IN THE SUPREME COURT OF OHIO

STATE OF OHIO, PLAINTIFF-APPELLEE	:	CASE NOS. 2020-0544 2020-0625
v.	:	ON APPEAL FROM THE BUTLER COUNTY COURT OF APPEALS
MIQUAN HUBBARD, DEFENDANT-APPELLANT.	:	TWELFTH APPELLATE DISTRICT
	:	C.A. CASE NO. CA2019-05-086

REPLY BRIEF OF APPELLANT MIQUAN HUBBARD

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Table of Contents

Page No.

Table of Authorities

Page No.

Cases:

Constitutional Provision:

Statutes:

Other Authorities:

Statement of the Case and Facts

Miquan Hubbard relies on the Statement of the Case and Facts set forth in his merit brief.

Argument

Proposition of Law

The retroactive application of Senate Bill 231—Sierah's Law—is unconstitutional as applied to offenses committed prior to the effective date of the statute. Article II, Section 28 of the Ohio Constitution.

Certified Question

Does retroactive application of the violent offender database enrollment statutes codified in sections 2903.41 through 2903.44 of the Revised Code, commonly known as "Sierah's Law," violate the Retroactivity Clause of the Ohio Constitution, as set forth in Article II, Section 28 of the Ohio Constitution?

A. The State's focus on the existence of a vested right fails to recognize the significance of the additional burdens, duties, and obligations imposed by the violent offender registry and disregards this Court's precedent in *Williams*.

As this Court has consistently held, a statute affects a substantial right if it (1) impairs or takes away vested rights, (2) affects an accrued substantive right, (3) imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction, or (4) creates a new right. *Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, ¶ 9, citing *Van Fossen v. Babcock & Wilcox Co*., 36 Ohio St.3d 100, 102, 522 N.E.2d 489 (1988). Therefore, a new law affects a substantial right if it meets *any* one of those four criteria. Yet, both the State and amicus counsel focus heavily on whether the violent offender registry affects a "vested right" and attempt to minimize the individual significance of each prong. *Merit Brief of Plaintiff-Appellee* at p. 8; *Merit Brief of Amicus Curiae Ohio Attorney General Dave Yost* at p. 7. In fact, the State asserts that—despite this Court's longstanding, multi-pronged definition of "substantial right"—the retroactivity analysis turns entirely on the existence or absence of a vested right. *Merit Brief of*

Plaintiff-Appellee at pp. 8-9. In doing so, the State relies on *Matz*, where this Court found 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*, 37 Ohio St.3d 279, 281, 525 N.E.2d 805 (1988). However, the State's position ignores the fact that a statute can affect a substantial right when it imposes new or additional burdens, duties, or obligations, regardless of whether the statute creates a vested right. In *Williams*—despite prior decisions in *Matz*, *Cook*, and *Ferguson*—this Court found that the new amendments to the sex offender registry affected a substantive right because the statute "imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction * * * and create[s] new burden, new duties, new obligations, or new liabilities not existing at the time." (Citation omitted.) *Williams*, at ¶ 20. The State incorrectly asserts that this Court's analysis in *Williams* was an unprecedented and mistaken departure from *Matz*. Instead, this Court's decision in *Williams* illustrates precisely how a new statute may create such substantial new burdens, duties, or obligations as to create a substantial right.

Additionally, amicus counsel erroneously claims that the violent offender registry "*does not* impose 'new or additional burdens, duties, obligations, or liabilities as to a past transaction.'" (Emphasis added.) *Merit Brief of Amicus Curiae Ohio Attorney General Dave Yost*, at p. 7. Instead, amicus counsel attempts to distinguish this important substantial right by framing all registration duties as "future obligations" and arguing that such obligations are somehow exempt from the substantial right analysis. *Merit Brief of Amicus Curiae Ohio Attorney General Dave Yost*, at p. 7. That assertion is no more than an attempt to circumvent this Court's precedent by renaming the nature of the obligation to create an illusory distinction. Put simply, there is no distinction between

a "future obligation" and a "new obligation." The only question is whether the new and future obligation is severe enough to be a punishment. Accordingly, the State's arguments lack merit and directly contravenes this Court's prior analysis of registry requirements.

B. The State's brief presents a flawed comparison of the violent offender registry to the current and past versions of the sex offender registry.

