ORIGINAL

In the
Supreme Court of Ohio

STATE OF OHIO,	:	Case No. 2009-0088
	:	
Plaintiff-Appellee,	:	On Appeal from the
	:	Warren County
v.	:	Court of Appeals,
	:	Twelfth Appellate District
GEORGE WILLIAMS,	:	
	:	Court of Appeals Case
Defendant-Appellant.	:	No. 2008-02-029
	:	

JOINT MOTION FOR RECONSIDERATION AND/OR CLARIFICATION BY APPELLEE STATE OF OHIO AND *AMICUS CURIAE* OHIO ATTORNEY GENERAL MICHAEL DEWINE

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JOINT MOTION FOR RECONSIDERATION AND/OR CLARIFICATION

In accordance with S.Ct. Prac. R. 11.2 and 14.4, the State of Ohio and the Ohio Attorney General respectfully move this Court for reconsideration and/or clarification of its decision in *State v. Williams*, slip op., 2011-Ohio-3374, issued on July 13, 2011.

Neither the State nor the Attorney General is asking the Court to revisit its bottom-line holding that S.B. 10 ("the Walsh Act") is unconstitutional as applied to defendants who committed sex offenses prior to its enactment. But the State and the Attorney General strenuously urge the Court to reconsider its analysis. The *Williams* opinion entangles state constitutional law with federal constitutional law—specifically, Section 28, Article II of the Ohio Constitution (commonly known at "the Retroactivity Clause"), with the federal Ex Post Facto Clause— and severely muddles this Court's constitutional jurisprudence.

Three blackletter principles have consistently animated this Court's Retroactivity Clause jurisprudence: First, "a past transaction or consideration" must "create[] at least a reasonable expectation of finality" to trigger the Retroactivity Clause. *State ex rel. Matz v. Brown* (1988), 37 Ohio St. 3d 279, 281. Second, an individual's "[p]ast felonious conduct is not such a transaction or consideration." *Id.* at 282. Third, the Retroactivity Clause is different from the federal Ex Post Facto Clause; the former uses a bright-line test, while the latter doctrine applies a seven-factor "matter of degree" analysis.

These three principles were abandoned in *Williams*. For the first time, the Court ignored the *Matz* rule and concluded that criminal conduct *is* a "past transaction" that triggers a "reasonable expectation of finality" under the Retroactivity Clause. And for the first time, the Court used a federal Ex Post Facto Clause "matter of degree" analysis (and expressly relied on

Ex Post Facto terminology and caselaw) to invalidate a statute under the state Retroactivity Clause.

While the majority's objection to the Walsh Act's reclassification provisions is clear (and is respected by both the State and the Attorney General), it is genuinely *un*clear what the Court meant to do doctrinally, and that confusion has significant consequences. The *Williams* decision fundamentally alters the scope of the Retroactivity Clause, casts a shadow over an array of civil laws that address prior convictions, and leaves the constitutional landscape in a state of confusion. Because there is no indication, however, that the Court intended to overrule *Matz* or revamp its Retroactivity Clause jurisprudence to mirror the Ex Post Facto Clause, it should grant this motion and clarify its analysis.

A. *Williams* contradicts the bright-line rule that felonious conduct does not trigger the Retroactivity Clause.

Convicted felons have long sought to use the Retroactivity Clause to challenge statutes that attach collateral consequences to past convictions. And those efforts have consistently failed because, for two decades, the Court has held that criminal conduct simply does not trigger the protections of the Retroactivity Clause.

To prevail in a state Retroactivity Clause challenge, a litigant must make two showings. First, he must demonstrate that the disputed law is "retroactive." Second, he must establish that the law is "substantive." See, e.g., *Hyle v. Porter*, 117 Ohio St. 3d 165, 2008-Ohio-542, ¶ 7. These inquiries rest on bright-line, clear-cut legal distinctions.

The parties here did not dispute the first prong: S.B. 10 is a "retroactive" law. Mr. Williams's claim turned entirely on whether S.B. 10 is a "substantive" law.

