IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2019-0606
Plaintiff—Cross-Appellant,	:	
	:	On Appeal from the Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
ALBERT TOWNSEND,	:	Case No. 107186
	:	
Defendant—Cross-Appellee.	:	

MERIT BRIEF OF CROSS-APPELLEE ALBERT TOWNSEND

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INTRODUCTION

The General Assembly may prospectively amend a statute that has been interpreted by this Court, but it cannot retroactively overrule this Court's interpretation of what that prior statute meant.

That is because the interpretation of ambiguous statutes "is a responsibility of the judicial branch." *State v. Noling*, 136 Ohio St. 163, 2013-Ohio-1764, 999 N.E.2d 1095, ¶ 39; *see also Marbury v. Madison*, 5 U.S. 137, 177, 2 L.Ed. 60 (1803). In *State v. Smith*, 104 Ohio St.3d 106, 2004-Ohio-6238, 818 N.E.2d 283, this Court shouldered this responsibility, interpreting the former R.C. 2971.01(H) to clearly hold that "only a conviction that existed prior to the indictment of the underlying offense can be used to support [a sexually-violent predator] specification." *Id.* at ¶ 1. Approximately six months after this Court decided *Smith*, the provisions of 2004 Am.Sub.H.B. No. 473 became effective, amending R.C. 2971.01(H)(1) to allow what *Smith* forbid: including a sexually-violent predator specification in an indictment that is predicated only upon the act alleged in the indictment. R.C. 2971.01(H)(1).

The State argues now that the currently adopted R.C. 2971.01(H)(1) is a clarification of the legislature's original intent in passing the former R.C. 2971.01(H)(1).[1]

[1] Notably, the Cuyahoga County Prosecutor's Office has previously conceded that the amended version of R.C. 2971.01(H)(1) was a substantive change that did not apply to conduct that pre-dated April 29, 2005. *See State v. Hardley*, 8th Dist. Cuyahoga Nos. 88456, 88457, 2007-Ohio-3530, ¶ 49.

State's Brief at p. 6-14. But even courts that have found it permissible for a legislative body to clarify a previous legislative body's words have explicitly held that such clarification may not overrule a definitive judicial interpretation of the amended statute. *See United States v. Brennan*, 326 F.3d 167, 197-198 (3d Cir.2003) (allowing for non-substantive clarifications of sentencing guidelines when the amendment does not overrule a "prior judicial construction."). *Smith* definitively interpreted the former R.C. 2971.01(H)(1), leaving nothing to be clarified.

Consequently, the General Assembly's revision of the R.C. 2971.01(H)(1) was substantive. Under the definition of "sexually violent predator" in the amended R.C. 2971.01(H)(1), Albert faced a life sentence for conduct that would have carried determinate sentence at the time of the offense.[2] Given this increased punishment, the retroactive application of the amended statute violates both the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution.

This Court should affirm the Eighth District Court of Appeals.

[2] Under current legislation, Mr. Townsend would face a maximum sentence of eleven years for a first-degree felony. R.C. 2929.14(A)(1). Because the amended sentencing scheme allows for an increase in punishment instead of reduction, Mr. Townsend should be sentenced according to the provisions in 1996 Am.Sub.S.B. No. 2. *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612.

STATEMENT OF THE CASE AND FACTS

Albert was indicted on February 22, 2017 based on allegations that were over a decade old. (T.d. 1). The indictment did not allege the existence of any prior sexually-violent convictions, but did include a number of sexually-violent predator specifications. (T.d. 1). One set of allegations—pertaining to M.W.—are from January 2003. (T.d.1; T.p. 687). Another—pertaining to C.W.—are from sometime between January 1 and March 14, 2005. (T.d. 1; T.p. 464). The final set of allegations—pertaining to B.G.—are from November 2006. (T.d. 1; T.p. 767). Maintaining his innocence, Albert proceeded to a trial where he represented himself (T.d. 132). Although Albert's jury acquitted him of various firearm specifications and one kidnapping count, he was convicted on the bulk of his indictment. (T.d. 132). Albert was also convicted of sexually-violent predator specifications on counts that stemmed from the M.W., C.W., and B.G. incidents. (T.d. 127). The trial court sentenced him to an aggregate term of fifty-six-years-to-life in prison. (T.d. 132). The facts as laid out in the State's brief adequately summarize the bases for Albert's convictions and sentence.