Three times between 1998 and 2011, this Court considered the retroactive application of amendments to Ohio's sex offender registry. *State v. Cook*, 83 Ohio St.3d 404, 413, 700 N.E.2d 570 (1998); *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, ¶ 12-40; *Williams* at ¶ 6-22. In *Cook* and *Ferguson*, this Court upheld the retroactive application of Megan's Law finding that the new dissemination and community notification requirements did not impose new burdens or duties on offenders and that the amendments achieved the General Assembly's nonpunitive purpose. *Cook* at 413; *Ferguson* at ¶ 38-43. However, in *Williams*, this Court held that the amendments implemented under the Adam Walsh act were so significant, that the statute affected a substantive right. *Williams* at ¶ 21. Accordingly, the State asks this Court to decide whether the violent offender registry is "more like Adam Walsh * * * or more like Megan's Law?" *Merit Brief of Plaintiff-Appellee* at p. 10. However, this question oversimplifies the important constitutional question presented in this case and ignores that this Court's split opinion in *Ferguson* illustrated a divide regarding the remedial nature of Megan's Law. While these cases provide the backdrop for this Court's prior analysis of whether the offender registry requirements are substantive or remedial, this analysis is more than a mere comparison. The charts[1] below demonstrate the key similarities and differences between the various versions of Megan's Law, the Adam Walsh Act, and the new violent offender registry:

[1] The chart below uses the following abbreviations: Sexually Oriented Offender (SOO), Habitual Sex Offender (HSO), Sexual Predator (SP).

	Megan's Law (1997)	Megan's Law (2003)	Adam Walsh Act (2007)	Violent Offender Registry (2019)
Statute	Former R.C. 2950	Former R.C. 2950	R.C. 2950	R.C. 2903.41-43
Discretionary or Mandatory	SOO: Mandatory based on offense. HSO and SP: Enhanced registration duty may be imposed after consideration of statutory factors.	SOO: Mandatory based on offense. HSO and SP: Enhanced registration duty may be imposed after consideration of statutory factors.	Mandatory based on offense.	Mandatory based on offense unless the person can prove that they were not the "principal offender"
Notice of Duty to Register	At time of sentencing or before release.	At time of sentencing or before release.	At time of sentencing.	At time of sentencing or before release.
Frequency and Length of Registration	SOO: Annually for 10 years HSO: Annually days for 20 years SP: Every 90 days for life	SOO: Annually for 10 years HSO: Annually days for 20 years SP: Every 90 days for life	Tier I: Annually for 15 years Tier II: Every 180 days for 25 years Tier III: Every 90 days for life	Annually for 10 years. Prosecutor can request extension for violation of duties or for a new misdemeanor or felony conviction.
Community Notification	SOO: None HSO and SP: Discretionary	SOO: None HSO and SP: Discretionary	Tier I: None Tier II: None Tier III: Discretionary	Permitted - Not expressly prohibited.
Counties where registration required.	Residence	Residence, Employment, School	Residence, Employment, School	Residence
Residential restrictions	Yes	Yes	Yes	
Violation	F5 if underlying is felony. M1 if underlying is misdemeanor.	F3 if underlying offense is ≥ F3 Same as underlying offense if that is ≤ F4	Same degree as underlying	F5
Public Record	Yes	Yes	Yes	Yes
Registration fee		Yes	Yes	
Expressed public safety purpose	Yes	Yes		
Substantive or Remedial	Remedial *Cook*	Remedial *Ferguson*	Substantive *Williams*	Question pending in *Hubbard* and *Jarvis*

	Megan's Law (1997)	Megan's Law (2003)	Adam Walsh Act (2007)	Violent Offender Registry (2019)
Information Provided to Sheriff				
Full Name	X	X	X	X
Alias			X	X
Date of Birth			X	
Social Security Number			X	X
Driver's License Number			X	X
Commercial Driver's License Number			X	X
State ID Number			X	X
Offense of Conviction			X	X
Home Address	X	X	X	X
Work Address		X	X	X
School Address		X	X	X
License Plate		Only if classified as SP after a hearing	X	X
Professional License Number			X	
Email Address			X	
Phone Number			X	
Description of scars, tattoos, or distinguishing marks			X	X
Photograph		X	X	X
Fingerprints or Palmprints			X	X

Former R.C. 2950; R.C. 2903.41-43; R.C. 2950.

