April 29, 1999

OPINION NO. 99-031

The Honorable James F. Stevenson
Shelby County Prosecuting Attorney
126 N. Main Avenue
P.O. Box 987
Sidney, Ohio 45365-0987

Dear Prosecutor Stevenson:

You have requested an opinion whether a county public defender is required to represent an indigent defendant at a hearing to determine whether he is a sexual predator for purposes of the provisions of R.C. Chapter 2950. Information in your letter indicates that in Shelby County legal representation of indigent defendants is provided by a county public defender pursuant to the provisions of R.C. 120.13-.18.[1]

R.C. Chapter 2950 sets forth provisions for the registration of sexual predators and for community notification regarding sexual predators who are about to be or have been released from imprisonment, a prison term, or other confinement and who will live in or near a particular neighborhood or who otherwise will live in or near a particular neighborhood.[2] R.C. 2950.04 requires a sexual predator to register with the sheriff of the county in which he resides or is temporarily domiciled for more than seven days. As part of the registration, a sexual predator is required to provide the county sheriff with his current residence address, the name and address of his employer, if he is employed at the time of registration or if he knows at the time of

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[1] A county may provide legal representation to indigent defendants through the state public defender, R.C. 120.04-.06, a county public defender system, R.C. 120.13-.18, a joint county public defender system, R.C. 120.23-.28, or a system of appointed counsel, R.C. 120.33.

[2] R.C. Chapter 2950 also contains provisions pertaining to the registration of habitual sex offenders and other offenders who have committed sexually oriented offenses and community notification regarding the release of habitual sex offenders.

registration that he will be commencing employment with that employer subsequent to registration, and any other information required by the Bureau of Criminal Identification and Investigation. R.C. 2950.04(C).[3] In addition, a sexual predator who is required to register pursuant to R.C. 2950.04 is required to provide written notice of any residence address change to the county sheriff with whom he most recently registered, R.C. 2950.05, and to periodically verify his current residence address with the county sheriff with whom he most recently registered, R.C. 2950.06.

R.C. 2950.09 sets forth the procedures for classifying a defendant as a sexual predator for purposes of R.C. Chapter 2950.[4] In this regard, R.C. 2950.09(A) provides:

> If a person is convicted of or pleads guilty to committing, on or after January 1, 1997, a sexually oriented offense that is a sexually violent offense and also is convicted of or pleads guilty to a sexually violent predator specification that was included in the indictment, count in the indictment, or information charging the sexually violent offense, the conviction of or plea of guilty to the specification automatically classifies the offender as a sexual predator for purposes of this chapter. If a person is convicted of or pleads guilty to a sexually oriented offense in another state, or in a federal court, military court, or an Indian tribal court and if, as a result of that conviction or plea of guilty, the person is required, under the law of the jurisdiction in which the person was convicted or pleaded guilty, to register as a sex offender until the person's death and is required to verify the person's address on at least a quarterly basis each year, that conviction or plea of guilty automatically classifies the offender as a sexual predator for the purposes of this chapter, but the offender may challenge that classification pursuant to division (F) of this section. In all other cases, a person who is convicted of or pleads guilty to, or has been convicted of or pleaded guilty to, a sexually oriented offense may be classified as a sexual predator for purposes of this chapter only in accordance with division (B) or (C) of this section.

R.C. 2950.09(B)(1) authorizes a judge to conduct a hearing to determine whether a defendant who, on or after January 1, 1997, was sentenced for a sexually oriented offense that is

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[3] The registration form to be signed by a sexual predator must include his photograph. R.C. 2950.04(C).

[4] R.C. 2950.01(E) provides that, for purposes of R.C. Chapter 2950, unless the context clearly requires otherwise, the term "'[s]exual predator' means a person who has been convicted of or pleaded guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses."

not a sexually violent offense or for a sexually oriented offense that is a sexually violent offense and a sexually violent predator specification was not included in the indictment, count in the indictment, or information charging the sexually violent offense is a sexual predator. Under R.C. 2950.09(C)(2), a court, upon the recommendation of the Department of Rehabilitation and Correction, may conduct a hearing to determine whether a defendant in the custody of the Department for the commission of a sexually oriented offense committed prior to January 1, 1997, is a sexual predator. Accordingly, pursuant to divisions (B)(1) and (C)(2) of R.C. 2950.09, a court is authorized to conduct a hearing to determine whether a defendant who has been convicted of, or pleaded guilty to, a sexually oriented offense is a sexual predator for purposes of R.C. Chapter 2950.

