**IN THE COURT OF COMMON PLEAS**
**CUYAHOGA COUNTY, OHIO**

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| **THE STATE OF OHIO** | ) | **CASE NO. CR 11 557417** |
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| **Plaintiff** | ) | **JUDGE JOHN P. O'DONNELL** |
| | ) | |
| **vs.** | ) | |
| | ) | |
| **RAYMUNDO VAQUERA** | ) | **JOURNAL ENTRY** |
| | ) | |
| **Defendant** | ) | |

On December 21, 2011, defendant Raymondo Vaquera was indicted on one count of failure to provide notice of change of address pursuant to section 2950.05(F)(1) of the Ohio Revised Code. On June 12, 2012, the defendant appeared in court with his counsel, Valerie Arbie McClelland. Prosecutor Nathaniel Tosi and the court reporter Maureen Povinelli were also present. After being fully advised of all of his constitutional rights, the defendant withdrew the plea of not guilty he had made at the arraignment and pled no contest. The prosecutor then summarized the evidence supporting the charge in the indictment and the court found the defendant guilty.

Before entering his changed plea, the defendant was advised by the court that the felony level of the offense was uncertain. The state believes that the offense is a non-probationable third-degree felony with a mandatory minimum prison term of three years. Defense counsel argues that the crime is a probationable fifth-degree felony with a possible prison term of six to twelve months. These divergent possibilities were discussed with the defendant during the plea colloquy, but the court told the defendant to consider that the offense is, in fact, a third-degree felony with mandatory prison time when deciding whether to plead no contest. In that fashion,

the defendant was made aware of "the maximum penalty involved" as required by Rule 11(C)(2)(a) of the Ohio Rules of Criminal Procedure, and the court believes that the defendant made his no contest plea knowingly, despite the uncertainty of the level of the offense.

Since the defendant has been found guilty and will be sentenced on June 26, the question of the correct felony level is now justiciable and is decided by this entry. To assist in making that determination the court has considered the "motion to dismiss and/or determine level of offense" filed by the defendant on May 21, and the plaintiff's brief in opposition filed May 24.

On November 30, 2001[1] the defendant was sentenced in case number 411570 to two years in prison for gross sexual imposition, a third-degree felony. At the time of sentencing he was declared a sexually oriented offender under Chapter 2950 of the Ohio Revised Code, the sexual offender registration and notification law. As a sexually oriented offender, he was required for ten years, beginning at the conclusion of his prison term, to annually register his address with the sheriff of his county of residence and to notify the sheriff upon changing his address. On November 3, 2011, he failed to notify the sheriff of a change in address, thereby committing the offense in this case.

When the defendant's registration and notification requirements began in 2003, the version of Chapter 2950 in effect was known as Megan's Law. Under Megan's Law, Vaquera's offense of failure to notify of a change in address would be a fifth-degree felony. See *State v. Gingell*, 128 Ohio St. 3d 444, 2011-Ohio-1481, ¶1. But since then, most recently by H.B. 86, effective September 30, 2011, the penalty provision of the sex offender registration and notification law has been amended and the defendant's crime here (which includes the element of a prior similar offense) is now classed as a third-degree felony with a mandatory

[1]

minimum prison term of three years. R.C. 2950.99(A)(1)(b)(ii); 2950.99(A)(2)(b). But before then, effective 2008, Megan's Law was repealed by the enactment of S.B. 10, known as the Adam Walsh Act.

The basic effect of the AWA was to replace the judicial determination of a sex offender's status as a sexually oriented offender, habitual sexual offender or sexual predator with a statutory classification of sex offenders as Tier I, Tier II or Tier III offenders based only on the identity of their offense. But in addition to changing how sex offenders who committed crimes after its effective date would be classified, the AWA required that the attorney general re-classify according to the new tier system sex offenders who were convicted and sentenced before the AWA's effective date. The AWA was then challenged as an unconstitutional violation of the separation of powers among the branches of government.

