

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case Nos. 2020-0544
	:	2020-0625
Plaintiff-Appellee,	:	
	:	On Appeal from the Butler
	:	Butler County Court of Appeals
-vs-	:	Twelfth Appellate District
	:	
	:	
MIQUAN HUBBARD,	:	
	:	C.A. Case No. CA2019-05-086
Defendant-Appellant.	:	

MERIT BRIEF OF PLAINTIFF-APPELLEE, STATE OF OHIO

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STATEMENT OF THE CASE AND FACTS

On September 10, 2018, Appellant, Miquan Hubbard, was indicted and charged in Count 1 with murder in violation of R.C. 2903.02(A), an unclassified felony. (Indictment, T.d. 01) Count 1 included a firearm specification under R.C. 2941.145. (*Id.*) In Count 2, Appellant was charged with murder in violation of R.C. 2903.02(B), an unclassified felony. (*Id.*) Count 2 included a firearm specification under R.C. 2941.145. (*Id.*) In Counts 3 through 6, Appellant was charged with various counts of felonious assault under R.C. 2903.11(A)(1) and (A)(2). (*Id.*) Each count included a firearm specification under R.C. 2941.145. (*Id.*) In Count 7, Appellant was charged with discharge of a firearm on or near prohibited premises, a first-degree felony. (*Id.*) Count 7 included a firearm specification under R.C. 2941.145. (*Id.*)

According to the bill of particulars, on August 29, 2018, Appellant was in the vicinity of South Front Street in Hamilton, Ohio. (Bill of Particulars, T.d. 84, 3) While there, Appellant, acting with his co-defendant, Kameron Tunstall, discharged a firearm multiple times across South Front Street into a group of people, hitting and killing Jaraius Gilbert, Jr. (*Id.*)

On March 7, 2019, Appellant and the State entered into a plea agreement. (Plea of Guilty & Jury Waiver, T.d. 91) Appellant agreed to plead guilty to Count 2, murder, and to the attached firearm specification as amended from a three-year sentence to a one-year sentence. (*Id.*) In exchange for Appellant's guilty pleas, the State agreed to seek dismissal of Counts 1, 3, 4, 5, 6, and 7. (*Id.*) Moreover, Appellant agreed to testify at the trial of his co-defendant, and, if Appellant were to commit perjury, then the plea agreement would be void. (*Id.*)

On the same day, Appellant's case proceeded to a plea hearing. (Plea Hearing, T.p. 1-16) According to the record, the trial court engaged in a Crim.R. 11(C) colloquy with Appellant. (*Id.*)

5-13) Subsequently, Appellant pled guilty to Count 2, murder, and the amended firearm specification. (*Id.* 14)

On April 30, 2019, the trial court convened a sentencing hearing. (Sentencing Hearing, T.p. 1-16) At the outset of the hearing, the trial court discussed Senate Bill 231 with Appellant. (*Id.* 2) The trial court explained that since Appellant had pled guilty to murder, it was presumed that he was required to enroll as a violent offender. (*Id.* 2-3) The trial court also explained that Appellant could file a motion in which he would have the opportunity to rebut that presumption if he could prove by preponderance of the evidence that he was not the principal offender of the offense. (*Id.* 3) Appellant decided not to attempt to rebut the presumption regarding enrollment. (*Id.*) But Appellant objected to being subject to violent offender enrollment. (*Id.*) Appellant stated—without making any legal or factual arguments—that the statutes regarding violent offender enrollment were punitive not remedial; thus, it was unconstitutional to retroactively apply them to Appellant. (*Id.*) After Appellant’s objection, the trial court noted that Appellant had pled guilty on March 7, 2019 and noted that the violent offender enrollment statutes went into effect on March 20, 2019. (*Id.* 4)

Regarding Count 2, murder, the trial court sentenced Appellant to serve 15 years to life in prison. (*Id.* 11) As for the amended firearm specification, the trial court sentenced Appellant to serve one year in prison. (*Id.*) The trial court noted that the prison terms were mandatory and were required to be served consecutively for a total of 16 years to life in prison. (*Id.*)

Appellant appealed his conviction to the Twelfth District Court of Appeals. *State v. Hubbard*, 12th Dist. Butler No. CA2019-05-086, 2020-Ohio-856, ¶1. Appellant argued that the statutes that required Appellant to register as a violent offender were unconstitutional, violating the prohibition against retroactive laws set forth in Section 28, Article II of the Ohio

Constitution. *Id.* On March 9, 2020, the Twelfth District issued an opinion and concluded that the statutory scheme was remedial not substantive; thus, it did not violate the prohibition against retroactive laws. *Id.*

On March 23, 2020, the Fifth District Court of Appeals issued an opinion in which it concluded that the violent offender registration system imposed new or additional burdens, duties, obligations, or liabilities regarding a past transaction, thus, violating Section 28, Article II of the Ohio Constitution. *State v. Jarvis*, 5th Dist. Muskingum No. CT 2019-0029, 2020-Ohio-1127, ¶37.