A law is "substantive" if it "imposes new or additional burdens, duties, obligations, or liabilities *as to a past transaction*." *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d

100, 107 (emphasis added). In *State ex rel. Matz v. Brown* (1988), 37 Ohio St. 3d 279, this Court made clear that "a law that attaches a new disability to a past transaction or consideration is not a prohibited retroactive law unless the past transaction or consideration *created at least a reasonable expectation of finality*." *Id.* at 282 (emphasis added). In the clearest of terms, this Court held that "[p]ast felonious conduct is *not* such a transaction or consideration." *Id.* (emphasis added).

The Court reaffirmed the bright-line *Matz* rule in *State v. Cook* (1998), 83 Ohio St. 3d 404. In that litigation, Mr. Cook argued that his Megan's Law sex offender classification violated the state Retroactivity Clause because it "impos[ed] additional duties and attach[ed] new disabilities to past transactions." *Id.* This Court rejected the claim. Cook lacked "a reasonable expectation of finality" in his past criminal transaction, the Court said, because "except with regard to constitutional protections against ex post facto laws, felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation." *Id.* at 412 (quoting *Matz*, 37 Ohio St. 3d at 281-82) (emphasis omitted); see also *State v. Consilio*, 114 Ohio St. 3d 295, 2007-Ohio-4163, ¶ 37 (Lanzinger, J., dissenting) (explaining that felons "ha[ve] no expectation of finality" in their past criminal conduct under the Retroactivity Clause).

In short, *Matz* imposed—and *Cook* reaffirmed—a settled rule that "[p]ast felonious conduct is not . . . a transaction or consideration" protected by the Retroactivity Clause.[1] *Matz*, 37 Ohio St. 3d at 281.

In this case, Mr. Williams committed his felony in May 2007, and the General Assembly enacted S.B. 10 on July 1, 2007. Williams argued that S.B. 10 violated the Retroactivity Clause

[1] The Attorney General discussed this rule on pages 29-32 of his amicus brief.

because the statute "imposes new or additional burdens as to [his] past transaction"—specifically, his past criminal transaction. Merit Br. at 29.

Although *Matz* rejected that very proposition, the majority in *Williams* accepted it: "[A]s to a sex offender whose crime was committed prior to the enactment of S.B. 10, the act 'imposes new or additional burdens, duties, obligations, or liabilities *as to a past transaction*.'" *Williams*, 2011-Ohio-3374, at ¶ 19 (citation omitted). The majority concluded that Williams's felonious conduct from May 2007 was a "past transaction" that created a reasonable expectation of finality under the Retroactivity Clause.

Simply put, *Williams* is irreconcilable with *Matz*. Either felonious conduct is, or is not, a "past transaction" within the purview of the Retroactivity Clause. The Court should clarify what the law is.

B. *Williams* conflated the Retroactivity Clause's bright-line test with the federal Ex Post Facto Clause's "matter of degree" inquiry.

The Retroactivity Clause and the Ex Post Facto Clause occupy separate and distinct spaces in Ohio jurisprudence. *Williams* merged the two without explanation.

Cook illustrates the proper division between the two provisions. In that case, the offender challenged the old Megan's Law framework under both the Retroactivity Clause and the Ex Post Facto Clause. 83 Ohio St. 3d at 405. The Court first dismissed the Retroactivity Clause claim under the bright-line *Van Fossen* test: Although Megan's Law "applied retrospectively," *id.* at 410, the statute "d[id] not impinge on any reasonable expectation of finality defendant may have had with regard to his conviction for gross sexual imposition," *id.* at 414. That was because—as just discussed—Ohio law is settled that past felonious conduct is not a transaction or consideration protected by the Retroactivity Clause. *Id.* at 412 (quoting *Matz*, 37 Ohio St. 3d at 281-82).

