Commonwealth of Kentucky
Supreme Court
No. 2007-SC-000347-CL

COMMONWEALTH OF KENTUCKY — **APPELLANT**

v.

Appeal from Kenton District Court
Hon. Martin J. Sheehan, Judge
Indictment No. 07-M-604

MICHAEL BAKER — **APPELLEE**

Reply Brief for Commonwealth

Submitted by,

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CERTIFICATE OF SERVICE

I certify that the record on appeal has not been checked out from the Clerk of this Court and that a copy of the Brief for Commonwealth has been this 25th day of March, 2008, mailed via U.S. Mail to Honorable Martin J. Sheehan, Judge, Kenton District Court, 500 Justice Center, 230 Madison Avenue, Covington, Kentucky 41011, sent via electronic mail to Hon. Christopher S. Nordloh, Assistant Kenton County Attorney, 28 West Fifth Street, Covington, Kentucky 41011, by regular mail to Hon. Bradley Fox, Fox & Scott, P. L. L. C., 517 Madison Avenue, Covington, Ky.41011, Attorney for Appellee.

Jason B. Moore
Assistant Attorney General

PURPOSE OF THIS REPLY BRIEF

This Reply Brief responds to the Appellee's brief. Any failure to respond to any particular argument should not be taken as a waiver of an issue or argument.

I.

APPELLEE'S ARGUMENT RELIES ALMOST EXCLUSIVELY ON AN UNPUBLISHED DECISION OF A SINGLE UNITED STATES DISTRICT COURT.

In his brief, appellee relies heavily on the decision of the United States District Court for the Norther District of Ohio in the case of Mikaloff v. Walsh, 2007 WL 2572268 (N.D. Ohio September 4, 2007). This is an unpublished slip opinion considering whether Ohio's sex offender residency restriction constituted an *ex post facto* law. In his brief, appellee variously cites this case as being from both the United States Sixth Circuit Court of Appeals (See pages iii, 4, 6, 7, 9, 11, 12, 15, 17, 18, and 19) and the Ohio Supreme Court (See page 7 and 11). It is, in fact, merely the opinion of a single United States District Court judge that was not selected for publication in the Federal Supplement. The state of Ohio took an appeal of the decision to the United States Sixth Circuit Court of Appeals, but the appeal was dismissed on March 6, 2008, on the state's motion.

Although not explicitly stated, it is assumed that the appeal of the decision was dismissed because the Ohio Supreme Court issued an opinion on this matter on February 20, 2008, in Hyle v. Porter, — N.E.2d —, 2008 WL 467895 (Ohio 2008)(copy attached). In Hyle, the Ohio Supreme Court relied upon the Ohio Constitution to hold

that the sex offender residency restriction could not be applied retroactively because the Ohio legislature had not expressly made it retroactive. Id. at 6. Obviously, such a question is not presented in the case at bar.

Appellee's reliance upon Mikaloff, *supra*, is understandable as it represents the only decision, published or non-published, which has agreed with his position in this matter, and it relied upon the decision of the Kenton District Court in the case at bar as support for its decision. The Commonwealth, however, asserts that the line of cases cited in its original brief[1], rendered by appellate courts and courts of last resort, should be more persuasive to and provide better guidance to this Court in considering the merits of this case than the opinion of a single United States District Judge. Mikaloff, and the opinion of the Kenton District Court, represent the exception, not the rule.

II.

THE QUESTION IS NOT WHETHER THE GENERAL ASSEMBLY MADE THE BEST DECISION IN ADDRESSING THE ISSUE.

In his brief, appellee cites a Department of Justice study which purports that sex offenders do not have high rates of recidivism despite the United States Supreme Court's statement to the contrary when it affirmed Alaska's sex offender registration system in Smith v. Doe, 538 U.S. 84, 103, 123 S.Ct. 1140 (2003). Be that as it may, the question is not whether the General Assembly made the best, or the wisest, choice in

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[1] The Commonwealth would also cite the Court to People v. Morgan, 881 N.E.2d 507 (Ill. App.3 Dist. 2007), which became final since the filing of its original brief herein. This decision followed the prior decision of People v. Leroy, 828 N.E.2d 769 (Ill. App. 5 Dist. 2005) in holding that Illinois's sex offender residency restriction did not constitute an *ex post facto* law.

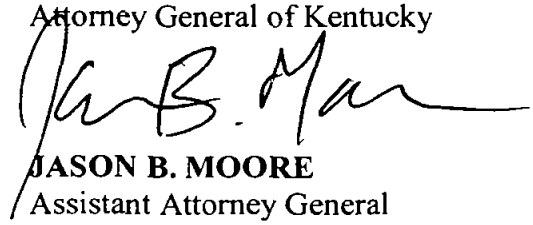
responding to the issue, but rather whether the law is rationally connected to a legitimate non-punitive purpose. Appellee makes no showing that KRS 17. 545 is not so related. Instead, he argues that the statute provides a "false sense of security" and that there are "numerous other ways to address" this issue. App'ee Br. at 17 and 18. Again, that is not the issue presented herein. Rather, the question is whether the statute is rationally connected to a legitimate non-punitive purpose. Clearly, public safety is a legitimate non-punitive purpose, and KRS 17.545 is rationally connected thereto.

Finally, appellee argues that the criminal sanction imposed for the violation of KRS 17.545 makes the statute excessive with respect to its purpose of protecting public safety and argues that "injunctions, evictions and the contempt powers of the courts afford an alternative and less punitive means of effectively promoting public safety and enforcing registration requirements." App'ee. Br. at 19. Appellee ignores the line of cases cited by the Commonwealth in its original brief, all of which imposed criminal sanctions for the violation of a sex offender residency restriction, and were found not to be excessive with respect to the non-punitive purpose of protecting public safety.

WHEREFORE, the Commonwealth respectfully requests that this Court certify that KRS 17.545 is a civil, non-punitive regulatory statute and is not an *ex post facto* law.

Respectfully submitted,

JACK CONWAY
Attorney General of Kentucky



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APPENDIX

HHyle v. Porter
Ohio,2008.

Supreme Court of Ohio.
HYLE, Appellee,
v.
PORTER, Appellant.
No. 2006-2187.

Submitted Oct. 10, 2007.
Decided Feb. 20, 2008.

HYLE, APPELLEE, *v.* PORTER, APPELLANT.

Background: Prosecutor brought action to enjoin convicted sex offender from remaining in his home, in violation of statute prohibiting sexually oriented offenders from living within 1,000 feet of any school premises. The Court of Common Pleas, No. A-0506155, found offender in violation of statute and ordered that he vacated home. Offender appealed. The Hamilton County Court of Appeals, 170 Ohio App.3d 710, 868 N.E.2d 1047, affirmed, and then certified conflict with *Nasal v. Dover*.

Holding: The Supreme Court, Moyer, C.J., held that statute prohibiting sex offenders of residing within 1,000 feet of any school premises did not apply retroactively to offender who committed offenses prior to statute's effective date.

