

IN THE SUPREME COURT OF OHIO

08-2502

STATE OF OHIO,

Appellee,

vs.

GERALD E. PHILLIPS,

Appellant.

\* Supreme Court Case No.:

\*  
\* On Appeal from the  
\* Huron County Court of  
\* Appeals, Sixth Appellate  
\* District

\* Court of Appeals Nos.  
\* H-07-040  
\* H-07-041  
\* H-07-042

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MEMORANDUM IN SUPPORT OF JURISDICTION  
GERALD E. PHILLIPS, APPELLANT

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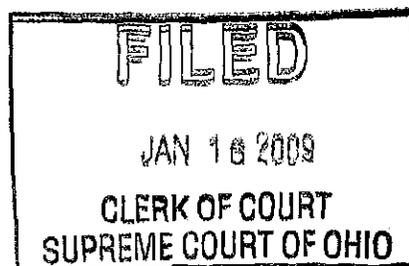
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## TABLE OF CONTENTS

	<u>Page</u>
WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1
STATEMENT OF THE CASE AND FACTS	3
ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW	4
<u>Proposition of Law No. 1:</u> Application of S.B. 10, Ohio's version of the Adam Walsh Act, to offenders whose crimes occurred before its effective date violates the Ex Post Facto Clause of the United States Constitution.	5
<u>Proposition of Law No. 2:</u> Application of S.B. 10, Ohio's version of the version of the Adam Walsh Act, to offenders whose crimes occurred before its effective date violates the Retroactivity Clause of the Ohio Constitution.	8
<u>Proposition of Law No. 3:</u> Application of S.B. 10, Ohio's version of the Adam Walsh Act, to offenders who were classified under Megan's Law effectively vacates valid judicial orders, and violates the Separation of Powers Doctrine embodied in the Ohio Constitution.	9
<u>Proposition of Law No. 4:</u> Application of S.B. 10, Ohio's version of the Adam Walsh Act, to offenders who have previously been sentenced for sex offenses violates the Double Jeopardy Clauses of the Ohio and United States Constitutions.	11
<u>Proposition of Law No. 5:</u> Application of S.B. 10, Ohio's version of the Adam Walsh Act, to offenders who have previously been subject to the provisions of either the 1996 or 2003 version of Megan's Law violates Due Process and constitutes cruel and unusual punishment as prohibited by the Ohio and United States Constitutions.	12
<u>Proposition of Law No. 6:</u> Application of S.B. 10, Ohio's version of the Adam Walsh Act, to offenders who, pursuant to agreement with the Prosecutor and before the Act's effective date, entered pleas of guilty or no contest impairs the obligation of contracts as protected by the Ohio and United States Constitutions.	14
CONCLUSION	15
PROOF OF SERVICE	16
<i>State v. Bodyke</i> , Huron App. Nos. H-07-040, H-07-041, H-07-042, 2008-Ohio-6387	

**WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Introduction

On December 31, 2008, notice of appeal and memorandum in support of jurisdiction were filed in this Court by Christian Bodyke. *State v. Bodyke*, No. 08-2502. Bodyke's was one of three cases consolidated by the Huron County Court of Appeals and decided by single opinion. *State v. Bodyke*, 2008-Ohio-6387. This case, and *State v. Phillips* (for which notice of appeal and memorandum in support of jurisdiction are being filed concurrently with the materials in this case) are the other two. As is the case with *Bodyke*, these cases provide the opportunity for this Court to address all the serious issues that plague the courts, sheriffs, prosecutors, offenders, victims, and people of Ohio in the wake of Senate Bill 10, Ohio's version of the Adam Walsh Act.

Those issues concern retroactivity, ex post facto, separation of powers, due process, double jeopardy, cruel and unusual punishment, and impairment of contract. The uncertainty surrounding them has led courts to stay all S.B. 10 proceedings pending a ruling from this Court.<sup>1</sup> It is time for this Court to undertake that review and resolve these issues.