In May of this year, the Twelfth District granted Appellant’s motion to certify conflict, concluding that its decision in *Hubbard* was in conflict with the Fifth District’s decision in *Jarvis*. (*State v. Hubbard*, 12th Dist. Butler No. CA2019-05-086, Entry Granting Motion to Certify Conflict.)

On July 1, 2020, this Court accepted jurisdiction over Appellant’s discretionary appeal from the Twelfth District’s decision in *Hubbard*. (*State v. Hubbard*, Case No. 2020-0544, July 1, 2020 Entry.) On the same day, this Court determined that a conflict existed and ordered the parties to address the following 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?

(*State v. Hubbard*, Case No. 2020-0625, July 1, 2020 Entry.) This Court also consolidated both appeals. (*State v. Hubbard*, Case No. 2020-0544, July 1, 2020 Entry & *State v. Hubbard*, Case No. 2020-0625, July 1, 2020 Entry.)

ARGUMENT

The Response of Appellee, the State of Ohio, to Appellant's Proposition of Law and this Court's Certified Question:

Sierah's Law, R.C. 2903.41, *et seq.*, which established a violent offender registration scheme and the Violent Offender Database ("VOD"), which went into effect on March 20, 2019, does not violate the prohibition against retroactive laws set forth in Section 28, Article II of the Ohio Constitution and may be applied to violent offenders who have committed their crimes prior to the law's effective date.

As this Court knows, the violent offender registry and Violent Offender Database ("VOD") set forth in R.C. 2903.41 through R.C. 2903.44 went into effect on March 20, 2019.

R.C. 2903.41. According to the Ohio Legislative Service Commission Bill Analysis as Introduced:

[Senate Bill 231] provides for the establishment and operation by the Bureau of Criminal Identification and Investigation (BCII) of a Violent Offender Database (VOD), requires persons convicted of specified violent offenses in Ohio (violent offenders) or those convicted of a comparable offense in another state (out-of-state violent offenders) who become aware of the Database to enroll in the Database, and names the Database-related provisions of the act "Sierah's Law."

Id. 1.

Ohio Revised Code 2903.41 sets forth various definitions for Sierah's Law, including two definitions for "violent offender." According to R.C. 2903.41(A)(1)(a), a violent offender is anyone "who on or after the effective date" is convicted or pleads guilty to aggravated murder, murder, voluntary manslaughter, kidnapping, or abduction as a second-degree felony. This definition also includes "[a]ny attempt to commit, conspiracy to commit, or complicity in committing" any of the offenses previously mentioned. R.C. 2903.41(A)(1)(b). The second definition for violent offender, which is set forth in R.C. 2903.41(A)(2), reads:

A person who on the effective date of this section has been convicted of or pleaded guilty to an offense listed in division (A)(1) of this section and is confined in a jail, workhouse, state correctional institution, or other institution,

serving a prison term, term of imprisonment, or other term of confinement for the offense.

Turning to R.C. 2903.42, it is presumed that all violent offenders must enroll in the violent offender database (“VOD”) regarding the offense that caused the offender to be subject to Sierah’s Law. R.C. 2903.42(A)(1). All violent offenders “shall have all violent offender database duties with respect to that offense for ten years after the offender initially enrolls in the database.” *Id.* The presumption is rebuttable. *Id.* Every violent offender must be informed that the presumption is rebuttable and that the offender can file a motion to attempt to rebut the presumption by establishing that the offender was not the principal offender. *Id.* R.C. 2903.42(A)(2-4) sets forth procedures for violent offenders seeking to rebut the enrollment presumption.

If the offender is classified as a violent offender under R.C. 2903.41(A)(1), then the court that sentenced the offender must tell the offender before sentencing “of the presumption, the right, and the procedure, criteria, and possible outcome.” However, if the offender is classified under R.C. 2903.41(A)(2), then:

the official in charge of the jail, workhouse, state correctional institution, or other institution in which the offender is serving a prison term, term of imprisonment, or other term of confinement for the offense, or the official’s designee, shall inform the offender in writing, a reasonable period of time before the offender is released from the confinement, of the presumption, the right, and the procedure, criteria, and possible outcome.