Reversed.

O'Connor, J., concurred in judgment only.

O'Donnell, J., filed dissenting opinion.

[1] Mental Health 257A ⚷433(2)

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons
257AIV(E) Crimes
257Ak433 Constitutional and Statutory Provisions
257Ak433(2) k. Sex Offenders. Most Cited Cases

Statute prohibiting convicted sex offenders of residing within 1,000 feet of any school premises did not apply retroactively to sex offender who committed offenses prior to statute's effective date, absent clear declaration of retroactivity. R.C. § 1.48; R.C. § 2950.031 (2006).

[2] Statutes 361 ⚷278.6

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.4 Prospective Construction
361k278.6 k. Presumptions. Most Cited Cases

Statutes 361 ⚷278.7

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.7 k. Express Retroactive Provisions. Most Cited Cases

A statute is presumed to be prospective in its operation unless expressly made retrospective.

[3] Statutes 361 ⚷278.9

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.9 k. Statutes Affecting Vested Rights. Most Cited Cases

Statutes 361 ⚷278.11

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.11 k. Remedial, Ameliorative, and Curative Statutes. Most Cited Cases

A retroactive statute is unconstitutional if it retroactively impairs vested substantive rights, but not if it is merely remedial in nature.

[4] Statutes 361 ⚷278.7

361 Statutes

361VI Construction and Operation
361VI(D) Retroactivity
361k278.7 k. Express Retroactive Provisions. Most Cited Cases
There is a two-part test to determine whether a statute may be applied retroactively: first, the court asks whether the General Assembly expressly made the statute retroactive; if it has, then the court determines whether the statutory restriction is substantive or remedial in nature. R.C. § 1.48.

[5] Statutes 361 ⚷278.7

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.7 k. Express Retroactive Provisions. Most Cited Cases
A court does not address the question of constitutional retroactivity of a statute unless and until it determines that the General Assembly expressly made the statute retroactive.

[6] Constitutional Law 92 ⚷978

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)2 Necessity of Determination
92k978 k. Ripeness; Prematurity. Most Cited Cases
No constitutional question is ripe for judicial review where the case can be disposed of upon other tenable grounds.

[7] Statutes 361 ⚷278.5

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.4 Prospective Construction
361k278.5 k. In General. Most Cited Cases
If a statute is silent on the question of its retroactive application, the court must apply it prospectively only. R.C. § 1.48.

[8] Statutes 361 ⚷278.7

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.7 k. Express Retroactive Provisions. Most Cited Cases
In order to overcome the presumption that a statute applies prospectively, a statute must clearly proclaim its retroactive application. R.C. § 1.48.

[9] Statutes 361 ⚷278.6

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.4 Prospective Construction
361k278.6 k. Presumptions. Most Cited Cases
Statutory text that supports a mere inference of retroactivity is not sufficient to support a determine of retroactivity; the court cannot infer retroactivity from suggestive language. R.C. § 1.48.

[10] Statutes 361 ⚷278.2

361 Statutes
361VI Construction and Operation
361VI(D) Retroactivity
361k278.2 k. Nature and Scope. Most Cited Cases
A statute, employing operative language in the present tense, does not purport to cover past events of a similar nature. R.C. § 1.48.

CERTIFIED by the Court of Appeals for Hamilton County, No. C-050768, 170 Ohio App.3d 710, 2006-Ohio-5454.

SYLLABUS OF THE COURT

***1** Because R.C. 2950.031 was not expressly made retrospective, it does not apply to an offender who bought his home and committed his offense before the effective date of the statute.

Joseph T. Deters, Hamilton County Prosecuting Attorney, and Paula E. Adams, Assistant Prosecuting Attorney; Hyle Mecklenborg Co., L.P.A., and Robert P. Mecklenborg, Cincinnati, for appellee.
Ohio Justice Policy Center, David A. Singleton, and Stephen JohnsonGrove, for appellant.
Rosenthal Institute for Justice, University of

Cincinnati College of Law, and Jenny E. Carroll, urging reversal for amici curiae Iowa County Attorneys Association, Iowa Coalition Against Sexual Assault, Iowa State Sheriffs & Deputies Association, Jacob Wetterling Foundation, and Association for the Treatment of Sexual Abusers.
Jeffrey M. Gamso, Toledo, urging reversal for amici curiae American Civil Liberties Union of Ohio Foundation, Inc. and Ohio Association of Criminal Defense Lawyers.
Marc Dann, Attorney General, William P. Marshall, Solicitor General, Stephen P. Carney, Deputy Solicitor, and Frank M. Strigari, Assistant Attorney General, urging affirmance for amicus curiae Attorney General of Ohio.
MOYER, C.J.
MOYER, C.J.

{¶ 1} The First District Court of Appeals found its judgment in this case to be in conflict with the judgment of the Second District Court of Appeals in *Nasal v. Dover*, 169 Ohio App.3d 262, 2006-Ohio-5584, 862 N.E.2d 571, and certified the record to this court for review and final determination. We determined that a conflict exists on the following issue: "Whether R.C. 2950.031-Ohio's residency-restriction statute prohibiting certain sexually oriented offenders from living within 1,000 feet of a school-can be applied to an offender who had bought his home and committed his offense before July 31, 2003 (the effective date of the statute)."112 Ohio St.3d 1487, 2007-Ohio-724, 862 N.E.2d 115.

{¶ 2} We hold that R.C. 2950.031 does not apply to an offender who bought his home and committed his offense before the effective date of the statute. The judgment of the First District Court of Appeals is reversed.

I

{¶ 3} Appellant Gerry R. Porter Jr. was convicted of sexual imposition in 1995 and of sexual battery in 1999. The Court of Common Pleas of Hamilton County entered an order determining that Porter was a sexually oriented offender. Porter subsequently registered as a sexually oriented offender.

{¶ 4} In 2003, the General Assembly imposed residency restrictions on certain sexually oriented offenders through the enactment of R.C. 2950.031, later amended and recodified as R.C. 2950.034.[FN1]Former R.C. 2950.031(A) provides as follows: "No person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to either a sexually oriented offense that is not a registration-exempt sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises." 150 Ohio Laws, Part IV, 6657.

*2 {¶ 5} Following the enactment of former R.C. 2950.031, Francis M. Hyle, the chief legal officer of Green Township in Hamilton County, Ohio, initiated the current action against Porter. Hyle alleged that Porter had been convicted of a sexually oriented offense that was not registration-exempt and that Porter's residence in Cincinnati was within 1,000 feet of the premises of a school, in violation of R.C. 2950.031. Hyle sought a permanent injunction that would enjoin Porter from continuing to occupy his residence. Porter and his wife, Amanda Porter, had co-owned and lived in the house since 1991.