In *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, the re-classification scheme was invalidated as unconstitutional by the Ohio Supreme Court. In particular, the court held that R.C. §§2950.031 and 2950.032 (for re-classification by the attorney general of previously adjudicated offenders) were unconstitutional and those provisions were severed, with the remainder of the statute kept intact. After *Bodyke*, any re-classification of Vaquera under the AWA[2] would have been void. But that left the question of whether a defendant adjudicated as a sexually oriented offender before the AWA was still subject to registration and notification requirements after *Bodyke* and, if so, which requirements. The court answered that question in *Bodyke* itself, declaring that "the classifications and community notification and registration orders imposed previously by judges are reinstated." *Id*., ¶66. Hence, as of the decision in *Bodyke*, Vaquera remained a sexually oriented offender obligated under Megan's Law to

[2] There is no evidence here that Vaquera was ever re-classified and the parties stipulate for purpose of deciding the

register annually and to notify the sheriff and re-register whenever he changed his address. But *Bodyke* did not specifically address the question of which sentencing law would apply to Vaquera, and others like him, for a post-AWA violation of his pre-AWA registration requirement.

A partial answer to that question came in *State v. Williams*, 129 Ohio St. 3d, 2011-Ohio-3744, where the Ohio Supreme Court held that the application of S.B. 10 (the AWA) to defendants who committed their offenses before its enactment was unconstitutional by violating the prohibition on retroactive laws. The defendant in *Williams* committed his sex offense while Megan's Law was in effect, but was found guilty and sentenced after the effective date of the AWA. He moved to be sentenced under Megan's Law. The trial court denied that motion and the court of appeals affirmed the trial court's decision. Consistent with its holding that the application of the AWA to Williams violated Ohio's constitutional prohibition against retroactive laws, the Supreme Court remanded Williams's case "for resentencing under the law in effect at the time Williams committed the offense." *Id.*, ¶23. So, as of the decision in *Williams* it was clear that the application to Vaquera of any part of S.B. 10 would be unconstitutional. But because Vaquera's situation is not directly analogous to Williams's – Williams was being sentenced after the AWA for his pre-S.B. 10 sex offense while Vaquera's crime, violating his Megan's Law registration requirements, was committed post-S.B. 10 – and because the enhanced penalty provision of R.C. 2950.99 was part of S.B. 97, not S.B. 10,[3] the holding in *Williams* does not provide the final answer to the question at hand.

That answer could have been provided in *Gingell*, supra. In that case, the defendant was sentenced, pre-*Bodyke*, for a violation of his Megan's Law registration requirement that he committed after the effective date of S.B. 10. He argued that he should be sentenced under the

[3] See, for example, *State v. Nelson*, 5th Dist. No. 2011 CA 00219, 2012-Ohio-2400, 2012 WL 1964911, ¶16.

version of R.C. 2950.99 in effect at the time of his original sex offense, i.e. Megan's Law. The trial court and the court of appeals disagreed, finding that application of the S.B. 10 version of R.C. 2950.99 was not retroactive because it was the version of the penalty statute in existence at the time of Gingell's crime. The Ohio Supreme Court accepted an appeal based primarily on the question of the retroactive application of R.C. 2950.99. But *Bodyke* was decided by the time of the decision in *Gingell* and the court simply vacated Gingell's conviction since he had been prosecuted contrary to *Bodyke* as a re-classified tier offender. Hence, the court never addressed the issue of impermissible retroactivity of the sentencing statute at R.C. 2950.99.

Without an unambiguous statement on the subject by the Ohio Supreme Court, this court is left to consider applicable authority from the courts of appeals. The defendant argues that the "Eighth District Court of Appeals has repeatedly held that the enhanced penalty provisions [of current R.C. 2950.99] cannot be applied to Megan's Law offenders."[4] In particular, he cites to the cases of *State v. Page*, 8th Dist. No. 94369, 2011-Ohio-83, 2011 WL 208290, and *State v. Caldero*, 8th Dist. No. 96719, 2012-Ohio-11, 2012 WL 20002.