Regarding enrollment in the VOD, each violent offender is required to enroll personally with the sheriff of the county in which the violent offender resides. R.C. 2903.43(A). If the sentencing court does not sentence the violent offender to a prison term, term of imprisonment, or other term of confinement, then the violent offender must enroll within ten days after the sentencing hearing. R.C. 2903.43(A)(1). If the violent offender is sentenced to a prison term,

term of imprisonment, or other term of confinement, then the violent offender must enroll within ten days from being released from incarceration. R.C. 2903.43(A)(2).

Whenever the violent offender enrolls and re-enrolls, he must provide the following: 1) full name and any aliases; 2) address; 3) social security number; 4) driver's license number, commercial driver's license number, or state identification number; 5) crime of conviction; 6) employer and/or school attended; 7) license plate numbers, vehicle identification numbers, and descriptions of the offender's vehicles; and 8) description of offender's scars, tattoos, or other distinguishing marks. R.C. 2903.43(C)(2)(a-i). Each violent offender must re-enroll annually with the sheriff of the county in which the violent offender resides for the entirety of the ten-year enrollment period. R.C. 2903.43(D)(1). But the prosecutor may file a motion with the trial court to extend the enrollment period, and, after a hearing, the enrollment period may be extended indefinitely upon showing that the offender has violated a term or condition of a sanction imposed upon the offender or that the offender has committed a new felony or misdemeanor of violence. R.C. 2903.43(D)(2). However, if an offender's enrollment period has been extended under R.C. 2903.43(D)(2), then the offender may file a motion with the trial court to terminate the extended enrollment period. R.C. 2903.44(A). R.C. 2903.44(B) & (C) set forth procedures and the necessary information regarding such motions. Failure to enroll, re-enroll, or give notice of a change of address is a fifth-degree felony. R.C. 2903.43(I)(1).

In addition to the enrollment requirements, sheriffs must forward the VOD information to BCII. R.C. 2903.43(F)(1). BCII must establish and maintain the VOD and must make the VOD available to federal, state, and local law enforcement officers. R.C. 2903.43(F)(2). According to R.C. 2903.43(F)(2), the VOD is not a public record. While the public cannot access the VOD, "any statements, information, photographs, fingerprints, or materials that are provided . . . by a

violent offender . . . and that are in the possession of a county sheriff are public records open to public inspection under section 149.43 of the Revised Code.” R.C. 2903.43(F)(3)(a). But a violent offender’s social security number, driver’s license number, commercial driver’s license number, and/or state identification card number are not public records and “shall not be open to public inspection[.]” R.C. 2903.43(F)(3)(b). Moreover, an offender may file a motion with the trial court in which the offender resides stating that he fears for his safety if the statements, information, photographs, fingerprints, or materials are open for public inspection; thus, an offender can seek to exempt said items from public disclosure. R.C. 2903.43(F)(3)(c).

Appellant asserts that Sierah’s Law is unconstitutional, claiming that it violates the prohibition regarding retroactive statutes set forth in Section 28, Article II of the Ohio Constitution. According to this Court, it is strongly presumed that statutes enacted by the General Assembly are constitutional. *State v. Cook*, 83 Ohio St.3d 404, 409, 700 N.E.2d 570 (1998). A statute’s presumption of constitutionality cannot be surmounted unless there is a clear conflict between the statute and a particular provision—or provisions—of the Constitution. *Id.*

In order to determine whether a statute’s retroactive application violates Section 28, Article II of the Ohio Constitution, this Court has developed a two-step analysis. *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, ¶27. First, it must be determined whether the legislature intended for the statute to be applied retroactively. *Id.* If the General Assembly did not intend for retroactive application, then the statute may not be applied retroactively. *Id.*, citing R.C. 1.48. But, if the legislature intended for the statute to be applied retroactively, then it must be ascertained whether the statute is remedial, in which case retroactive application is permitted, or whether it is substantive, in which case retroactive application is forbidden. *White*, 2012-Ohio-2583, at ¶27.

According to the pertinent part of R.C. 2903.41(A)(2), a violent offender is “[a] person who on the effective date of this section has been convicted of or pleaded guilty to an offense listed in division (A)(1) of this section[.]” (Emphasis added) Given the clear language of this statute, the General Assembly expressly intended for Sierah’s Law to be applied retroactively.