{¶ 6} The trial court permanently enjoined Porter from occupying his home. The First District Court of Appeals affirmed the trial court decision and held that R.C. 2950.031 could be applied to an offender who bought his home and committed his offense before the effective date of the statute. *Hyle v. Porter*, 170 Ohio App.3d 710, 2006-Ohio-5454, 868 N.E.2d 1047.Upon motion for reconsideration, and in response to the release of the decision in *Nasal v. Dover*, 169 Ohio App.3d 262, 2006-Ohio-5584, 862 N.E.2d 571, the court of appeals sua sponte certified its judgment as being in conflict with *Nasal*, and we agreed to resolve the conflict.

II

[1][2][3]{¶ 7} We are once again required to apply two provisions of Ohio law that limit the retroactive [FN2] application of statutes. The first is the rule of statutory construction, adopted in R.C. 1.48: "A statute is presumed to be prospective in its operation unless expressly made retrospective."See *Van Fossen v. Babcock Wilcox Co.* (1988), 36 Ohio St.3d 100, 105, 522 N.E.2d 489.The second is a rule of constitutional limitation, imposed in Section 28, Article II of the Ohio Constitution: "The general assembly shall have no power to pass retroactive

laws * * *." See *Van Fossen*, id. A retroactive statute is unconstitutional if it retroactively impairs vested substantive rights, but not if it is merely remedial in nature. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶ 9.

[4]{¶ 8} In *Consilio*, we applied these two provisions in the form of a two-part test to determine whether a statute may be applied retroactively. Id. at ¶ 10. Under this test, we first ask whether the General Assembly expressly made the statute retroactive. Id. If it did, then we determine whether the statutory restriction is substantive or remedial in nature. Id. The first part of the test determines whether the General Assembly "expressly made [the statute] retroactive," as required by R.C. 1.48; the second part determines whether it was empowered to do so. *Van Fossen*, 36 Ohio St.3d at 106, 522 N.E.2d 489.

[5][6]{¶ 9} We do not address the question of constitutional retroactivity unless and until we determine that the General Assembly expressly made the statute retroactive. Id.; *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, ¶ 14; *Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶ 10. "[N]o constitutional question is ripe for judicial review 'where the case can be disposed of upon other tenable grounds.'" *Van Fossen*, 36 Ohio St.3d at 105, 522 N.E.2d 489, quoting *Ireland v. Palestine, Braffetsville, New Paris, & New Westville Turnpike Co.* (1869), 19 Ohio St. 369, 373.

*3[7][8][9]{¶ 10} We therefore begin our retroactivity analysis with the question of statutory interpretation. Pursuant to R.C. 1.48, if the statute is silent on the question of its retroactive application, we must apply it prospectively only. *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶ 40. In order to overcome the presumption that a statute applies prospectively, a statute must "clearly proclaim" its retroactive application. *Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, paragraph one of the syllabus. Text that supports a mere inference of retroactivity is not sufficient to satisfy this standard; we cannot *infer* retroactivity from suggestive language. Id.

{¶ 11} Two arguments are advanced in support of the proposition that R.C. 2950.031 was expressly made retroactive. Both concern the language of the statute. First, Hyle notes that the description of convicted sex offenders uses contrasting verb tenses, past and present: "No person who *has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to* [specified categories of sexual offenses] * * *." (Emphasis added.) Former R.C. 2950.031(A). Hyle argues that the use of these two contrasting verb tenses, including one in a form of the past tense, indicates that the statute applies to convictions before and after the effective date of the statute.

{¶ 12} Second, amicus curiae Attorney General of Ohio notes that the statute's description of prohibited acts includes the verb "occupy," which he argues denotes "continue to occupy": "No person * * * shall *establish a residence or occupy residential premises* within one thousand feet of any school premises." In particular, the attorney general argues that the two different verbs in the above passage-"shall establish a residence" and "occupy residential premises"-denote two different prohibited activities, and that unless the term "occupy" is interpreted to mean "continue to occupy," the phrases "shall establish a residence and occupy residential premises" are redundant. The attorney general thus argues that the statute applies to an offender who purchased his home before the effective date of the statute as well as to an offender who purchased his home after the effective date of the statute.

{¶ 13} On review of the text of R.C. 2950.031, we find that neither the description of convicted sex offenders nor the description of prohibited acts includes a clear declaration of retroactivity. Although we acknowledge that the language of R.C. 2950.031 is ambiguous regarding its prospective or retroactive application, we emphasize that ambiguous language is not sufficient to overcome the presumption of prospective application. The language in R.C. 2950.031 presents at best a *suggestion* of retroactivity, which is not sufficient to establish that a statute applies retroactively.

*4 {¶ 14} Two previous cases serve as examples of clear expressions of retroactivity and underscore the absence of a comparable declaration in former R.C. 2950.031.

{¶ 15} In *Van Fossen*, we based our finding of a clearly expressed legislative intent for former R.C.

4121.80 to apply retroactively on the following passage: "This section applies to and governs any action * * * pending in any court on the effective date of this section * * * notwithstanding any provisions of any prior statute or rule of law of this state."Former R.C. 4121.80(H), 141 Ohio Laws, Part I, 736-737. *Van Fossen*, 36 Ohio St.3d at 106, 522 N.E.2d 489.

{¶ 16} In *State v. Cook* (1998), 83 Ohio St.3d 404, 700 N.E.2d 570, our finding that the General Assembly specifically made R.C. 2950.09 retroactive was based in part on an express provision making the statute applicable to anyone who "was convicted of or pleaded guilty to a sexually oriented offense prior to the effective date of this section, if the person was not sentenced for the offense on or after" that date. Former R.C. 2950.09(C)(1), 146 Ohio Laws, Part II, 2620. Id. at 410, 700 N.E.2d 570.

{¶ 17} Both former R.C. 4121.80(H) and former 2950.09(C)(1) expressly make their provisions applicable to acts committed or facts in existence prior to their effective dates. In addition, R.C. 4121.80(H) expressly proclaimed its applicability in spite of contrary preexisting law by including the phrase "notwithstanding any provisions of any prior statute or rule of law of this state."Thus, both statutes include strong and unmistakable declarations of retroactivity.

{¶ 18} These examples demonstrate that the drafters of legislation know the words to use in order to comply with the Ohio Constitution and the requirement created by the General Assembly (R.C. 1.48).

{¶ 19} The text of R.C. 2950.031, by contrast, does not feature a clear declaration of retroactivity in either its description of convicted sex offenders or its description of prohibited acts. The statute does not proclaim its applicability to acts committed or facts in existence prior to the effective date of the statute or otherwise declare its retroactive application. In the present case, the absence of a clear declaration comparable to the two excerpted above precludes the retrospective application of R.C. 2950.031.

{¶ 20} An analysis of the text that Hyle advances as a declaration of retroactivity demonstrates its lack of clarity. First, in response to Hyle's argument regarding the use of a form of the past tense in the description of convicted sex offenders, we refer to our decision in *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 28 OBR 337, 503 N.E.2d 753.In *Kiser*, we held that there was no indication that two statutes were intended to have retroactive application, despite the fact that both used a form of the past tense. Id. at 261-262, 28 OBR 337, 503 N.E.2d 753.