*Page* involved a defendant convicted of importuning who was labeled as a sexual predator under Megan's Law in 2005. In 2006 he was convicted for the first time of violating the registration requirements imposed under Megan's Law. He was then charged with a new registration violation that occurred in 2009. The indictment also alleged a prior similar conviction that enhanced the penalty under R.C. 2950.99(A)(2)(b). After a no contest plea he was found guilty and sentenced to three years in prison under the enhanced penalty statute. On appeal, the Eighth District vacated the defendant's conviction on the basis that he had been convicted, contrary to law, for violating a reporting requirement under the AWA. That is not the case here, since the parties agree that Vaquera was charged with violating his Megan's Law

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address notification requirement, not the AWA.[5] However, in remanding Page's case, the Eighth District held that the "*defendant is subject to the* reporting requirements, and *penalties* for violating these requirements, of sexual predators *pursuant to Megan's Law*." *Id.*, ¶12. (Emphasis in italics added.)

*Caldero* presented the case of a defendant adjudicated in 2003 under Megan's Law as a sexually oriented offender who was then prosecuted in 2009 for a reporting violation allegedly committed that year. He pled guilty before *Bodyke*, but filed a motion to withdraw that plea after *Bodyke* was decided. The trial court granted the motion to withdraw the plea and the state appealed. Although the posture of Caldero's appeal was different from Page's, as in *Page* the court of appeals found that Caldero was unlawfully prosecuted under the AWA and affirmed the trial court's ruling. In doing so, the *Caldero* court said:

> For Caldero, under the AWA, failure to verify is a felony of the third degree, whereas, under Megan's Law, in effect at the time of Caldero's original classification, failure to verify was a fifth degree felony. *In State v. Page*, 8th Dist. No. 94369, 2011-Ohio-83, *this court interpreted Bodyke to mean that the AWA provisions, including the enhanced penalty provisions, cannot apply to Megan's Law offenders*. *Id.*, ¶12. (Emphasis in italics added.)

In support of that conclusion the appellate court also cited to its earlier decision in *State v. Grunden*, 8th Dist. No. 95909, 2011-Ohio-3687, WL 3240675. Grunden was another Megan's Law sexually oriented offender unlawfully charged with a registration violation under the AWA. His conviction was vacated based on *Bodyke*. In *dicta*, the Eighth District noted:

> While it is true that defendant had to provide a change of address under both Megan's Law and AWA, the fact remains that a violation of that duty can carry a significantly harsher penalty under the AWA than it would under Megan's Law. Compare R.C. 2950.99 (AWA) with former R.C. 2950.99 (Megan's Law). This is significant and can mean the difference between being indicted with a first degree

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[5] motion to dismiss has preserved for appeal his argument that the indictment charged him under the AWA and should therefore be dismissed.

felony as opposed to one of a lesser felony, such as a third degree felony. *Grunden,* supra, ¶9.

Even though the application to Megan's Law registration violators of the newer, and more severe, penalty provisions of R.C. 2950.99 was not the primary issue on appeal in any of these three cases, all of them, especially *Page*, make it clear that the Eighth District Court of Appeals would conclude here that Vaquera cannot be sentenced under the post-Megan's Law version of R.C. 2950.99. This is especially true given the dissent in *Page*. That dissent finds fault with the *Page* majority for deciding that a Megan's Law registration violator must be subject only to the Megan's Law penalties without having analyzed whether application of the enhanced penalty statute would be unconstitutionally *ex post facto*. Citing the analysis of the First District Court of Appeals in *State v. Clark*, 1st Dist. No. C-910541, 1992 WL 188535 (Aug. 5, 1992), the dissent pointed out that a "sentencing enhancement" is not unconstitutional because it is not retrospective by changing the legal consequence of an act committed before its effective date. Instead, it "simply mandates an enhanced penalty for acts committed after the effective date." *Page,* supra, ¶16.