From Megan's Law to the Adam Walsh Act

In 1996, the General Assembly passed and the Governor signed H.B. 180, Ohio's

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<sup>1</sup> See, e.g., *State v. P.F.M.*, Van Wert C.P. Nos. CR 07-12-185, CR 07-12-186, CR 97-06-049, CR 02-01-007, CR 07-12-187, CR 08-01-001, CR 06-09-159 (Jan. 14, 2008); *In re: Petitions Filed Contesting Application of Adam Walsh Act*, Summit C.P. Judgment Entry Stay Order, no number (Jan. 28, 2008); *In re: Petitions Filed Contesting Application of Adam Walsh Act*, Medina App., Judgment Entry Stay Order, no number (Jan. 31, 2008); *In re: Petitioner Contesting Reclassification Pursuant to Adam Walsh Act and/or Seeking Stay of Enforcement of Adam Walsh Act*, Geauga C.P., Judgment Entry, no number (Feb. 4, 2008). Links to these orders can be found on the Ohio Public Defender website at [http://opd.ohio.gov/AWA\\_Attorney\\_Forms/AWA\\_Attorney\\_Forms.htm](http://opd.ohio.gov/AWA_Attorney_Forms/AWA_Attorney_Forms.htm)

version of Megan's Law--a comprehensive program of classification, registration, and notification designed to protect the public from recidivism by sex offenders. Because H.B. 180 was specifically made retroactive, Ohio courts were required to resolve whether the law violated either the Retroactivity Clause of the Ohio Constitution or the Ex Post Facto Clause of the United States Constitution. In *State v. Cook* (1998), 83 Ohio St.3d 404, this Court held that it did not, that H.B. 180 had a remedial purpose and was narrowly targeted to track likely recidivists.

In 2003, the General Assembly adopted the first major revisions of Megan's Law. In *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, over dissents by three Justices, this Court concluded that the revised law, although more onerous than the 1996 law, survived retroactivity and ex post facto challenges.

In 2007, the General Assembly replaced Megan's Law entirely. S.B. 10, the Adam Walsh Act, abandoned H.B. 180's narrowly-focused, targeted scheme aimed at protecting the public from likely recidivists, and replaced it with sweeping new classification and registration requirements. S.B. 10 mandates that all previously classified offenders be reclassified under the new system, and arbitrarily treats those previously found unlikely to reoffend the same as those found the most likely to reoffend. The new system abandons all concerns with future dangerousness, increases the frequency and duration of registration, as well as requiring additional registrations in multiple locations. In short, it replaces remediation and regulation with punishment.

Under S.B. 10, tens of thousands of people have been reclassified. Thousands of them have petitioned for review of the details and the constitutionality of their reclassifications. They have argued not just that the law violates the Ex Post Facto and

Retroactivity Clauses but also that its application to them violates the separation of powers, due process, double jeopardy, and cruel and unusual punishment. They further argue that, when applied to offenders who had been classified following negotiated pleas, it impairs contracts in violation of the Ohio and United States Constitutions.<sup>2</sup>

### **STATEMENT OF THE CASE AND FACTS**

In November 1993, Appellant Gerald E. Phillips entered an agreed plea of guilty to one count of gross sexual imposition and one count of sexual battery. He was sentenced to prison for a term of 3-10 years on the count of sexual battery and to a concurrent term of 2 years on the count of gross sexual imposition. At the time, Ohio law included no sexual classification and registration system.

After Ohio's Megan's Law took effect, the Adult Parole Authority recommended that Phillips be classified as a sexual predator. In November 1997, the State of Ohio informed the trial court that it would not seek to have Phillips declared a sexual predator. Therefore, he was classified as a sexually oriented offender.

On November 26, 2007, Phillips received a letter from the Attorney General informing him that, pursuant to Senate Bill 10, 127<sup>th</sup> General Assembly, Sections 2, 3,

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<sup>2</sup> See, e.g., *State v. Desbiens*, 2nd Dist. No. 22489, 2008-Ohio-3375 (ex post facto, substantive/procedural due process, right to contract, overbroad and unconstitutionally impermissible); *State v. Worthington*, 3rd Dist. No. 7-07-62, 2008-Ohio-3222 (ex post facto, retroactivity, double jeopardy, due process); *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051 (ex post facto, retroactivity, separation of powers, cruel & unusual punishment, due process, double jeopardy); *State v. Christian*, 10th Dist. No. 08AP-170, 2008-Ohio-6304 (ex post facto, retroactivity, separation of powers, substantive due process, procedural due process, double jeopardy, cruel and unusual punishment); *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059 (ex post facto, retroactivity, separation of powers, substantive & procedural due process); *State v. Williams*, 12<sup>th</sup> District No. CA2008-02-029, 2008-Ohio-6195 (ex post facto, due process, double jeopardy, retroactivity, separation of powers).

and 4 (2007),<sup>3</sup> he was being reclassified as a Teir III sex offender; thus, he was required to register every 90 days for the rest of his life. Phillips filed a petition to challenge the classification. He asserted that S.B. 10 could not be properly applied to him. Phillips also sought from the court, a ruling that he should not be subject to the community notification provisions of S.B. 10. The prosecutor agreed that community notification would serve no purpose in this case.