*5 {¶ 21} In particular, R.C. 5313.08, considered in *Kiser*, includes the following language: "If the contract *has been in effect* for less than five years, * * * the vendor may bring an action for forfeiture."(Emphasis added.) In addition, R.C. 5313.07, also considered in *Kiser*, includes the following language: "If the vendee of a land installment contract *has paid* * * * for a period of five years or more * * *, the vendor may recover possession of his property only by use of a proceeding for foreclosure."(Emphasis added.) Our decision in *Kiser* thus demonstrates that we have previously found similar language insufficient to overcome the presumption of prospective application.

[10]{¶ 22} In addition, in response to the attorney general's argument that "occupy" denotes "continue to occupy" in the description of prohibited acts, we note two characteristics of R.C. 2950.031 that counter his argument and suggest prospective application. First, the description of prohibited acts is described in the present tense: "shall establish" and "occupy". As we have previously noted, " '[a] statute, employing operative language in the present tense, does not purport to cover past events of a similar nature.'"*Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶ 17, quoting *Smith v. Ohio Valley Ins. Co.* (1971), 27 Ohio St.2d 268, 276, 56 O.O.2d 160, 272 N.E.2d 131.Second, the two verbs in the description of prohibited acts could reasonably denote two distinct, present-tense meanings. For example, "establish a residence" could mean "purchase and occupy a permanent home," and "occupy a residence" could mean "live in a temporary residence or occupy another's home."The language cited is therefore not a clear declaration of retroactivity.

{¶ 23} Hyle argues in the alternative that it was not necessary for the General Assembly to expressly state that R.C. 2950.031 applies retroactively. In particular, he argues that "R.C. Chapter 2950 as a

whole supports the General Assembly's retroactive intent" and that without an express statement that a particular provision in that chapter applies prospectively only, the provision applies retroactively. Hyle's argument reverses the presumption codified in R.C. 1.48. The General Assembly is not required to specify the prospective nature of a statute. On the contrary, R.C. 1.48 provides that "[a] statute is *presumed* to be prospective in its operation *unless expressly made retrospective.*"(Emphasis added.) We therefore reject Hyle's argument that R.C. Chapter 2950 "as a whole" applies retroactively.

III

*6 {¶ 24} Our conclusion that R.C. 2950.031 was not expressly made retrospective precludes us from addressing the constitutional prohibition against retroactivity. *Van Fossen*, 36 Ohio St.3d at 106, 522 N.E.2d 489.We hold that because R.C. 2950.031 was not expressly made retroactive, it does not apply to an offender who bought his home and committed his offense before the effective date of the statute. The judgment of the court of appeals is reversed.

Judgment reversed.

PFEIFER, LUNDBERG STRATTON, LANZINGER, and CUPP, JJ., concur.
O'CONNOR, J., concurs in judgment only.
O'DONNELL, J., dissents.
PFEIFER, LUNDBERG STRATTON, LANZINGER, AND CUPP, JJ., CONCUR.O'CONNOR, J., CONCURS IN JUDGMENT ONLY.O'DONNELL, J., DISSENTS.
O'DONNELL, J., dissenting.
O'DONNELL, J., dissenting.

{¶ 25} Respectfully, I dissent. A plain reading of the language of former R.C. 2950.031(A) reveals the intent of the legislature that it should be applied retroactively and that it is a remedial, not a substantive, enactment. Thus, it is constitutional and prevents a person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense or a child-victim oriented offense from either establishing or occupying residential premises within 1,000 feet of a school.

Retroactive Application

{¶ 26} Former R.C. 2950.031, now amended and recodified at R.C. 2950.034, provided, "(A) No person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to either a sexually oriented offense that is not a registration-exempt sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises." 150 Ohio Laws, Part IV, 6657.

{¶ 27} Statutes are presumed to be prospective in application. R.C. 1.48. Because of this presumption, as we stated in *State v. Cook* (1998), 83 Ohio St.3d 404, 410, 700 N.E.2d 570, a statute does not apply retroactively "unless there has been a prior determination that the General Assembly specified that the statute so apply."Id., citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph one of the syllabus. See also *In re Seltzer* (1993), 67 Ohio St.3d 220, 224, 616 N.E.2d 1108, which stated, " ' "It is a well settled rule of law that statutes should not receive a retroactive construction, unless the intention of the legislature is so clear and positive as by no possibility to admit of any other construction." ' "Id., quoting *Cincinnati v. Seasongood* (1889), 46 Ohio St. 296, 304, 21 N.E. 630, quoting *Houston v. McKenna* (1863), 22 Cal. 550, 554.Furthermore, in *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, paragraph one of the syllabus, this court held that the presumption of prospective application may not be overcome by ambiguous statutory language or by an *inference* that the General Assembly intended retroactive application.

{¶ 28} However, we have never required the General Assembly to recite talismanic phrases or magic words when expressing its intent for a statute to be applied retroactively. Instead, as we stated in *Consilio*,"[t]he Constitution requires the General Assembly to write statutes in such a way that people of common intelligence may understand what conduct is required."114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶ 23, citing *State v. Williams* (2000), 88 Ohio St.3d 513, 532, 728 N.E.2d 342.We emphasized there that "[r]equiring the General Assembly to clearly enunciate its intent in plain terms allows casual readers of the law to immediately know what statutes are retroactive."Id. Thus, in determining legislative intent regarding retroactive statutory

application, we apply long-standing rules of statutory construction.

*7 {¶ 29} In *State ex rel. Russo v. McDonnell*, 110 Ohio St.3d 144, 2006-Ohio-3459, 852 N.E.2d 145, ¶ 37, we stated that "[i]n order to determine [legislative] intent, we must ' "read words and phrases in context according to the rules of grammar and common usage." "Id., quoting *State ex rel. Cincinnati Bell Tel. Co. v. Pub. Util. Comm.*, 105 Ohio St.3d 177, 2005-Ohio-1150, 824 N.E.2d 68, ¶ 27, quoting *State ex rel. Lee v. Karnes*, 103 Ohio St.3d 559, 2004-Ohio-5718, 817 N.E.2d 76, ¶ 23; see also R.C. 1.42. This court further explained in *Sharp v. Union Carbide Corp.* (1988), 38 Ohio St.3d 69, 70, 525 N.E.2d 1386,"[w]here a particular term employed in a statute is not defined, it will be accorded its plain, everyday meaning."Id., citing *State v. Dorso* (1983), 4 Ohio St.3d 60, 62, 4 OBR 150, 446 N.E.2d 449; see also *State v. Reeder* (1985), 18 Ohio St.3d 25, 26-27, 18 OBR 21, 479 N.E.2d 280, quoting *Mut. Bldg. & Invest. Co. v. Efros* (1949), 152 Ohio St. 369, 40 O.O. 389, 89 N.E.2d 648, paragraph one of the syllabus, and citing *Youngstown Club v. Porterfield* (1970), 21 Ohio St.2d 83, 86, 50 O.O.2d 198, 255 N.E.2d 262 ("The courts however will assume the legislature is using a word in its ordinary meaning and our task is to accord ' * * * its common, ordinary and usually accepted meaning in the connection in which it is used * * *.' " [Ellipsis sic.])