At such a hearing, a defendant has a statutory right to be represented by counsel. R.C. 2950.09(B)(1), (C)(2); *State v. Cook*, 83 Ohio St. 3d 404, 407, 423, 700 N.E.2d 570, 575, 586 (1998), *cert. denied*, 119 S. Ct. 1122 (1999); *see also State v. Cady*, 3-98-14, 1998 Ohio App. LEXIS 5491 (Crawford County Nov. 5, 1998) (a hearing to determine whether a defendant should be classified as a sexual predator does not comport with the dictates of due process unless the defendant is represented by counsel at the hearing or informed of his right to counsel under R.C. 2950.09(C)(2) and waives such right). Moreover, if the defendant is indigent, he has a statutory right to have counsel appointed to represent him at such a hearing. R.C. 2950.09(B)(1), (C)(2); *State v. Cook*, 83 Ohio St. 3d at 423, 700 N.E.2d at 586.

R.C. 2950.09 does not expressly require a county public defender to provide legal representation to an indigent defendant at a hearing to determine whether the defendant is a sexual predator for purposes of R.C. Chapter 2950. Nevertheless, it is a general rule that whenever an indigent defendant is constitutionally or statutorily entitled to court-appointed legal representation, the representation is provided through one of the systems established by R.C. Chapter 120. *See* 1997 Op. Att'y Gen. No. 97-040; 1985 Op. Att'y Gen. No. 85-090; 1984 Op. Att'y Gen. No. 84-023. R.C. Chapter 120 authorizes a county to provide legal representation for indigent defendants through the state public defender, R.C. 120.04-.06, a county public defender system, R.C. 120.13-.18, a joint county public defender system, R.C. 120.23-.28, or a system of appointed counsel, R.C. 120.33. 1997 Op. Att'y Gen. No. 97-040 at 2-234 n.1; 1984 Op. Att'y Gen. No. 84-023 at 2-72.

As indicated previously, your county provides legal representation to indigent defendants pursuant to the county public defender system. Under a county public defender system, the county public defender is vested with the responsibility for providing legal representation to indigent defendants. *See* R.C. 120.15-.17. R.C. 120.16 sets forth the circumstances under which a county public defender is required to provide legal representation to indigent defendants, stating in pertinent part:

> (A)(1) The county public defender shall provide legal representation to indigent adults and juveniles who are charged with *the commission of an offense or act that is a violation of a state statute and for which the penalty or any*

> *possible adjudication includes the potential loss of liberty* and in postconviction proceedings as defined in this section.
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> ….
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> (B) The county public defender shall provide *the legal representation authorized by division (A) of this section at every stage of the proceedings* following arrest, detention, service of summons, or indictment. (Emphasis added.)

Accordingly, pursuant to R.C. 120.16(A)(1) and (B), a county public defender is required to provide legal representation (1) at every stage of a proceeding in which an indigent defendant is charged with the commission of an offense or act, (2) that is a violation of a state statute, and (3) for which the penalty or any possible adjudication includes the potential loss of liberty. Let us therefore examine each of these criteria and determine whether they are present in the case of a hearing that is held by a court to determine an indigent defendant's sexual predator status.