Since Sierah’s Law applies retroactively, the question then becomes is it substantive or remedial in nature. *See Cook*, 83 Ohio St.3d at 411. According to this Court, a statute that is purely remedial does not offend Section 28, Article II of the Ohio Constitution, even if it is applied retroactively. *Id.* If a statute impairs a vested right; affects an accrued substantive right; imposes a new or additional burden, duty, obligation, or liability regarding a past transaction, then the statute would be substantive. *Id.* On the other hand, if a statute only affects the remedy provided, then it is remedial. *Id.* A remedial statute merely substitutes a new or more appropriate remedy for the enforcement of an existing right. *Id.*

In Appellant’s brief, he argues that Sierah’s Law impairs or affects a “substantive right.” (Appellant’s Brief 12, 15) Appellant fails to identify the “substantive right” burdened or impaired by Sierah’s Law. Nor does Appellant argue that Sierah’s Law created some new vested right. Appellant has failed to identify a “substantive right” impaired by Sierah’s Law and has failed to identify a vested right created by Sierah’s Law. So, does Sierah’s Law impose a new or additional burden, duty, obligation, or liability regarding a past transaction? According to this Court, if a statute does not create a vested right, then it will not burden or disable a past transaction unless that past transaction created at least a reasonable expectation of finality. *White*, 2012-Ohio-2538, at ¶42, citing *State ex rel Matz v. Brown*, 37 Ohio St.3d 279, 281, 525 N.E.2d 805 (1988). According to this Court:

[I]n *Matz*, we held that “the commission of a felony” is not a transaction that creates a reasonable expectation of finality. “Except with regard to constitutional

protections against ex post facto laws * * *, felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.”

White, 2012-Ohio-2583, at ¶43, citing *Matz*, 37 Ohio St.3d at 281-282. Because the commission of a felony is not a transaction that creates a reasonable expectation of finality, Appellant—when he committed murder—could not have had a reasonable expectation of finality regarding the duties of any postconviction regulations that may or may not have attached following his conviction for murder. So the registration duties and obligations of Sierah’s Law do not infringe upon a substantive right and those duties and obligations are not new duties in the constitutional sense. See *Cook*, 83 Ohio St.3d at 414 (The dissemination provisions of Megan’s Law did not impinge of any reasonable expectation of finality the defendant may have had regarding his conviction for gross sexual imposition.), and *White*, 2012-Ohio-2583, at ¶44 (White did not have a reasonable expectation of finality with respect to the holding in *Penix* on the date White had committed murder, so retroactive application of R.C. 2929.06(B) did not create a new burden in the constitutional sense.). Therefore, Sierah’s Law is remedial in nature—not substantive—and does not violate the prohibition against retroactive laws found in Section 28, Article II of the Ohio Constitution.

That, however, is not the end of the analysis. In *Cook*, 83 Ohio St.3d 404, this Court held that the sex offender registry system known as “Megan’s Law” was remedial and did not violate the prohibition against retroactive laws set forth in Section 28, Article II of the Ohio Constitution and, in coming to this conclusion, this Court relied on the holding in *Matz* that, except regarding constitutional protections against ex post facto laws, felons have no reasonable right to expect that their conduct would never thereafter be made the subject of legislation. *Cook*, 83 Ohio St.3d at paragraph 1 of the syllabus & 412. Later, when Megan’s Law was amended to make it more stringent, this Court held that classification under Megan’s Law was a collateral consequence of

an offender’s criminal act rather than a form of punishment because, except regarding constitutional protections against ex post facto laws, felons have no reasonable right to expect that their conduct would never thereafter be made the subject of legislation. *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, ¶34. Thus, this Court held again that Megan’s Law was remedial and did not violate the prohibition against retroactive laws. *Id.* ¶40.

However, after Megan’s Law was repealed and replaced with the sex offender registry system known as “Adam Walsh,” this Court held that Adam Walsh was substantive and, thus, had violated the prohibition against retroactive law. *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 952 N.E.2d 1108, at syllabus. But, in reaching this conclusion, this Court made no reference to this Court’s prior holding that the commission of a felony is not a transaction that creates a reasonable expectation of finality. Thus, the application of this holding is not the end of the analysis. But, as noted above, after *Williams*, this Court held again in *White* that the commission of a felony is not a transaction that creates a reasonable expectation of finality. *White*, 2012-Ohio-2583, at ¶44.

So, in regards to offender registry systems like Megan’s Law, Adam Walsh, and Sierah’s Law, we know with certainty that Megan’s Law was—and is—remedial and, thus, does not violate the prohibition against retroactive laws. And we know with certainty that Adam Walsh was—and is—substantive and, thus, does violate the prohibition against retroactive laws. So, is Sierah’s Law more like Adam Walsh? Or is Sierah’s Law more like Megan’s Law?