{¶ 30} The language used in former R.C. 2950.031 demonstrates that the General Assembly intended the statute to apply retroactively. First, the statute specifically identified the individuals to whom it applies: an individual "who *has been convicted* of * * * [or] *has pleaded* guilty to * * * either a sexually oriented offense * * * or a child-victim oriented offense," and an individual who "*is convicted* of * * * or *pleads* guilty to either" of the designated sexual offenses. (Emphasis added.) Thus, the statute applies to persons classified as sexually oriented or child-victim oriented offenders who have already been convicted of the offenses in the past as well as those who are convicted of or plead guilty to such offenses on or after the date of the legislation. This language expressly sets forth the intent of the legislature in this regard.

{¶ 31} In corresponding fashion, former R.C. 2950.031 stated that sexually oriented or child-victim oriented offenders "shall [not] *establish* a residence or *occupy* residential premises within one thousand feet of any school premises."(Emphasis added.) The words "establish" and "occupy" have different meanings and convey the notion that these prohibitions apply not only to the future conduct of offenders, but also to the behavior of such persons who are presently living in a residential premises located within 1,000 feet of a school premises. The word "establish," as defined in Black's Law Dictionary (8th Ed.2004) 586, means, inter alia, "to bring about or into existence."See also Webster's Third New International Dictionary (1986) 778, which provides that "establish" means "to place, install, or set up in a permanent or relatively enduring position esp. as regards living quarters," and "to bring into existence, create, make, start, originate, found, or build."In the context of former R.C. 2950.031, these definitions relate to an action that may occur in the future; thus, the use of this word is prospective in nature.

*8 {¶ 32} The word "occupy," however, has a different connotation and means "to reside in as an owner or tenant" or "to hold possession of." Webster's Third New International Dictionary (1986) 1561. Although Black's Law Dictionary does not define the word "occupy," it provides further illumination from its definitions of the words "occupancy" ("the act, state, or condition of holding, possessing, or residing in or on something"), "occupant" ("[o]ne who has possessory rights in, or control over, certain property or premises"), and "occupation" ("[t]he possession, control, or use of real property").Id. at 1108 and 1109.It is obvious from these definitions that the word "occupy" describes conduct that has already commenced and that is presently occurring; the term refers to a presently existing state rather than conduct to be engaged in at a future time.

{¶ 33} The role of the judiciary is to interpret statutes and give meaning to every word used by the legislature. If the General Assembly had intended only to prohibit individuals from establishing a residence within 1,000 feet of a school after its adoption of this statute, it did not need to also prohibit those individuals from occupying residential premises-but it did so. As emphasized in *E. Ohio Gas Co. v. Pub. Util. Comm.* (1988), 39 Ohio St.3d 295,

299, 530 N.E.2d 875, it is "a basic rule of statutory construction-that words in statutes should not be construed to be redundant, nor should any words be ignored."Id., citing 50 Ohio Jurisprudence 2d (1961) 207, Statutes, Section 227. The General Assembly, in choosing to prohibit both the establishment of a residence and the occupation of a residential premises, intended to preclude present and future conduct regarding the location of a residence of persons described in this statute; and it did so by using language to preclude both establishing a residence and occupying one.

{¶ 34} No inference of retroactive intent is necessary in this context; here, in plain terms, former R.C. 2950.031(A) expressed the General Assembly's intent to prohibit a sexually oriented or child-victim oriented offender not only from *establishing* a residence within 1,000 feet of a school but also from continuing to *occupy* any such residential premises. Accordingly, this statute applies retroactively to individuals such as Porter, who established a residence within the proscribed distance from a school before the enactment of this statute, and who occupies that residence.

R.C. 2950.031(A) Is Remedial and Not Substantive

***9** {¶ 35} Not all retroactive legislation offends Section 28, Article II of the Ohio Constitution. See, e.g., *Rairden v. Holden* (1864), 15 Ohio St. 207, 210-211; *Cook*, 83 Ohio St.3d at 410, 700 N.E.2d 570; *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, 353, 721 N.E.2d 28. If the legislature has expressed its intent for a statute to apply retroactively, then, as we stated in *Bielat*, "the court moves on to the question of whether the statute is substantive, rendering it *unconstitutionally* retroactive, as opposed to merely remedial."(Emphasis sic.) Id. at 353, 721 N.E.2d 28, citing *Cook* at 410-411, 700 N.E.2d 570.

{¶ 36} In *Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, 847 N.E.2d 414, we explained, "A substantive statute is one that 'impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction.'"Id. at ¶ 6, quoting *Bielat*, 87 Ohio St.3d at 354, 721 N.E.2d 28. Remedial legislation, on the other hand, affects "the methods and procedure by which rights are recognized, protected and enforced, not * * * the rights themselves."*Weil v. Taxicabs of Cincinnati, Inc.* (1942), 139 Ohio St. 198, 205, 22 O.O. 205, 39 N.E.2d 148. Furthermore, as stated in *Bielat*, 87 Ohio St.3d at 354, 721 N.E.2d 28, remedial laws " 'merely substitute a new or more appropriate remedy for the enforcement of an existing right.'"Id., quoting *Cook*, 83 Ohio St.3d at 411, 700 N.E.2d 570.

{¶ 37} In *Cook*, we considered whether statutes requiring sexual offenders to register and verify their addresses with law enforcement could be applied retroactively to individuals who had been adjudicated as sexual offenders before the enactment of those statutes. After concluding that the General Assembly intended retroactive application, we specifically acknowledged the General Assembly's findings in support of R.C. Chapter 2950, which included the determination that "[s]exual predators and habitual sexual offenders pose a high risk of engaging in further offenses even after being released from imprisonment, * * * [and] protection of members of the public from sexual predators and habitual sexual offenders *is a paramount governmental interest*."(Emphasis added.) Former R.C. 2950.02(A)(2), quoted at 83 Ohio St.3d at 416, 700 N.E.2d 570. On this basis, we held that "the registration and address verification provisions of R.C. Chapter 2950 are *de minimis* procedural requirements that are necessary to achieve the goals of R.C. Chapter 2950" and, therefore, that they "are remedial in nature and do not violate the ban on retroactive laws set forth in Section 28, Article II of the Ohio Constitution."Id. at 412 and 413, 700 N.E.2d 570.