As provided in R.C. 2950.09, a hearing to determine whether a defendant is a sexual predator is conducted by a court after a defendant is convicted of, or pleads guilty to, a sexually oriented offense. It is axiomatic that before a defendant may be convicted of, or plead guilty to, a sexually oriented offense, the defendant must be charged with the commission of a sexually oriented offense. *See generally* Ohio R. Crim. P. 5(A) (at a defendant's initial appearance, a judge or magistrate must inform the defendant of the nature of the charge against him); Ohio R. Crim. P. 7(B) (an indictment or information shall contain a statement that the defendant has committed a public offense specified in the indictment or information). Charging a defendant with a sexually oriented offense thus is a condition precedent to the holding of a hearing to determine whether the defendant is a sexual predator. Further, such a hearing arises only because a defendant who is charged with the commission of a sexually oriented offense is convicted of that offense or a lesser-included sexually oriented offense. Therefore, a hearing to determine whether a defendant is a sexual predator is a "stage of the proceedings following arrest, detention, service of summons, or indictment" for persons convicted of such offenses. R.C. 120.16(B).

As used in R.C. 2950.09, unless the context clearly requires otherwise, "[s]exually oriented offense" means any of the following offenses:

> (1) Regardless of the age of the victim of the offense, a violation of section 2907.02, 2907.03, or 2907.05 of the Revised Code;
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> (2) Any of the following offenses involving a minor, in the circumstances specified:

(a) A violation of section 2905.01, 2905.02, 2905.03, 2905.04,[5] 2905.05, or 2907.04 of the Revised Code when the victim of the offense is under eighteen years of age;

(b) A violation of section 2907.21 of the Revised Code when the person who is compelled, induced, procured, encouraged, solicited, requested, or facilitated to engage in, paid or agreed to be paid for, or allowed to engage in the sexual activity in question is under eighteen years of age;

(c) A violation of division (A)(1) or (3) of section 2907.321 or 2907.322 of the Revised Code;

(d) A violation of division (A)(1) or (2) of section 2907.323 of the Revised Code;

(e) A violation of division (B)(5) of section 2919.22 of the Revised Code when the child who is involved in the offense is under eighteen years of age.

(3) Regardless of the age of the victim of the offense, a violation of section 2903.01, 2903.02, 2903.11, or 2905.01 of the Revised Code, or of division (A) of section 2903.04 of the Revised Code, that is committed with a purpose to gratify the sexual needs or desires of the offender;

(4) A sexually violent offense;[6]

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[5] R.C. 2905.04 has been repealed. 1995-1996 Ohio Laws, Part IV, 7136 (Am. Sub. S.B. 2, eff. July 1, 1996).

[6] For purposes of R.C. Chapter 2950, "[s]exually violent offense" has the same meaning as in R.C. 2971.01. R.C. 2950.01(H). R.C. 2971.01(G) defines "[s]exually violent offense" as "a violent sex offense, or a designated homicide, assault, or kidnapping offense for which the offender also was convicted of or pleaded guilty to a sexual motivation specification." R.C. 2971.01, in turn, defines the terms "[s]exual motivation specification" and "[v]iolent sex offense" as follows:

(K) "Sexual motivation specification" means a specification, as described in section 2941.147 of the Revised Code, that charges that a person charged with a designated homicide, assault, or kidnapping offense committed the offense with a sexual motivation.

(L) "Violent sex offense" means any of the following:

(1) A violation of section 2907.02, 2907.03, or 2907.12 or of division (A)(4) of section 2907.05 of the Revised Code;

(2) A felony violation of a former law of this state that is substantially equivalent to a violation listed in division (L)(1) of this section or of an existing or former law of the United States or of another state that is substantially equivalent to a violation listed in division (L)(1) of this section;

> (5) A violation of any former law of this state that was substantially equivalent to any offense listed in division (D)(1), (2), (3), or (4) of this section;
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> (6) A violation of an existing or former municipal ordinance or law of another state or the United States, a violation under the law applicable in a military court, or a violation under the law applicable in an Indian tribal court that is or was substantially equivalent to any offense listed in division (D)(1), (2), (3), or (4) of this section;
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> (7) An attempt to commit, conspiracy to commit, or complicity in committing any offense listed in division (D)(1), (2), (3), (4), (5), or (6) of this section. (Footnotes added.)

R.C. 2950.01(D).