Megan’s Law Remedial	Sierah’s Law	Adam Walsh Substantive
<u>Classification</u> Sexually Oriented Offender: Offender convicted of a sexually oriented offense. Habitual Sex Offender:	<u>Classification</u> All Offenders: If Offender convicted of aggravated murder, murder, voluntary manslaughter, kidnapping, or abduction as a second-degree	<u>Classification</u> Tier I Offender: Offender convicted of one of the multiple offenses set forth in R.C. 2950.01(E)(1)-(4) (i.e., sexual imposition,

<p>Offender convicted of sexually oriented offense with prior conviction for one or more sexually oriented offenses.</p> <p>Sexual Predator: Offender convicted of sexually oriented offense and trial court determines offender likely to commit a sexually oriented offense in the future or offender convicted of sexual predator specification.</p> <p>Former R.C. 2950.01(B), (D), (E).</p>	<p>felony, then rebuttable presumption that Offender must enroll in VOD.</p> <p>An Offender has an opportunity to rebut the presumption by establishing that he was not the principal offender.</p> <p>R.C. 2903.41(A) & R.C. 2903.42(A).</p>	<p>importuning, public indecency).</p> <p>Tier II Offender: Offender convicted of one of the multiple offenses set forth in R.C. 2950.01(F)(1)-(5) (i.e., gross sexual imposition, compelling prostitution, trafficking in persons).</p> <p>Tier III Offender: Offender convicted of one of the multiple offenses set forth in R.C. 2950.01(G)(1)-(7) (i.e., rape, sexual battery, aggravated murder with sexual motivation).</p> <p>R.C. 2950.01(E), (F), (G).</p>
<p><u>Registration Requirements</u> All Offenders must register with sheriff of county: (1) where offender resides; (2) where offender works; (3) where offender attends school.</p> <p>All Offender must provide: (1) name; (2) address; (3) photograph; (4) employer's name & address; (5) school's name & address</p> <p>Sexual Predators must provide license plate numbers of each vehicle</p> <p>Former R.C. 2950.04(C).</p>	<p><u>Enrollment Requirements</u> All Offenders must register with sheriff of county where offender resides.</p> <p>All Offenders must provide: (1) name & aliases; (2) address; (3) social security number; (4) driver's license number, commercial driver's license number, or state identification number; (5) crime of conviction; (6) employer and/or school attended; (7) license plate numbers, vehicle identification numbers, & descriptions of the offender's vehicles; (8) description of offender's scars, tattoos, or other distinguishing marks.</p> <p>R.C. 2903.43(A) & (C).</p>	<p><u>Registration Requirements</u> All Offenders must register with sheriff of county: (1) where offender resides; (2) where offender works; (3) where offender attends school.</p> <p>All Offenders must provide: (1) name & aliases; (2) address; (3) photograph; (4) social security number; (5) date of birth; (6) employer's name & address; (7) school's name & address; (8) license plate numbers of all vehicles owned and operated; (9) description of where each vehicle stored; (10) photograph of each vehicle; (11) DNA specimen; (12) description of professional & occupational licenses; (13) email addresses & telephone numbers.</p> <p>R.C. 2950.04(C).</p>

<p><u>Verification & Duration</u> Sexual Oriented Offender: verify annually for 10 years.</p> <p>Habitual Sex Offender: verify annually for 20 years.</p> <p>Sexual Predator: verify every 90 days for life.</p> <p>All Offenders must give notice of change of address; change of employer's address; and change of school's address.</p> <p>Former R.C. 2950.06(B) & Former R.C. 2950.07(B).</p>	<p><u>Verification & Duration</u> All Offenders: re-enroll annually for 10 years.</p> <p>All Offenders must give notice of change of address; change of employer's address; and change of school's address.</p> <p>But upon prosecutor's motion and a hearing before the trial court, the duration can be increased indefinitely.</p> <p>R.C. 2903.43(D)</p> <p>If an Offender's enrollment period has been extended under R.C. 2903.43(D), then the Offender may file a motion with the trial court to terminate the extended enrollment period.</p> <p>R.C. 2903.44(A).</p>	<p><u>Verification & Duration</u> Tier I Offender: verify annually for 15 years.</p> <p>Tier II Offender: verify every 180 days for 25 years.</p> <p>Tier III Offender: verify every 90 days for life.</p> <p>All Offenders must give notice of change of address; change of employer's address; and change of school's address.</p> <p>R.C. 2950.06(B) & R.C. 2950.07(B).</p>
<p><u>Database</u> BCII: establish & maintain internet database for public.</p> <p>Any statement, information, photographs, and fingerprints are public records and included in BCII's public database.</p> <p>Former R.C. 2950.13(A).</p>	<p><u>Database</u> BCII: establish & maintain internet database (VOD), accessible only by federal, state, & local law enforcement officers.</p> <p>VOD is not a public record.</p> <p>Any statements, information, photographs, fingerprints, or materials provided by Offenders are public records.</p> <p>But Offenders' social security number, driver's license number, commercial driver's license number, and/or state identification card number are not public records and not open to public inspection.</p>	<p><u>Database</u> BCII: establish & maintain internet database for public.</p> <p>Any statement, information, photographs, and fingerprints are public records and included in BCII's public database.</p> <p>R.C. 2950.13(A).</p>