The common pleas court denied the petition and affirmed Phillips' designation as a Tier III offender although it agreed with both Phillips and the State that there was no reason for community notification. Phillips appealed the trial court's determination to the Huron County Court of Appeals raising two assignments of error:

The retroactive application of Senate Bill 10 violates the Ex Post Facto, Due Process, and Double Jeopardy Clauses of the United States Constitution and the Retroactivity Clause of Section 28, Article II, Ohio Constitution. Fifth, Eighth, and Fourteenth Amendments, United States Constitution; Sections 9 and 10, Article I, Ohio Constitution.

The retroactive application of Senate Bill 10 to persons whose convictions were obtained pursuant to pleas of guilty or no contest rather than through trial verdicts impairs the obligation of contract protected by Article I, Section 10, Clause I, United States Constitution and Section 28, Article II, Ohio Constitution.

On December 5, 2008, the court of appeals affirmed the decision of the trial court.

*State v. Bodyke*, 2008-Ohio-6387.

### **ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW**

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<sup>3</sup> Ohio's former sex offender classification and registration law will be referred to as "Megan's Law." Specific provisions of the law will be identified as "Former R.C. 2950.." The new law, at issue here, will be referred to as "S.B. 10."

Proposition of Law No. 1: Application of S.B. 10, Ohio's version of the Adam Walsh Act, to offenders whose crimes occurred before its effective date violates the Ex Post Facto Clause of the United States Constitution.

Applying S.B. 10 to those whose crimes occurred before the date it was enacted violates the Ex Post Facto Clause of the United States Constitution. Clause 1, Section 10, Article I, United States Constitution.

Prior to S.B. 10, a person convicted of a sexually oriented offense was entitled to a hearing at which a court would determine and impose a classification: sexually oriented, habitual, or predator. Habitual offenders had been found guilty of a prior sexual or child-victim offense. Former R.C. 2950.09(C)(2)(c)(ii). Sexual predators were found "likely to engage in the future in one or more sexually oriented offenses." Former R.C. 2950.01(E). Sexually oriented offenders, by contrast, had not previously been convicted of sexual offenses and were not likely to commit them in the future. The frequency, duration, and onerousness of registration and community notification requirements increased from sexually oriented offenders to habitual offenders to sexual predators.

The legislative purpose was clearly remedial: to protect the public from the likely recidivist. The classification, registration, and notification system advanced that purpose. *Cook, supra*, at 421 (Megan's Law designed "to protect members of the public against those most likely to reoffend"). Because the purpose and effect of Megan's Law were primarily remedial, punitive, application to those whose offenses occurred before its effective date did not violate the Ex Post Facto Clause. That is not true of S.B. 10. Both the purpose and the effect of S.B. 10 are dramatically different.

Although S.B. 10 retains from Megan's Law language denying a punitive purpose, such a declaration of intent is not dispositive. Formal attributes of legislative enactment such as manner of codification and enforcement procedures are also probative. *Smith v. Doe* (2003), 538 U.S. 84, 94.

As the legislature placed S.B. 10 squarely within Ohio's Criminal Code, so the enforcement mechanisms it established are clearly criminal. Tier III offender sexual classification is part and parcel of the criminal punishment. See R.C. 2929.19(B)(4)(a) ("court *shall* include in the offender's sentence a statement that the offender is a tier III sex offender/child-victim offender . . .") (emphasis added). As former Attorney General Marc Dann said of S.B. 10, "by incorporating [classification and registration] *into the penalties*, the trial itself will provide sufficient due process" (emphasis added).<sup>4</sup> Furthermore, failure to comply with the registration, verification, or notification requirements of S.B. 10 subjects the offender to criminal prosecution and criminal penalties. R.C. 2950.99. See *State v. Williams*, 114 Ohio St.3d 103, 2007-Ohio-3268, at ¶10; cf., *Mikaloff v. Walsh* (N.D. Ohio Sept. 4, 2007), 2007 WL 2572268 at \*6. Finally, the legislative history of S.B. 10 indicates that the General Assembly did not enact the law to protect the public. As Senator Lance Mason noted, the law was enacted to "stiffen penalties." Senate Session, Wednesday, May 16, 2007.