A review of the offenses included within R.C. 2950.01(D)'s definition of "[s]exually oriented offense," as used in R.C. 2950.09(B)(1) and (C)(2), discloses that a person who is convicted of, or pleads guilty to, one of those offenses has committed an offense that "is a violation of a state statute." R.C. 120.16(A)(1). As defined in *Black's Law Dictionary* 1410 (6th ed. 1990), a "statute" is "[a]n act of the legislature declaring, commanding, or prohibiting something; a particular law enacted and established by the will of the legislative department of government; the written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the state." In Ohio, the legislative power of the state rests with the General Assembly. Ohio Const. art. II, § 1. The General Assembly thus is empowered to enact state statutes that prohibit certain specified conduct by persons and impose penalties for that conduct. *See id*. State statutes enacted by the General Assembly of a permanent and general nature are set forth in the Revised Code. R.C. 1.01.

Each offense listed in R.C. 2950.01(D) as a "[s]exually oriented offense," for purposes of R.C. 2950.09(B)(1) and (C)(2), constitutes conduct that is prohibited by a statute of the Revised Code.[7] *See, e.g.*, R.C. 2903.01; R.C. 2903.02; R.C. 2903.04(A); R.C. 2903.11; R.C. 2905.01;

> (3) An attempt to commit or complicity in committing a violation listed in division (L)(1) or (2) of this section if the attempt or complicity is a felony.

[7] Pursuant to R.C. 2950.01(E)(6), "[s]exually oriented offense" means "[a] violation of an existing or former municipal ordinance or law of another state or the United States, a violation under the law applicable in a military court, or a violation under the law applicable in an Indian tribal court that is or was substantially equivalent to any offense listed in division (D)(1), (2), (3), or (4) of this section." None of the violations listed in R.C. 2950.01(E)(6) is a violation of a statute of this state. However, since none of the violations listed therein will give rise to a hearing under R.C. 2950.09(B)(1) or (C)(2), such violations are not included within the

R.C. 2905.02; R.C. 2905.03; R.C. 2905.05; R.C. 2907.02; R.C. 2907.03; R.C. 2907.04; R.C. 2907.05; R.C. 2907.21; R.C. 2907.321(A)(1), (3); R.C. 2907.322(A)(1), (3); R.C. 2907.323(A)(1), (2); R.C. 2919.22(B)(5); R.C. 2923.01; R.C. 2923.02; R.C. 2923.03. Accordingly, a person who commits one of those offenses commits an offense that "is a violation of a state statute." R.C. 120.16(A)(1).

Moreover, each offense enumerated in R.C. 2950.01(D) is classified as either a felony or misdemeanor. *See* R.C. 2903.04(C); R.C. 2903.11(B); R.C. 2905.01(C); R.C. 2905.02(B); R.C. 2905.03(B); R.C. 2905.05(C); R.C. 2907.02(B); R.C. 2907.03(B); R.C. 2907.04(B); R.C. 2907.05(B); R.C. 2907.21(B); R.C. 2907.321(C); R.C. 2907.322(C); R.C. 2907.323(B); R.C. 2919.22(E); R.C. 2923.01(J); R.C. 2923.02(E); R.C. 2923.03(F); R.C. 2929.02. Pursuant to R.C. 2929.14 and R.C. 2929.21, respectively, a court may impose a prison term on a person convicted of, or pleading guilty to, a felony or misdemeanor. The penalty for each offense listed in R.C. 2950.01(D) as a "[s]exually oriented offense," for purposes of R.C. 2950.09(B)(1) and (C)(2), thus "includes the potential loss of liberty," R.C. 120.16(A)(1), insofar as a prison term may be imposed on a person convicted of, or pleading guilty to, one of those offenses. Accordingly, for purposes of R.C. 2950.09(B)(1) and (C)(2), a sexually oriented offense is a violation of a state statute for which the penalty includes the potential loss of liberty.