Albert appealed his conviction and sentence, raising numerous issues with the fairness of his trial proceedings. (A.d. 2; A.d. 19). Among the issues that Albert raised was the propriety of attaching sexually-violent predator specifications to counts that pre-dated the revision of R.C. 2971.01, which became effective on April 29, 2005. (A.d. 19). Albert prevailed on this issue, and the Eighth District Court of Appeals vacated his

convictions on the specifications attached to Counts 1, 2, 3, 6, 9, 10, 11, and 12. *State v. Townsend*, 8th Dist. Cuyahoga No. 107186, 2019-Ohio-1134, ¶ 55-66.

ARGUMENT

Mr. Townsend's Response to the State's Proposition of Law:

Applying the definition of "sexually violent predator" from 2004 Am.Sub.H.B. No. 473 to a person who committed an offense prior to April 29, 2005 violates the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution.

I. A timeline of R.C. 2971.01(H)(1).

The sexually-violent predator specification was introduced into Ohio law on January 1, 1997. 1996 Am.Sub.H.B. No. 180. In its original iteration, R.C. 2971.01(H)(1) "defined a 'sexually violent predator' as 'a person who has been convicted of or pleaded guilty to committing, on or after the effective date of this section [January 1, 1997], a sexually violent offense and is likely to engage in the future in one or more sexually violent offenses." *State v. Frierson*, 8th Dist. Cuyahoga No. 106841, 2019-Ohio-317, ¶ 7, *appeal allowed in part*, 157 Ohio St.3d 1418, 2019-Ohio-3797, 131 N.E.3d 961. Intermediate appellate courts struggled in interpreting this statute—some held that a sexually-violent predator specification required a predicate prior sexually violent conviction; others held that the specification could be based upon the conduct alleged in the indictment. *Compare State v. Reigle*, 3d Dist. Hancock No. 5-2000-14, 2000 WL

1682520 (Nov. 9, 2000) *with State v. Haven*, 9th Dist. Wayne No. 02CA0069, 2004-Ohio-2512, *rev'd* 105 Ohio St.3d 418, 2005-Ohio-2286, 827 N.E.2d 319.

To definitively interpret this statute, this Court accepted a State's appeal on the meaning of the former R.C. 2971.01(H)(1) on October 15, 2003. *State v. Smith*, 100 Ohio St.3d 1430, 2003-Ohio-5396, 797 N.E.2d 511. In 2004, after this Court accepted *Smith*, the General Assembly introduced a bill to amend R.C. 2971.01(H)(1). *See* 2004 Am.Sub.H.B. No. 473. This Court decided *Smith* on December 8, 2004, before any legislation revising R.C. 2971.01(H)(1) was passed.

The *Smith* Court held that R.C. 2971.01(H)(1) "clearly indicate[d]" that for a sexually-violent predator specification to be included in an indictment, the person under indictment must have "already been convicted of a sexually violent offense." *Smith*, 2004-Ohio-6238, ¶ 18. The *Smith* Court further noted that, "[w]e decline to interpret R.C. 2971.01(H)(1) to permit the state to subject first-time offenders of certain sexual offenses to such draconian sentence enhancements without an unambiguous mandate from the General Assembly." *Id.* at ¶ 29.

That unambiguous mandate arrived shortly after *Smith* was decided. The General Assembly replaced "the phrase 'has been convicted of or pleaded guilty to committing' with the word 'commits.'" *Frierson*, 2019-Ohio-317, ¶ 10.

II. The amended R.C. 2971.01(H)(1) substantively changed, and did not merely clarify, the prior sexually-violent predator law.

A. The State's argument about legislative clarification relies upon inapposite authority.

The State argues that, by passing 2004 Am.Sub.H.B. No. 473, the 125th General Assembly simply clarified the original meaning of statutory language written nine years earlier by the 121st General Assembly. State's Brief at p. 8-9. And the State claims that "this Court [has] recognized that an amendment that constitutes a clarification of the General Assembly's intent is not a substantive change," citing *State v. Johnson*, 23 Ohio St.3d 127, 491 N.E.2d 1138 (1986). *Id.* at p. 12. A more accurate characterization of *Johnson*, however, would be to say that "this Court has recognized that an amendment that constitutes a clarification of the General Assembly's intent is not *always* a substantive change."