Under Megan's Law, classification and registration requirements were based on judicial determinations of future dangerousness, of a continuing threat to the community. Under S.B. 10, future dangerousness, the risk to the community, is wholly irrelevant. All

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<sup>4</sup>Available in a podcast at [http://www.naag.org/podcast\\_the\\_adam\\_walsh\\_act\\_possibilities\\_and\\_challenges\\_for\\_state\\_management\\_of\\_sex\\_offenders.php](http://www.naag.org/podcast_the_adam_walsh_act_possibilities_and_challenges_for_state_management_of_sex_offenders.php)

that matters is the offense of conviction. S.B. 10 replaced a “narrowly tailored” solution, *Cook* at 417, with simple punishment that reflects neither risk to the community nor likelihood of reoffending. Unlike Megan’s Law which required hearings and determinations of danger, S.B. 10 classifies sex offenders solely on the offense of conviction. Deliberately requiring non-dangerous individuals to register for the rest of their lives underscores the General Assembly’s intent to make S.B.10 a criminal statute.

Even if S.B. 10 were not punitive in intent, it is punitive in effect “so as to negate a declared remedial intention.” *Allen v. Illinois*, 478 U.S. 364, 369.

S.B. 10 imposes burdens that have historically been regarded as punishment and operate as affirmative disabilities and restraints. Limitations regarding where offenders may live cause S.B. 10 to resemble colonial punishments of “shaming, humiliation, and banishment.” *Smith v. Doe*, 538 U.S. at 98. They resemble conditions of probation or parole. See *Mikloff, supra* at \*9. S.B. 10 categorically bars sex offenders from residing within 1000 feet of a school, preschool, or child day-care center. R.C. 2950.034.<sup>5</sup> Additionally, each time that a Tier III offender registers, updated information may be sent to neighbors, school superintendents and principals, preschools, daycares, and all volunteer organizations where contact with minors may occur. R.C. 2950.11(A)-(F). Of course, they in turn may disseminate that information which is, in any event, public.

Dissemination of that personal information, including photographs, addresses, e-mail addresses, travel documents, license plate numbers, fingerprints, and DNA samples also resembles shaming punishments intended to inflict public disgrace. R.C.

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<sup>5</sup>Although the residency restrictions do not apply retroactively, *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, they do indicate the punitive effect of the law.

2950.04(B); 2950.04(C). See Stephen P. Garvey, *Can Shaming Punishments Educate?*, 65 U. Chi. L. Rev. 733, 739 (1998).

S.B. 10 also furthers the traditional aims of punishment: retribution and specific deterrence. *Smith v. Doe*, 538 U.S. at 102. By placing offenders into tiers based on the offenses of conviction, and without reference to the likelihood that they will commit other sexual offenses, the General Assembly attempts both to punish the offenders and, prospectively, to deter the commission of other crimes by them. Absent specific determination that the offender is likely to reoffend, the argument that registration and notification are purely remedial means of protecting the public is unsupportable. Automatic classification without determining the likelihood of reoffending is simple retribution. See *Tison v. Arizona* (1987), 481 U.S. 137, 180-181.

A law violates the ex post facto prohibition if it is retrospective and disadvantages those it affects. *Miller v. Florida*, 482 U.S. at 430. A retrospective law “changes the legal consequences of acts completed before its effective date.” *Id.* at 431, citing *Weaver v. Graham* (1981), 450 U.S. 24, 31. A law disadvantages the offender when it is “more onerous than the prior law.” *Id.* S.B. 10 meets both of those tests and violates the Ex Post Facto Clause of the United States Constitution. Clause 1, Section 10, Article I.

Proposition of Law No. 2: Application of S.B. 10, Ohio’s version of the Adam Walsh Act, to offenders whose crimes occurred before its effective date violates the Retroactivity Clause of the Ohio Constitution.

Section 28, Article II, Ohio Constitution forbids retroactive laws. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 106.

When the General Assembly orders that a new law be applied retroactively, as it did with S.B. 10, the question is whether that law affects substantive rights. *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 137. A retroactively applied statute is unconstitutional, if it “impairs or takes away vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligation or liabilities as to a past transaction, or creates a new right.” *Cook, supra*, at 411.

Under S.B. 10, offenders who were previously adjudicated sexually oriented offenders have been reclassified and placed into tiers that mandate, at the very least, five additional years of reporting requirements with significantly more information required to be reported and then made public. The law thus imposes obligations and burdens which did not exist when the offense was committed.