In light of the foregoing, it is our conclusion that a hearing to determine whether a defendant is a sexual predator is a stage in a proceeding that is instituted against a defendant charged with the commission of a violation of a state statute for which the penalty includes the potential loss of liberty. This conclusion should not be interpreted to suggest that the sexual predator hearing itself results in the imposition of punishment. Indeed, the Ohio Supreme Court has already ruled that R.C. Chapter 2950 is "remedial, not punitive" in both its intent, *State v. Cook*, 83 Ohio St. 3d at 417, 700 N.E.2d at 581, and its effect, *id*. at 423, 700 N.E.2d at 585, and the registration and community notification provisions in R.C. Chapter 2950 are specifically described as "not punitive" by the General Assembly, R.C. 2950.02(B). Rather, this conclusion follows from the fact that R.C. 120.16 requires a county public defender to provide legal representation at every stage of a proceeding in which an indigent defendant is charged with the commission of an offense or act that is a violation of a state statute and for which the penalty or any possible adjudication includes the potential loss of liberty. A sexual predator hearing is one stage of such a proceeding, even though persons convicted of sexually oriented offenses face no potential loss of liberty at the sexual predator hearing. It follows, therefore, that a county public

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definition of "[s]exually oriented offense," as used in the context of R.C. 2950.09(B)(1) and (C)(2).

defender is required to represent an indigent defendant at a hearing to determine whether the defendant is a sexual predator for purposes of the provisions of R.C. Chapter 2950.[8]

There are two exceptions, however, to the foregoing requirement. A county public defender is not required to provide legal representation to an indigent defendant when the indigent defendant has waived his right to legal counsel[9] or the court pursuant to R.C. 120.16(E)[10] has appointed counsel other than the county prosecuting attorney or allowed an indigent defendant to select his own personal counsel to represent him. *See* 1997 Op. Att'y Gen. No. 97-040 at 2-237. Accordingly, pursuant to R.C. 120.16 and R.C. 2950.09, a county public defender is required to represent an indigent defendant at a hearing to determine whether the defendant is a sexual predator for purposes of the provisions of R.C. Chapter 2950, unless the defendant waives his right to counsel or the court pursuant to R.C. 120.16(E) appoints counsel other than the county public defender or allows the defendant to select his own personal counsel to represent him.

Based on the foregoing, it is my opinion, and you are hereby advised that, pursuant to R.C. 120.16 and R.C. 2950.09, a county public defender is required to represent an indigent defendant at a hearing to determine whether the defendant is a sexual predator for purposes of the provisions of R.C. Chapter 2950, unless the defendant waives his right to counsel or the court

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[8] In your letter, you state that *State v. Castro*, 67 Ohio App. 2d 20, 22, 425 N.E.2d 907, 909 (Cuyahoga County 1979), held that court appointed "[c]ounsel for postconviction proceedings is not a matter of right in Ohio, neither constitutional, nor statutory." Rather, "[t]he appointment of counsel for postconviction proceedings is a matter of judicial discretion which may be exercised pursuant to the public defender statutes, specifically R.C. 120.16 and 120.26." *Id.* By its enactment of R.C. 2950.09(B)(1) and R.C. 2950.09(C)(2), however, the General Assembly has granted a defendant a statutory right to be represented by counsel at a hearing held to determine whether the defendant is a sexual predator. In addition, a hearing to determine the sexual predator status of a sexually oriented offender is not a postconviction proceeding. Thus, the decision of the court of appeals in *State v. Castro* is inapposite and does not affect the conclusion we have reached in this opinion.

[9] In *State v. Gibson*, 45 Ohio St. 2d 366, 345 N.E.2d 399 (1976), the Ohio Supreme Court held that a defendant may waive his right to legal counsel when he voluntarily, knowingly, and intelligently elects to waive such right.

[10] R.C. 120.16(E) states, in pertinent part, that nothing in R.C. 120.16 "shall prevent a court from appointing counsel other than the county public defender or from allowing an indigent person to select the indigent person's own personal counsel to represent the indigent person."

pursuant to R.C. 120.16(E) appoints counsel other than the county public defender or allows the defendant to select his own personal counsel to represent him.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

April 29, 1999

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SYLLABUS: 99-031

Pursuant to R.C. 120.16 and R.C. 2950.09, a county public defender is required to represent an indigent defendant at a hearing to determine whether the defendant is a sexual predator for purposes of the provisions of R.C. Chapter 2950, unless the defendant waives his right to counsel or the court pursuant to R.C. 120.16(E) appoints counsel other than the county public defender or allows the defendant to select his own personal counsel to represent him.