	<p>Offender can file a motion with the trial court stating that he fears for his safety if the statements, information, photographs, fingerprints, or materials are open for public inspection, seeking to exempt said items from public disclosure.</p> <p>R.C. 2903.43(F)</p>	
<p><u>Community Notification</u> All Offenders: sheriff must give notice to victim, if victim so requests (certain offenses are exempt).</p> <p>Habitual Sex Offender & Sexual Predator: sheriff must give notice to particular community members (certain neighbors of offender and law enforcement).</p> <p>Former R.C. 2950.10 & Former R.C. 2950.11.</p>	<p><u>Community Notification</u> No community notification.</p>	<p><u>Community Notification</u> All Offenders: sheriff must give notice to victim, if victim so requests.</p> <p>All Offenders: sheriff must give notice to particular community members (certain neighbors of offender, law enforcement, public children services agency, board of education).</p> <p>R.C. 2950.10 & R.C. 2950.11.</p>
<p><u>Residential Restrictions</u> All Offenders: prohibited from living within 1000 feet of school.</p> <p>Former R.C. 2950.031.</p>	<p><u>Residential Restrictions</u> No residential restrictions.</p>	<p><u>Residential Restrictions</u> All Offenders: prohibited from living within 1000 feet of school, preschool, or child day-care.</p> <p>R.C. 2950.034.</p>
<p><u>Violation of Requirements</u> Based on the predicate sexually oriented offense, levels of violation range from misdemeanor to 3rd degree felony.</p> <p>Former R.C. 2950.99.</p>	<p><u>Violation of Requirements</u> All violations of requirements are a 5th degree felony.</p> <p>R.C. 2903.43(I).</p>	<p><u>Violation of Requirements</u> Based on the predicate sexually oriented offense, levels of violation range from 4th degree felony to 1st degree felony.</p> <p>R.C. 2950.99.</p>

Regarding classification, as the above table reveals, the provisions of Sierah's Law are substantively different from Adam Walsh's classification provisions and are also substantively different from the classification provisions of Megan's Law. Both Adam Walsh and Megan's Law include automatic classifications based upon the offense committed by the offender. Under Adam Walsh, no sex offender has the opportunity to challenge his classification. While under Megan's Law, neither a sexually oriented offender nor a habitual sex offender has the opportunity to challenge his classification. Under Megan's Law, a trial court must hold a hearing and determine whether an offender should be classified as a sexual predator. But, even if the offender successfully defends himself against the sexual-predator classification, the offender would still be automatically classified as a sexually oriented offender at the very least. However, unlike the situations faced by offenders subject to either Adam Walsh or Megan's Law, under Sierah's Law, a convicted felon is only subject to a rebuttable presumption that he would be required to enroll in the VOD. So there is no automatic classification under Sierah's Law because a convicted felon has the opportunity to rebut the presumption. And, if the convicted felon rebuts the presumption, then he would be exempt from enrollment. When compared, the classification scheme in Sierah's Law is less onerous than the classification scheme found in Adam Walsh. But, what is more, the classification scheme in Sierah's Law is less onerous than the classification scheme set forth in Megan's Law, which is remedial.