{¶ 38} Here, former R.C. 2950.031 serves the same remedial goals that the General Assembly had when enacting R.C. Chapter 2950 and that we recognized in *Cook*. See current R.C. 2950.02(A)(2). Presumably, the purpose for creating a 1,000-foot radius around school premises is to protect children from the risks posed by sexually oriented and child-victim oriented offenders, which is a paramount government interest. Such legislation does not create or impair any substantive rights in either the child or the offender; rather, it provides a remedy to protect the health, safety, and welfare of children, parents, and the public. Moreover, this remedial purpose outweighs whatever right a sexually oriented or child-victim oriented offender has to continue to occupy a residence within the statutorily proscribed perimeter

around a school facility, and as we stated in *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 282, 525 N.E.2d 805,"felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation."

***10** {¶ 39} Some argue that this legislation denies sexually oriented and child-victim oriented offenders a fundamental right; this view fails to recognize that certain convicted felons also are precluded from exercising numerous rights that may be considered fundamental, such as the right to vote and the right to possess a firearm. See R.C. 2961.01(A) and 2923.13(A)(2). Here, the paramount concern is protection of the public from the risks posed by sexually oriented and child-victim oriented offenders, and this remedial legislation is both appropriate and constitutional.

{¶ 40} Accordingly, because the General Assembly expressed its intent that this legislation be retroactive, and because this statute is remedial rather than substantive, its retroactive application to offenders such as Porter does not violate Section 28, Article II of the Ohio Constitution. For these reasons, I respectfully dissent.

Joseph T. Deters, Hamilton County Prosecuting Attorney, and Paula E. Adams, Assistant Prosecuting Attorney; Hyle Mecklenborg Co., L.P.A., and Robert P. Mecklenborg, for appellee.Ohio Justice Policy Center, David A. Singleton, and Stephen JohnsonGrove, for appellant.Rosenthal Institute for Justice, University of Cincinnati College of Law, and Jenny E. Carroll, urging reversal for amici curiae Iowa County Attorneys Association, Iowa Coalition Against Sexual Assault, Iowa State Sheriffs & Deputies Association, Jacob Wetterling Foundation, and Association for the Treatment of Sexual Abusers.Jeffrey M. Gamso, urging reversal for amici curiae American Civil Liberties Union of Ohio Foundation, Inc. and Ohio Association of Criminal Defense Lawyers.Marc Dann, Attorney General, William P. Marshall, Solicitor General, Stephen P. Carney, Deputy Solicitor, and Frank M. Strigari, Assistant Attorney General, urging affirmance for amicus curiae Attorney General of Ohio.

FN1. All references to R.C. 2950.031 in this opinion refer to the 2003 Am.Sub.H.B. No. 5 version of the statute.

FN2. The terms "retroactive" and "retrospective" may be used interchangeably to refer to a law that affects " 'acts or facts occurring, or rights accruing, before it came into force.'" *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶ 1, fn. 1 (quoting Black's Law Dictionary (6th Ed.1990) 1317).

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HPeople v. Morgan
Ill.App. 3 Dist.,2007.

Appellate Court of Illinois,Third District.
The PEOPLE of the State of Illinois, Plaintiff-*Appellee*,
v.
Jeffrey MORGAN, Defendant-Appellant.
No. 3-06-0362.

Dec. 14, 2007.

Background: Defendant, a convicted child sex offender, was convicted by jury in the Circuit Court, 14th Judicial Circuit, Rock Island County, Charles H. Stengel, J., of knowingly residing within 500 feet of a school building that persons under the age of 18 attended, and he appealed.

Holding: The Appellate Court, Carter, J., held that statute providing that it is unlawful for a child sex offender to knowingly reside within 500 feet of a school building did not constitute an impermissible *ex post facto law*, even though statute punished defendant for something (the original sex offense) that occurred before the enactment of the statute.

Affirmed in part and vacated in part; cause remanded with directions.

West Headnotes

[1] Constitutional Law 92 ⚿990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In General. Most Cited Cases

Constitutional Law 92 ⚿1030

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)4 Burden of Proof
92k1030 k. In General. Most Cited Cases
A statute is presumed constitutional, and the party challenging the statute bears the burden of demonstrating its invalidity.

[2] Constitutional Law 92 ⚿990

92 Constitutional Law
92VI Enforcement of Constitutional Provisions
92VI(C) Determination of Constitutional Questions
92VI(C)3 Presumptions and Construction as to Constitutionality
92k990 k. In General. Most Cited Cases
The court has a duty to construe a statute in a manner that upholds its validity and constitutionality if it can be reasonably done.

[3] Criminal Law 110 ⚿1139

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 k. Additional Proofs and Trial De Novo. Most Cited Cases
Whether a statute is constitutional is a question of law that is reviewed de novo.

[4] Constitutional Law 92 ⚿2820

92 Constitutional Law
92XXIII Ex Post Facto Prohibitions
92XXIII(B) Particular Issues and Applications
92k2819 Sex Offenders
92k2820 k. In General. Most Cited Cases

Mental Health 257A ⚿433(2)

257A Mental Health
257AIV Disabilities and Privileges of Mentally Disordered Persons

257AIV(E) Crimes
257Ak433 Constitutional and Statutory Provisions
257Ak433(2) k. Sex Offenders. Most Cited Cases
Statute providing that it is unlawful for a child sex offender to knowingly reside within 500 feet of a school building did not constitute an impermissible ex post facto law, even though statute punished defendant, who was convicted child sex offender, for something (the original sex offense) that occurred before the enactment of the statute; although statute specifically restricted persons from living in certain areas, it did not otherwise restrict the movement and activities of such persons, and statute bore a reasonable relationship to the stated purpose of keeping children safe from child predators and promoted a reasonable method of accomplishing that goal. S.H.A. Const. Art. 1, §§ 10, 16; S.H.A. 720 ILCS 5/11-9.3(b-5).

**508Thomas A. Karalis (argued), Office of the State Appellate Defender (Court-Appointed), Ottawa, for Jeffrey A. Morgan.
Terry A. Mertel, Deputy Director, Thomas D. Arado (argued), State's Attorneys Appellate Prosecutor, Ottawa, Jeff Terronez, State's Attorney, Rock Island, for the People.
Justice CARTER delivered the opinion of the court:
*822 Defendant, Jeffrey Morgan, a convicted child sex offender, was convicted following a jury trial of knowingly residing within 500 feet of a school building that persons under the age of 18 attended 720 ILCS 5/11-9.3(b-5) (West 2006). Defendant was sentenced to 30 months' probation and fined. Defendant appeals his conviction and fines. We affirm in part and vacate and remand in part.

FACTS

Defendant was convicted in 1997 of a sex offense involving a child. In 1998 the Illinois General Assembly prohibited the presence of child sex offenders in school zones. 720 ILCS 5/11-9.3 (West 2006). In July 2000 an amendment was added prohibiting child sex offenders from residing within 500 feet of a school that children under the age of 18 attended. 720 ILCS 5/11-9.3(b-5) (West 2006). Defendant was released from prison in 1999. In April 2005 defendant was arrested for living within 500 feet of the Longfellow School in Rock Island, Illinois and charged under section 11-9.3(b-5). Defendant was convicted at jury trial in October 2005 and sentenced to 30 months probation. He was also fined $1,000 and an additional $40 for the Violent Crime Victims Assistance Fund. Defendant now appeals.