Many of the State's inferences are misplaced. First, the State asserts that the violent offender database is not an automatic, offense-based scheme because offenders are "only subject to a rebuttable presumption that he would be required to enroll in the VOD." *Merit Brief of Plaintiff-Appellee* at p. 14. Although R.C. 2903.42 provides an *opportunity* to rebut the presumption, a presumption exists, nonetheless. Absent a motion and specific findings by the trial court, the registry requirements are both automatic and offense based. An individual only receives

this perceived benefit if he moves the court to rebut the presumption—but, if he is subject to retroactive enrollment upon release from prison, he is required to file a motion to rebut the presumption *before* his release from prison and without access to counsel. And, before the trial court may exercise its discretion, the movant must prove that he was not the principal offender. Accordingly, if unequivocally the principal offender, the statute provides no opportunity to rebut the presumption.

Second, the State argues that because the violent offender statutes do not explicitly provide for community notification or public dissemination, the violent offender registry is less onerous than Megan's Law and is therefore, remedial. *Merit Brief of Plaintiff-Appellee* at p. 15. Specifically, the State argues that "the lack of such a prohibition is not equivalent to the required public dissemination of information" under Megan's Law and Adam Walsh. *Merit Brief of Plaintiff-Appellee* at p. 15. Although the violent offender *database* maintained by BCI is not subject to public inspection, the statute explicitly authorizes public inspection of nearly all registry information maintained by the county sheriff. And, while the violent offender registry does not contain explicit directives regarding public dissemination, nothing in the law prohibits such dissemination. Accordingly, the public and/or law enforcement officials retain the unfettered ability to disseminate nearly all registry information via mailers, internet publication, or social media.

Finally, after comparing the violent offender registry to both Megan's Law and the Adam Walsh Act, the State avers that because the violent offender registry requirements are "substantially different and less onerous" than the Adam Walsh Act and Megan's Law, those requirements must be remedial in nature. *Merit Brief of Plaintiff-Appellee* at p. 17. That conclusory argument is flawed for two reasons. First, the State attempts to create a bright line rule that any

offender registry that is "less onerous" than the Adam Walsh Act must necessarily be remedial. That position seeks to supplant the standard of review by asking this Court to find that a registration scheme cannot be deemed unconstitutionally retroactive unless it is at least as punitive as the Adam Walsh Act. Notably, this Court's decision in *Williams* was also applied in full force to the amendments to the juvenile sex offender scheme—which is substantially less onerous than the criminal registry requirements considered by this Court in *Williams*. *See In re D.J.S.*, 130 Ohio St.3d 257, 2011-Ohio-5342, 957 N.E.2d 291, ¶ 1. Second, the offender registry is an entirely new registration scheme that did not exist in any form prior to the enactment of Senate Bill 231. Accordingly, the creation of the violent offender registry did not merely amend an existing registry scheme, it created a new, expansive set of duties, burdens, and obligations, that did not exist prior to the statute's enactment.

C. The newly established violent offender registration imposes new and additional burdens, duties, and obligations that are punitive in nature.

"[A]s dangerous as it may be not to punish someone, it is far more dangerous to permit the government under guise of civil regulation to punish people without prior notice." *Does #1-5 v. Snyder*, 834 F.3d 696, 706 (6th Cir.2016). Until 2012, this Court historically disagreed whether sex offender registration requirements are civil or criminal in nature. *See Ferguson*, 2008-Ohio-4824, 896 N.E.2d 110, ¶ 38-40, 45-47 (Lanzinger, dissenting); *Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, ¶ 21. However, in *Williams*, the majority of this Court held for the first time that amendments to an offender registration scheme were punitive in nature and affected a substantial right. *Williams* at ¶ 21. In 2016, the Sixth Circuit similarly held that Michigan's tiered sex offender registration system was unconstitutionally retroactive. *Does* at 706. The Sixth Circuit's decision highlighted several key elements of Michigan's SORA law that—like Ohio's version of Adam Walsh—meet the definition of punishment. *Id.* at 703. One consideration

was the fact that the registry bore a resemblance to the conditions of probation and parole. *Id*. Specifically, the Sixth Circuit noted that

> much like parolees, they must report in person, rather than by phone or mail. Failure to comply can be punished by imprisonment, not unlike a revocation of parole. And while the level of individual supervision is less than is typical of parole or probation, the basic mechanism and effects have a great deal in common. In fact, many of the plaintiffs have averred that SORA's requirements are more intrusive and more difficult to comply with than those they faced when on probation. **In sum, while SORA is not identical to any traditional punishments, it meets the general definition of punishment, has much in common with banishment and public shaming, and has a number of similarities to parole/probation**. (Emphasis added.)