As for the registration duties, as the above table reveals, the registration requirements of Sierah's Law are substantively different from Adam Walsh's registration requirements and are substantively different from the registration requirements of Megan's Law. Offenders subject to Adam Walsh could be required to register in multiple counties. Like Adam Walsh, offenders subject to Megan's Law could also be required to register in multiple counties. Sexual predators

under Megan's Law and Tier III offenders under Adam Walsh are required to verify their information every 90 days for life. A sex offender subject to either Adam Walsh or Megan's Law must report changes to his residential address, his employer's address, and his school's address. In addition, sex offenders subject to Adam Walsh are prohibited from residing within 1,000 feet of a school, preschool, or child day-care while sex offenders subject to Megan's Law are prohibited from residing within 1,000 feet of a school. Moreover, both Adam Walsh and Megan's Law contain community notification provisions; Adam Walsh's community notification provisions are more stringent than those of Megan's Law. Both Adam Walsh and Megan's Law require the Attorney General, through BCII, to establish and maintain an internet database regarding sex offenders for the public to access, thus, actively and publicly disseminating a sex offender's information. An offender subject to Sierah's Law is only required to re-enroll once every year for ten years and only required to register in the county of his residence. But, like a sex offender subject to either Adam Walsh or Megan's Law, a violent offender is required to report changes to his residential address, his employer's address, and his school's address. Unlike sex offenders subject to Adam Walsh and Megan's Law, violent offenders under Sierah's Law are not subject to any residential restrictions. While certain pieces of information that violent offenders must provide would be matters of public record, Sierah's Law does not contain any community notification provisions nor does Sierah's Law provide a publicly available internet database. The VOD is only accessible by law enforcement. And it is true that Sierah's Law does not prohibit sheriffs—or any other person—from publicly disseminating information designated as matters of public record. However, the lack of such a prohibition is not the equivalent of the required public dissemination of information regarding sex offenders under Adam Walsh and under Megan's Law, which is remedial. When compared, a violent offender's

requirements under Sierah's Law are far less onerous than those of an offender subject to Adam Walsh. More than that, a violent offender's requirements under Sierah's Law are far less onerous than those of an offender subject to Megan's Law, which is remedial.

Regarding violations of the enrollment requirements, as the above table reveals, Sierah's Law provides penalties for those violent offenders who recklessly fail to enroll, re-enroll, or give notice to the sheriff of a change of address. A failure to enroll, re-enroll, or give notice of a change of address constitutes a fifth-degree felony. Under Adam Walsh, a failure to comply with the registration requirements is predicated on the sexually oriented offense for which the sex offender was convicted, and a failure to register would constitute a felony of the same degree as the predicate sexually oriented offense. R.C. 2950.99. So, if the predicate sexually oriented offense was first-degree felony, then a failure to register would constitute a first-degree felony. Turning to Megan's Law, a failure to register is also based on the predicate sexually oriented offense. If the predicate offense was a first-degree felony, a second-degree felony, or a third degree felony, then the failure to register would constitute a third-degree felony. Former R.C. 2950.99. If the predicate offense was a fourth-degree felony, a fifth-degree felony, or a misdemeanor, then the failure to register would constitute an offense of the same degree—either felony or misdemeanor—as the predicate offense. Former R.C. 2950.99. As can be seen, the penalties under Sierah's Law are substantively different from either Adam Walsh or Megan's Law. The penalties under Adam Walsh can, at best, be the same as the penalties found in Sierah's Law. But, at worst, the penalties under Adam Walsh can be substantially more onerous. The penalties under Megan's Law can, at best, be less onerous than the penalties found in Sierah's Law. However, at worst, Megan's Law, which is remedial, can be more onerous.

Sierah's Law is substantively different and less onerous than Adam Walsh, which this Court has previously found to be unconstitutional. This suggests that Sierah's Law is remedial rather than substantive. Thus, it is not so punitive as to impose a new burden in the constitutional sense. But more importantly, Sierah's Law is substantively different and less onerous than Megan's Law, which this Court has previously found to be constitutional. Since Sierah's Law is less onerous than Megan's Law, Sierah's Law must be remedial, not substantive. This means that Sierah's Law cannot be so punitive as to impair a vested right, or affect an accrued substantive right, or impose a new burden to a past transaction in the constitutional sense. As such, Sierah's Law does not violate the prohibition against retroactive laws found in Section 28, Article II of the Ohio Constitution.

At this point, the State pauses to briefly address the issues of stigmatization and ostracism. In *Cook*, this Court acknowledged that sex offenders may experience ostracism and harassment due to the dissemination of information under the community notification provisions of Megan's Law. *Cook*, 83 Ohio St.3d at 413. But Sierah's Law does not contain any community notification provisions nor is the VOD accessible by the public. Moreover, according to the United States Supreme Court:

[O]ur criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused. The publicity may cause adverse consequences for the convicted defendant, running from mild personal embarrassment to social ostracism.

