, then the court would not need to determine if the registration requirements were “substantially similar.” It would only need to determine whether the individual was required to register for life without possibility of removal. *See Lingle*, 2019-Ohio-2928 at ¶¶ 32-34.

c. An Alternate Interpretation

Given these issues in the *Pasqua* and *Lingle* interpretations of R.C. 2950.09(F)(2), this Court should look for an alternate interpretation fully consistent with the language and intent of the statute.

To begin, the statute should be read considering its overarching purpose: to determine whether the individual is an “adjudicated sexual predator” for purposes of Ohio registration law.

R.C. 2950.09(F) (“An offender . . . may petition the court . . . to enter a determination that the offender . . . is not an adjudicated sexual predator in this state.”) Under Ohio law, a “sexual predator” is a person determined by judicial process (plea, conviction, or other adjudicative proceeding) to 1) have committed a (registerable) sexually oriented offense and 2) be likely to engage in the future in one or more sexually oriented offenses. R.C. 2950.09(A); R.C. 2950.01(E). Accordingly, the term “a classification as a sexual predator” (singular) refers to this individual adjudication and the term “adjudicated sexual predator” refers to a person who has been found, by judicial process, to meet the definition of sexual predator set forth in the statute. *See* R.C. 2950.01(G) (defining “adjudicated a sexual predator”).³ Thus, the ultimate finding by the court under R.C. 2950.09(F)(2) is whether the petitioner meets the statutory definition of a “sexual predator” under Ohio law.

In making this determination, R.C. 2950.09(F)(2) directs the court to consider the threshold issue whether the requirement of the other jurisdiction that the offender register for life is “substantially similar” to the determination under Ohio law that the offender is a sexual predator. While the phrase “requirement of the other jurisdiction” standing alone might be susceptible to varied interpretation, there is only one that makes sense given the stated comparator (“a classification as a sexual predator”) and the fact that the court is directed to make

³ R.C. 2950.01(G)(5) separately defines “adjudicated a sexual predator” as a person convicted of an out-of-state offense and required to register for life on the basis of that conviction. This definition of “adjudicated sexual predator,” however, cannot be the operative definition for purposes of R.C. 2950.09(F). Under R.C. 2950.09(F)(1)(b), a person may not bring a petition under R.C. 2950.09(F) unless they have, in fact, been convicted of an out-of-state offense and required to register for life in the state of conviction. If the definition of “adjudicated sexual predator” for purposes of R.C. 2950.09(F) is the definition contained in R.C. 2950.01(G)(5) then the statute renders an absurdity – to petition the court for a determination that one is not an “adjudicated sexual predator” one must be, in fact, an “adjudicated sexual predator.” R.C. 2950.01(G)(5) instead refers to the fact that a person required to register for life in the state of conviction is, presumptively, an “adjudicated sexual predator” under Ohio law *unless* they successfully petition the court under R.C. 2950.09(F).

a determination that the requirement of lifetime registration in the state of conviction and the classification as a sexual predator under Ohio law are “substantially similar.” As the phrase “a classification as a sexual predator” under Ohio law refers to the underlying judicial process and finding of fact that the individual meets the definition of “sexual predator” set forth in R.C. 2950.01(E), the appropriate comparator can only be whether the requirement of lifetime registration in the state of conviction reflects an adjudicative process and findings of fact “substantially similar” to that which results in classification as a sexual predator under Ohio law. Only this reading allows the court to make the directed comparison while remaining faithful to the text.

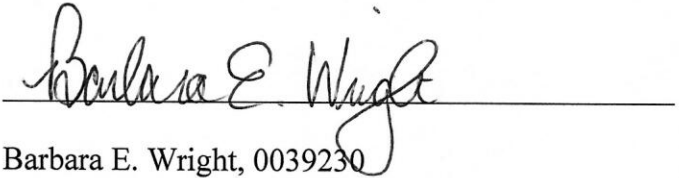
The court is charged with determining as a threshold matter whether the petitioner is an “adjudicated sexual predator” by determining whether, in fact, that person has been previously adjudicated a “sexual predator” in the state of conviction. If they have, the statute does not allow the Ohio court to revisit this determination. If the petitioner presents clear and convincing evidence that they have not, *then* the Court may independently consider whether they do in fact meet the Ohio statutory definition. At the threshold stage, the statute does not require a hearing to determine whether the individual is likely to commit a sexually oriented offense in the future because that fact is irrelevant to the threshold determination. The operative question is whether the state of conviction has *already* found that the individual is likely to commit such an offense. In making this determination, it is not necessary that the state of conviction follow the procedures and consider facts precisely the same as an Ohio court would. It is enough that these procedures and findings of fact were “substantially similar” to those under R.C. 2950.09.

CONCLUSION

As shown above, the interpretations of R.C. 2950.09(F)(2) provided by the lower courts are simply not consistent with the full text of the statute. *Pasqua* effectively ignores the fact that R.C. 2950.09(F)(2) requires the court to make a comparison – substituting instead a *de novo* inquiry into whether the petitioner meets the Ohio statutory definition of “sexual predator.” In doing so, the *Pasqua* court gives no effect to the out-of-state classification. The 10th District’s opinion recognizes the need to make a comparison, but then selects a comparator (the Ohio state registration requirement for sexual predators) that is not in the statute and that would render much of 2950.09(F) effectively meaningless. In light of these deficiencies, the court should adopt a separate construction of R.C. 2950.09 that both gives effect to another state’s determination that an individual is a “sexual predator” as that term is defined in Ohio law while also giving effect to the full language of both R.C. 2950.09(F)(2) specifically and R.C. 2950 generally. The construction offered above does both.

Under R.C. 2950.09(F)(2), the threshold question is whether the fact of lifetime registration in another state indicates that the future dangerousness of the offender has already been determined. Under the statute, an out-of-state offender is treated no differently than an Ohio state offender in that the court may not revisit the adjudication that the offender is a sexual predator. However, if the state of conviction has not adjudicated him to be a sexual predator, he may ask the Ohio court to review his automatic classification. In this manner, all persons classified as “sexual predators” under Ohio law meet the definition of a “sexual predator” under Ohio law while relieving the Ohio courts of the duty of conducting a classification hearing for every individual with an out-of-state conviction.

Respectfully submitted on behalf of amici curiae Ohio RSOL and NARSOL this the 18th day of February, 2020.

A handwritten signature in cursive script, reading "Barbara E. Wright", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Merit Brief of Amici Curiae, Ohio Rational Sexual Offense Laws and National Association for Rational Sexual Offense Laws, in Support of Neither Party, with the Clerk of Court using the e-filing system, and served a copy by e-mail on the Counsel of Record for the Appellants and Appellees.

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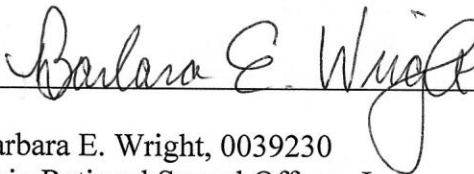
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