The *Cook* Court next rejected the Ex Post Facto Clause claim under the U.S. Supreme Court's "intent-effects" test. *Id.* at 415. As to "intent," the Court found that the General Assembly crafted Megan's Law with a remedial objective. *Id.* at 416-17. As to "effects," the Court analyzed Megan's Law under the seven guideposts of *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, recognizing that the "determination [was] *a 'matter of degree'*" under federal caselaw. *Id.* at 418 (quoting *California v. Morales* (1995), 514 U.S. 499, 509) (emphasis added). Balancing those factors, the Court held that Megan's Law "serve[d] the solely remedial purpose of protecting the public" and it found "no clear proof that [the law] [was] punitive in its effect." *Id.* at 423.

The Court has kept the federal and state constitutional analyses separate in its other decisions. In *State v. Walls*, 96 Ohio St. 3d 437, 2002-Ohio-5059, for instance, the defendant challenged several amendments to Ohio's juvenile code. *Id.* ¶ 18. (Those amendments retroactively authorized the defendant's trial for murder as an adult.) The Court rejected the Retroactivity Clause claim under *Van Fossen* because the amendments "did not impair any of [the defendant's] vested rights within the meaning of our retroactivity jurisprudence." *Id.* ¶ 17. But that holding "d[id] not end [the Court's] constitutional inquiry" because the *Walls* defendant "also argue[d] that the amendments to the juvenile statutes, when retroactively applied to him, [were] ex post facto laws prohibited by Section 10, Article I of the United States Constitution." *Id.* ¶ 20. Emphasizing that the state and federal claims were distinct, the Court undertook a separate inquiry to evaluate the federal claim because "[e]ven though a law may not impair

'vested rights' within the meaning of our retroactivity cases, the law may still run afoul of the ex post facto prohibition."[2] *Id.* ¶ 23.

For the first time, and without explanation, *Williams* conflates the state Retroactivity Clause and federal Ex Post Facto Clause.

First, the syllabus indicates that the majority's decision will rest exclusively on state Retroactivity Clause grounds. See *Williams*, 2011-Ohio-3374, at syl. The Court's analysis then begins by summarizing its Retroactivity Clause jurisprudence and the *Van Fossen* test. See *id.* ¶¶ 8-9. But in the very next breath, while still purporting to be doing a Retroactivity Clause analysis, the decision switches to the rubric of an Ex Post Facto inquiry: "There is no absolute test to determine whether a retroactive statute is so punitive as to violate the constitutional prohibition against *ex post facto* laws; such a determination is a 'matter of degree.'" *Id.* ¶ 10 (quoting *Cook*, 83 Ohio St. at 418).

While still purporting to be in Retroactivity Clause mode, the Court next reproduced two paragraphs from Justice Lanzinger's dissent in *State v. Ferguson*, 120 Ohio St. 3d 7, 2008-Ohio-4824. See *Williams*, 2011-Ohio-3374, at ¶¶ 12-14. In those passages, Justice Lanzinger articulated her view that amendments to the old Megan's Law framework violated *the federal Ex Post Facto Clause*. Those passages even reference *Cook*'s discussion of the Ex Post Facto Clause. See *Ferguson*, 2008-Ohio-4824, at ¶¶ 47-48 (Lanzinger, J., dissenting) (quoting *Cook*, 83 Ohio St. at 418).

[2] The Court's decision in *State v. Rush* (1998), 83 Ohio St. 3d 53, used the same bipartite approach when it affirmed the constitutionality of several amendments to Ohio's criminal and sentencing statutes. The Court first rejected the defendant's claim under federal Ex Post Facto Clause standards, *id.* at 59, and it then dismissed his Retroactivity Clause claim under *Matz* and *Van Fossen*, *id.* at 60.

The Court then indicated that "all doubt" about R.C. Chapter 2950's punitive effect "has been removed" after passage of S.B. 10. *Williams*, 2011-Ohio-3374, at ¶ 15. It cataloged the various revisions to Ohio's sex offender registration and notification scheme, and observed that "[n]o one change compel[led] [its] conclusion that S.B. 10 is punitive." *Id.* ¶ 20. Rather, the Court said, "*[i]t is a matter of degree* whether a statute is so punitive that its retroactive application is unconstitutional." *Id.* (emphasis added) (citing *Cook*, 83 Ohio St. at 418). Again, these quoted passages originate in *Cook*'s discussion of *the federal Ex Post Facto Clause* and deploy the federal Ex Post Facto Clause's matter-of-degree framework. See *Morales*, 514 U.S. at 509.