Smith v. Doe, 538 U.S. 84, 99, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003). Since Sierah's Law does not require public dissemination of a violent offender's information and given the transparent nature of our criminal justice system, if a violent offender does experience some

stigmatization or ostracism, it would be the direct consequence of the violent offender's past criminal action not of Sierah's Law. *See Cook*, 83 Ohio St.3d at 413.

The State now turns to the decision of the Fifth District Court of Appeals in *State v. Jarvis*, 5th Dist. Muskingum No. CT 2019-0029, 2020-Ohio-1127. As this Court knows, the Fifth District held that Sierah's Law was unconstitutional due to violating the prohibition against retroactive laws set forth in Section 28, Article II of the Ohio Constitution. *Id.* ¶36.

The State will forego summarizing the Fifth District's opinion in *Jarvis* and address the heart of the matter: How did the Fifth District reach the conclusion that Sierah's Law violated the prohibition against retroactive laws? After the Fifth District attempted to both distinguish and reconcile *Matz*, 37 Ohio St.3d 279, and *White*, 132 Ohio St.3d 344, 2012-Ohio-2583, with *Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, the Fifth District briefly summarized Sierah's Law. *Jarvis*, 2020-Ohio-1127, at ¶¶34-35. The Fifth District did not compare Sierah's Law to Adam Walsh, which is substantive and does violate Section 28, Article II of the Ohio Constitution. Nor did the Fifth District compare Sierah's Law to Megan's Law, which is remedial and does not violate Section 28, Article II of the Ohio Constitution.

After briefly summarizing Sierah's Law, the Fifth District proclaimed in paragraph 36 that it violates Section 28, Article II of the Ohio Constitution. *Id.* ¶36. And the Fifth District proclaimed in paragraph 37 that the VOD imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction, and the Fifth District reiterated its earlier proclamation that Sierah's Law violates the prohibition against retroactive laws set forth in Section 28, Article II of the Ohio Constitution. *Id.* ¶37. The Fifth District did not engage in any legal analysis to reach these conclusions, nor did the Fifth District try to explain these conclusions. So, according to the Fifth District, Sierah's Law violates Section 28, Article II of the Ohio Constitution because it

imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction. And Sierah's Law imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction because it violates Section 28, Article II of the Ohio Constitution. The Fifth District reached its decision through tautology—not legal analysis—meaning the *Jarvis* decision cannot withstand this Court's scrutiny.

CONCLUSION

The commission of a felony is not a transaction that creates a reasonable expectation of finality. So Appellant—when he committed murder—could not have had a reasonable expectation of finality regarding the duties of any postconviction regulations that may or may not have attached following his conviction for murder. Thus, the registration duties and obligations of Sierah's Law do not infringe upon a substantive right and those duties and obligations are not new duties in the constitutional sense. As such, Sierah's Law does not violate the prohibition against retroactive laws set forth in Section 28, Article II of the Ohio Constitution.

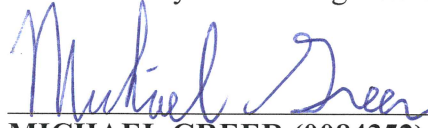
What is more, when Sierah's Law is compared to Adam Walsh—which was held to be substantive and held to have violated the prohibition against retroactive laws—Sierah's Law is fundamentally less onerous, suggesting that Sierah's Law is remedial as opposed to substantive. Additionally, when Sierah's Law is compared to Megan's Law—which was held to be remedial and was held to not have violated the prohibition against retroactive laws—Sierah's Law is fundamentally less onerous than Megan's Law, meaning that Sierah's Law must be remedial as well. Since Sierah's Law is remedial, it does not violate the prohibition against retroactive laws set forth in Section 28, Article II of the Ohio Constitution.

For the foregoing reasons the State respectfully requests this Court to hold that Sierah's Law is constitutional and requests this Court to affirm the Twelfth District's decision in *State v.*

Hubbard, 12th Dist. Butler No. CA2019-05-086, 2020-Ohio-856, and reverse the Fifth District's decision in *State v. Jarvis*, 5th Dist. Muskingum No. CT 2019-0029, 2020-Ohio-1127.

Respectfully submitted,

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CERTIFICATE OF SERVICE

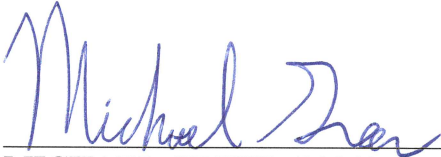
This is to certify that a copy of the foregoing Brief of Plaintiff-Appellee was sent by email and/or ordinary mail to Defendant-Appellant's attorney:

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on this 27th day of October, 2020.



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