This court agrees that the Eighth District's holding in *Page* that a defendant in Vaquera's position is subject only to the penalties under Megan's Law, i.e. those in effect at the time he was labeled a sexually oriented offender, was unsupported by any meaningful analysis. Indeed, comparing *Page* to *State v. Poling*, 5th Dist. No. 2009-CA-00264, 2011-Ohio-3201, 2011 WL 2557030, reveals *Page*'s deficiencies. The defendant in *Poling* was a Megan's Law sexually oriented offender who was sentenced for a post-AWA violation of his pre-AWA registration requirements. Poling's assignment of error that the

the enhanced penalty provisions of R.C. 2950.99 violated the constitutional prohibition against

the imposition of *ex post facto* laws was fully considered, and rejected, by the Fifth District. The court's thorough analysis was demonstrated by its opinion, which noted:

> To violate the Ex Post Facto Clause, the law must be retrospective so that it applies to events occurring before its enactment and it must disadvantage the person affected by altering the definition of criminal conduct or increasing the punishment for the crime. (Citations omitted.) The clause prohibits the enactment of any law that criminalizes conduct which was innocent and not punishable at the time it was committed; or that makes the crime more serious than it was when committed; or that inflicts a greater punishment than that prescribed at the time the crime was committed; or that alters the legal rules of evidence either by requiring less or different evidence in order to convict or by eliminating a defense available when the crime was committed. (Citations omitted.)
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> In the case at bar, R.C. 2950.99 as amended in 2008 does not punish any action that was formerly not a crime or increase the penalty for a crime already committed. In 2006 appellant was subject to the reporting requirements as a sexually oriented offender for a period of ten years. R.C. 2950.07(B)(3) (repealed January 1, 2008). The pre-existing ten-year reporting period applicable to appellant had not expired when he was charged and convicted of failing to provide notice of an address change twenty days prior to the change. Appellant had a duty to report a change of address when the statutory amendment to R.C. 2950.99 was enacted. Accordingly, appellant could only be charged with a felony of the first degree if he failed to report an address change after January 1, 2008. *Id*., ¶¶27 and 29.

The Fifth District concluded by quoting from the Ohio Supreme Court's opinion in *State v. Cook*, 83 Ohio St. 3d 404 (1998):

> Even prior to the promulgation of the current version of R.C. Chapter 2950, failure to register was a punishable offense. See former R.C. 2950.99, 130 Ohio Laws 671. Thus, any such punishment flows from a failure to register, a new violation of the statute, not from a past sex offense. In other words, the punishment is not applied retroactively for an act that was committed previously, but for a violation of law committed subsequent to the enactment of the law.

By contrast, the Eighth District's majority opinion in *Page* – not to mention the opinions in *Grunden* and *Caldero* – does not show any such reasoning.

But even assuming the Eighth District is wrong, this court is not free to ignore the

, notwithstanding the 2002 amendment to Rule 4 of the Supreme Court Rules for the Reporting of Opinions that eliminated the distinction between

"controlling" and "persuasive" appellate authority. The Eighth District Court of Appeals is a superior court to all 34 judges of the general division of this county's court of common pleas. If all of those judges disregarded the Eighth District's clear statement of the law on any given issue then the administration of justice – for the prosecution, civil plaintiffs, and criminal and civil defendants – would be so uncertain and unmanageable as to be unjust. Here, the Eighth District has made a clear statement of the law:

> We hold that [a Megan's Law sex offender] is subject to the reporting requirements, and penalties for violating these requirements, of sexual predators pursuant to Megan's Law. *Page,* supra, ¶12.

Therefore, and despite the regrettable lack of a fully reasoned opinion supporting that clear statement of the law, this court finds that the crime Vaquera has admitted is a felony of the fifth degree and, at sentencing, the court will impose a sentence within the statutory range of allowable sentences for a fifth-degree felony.

**IT IS SO ORDERED:**

_____ Date: _____

**SERVICE**

A copy of this Journal Entry was sent by email, this 14th day of June, 2012, to the following:

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_____
Judge John P.