In short, paragraphs 10 through 20 of *Williams* set forth a federal Ex Post Facto Clause analysis, even though the statements bookending that analysis indicate that the majority intended to rule on state Retroactivity Clause grounds. As the majority summed up: "If the registration requirements of S.B. 10 are imposed on Williams, the General Assembly has imposed new or additional burdens, duties, obligations, or liabilities as to a past transaction." *Id.* ¶ 21. That "violates Section 28, Article II of the Ohio Constitution." *Id.*

Given the entrenched separation of the Ex Post Facto Clause "matter of degree" inquiry and the Retroactivity Clause's bright-line test in Ohio case law, further explanation is needed. By merging these analyses together for the first time, but without explanation, it is unclear whether *Williams* meant to herald a sea change in the Court's state constitutional jurisprudence, whether the Court meant to rule on federal *Ex Post Facto* grounds (as its analysis indicates), or something else. For the sake of prosecutors and defendants alike, and for the sake of the lower courts and the General Assembly, the Court is respectfully urged to clarify what it meant.

C. The Court should reconsider or clarify its analysis to address these major jurisprudential questions.

A majority of the Court in *Williams* clearly concluded that S.B. 10 is unconstitutional in the main. As noted, neither the State nor the Ohio Attorney General asks the Court to revisit that ultimate pronouncement. But the State and the Attorney General urge the Court to reconsider or clarify its analysis.

The Court's "matter of degree" inquiry suggests that it intended to strike down S.B. 10 under the Ex Post Facto Clause. If so, the Court should revise its holding accordingly.

But if the Court intended to invalidate S.B. 10 using the Retroactivity Clause, it must take the monumental and explicit step of overruling *Matz*. The central holding of that case—that "[p]ast felonious conduct is not . . . a transaction or consideration" that "create[s] . . . a reasonable expectation of finality" under the Retroactivity Clause, *Matz*, 37 Ohio St. 3d at 282—cannot be squared with the Court's decision here. The only "transaction" that occurred before the enactment of S.B. 10 on July 1, 2007, was Mr. Williams's felonious conduct.

The State and the Attorney General do not bring this motion lightly, but rather out of sincerest concern that leaving the law in this state is certain to sow great confusion in the lower courts, the halls of the legislature, and among prosecutors and defendants alike—all of whom will look to *Williams* for guidance on Retroactivity Clause questions in all types of contexts (not just sex offender laws). Both the State and its localities attach all sorts of collateral consequences to past felony convictions. Regardless of when the crime occurred, state and local laws restrict the rights of felons to carry firearms, work in certain fields, obtain public benefits and permits, and the like. To date, the Retroactivity Clause analysis has been clear. But if felonious conduct now qualifies as a "transaction" that creates a reasonable expectation of finality within the meaning of the Retroactivity Clause, then a wide range of civil statutes and

ordinances are at risk of invalidation. The same is true for many prior decisions of this Court that are wholly unrelated to sex offender laws.

If the Court intended to broaden significantly the scope of the Retroactivity Clause, and to overrule certain entrenched precedents, then it is implored to say so clearly; or if it intended to rule on Ex Post Facto Clause grounds, as it seems to have done, it should say that clearly. Otherwise, the State, its municipalities, prosecutors, defendants, and the lower courts will be forced to litigate these Retroactivity Clause questions for years.

CONCLUSION

For these reasons, the Court should grant the motion for reconsideration and/or clarification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Joint Motion for Reconsideration and/or Clarification by Appellee State of Ohio and *Amicus Curiae* Ohio Attorney General Michael DeWine was served by U.S. mail this 25th day of July, 2011, upon the following counsel:

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