ANALYSIS

On appeal, defendant contends that section 11-9.3(b-5) of the *823 Illinois Criminal Code violates the *ex post facto* clause of the constitution. He also contends that his $40 fine for the Violent Crime Victims Assistance Fund should be vacated and that he should receive a $40 credit against the larger fine.

Defendant contends that section 11-9.3(b-5) violates the *ex post facto* clause of the both the Illinois and United States Constitutions. Specifically, defendant argues that he is being punished under the statute for a crime that he committed before the statute took effect in July 2000. The State counters that the *ex post facto* clauses have not been violated because the offense defined in the statute is a new offense for which being a child sex offender is merely one factor and that, further, even if *ex post facto* analysis is appropriate, the statute does not have a punitive effect so as to violate *ex post facto* provisions.

The Constitution of the United States provides that no state shall pass any *ex post facto* law. U.S. Const., art. I, § 10. The Illinois Constitution likewise provides that no *ex post facto* law shall be passed. Ill. Const.1970, art. I, § 16. The general intent and meaning behind the prohibition was expressed early in our constitutional history when United States Supreme Court Justice Samuel Chase defined *ex post facto* laws thusly:

> "Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law **509 that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive." (Emphasis omitted.) *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390.

1 L.Ed. 648 (1798).

[1][2][3] When analyzing a statute's constitutional validity or invalidity our supreme court has provided general guidelines that we must follow in *People v. Malchow*, 193 Ill.2d 413, 250 Ill.Dec. 670, 739 N.E.2d 433 (2000). "A statute is presumed constitutional, and the party challenging the statute bears the burden of demonstrating its invalidity." *Malchow*, 193 Ill.2d at 418, 250 Ill.Dec. 670, 739 N.E.2d at 437. "The court has a duty to construe a statute in a manner that upholds its validity and constitutionality if it can be reasonably done." *Malchow*, 193 Ill.2d at 418, 250 Ill.Dec. 670, 739 N.E.2d at 437. "Whether a statute is constitutional is a question of law that is reviewed *de novo*." *Malchow*, 193 Ill.2d at 418, 250 Ill.Dec. 670, 739 N.E.2d at 437.

The statute at issue in the present case reads as follows:

> "It is unlawful for a child sex offender to knowingly reside within ***824** 500 feet of a school building or the real property comprising any school that persons under the age of 18 attend. Nothing in this subsection (b-5) prohibits a child sex offender from residing within 500 feet of a school building or the real property comprising any school that persons under 18 attend if the property is owned by the child sex offender and was purchased before the effective date of this amendatory Act of the 91st General Assembly." 720 ILCS 5/11-9.3(b-5) (West 2006).

[4] It is not contested that defendant qualified as a child sex offender under the statute and was subject to its provisions. Rather, defendant challenges the constitutionality of the statute as an unconstitutional *ex post facto* law punishing him for something (the original sex offense) that occurred before the enactment of the statute. We find instructive to our analysis of section 11-9.3(b-5) a Fifth District case, *People v. Leroy*, 357 Ill.App.3d 530, 293 Ill.Dec. 459, 828 N.E.2d 769 (2005), which dealt with a nearly identical statute. In *Leroy*, defendant, a convicted child sex offender, challenged section 11-9.4(b-5) of the Illinois Criminal Code, which is a statutory provision nearly identical to the one at issue in the instant case, except that it bans child sex offenders from loitering within 500 feet of a playground facility comprising any public park when children under 18 are present. In the present case, both State and defense briefs have conceded the nearly identical nature of sections 11-9.4(b-5) and 11-9.3(b-5). Therefore, the analysis employed by the *Leroy* court will be employed here. The subsection at issue in *Leroy* stated:

> "It is unlawful for a child sex offender to knowingly reside within 500 feet of a playground or a facility providing programs or services exclusively directed toward persons under 18 years of age. Nothing in this subsection (b-5) prohibits a child sex offender from residing within 500 feet of a playground or a facility providing programs or services exclusively directed toward persons under 18 years of age if the property is owned by the child sex offender and was purchased before the effective date of this amendatory Act of the 91st General Assembly." 720 ILCS 5/11-9.4(b-5) (West 2002).

****510** The court first looked to determine whether the statute constituted punishment, and thus established criminal proceedings. *Leroy*, 357 Ill.App.3d at 537, 293 Ill.Dec. 459, 828 N.E.2d at 779. The court noted:

> "When faced with a question of whether a given statute imposes a punishment, a reviewing court must first ascertain whether the legislature meant the statute to establish 'civil' proceedings. [Citation.] If the legislature intended to impose a punishment, the inquiry is complete. [Citation.] If, however, the intention of the legislature was to enact a regulatory scheme that is civil and nonpunitive, the reviewing court must further examine whether the ***825** statutory scheme is so punitive in either purpose or effect that it negates the state's intention to deem it civil. [Citation.] In making this determination, the reviewing court should ordinarily defer to the legislature's stated intent, and only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Leroy*, 357 Ill.App.3d at 538, 293 Ill.Dec. 459, 828 N.E.2d at 779, citing *Smith v. Doe*, 538 U.S. 84, 92, 123 S.Ct. 1140, 1146-47, 155 L.Ed.2d 164, 176 (2003).

The court determined the statute was not punitive but rather intended to protect children from known child sex offenders, and thus was a regulatory act of the General Assembly to create a civil, nonpunitive

statutory scheme to protect the public rather than impose a punishment. *Leroy*, 357 Ill.App.3d at 538, 293 Ill.Dec. 459, 828 N.E.2d at 779. Once the court concluded that the intent behind the statute was civil and not punitive, it needed to consider whether the effect of the law was so punitive that it negated the state's attempt to craft civil restrictions. *Leroy*, 357 Ill.App.3d at 538, 293 Ill.Dec. 459, 828 N.E.2d at 779. Whether the punitive effect negates the civil nonpunitive purpose is evaluated using five factors from United States Supreme Court precedent that, while not exhaustive or dispositive, are " 'useful guideposts.' " [Citations.] *Leroy*, 357 Ill.App.3d at 538-39, 293 Ill.Dec. 459, 828 N.E.2d at 780. The five factors are the following:

> "(1) whether the restriction has historically been regarded as punishment, (2) whether the restriction imposes an affirmative disability or restraint, (3) whether the restriction promotes the traditional aims of punishment, namely retribution and deterrence, (4) whether the restriction has a rational connection to a nonpunitive purpose, and (5) whether the restriction is excessive with respect to this purpose." *Leroy*, 357 Ill.App.3d at 538-39, 293 Ill.Dec. 459, 828 N.E.2d at 780, citing *Smith*, 538 U.S. at 97, 123 S.Ct. at 1149, 155 L.Ed.2d at 180.