Johnson dealt with a fundamentally different scenario than the one presented here. In *Johnson*, lower courts had reached conflicting positions regarding whether a more punitive repeat-offender provision should be given effect over a more general provision that had been held over from a previous iteration of the statute in question. *Johnson*, 23 Ohio St.3d at 130. After the lower court split developed, the General Assembly acted to clarify which provision controlled. *Id* at 130-131. And then, after that revision, this Court determined that had the issue reached the Court at a time before the General Assembly enacted the provision, it would have ruled that the more punitive,

more specific repeat-offender provision had to be given effect to avoid an "absurd result." *Id.*

Here, in contrast, this Court in *Smith* already determined that the statutory provision in question could not be applied to individuals charged with a sex offense who did not have a prior qualifying provision. *Smith,* 2004-Ohio-6238, ¶ 1. Thus, when the General Assembly acted to "clarify" the circumstances under which a sexually-violent predator specification could attach, it was making a substantive revision to address the problem identified in *Smith*. Because the General Assembly made a substantive revision, and because without that revision, the specification could not lawfully apply to first-time offenders, the revised statute cannot be given retroactive effect.

This Court recognized as much in *State v. Haven*, 105 Ohio St.3d 418, 2005-Ohio-2286, 827 N.E.2d 319, ¶ 1. *Haven* offers the clearest indication from this Court that the amendment to R.C. 2971.01(H)(1) substantively and prospectively amended the law. On May 25, 2005, *Haven* answered the certified question: "[c]an an offender be convicted of a sexually violent predator specification without there being a separate, prior conviction for a sexually violent offense?" *Id.* at ¶ 1. This decision was announced one month after the General Assembly revised R.C. 2971.01(H)(1). If—as the State argues—this amendment simply clarified existing law, the question in *Haven* would have been moot. But this Court vacated Mr. Haven's sexually-violent predator conviction and sentence

and remanded the matter "to the trial court for resentencing consistent with *State v. Smith*." *Id.* at ¶ 2. This remand order relied upon the premise that the amended R.C. 2971.01(H)(1) applies only prospectively.

The State's arguments to the contrary fail. The core of the State's argument— that a legislature may use statutory amendments to clarify the original meaning of a statute —was articulated in a now overruled Vermont Supreme Court case:

> When a clarification of a misapplied or misinterpreted statute is enacted by the legislature, it is generally understood that the "act has no retrospective effect because the true meaning of the statute remains the same." *Western Sec. Bank v. Super. Ct.,* 15 Cal.4th 232, 62 Cal.Rptr.2d 243, 933 P.2d 507, 514 (1997); see also *Levy v. Sterling Holding Co.,* 544 F.3d 493, 506 (3d Cir.2008) ("[A] new rule should not be deemed to be 'retroactive' in its operation ... if it d[oes] not alter existing rights or obligations [but] merely clarifie[s] what those existing rights and obligations ha[ve] always been." (quotation omitted)); *Fox v. State,* 138 Wash.App. 374, 158 P.3d 69, 76 (2007) ("[A] statute that clarifies, rather than alters, a current law does not operate retroactively even when applied to transactions conducted before its enactment."). Thus, because a law must be retroactive to violate the ex post facto clause, we need not be concerned here about any possible objection on this ground. See *United States v. Brennan,* 326 F.3d 176, 197 (3d Cir.2003) ("[W]hen an amendment is a mere clarification, rather than a substantive change ..., its application does not violate the *ex post facto* clause."); *United States v. Mapp,* 990 F.2d 58, 61 (2d Cir.1993) ("When an amendment serves merely to clarify ... the Ex Post Facto clause is not implicated."); *Holm v. Iowa Dist. Ct.,* 767 N.W.2d 409, 416 (Iowa 2009) ("There is no ex post facto violation where a court merely clarifies the law without making substantive changes.").

State v. Kenvin, 191 Vt. 30, fn. 2, 2011 VT 123, 38 A.3d 26 (2011), *overruled by State v. Aubuchon*, 195 Vt. 571, 2014 VT 12, 90 A.3d 914 (2014); *see* State's Brief at p. 7.

Kenvin's logic was expressly overruled three years after it was decided because it runs directly into insurmountable constitutional issues. *Aubuchon*, 195 Vt. 597, ¶ 18.

B. Legislative clarification and separation of powers.

Nearly forty-five years ago, the Washington Supreme Court identified the problem with permitting the legislature "to retroactively 'clarify' an existing statute, when that clarification contravenes the construction placed upon that statute by [a court of last resort]"—allowing it "would effectively be giving license to the legislature to overrule [the court of last resort], raising separation of powers problems." *Johnson v. Morris*, 87 Wash.2d 922, 926, 557 P.2d 1299, 1303 (1976). This concern has infused the jurisprudence that defines *when* it is permissible for a legislative body to clarify its own prior work product. As one example, the State cited *Western Sec. Bank v. Super. Ct.*, 15 Cal.4th 232, 62 Cal.Rptr.2d 243, 933 P.2d 507, 514 (1997) for the proposition that "[c]larifications of statutes have no retroactive effect because the meaning (or intent) of the statute remains the same." State's Brief at p. 7. But seven years later, the California Supreme Court narrowed its holding in *Western Sec. Bank*, writing:

> Under fundamental principles of separation of powers, the legislative branch of government enacts laws. Subject to constitutional constraints, it may *change* the law. But *interpreting* the law is a judicial function. After the judiciary definitively and finally interprets a statute * * * the Legislature may amend the statute to say something different. But if it does so, it *changes* the law; it does not merely state what the law always was. Any statement to the contrary is beyond the Legislature's power. (Emphasis in original.)

McClung v. Emp. Dev. Dept., 34 Cal.4th 467, 470, 99 P.3d 1015, 1018, 20 Cal.Rptr.3d 428, 431 (2004). Other courts have held similarly. *State v. Smith*, 547 So.2d 613, 616 (Fla.1989); *Aubuchon,* 195 Vt. 597, ¶ 17 (collecting cases). Even *United States v. Brennan*, cited by the State as support for its argument, places important limits on a legislative body's ability to clarify its own ambiguous words: "[h]owever, where an amendment overrules a prior judicial construction of the guideline, it is [a] substantive" change. *Brennan*, 326 F.3d at 198.

C. Legislative clarification of a criminal statute and fair notice.

There is a second problem with allowing legislative clarification of a statute that controls criminal punishment: it denies people who commit offenses prior to the clarification fair notice of what is punished and how severely it is punished. Fair notice is of cardinal importance when the State is exercising its power to restrict an individual's physical liberty. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). For this reason, Ohio law directs courts to construe "sections of the Revised Code defining offenses or penalties" strictly against the state and liberally in favor of the accused. R.C. 2901.04. Allowing the General Assembly to retroactively clarify a statute—construing any previous ambiguity in favor of a clear and more punitive result—denies people fair notice of the consequences of their conduct.

The consequences of this lack of fair notice are highlighted in Albert's case. The ambiguity of the former R.C. 2971.01 led criminal defendants between 1997 and 2004 to make the argument that they were improperly convicted of a sexually-violent predator specification. This argument ultimately prevailed in the courts, largely because the former version of the statute failed to provide adequate notice of whether a prior conviction was necessary to classify a person as a "sexually-violent predator." Permitting a legislative clarification that retroactively overrules this Court denies those who are convicted after the amendment the ability to make arguments about the ambiguities in the prior version of the statute. If the previous statutory ambiguities were sufficiently problematic to grant relief to those prosecuted close in time to their offenses, then they failed to provide adequate notice to those like Albert, who were prosecuted years after their indicted conduct.

D. The State's use of Ohio authority does not address the separation of powers and notice problems with its argument.

The State points to lower court decisions which state that the General Assembly "intended to clarify the definition" of sexually-violent predator by amending R.C. 2971.01(H)(1). The context of these decisions indicates that any "clarification" referenced within them was prospective in nature. Specifically, the State cited *State v. Wagers*, 12th Dist. Preble No. CA2009-06-018, 2010-Ohio-2311, ¶ 30 to argue that the amendment clarified, but did not change R.C. 2971.01(H)(1)'s meaning. State's Brief at p. 13. But *Wagers* acknowledged that application of the current R.C. 2971.01(H)(1) to

conduct committed prior to April 29, 2005 could create ex post facto problems. *Id.* at ¶ 33 ("The record in this case provides evidence that appellate did commit a sexually violent offense after the April 29, 2005 effective date of the amended statute. Thus, the application of the current version of the statute would not violate the constitutional ban on ex post facto laws.").

III. Application of the amended R.C. 2971.01(H)(1) to conduct that occurred between January 1, 1997 and April 29, 2005 violates both the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution.

A. The General Assembly's ability to retroactively legislate is constitutionally constrained.

The plain language of R.C. 2971.01(H)(1) indicates a legislative intent to apply it retroactively to anyone who commits a sexually violent offense "on or after January 1, 1997). But retroactive application of the amended R.C. 2971.01(H)(1) would subject someone without prior convictions who committed a sexually-violent offense between January 1, 1997 and April 24, 2005 to greater punishment than was permissible at the time of the crime's commission. Where retroactive application of a statute would violate a constitutional guarantee, like it does here, legislative intent must yield to the Constitution.