Id. The Court further found troubling the fact that "offense-based public registration has, at best, no impact on recidivism." *Id.* at 705.

Ohio's violent offender registry has established significant new burdens, duties, and obligations that did not exist prior to March 20, 2019. And now, registrants are required to comply with significant requirements including annual in-person registration, duty to notify of change of address, and duty to disclose significant personal identifying information. R.C. 2903.42-43. Further, failure to comply with any of these obligations or with any of the terms of the offender's sentence constitutes a new felony offense and subjects the offender to mandatory lifetime registration duties if requested by the State. R.C. 2903.43. Like Ohio's Adam Walsh Act and Michigan's SORA provisions, Ohio's newly established violent offender registry contains significant provisions that are akin to general punishment.

D. Since the merit brief was filed, two additional appellate districts have issued conflicting decisions regarding the retroactive application of the violent offender registry.

Since Mr. Hubbard filed his merit brief, two additional appellate districts have issued decisions regarding the retroactive application of the violent offender registry—one relied on *Jarvis* and the other on *Hubbard*. In *State v. Pilkington*, the Third District Court of Appeals agreed

with the Fifth District's decision in *Jarvis* and held that the retroactive application of the violent offender registry is unconstitutionally retroactive:

> Because of the punitive nature of the requirements of the VOD statute, we follow the general holding of *State v. Jarvis*, in which the Fifth District Court of Appeals held that "imposing the VOD, R.C. 2903.41, et. seq. requirements upon defendants who committed offenses prior to its enactment, violates Section 28, Article II of the Ohio Constitution, which prohibits the General Assembly from passing retroactive laws."

State v. Pilkington, 3d Dist. Logan No. 8-19-58 (Aug. 17, 2020), quoting *State v. Jarvis*, 5th Dist. Muskingum No. CT-2019-0029, 2020-Ohio-1127, ¶ 36. Subsequently, the Third District certified a conflict with the Twelfth District's decision in *Hubbard* and this Court held the case for decisions in *Hubbard* and *Jarvis*. *See* 11/12/2020 *Case Announcements*, 2020-Ohio-5166.

In *State v. Rike*, the First District Court of Appeals relied on the Twelfth District's decision in *Hubbard* to hold that the violent offender registry is remedial and therefore, does not violate the laws against retroactivity:

> the violent-offender-registration duties are far less onerous than the requirements of the AWA. First, the duty is imposed for ten years as opposed to the AWA's 15-year, 25-year, or lifetime duty. Second, the offender is required to register once a year, with the sheriff where the offender resides. Unlike the sex-offender registry, the information is not disseminated online and is only available for inspection by the public. And violent offenders are not subject to residency restrictions. Finally, a failure-to-register offense imposes a recklessness standard as opposed to the strict-liability standard in the AWA, and any failure results in a low-level felony. Therefore, the provisions are "not so punitive that they impose a new burden in the constitutional sense, as contemplated by *Williams*[,]" and, instead, are remedial in nature.

State v. Rike, 1st Dist. Hamilton No. C-190401, 2020-Ohio-4690, ¶ 62, quoting *State v. Hubbard*, 2d Dist. Butler No. CA2019-05-086, 2020-Ohio-856, ¶ 37. These decisions, in addition to the cases cited in the merit brief, signify further divide among appellate districts on this issue.

Conclusion

Accordingly, Mr. Hubbard asks this Court to answer the certified question in the affirmative and hold that the retroactive application of the violent offender registry is unconstitutional in violation of Article II, Section 28 of the Ohio Constitution.

Respectfully submitted,

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Certificate of Service

The undersigned counsel certifies that a copy of the foregoing **REPLY BRIEF OF APPELLANT MIQUAN HUBBARD** via facsimile number 513-887-3489 upon Michael Greer, Assistant Prosecuting Attorney with the Butler County Prosecutor's Office on this 16th day of November, 2020.

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