In examining the first factor, the court noted that defendant compared the restrictions under the statute to the historical punishment of "banishment." The court rejected that characterization, noting that there was no evidence that the defendant could not return to live in his original community or that he would be unable to assimilate himself into a new community, the traditional aspects of banishment. *Leroy*, 357 Ill.App.3d at 539, 293 Ill.Dec. 459, 828 N.E.2d at 780. The court also noted that just because the defendant was prohibited from "residing" at his mother's house because it was less than 500 feet from a school, nothing prevented him from visiting his mother there. The court concluded by finding that

> "[T]he restrictions placed on the defendant by subsection (b-5) in no way resemble the historical punishment of banishment, and ***826** only a tortured reading of the term banishment could lead us to ****511** conclude otherwise. On the record before us, we cannot conclude that the restrictions of subsection (b-5) are a historic form of punishment." *Leroy*, 357 Ill.App.3d at 539-40, 293 Ill.Dec. 459, 828 N.E.2d at 780-81.

Turning to the second factor, whether the restriction imposed an affirmative disability or restraint, the court found that although the subsection specifically restricted persons from living in certain areas, it did not otherwise restrict the movement and activities of such persons. *Leroy*, 357 Ill.App.3d at 540, 293 Ill.Dec. 459, 828 N.E.2d at 781. Mindful that restricting the freedom of those deemed dangerous has historically been a legitimate nonpunitive governmental objective, the court found that although the disability or restraint imposed by the subsection was not minor or indirect, the court was not convinced that the presence of that factor alone turned the subsection's purpose from regulatory to punitive. *Leroy*, 357 Ill.App.3d at 540, 293 Ill.Dec. 459, 828 N.E.2d at 781.

The third factor, whether the restriction promoted the traditional aims of punishment (such as retribution and deterrence), was next addressed by the court. The court rejected any notion that the restriction was meant as retribution, instead finding that it bore a reasonable relationship to the stated purpose of keeping children safe from child predators and promoted a reasonable method of accomplishing that goal. *Leroy*, 357 Ill.App.3d at 540, 293 Ill.Dec. 459, 828 N.E.2d at 781. With regard to the deterrence factor, the court did admit that prohibiting child sex offenders from living closer to a school would prevent incidental contact between offenders and children, which could deter more crimes from happening. However, the court stated that even an obvious deterrent purpose did not necessarily make a law punitive, and relied on United States Supreme Court precedent that to hold that the mere presence of a deterrent purpose renders a statute criminal would severely undermine the government's ability to engage in effective regulation. *Leroy*, 357 Ill.App.3d at 541, 293 Ill.Dec. 459, 828 N.E.2d at 781, citing *Smith*, 538 U.S. at 102, 123 S.Ct. at 1152, 155 L.Ed.2d at 183. The court thus concluded that the subsection's purpose was protection of the public and that it did not significantly promote either retribution or deterrence. *Leroy*, 357 Ill.App.3d at 541, 293 Ill.Dec. 459, 828 N.E.2d at 781.

The court quickly found that the fourth factor, a rational connection to a nonpunitive purpose, was readily apparent, as the purpose was to protect children from sex offenders, and it would be reasonable to conclude that restricting those

offenders from residing within 500 feet of a playground providing programs or services exclusively ***827** directed at those under 18 might also protect society. *Leroy*, 357 Ill.App.3d at 541, 293 Ill.Dec. 459, 828 N.E.2d at 782.

The fifth and final factor, whether the restriction was excessive to its purpose, was also considered by the court. The court noted that of the 13 states that had enacted some form of residency restriction applicable to sex offenders, the 500-foot restriction was least restrictive in geographic terms. *Leroy*, 357 Ill.App.3d at 541, 293 Ill.Dec. 459, 828 N.E.2d at 782. The United States Supreme Court had already concluded that, in regard to the excessiveness inquiry of an *ex post facto* analysis, the issue is not whether the legislature made the best choice possible to address the problem it sought to remedy, but rather whether the regulatory means chosen were reasonable in light of the nonpunitive objective. *Leroy*, 357 Ill.App.3d at 541, 293 Ill.Dec. 459, 828 N.E.2d at 782, citing *Smith*, 538 U.S. at 105, 123 S.Ct. at 1154, 155 L.Ed.2d at 185. As the subsection simply restricted residency to a ****512** degree, and did not otherwise curtail the movement and activities of child sex offenders, the court declined to find it excessive. *Leroy*, 357 Ill.App.3d at 541, 293 Ill.Dec. 459, 828 N.E.2d at 782. The appellate court concluded that, under the Supreme Court factors, the subsection was not so punitive that it negated the state's attempt to craft civil restrictions, and thus did not constitute an unconstitutional *ex post facto* law. *Leroy*, 357 Ill.App.3d at 541-42, 293 Ill.Dec. 459, 828 N.E.2d at 782.

Turning to the subsection at issue in the instant case, we adopt the reasoning and analysis employed by the Fifth District in *Leroy* and apply it to the subsection under consideration before us. In doing so, we find that the law is constitutional. We conclude that, in accordance with the analysis employed by the court in *Leroy*, section 11-9.3(b-5) does not constitute an impermissible *ex post facto* law. Therefore, defendant's argument must fail.

Defendant next argues that he should receive a $40 credit against his $1,000 fine based on time credit of eight days for time served. He also argues that, since other fines were imposed, the $40 Violent Crime Victims Assistance Fund fine should be vacated.

By statute in Illinois, a person incarcerated for a bailable offense and against whom a fine is levied is entitled to $5-a-day credit for each day in custody. 725 ILCS 5/110-14 (West 2006). Further, regarding the $40 Violent Crime Victims Assistance Fund fine, the statute states that the fine may be collected when someone is convicted and no other fine is imposed. 725 ILCS 240/10(c) (West 2006). However, if other fines have been imposed on an offense, the fine may not be collected. *People v. Jones*, 375 Ill.App.3d 289, 297, 313 Ill.Dec. 938, 873 N.E.2d 562, 569 (2007).

The State concedes both points raised by defendant. As such, we vacate the $40 Violent Crime Victims Assistance Fund fine and order that a $40 credit be applied to defendant's $1,000 fine for the offense.

***828** In conclusion, we affirm defendant's conviction and find that section 11-9.3(b-5) does not violate the *ex post facto* clauses of the Illinois and United States Constitutions. We also vacate the $40 Violent Crime Victims Assistance Fund fine levied on defendant and direct the trial court to enter an order allowing a $40 credit to be applied against defendant's $1,000 fine.

Affirmed in part and vacated in part; cause remanded with directions.

LYTTON, P.J., and HOLDRIDGE, J., concurring.
Ill.App. 3 Dist.,2007.
People v. Morgan
377 Ill.App.3d 821, 881 N.E.2d 507, 317 Ill.Dec. 339

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