Two sources of constitutional law limit the General Assembly's ability to pass laws that apply retroactively in criminal proceedings: The Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution. The

Ex Post Facto Clause "forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred" because of "the lack of fair notice and fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Weaver v. Graham*, 450 U.S. 24, 30, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981). Relatedly, the Retroactivity Clause of the Ohio Constitution prohibits the General Assembly from creating and imposing "new or additional burdens, duties, obligations, or liabilities as to a past transaction." *State v. Williams*, 129 Ohio St.3d 344, 2011-Ohio-3374, 959 N.E.2d 1108, ¶ 21.

B. The Ex Post Facto Clause of the United States Constitution prohibits retroactive application of R.C. 2971.01(H)(1).

"The Legislature's characterization of [a] recent amendment as a clarification does not control constitutional ex post facto analysis. The only question is whether amended law effects a substantive change in the statue and increases the quantum of punishment." (Internal citation omitted.) *In re Smith*, 139 Wash.2d 199, 208 P.2d 131, 136 (1999). This question—whether "a law has inflicted a 'greater punishment, than the law annexed to the crime, when committed'"—has animated the "bulk of [the United States Supreme Court's] ex post facto jurisprudence." *Lynce v. Mathis,* 519 U.S. 433, 441, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997) *quoting Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed 648 (1798). This is because laws that retroactively increase punishment implicate questions of fair

notice that animate the Ex Post Facto Clause's "central concern[]." *Id. citing Weaver v. Graham*, 450 U.S. at 30.

This Court's resolution of *Haven* makes clear that application of the amended R.C. 2971.01(H)(1) to a sexually violent offense that occurred prior to April 29, 2005 inflicts greater punishment than the law at the time of the offense. The version of the statute in effect between January 1, 1997 and April 29, 2005 would allow only for a definite sentence (capped at ten years) for a sexually violent felony committed by someone without a prior conviction. The version of the statute in effect after April 29, 2005 allows for the imposition of a life-sentence with parole eligibility.

Applying the amended statute in a way that increases exposure to punishment violates the Ex Post Facto Clause of the United States Constitution.

C. The Retroactivity Clause of the Ohio Constitution prohibits retroactive application of R.C. 2971.01(H)(1).

Applying the revised R.C. 2917.01 to conduct that occurred before April 29, 2005 violates Ohio's constitutional prohibition on the "retroactive application of statutes." *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899, ¶ 7. Only remedial statutes may be retrospective in nature, and the General Assembly has no authority to pass laws that "retroactively impair[] vested substantive rights." *Id.*

Creating and imposing "new or additional burdens, duties, obligations, or liabilities as to a past transaction" is one way that the General Assembly may run afoul of the Ohio Constitution's retroactivity provision. *State v. Williams*, 129 Ohio St.3d 344,

2011-Ohio-3374, 959 N.E.2d 1108, ¶ 21. In *Williams*, this Court found that under this standard, a punitive law such as the Adam Walsh Act cannot be retroactively applied. *Id*. This Court later held that—under *Williams*—"only persons who commit their underlying offense on or after the *effective date* of [a punitive statute] can be constitutionally subjected to its requirements." (Emphasis in original.) *In re Von*, 146 Ohio St.3d 448, 2016-Ohio-3020, 57 N.E.3d 1158, ¶ 17.

For the reasons described above, there can be no question that the amended R.C. 2971.01 is punitive in nature: it alters a person's prison exposure from a definite sentence not to exceed ten years to a life sentence with the possibility of a parole board's mercy. Similar to *Williams* and *Von*, it is unconstitutional to subject someone to the sentence enhancements in the revised R.C. 2971.01 if he committed the underlying offense prior to its effective date.

CONCLUSION

This Court definitively interpreted the former R.C. 2971.01(H)(1) in *State v. Smith*. When the General Assembly amended the statute to create an "unambiguous mandate," it "change[d] he law" and did not "merely state what the law always was." *Smith,* 2004-Ohio-6238, ¶ 29; *McClung*, 34 Cal.4th at 470. Because this change in the law inflicts a "greater punishment, than the law annexed to the crime, when committed," its retroactive application violates the Ex Post Facto Clause of the United States Constitution. *Calder v. Bull*, 3 Dall. at 390. Additionally, its punitive nature means that

retroactive application violates the Retroactivity Clause of the Ohio Constitution. *Williams*, 2011-Ohio-3374, ¶ 21; *Von*, 2016-Ohio-3020, ¶ 17.

This Court should affirm the Eighth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **MERIT BRIEF OF CROSS-APPELLEE ALBERT TOWNSEND** was sent by electronic mail to dvan@prosecutor.cuyahogacounty.us on this 10th day of January, 2020.

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