S.B. 10 also takes away or impairs vested rights. Previously adjudicated sexually oriented offenders had a vested right in the final judgments which limited their registration duties to ten years. Under S.B. 10, all of those people’s registration requirements have been extended. Many have been reclassified as Tier-III Offenders, and ordered to register every ninety days for the rest of their lives. Moreover, those prior classifications were judicially determined with the state bearing the burden of proving dangerousness by clear and convincing evidence. Under S.B. 10, all those convicted of offenses occurring before January 1, 2008 lost their right to that judicial adjudication.

Proposition of Law No. 3: Application of S.B. 10, Ohio’s version of the Adam Walsh Act, to offenders who were classified under Megan’s Law effectively vacates valid judicial orders, and violates the Separation of Powers Doctrine embodied in the Ohio Constitution.

S.B. 10 violates the separation-of-powers principle inherent in Ohio's constitutional framework by unconstitutionally limiting the powers of the judicial branch of the government.

“Although the Ohio Constitution does not contain explicit language establishing the doctrine of separation of powers, it is inherent in the constitutional framework of government defining the scope of authority conferred upon the three separate branches of government.” *State v. Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790, at ¶22. As this Court explained in *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, paragraph one of the syllabus, “the administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers.” S.B. 10 improperly interferes with the exercise of the judicial function.

In *State v. Hochhausler* (1996), 76 Ohio St.3d 455, this Court held that former R.C. 4511.191(H)(1), by constraining the power of the courts to grant stays of certain license suspensions, “improperly interfere[d] with the exercise of a court’s judicial functions.” *Id.* at 464. In *State v. Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790, this Court held former R.C. 2953.82(D), unconstitutional because it allowed the executive to prosecute and punish crime. As the Court explained, “the judicial power resides in the judicial branch. Section 1, Article IV, Ohio Constitution. The determination of guilt in a criminal matter *and the sentencing of a defendant convicted of a crime are solely the province of the judiciary.*” *Id.* at ¶ 31 (citation omitted). S.B. 10 similarly divests the judiciary of power to sentence.. By directing trial courts to place offenders in specific

tiers based on their crimes of conviction, the legislature acts as “judge, prosecutor, and jury, which [goes] beyond the role of the [legislative] branch.” *Sterling, supra*, at ¶31.

Final court orders are immune from executive-branch interference. In *City of South Euclid v. Jemison* (1986), 28 Ohio St.3d 157, striking a statute that allowed an executive-branch agency to overrule final court judgments, this Court explained that “the doctrine of the separation of powers precludes the General Assembly from conferring appellate jurisdiction upon an administrative agency from a decision rendered by an Ohio court.” *Id.* at 162.

Under S.B. 10, the Attorney General, an executive-branch official, vacates existing court judgments regarding sex offenders’ classifications, and reverses final court judgments setting the duration of registration. The General Assembly did not merely grant the executive power to overrule final court judgments. It ordered the Attorney General to overrule them.

S.B. 10 does more. R.C. 2950.132, authorizes the Attorney General to adopt rules “to require additional sex offender registration or notification . . . .” Thus, the General Assembly authorized the Attorney General effectively to supersede and repeal statutes by administrative fiat! That it requires the executive branch to overrule final court judgments is only one aspect of its failure to respect the separation of powers.

Proposition of Law No. 4: Application of S.B. 10, Ohio’s version of the Adam Walsh Act, to offenders who have previously been sentenced for sex offenses violates the Double Jeopardy Clauses of the Ohio and United States Constitutions.

S.B. 10 violates the Double Jeopardy Clauses of the Ohio and United States Constitutions inflicting a second punishment upon a sex offender for a single offense.

Because S.B. 10 is punitive in both its intent and effect,<sup>6</sup> the registration and notification requirements operate as a second punishment.

The Double Jeopardy Clause states that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” Fifth Amendment to the United States Constitution. See, also, Section 10, Article I, Ohio Constitution. Among other things, the Clause protects against a state imposing multiple punishments for a single offense or from attempting a second time to criminally punish an offender for the same offense. See *Kansas v. Hendricks*, 521 U.S. at 369; *Witte v. United States* (1995), 515 U.S. 389, 396. Although only “punitive” sanctions are subject to the Fifth Amendment protection against multiple punishments, *Hudson v. United States* (1997), 522 U.S. 93, 101, S.B. 10 is punitive. The application of the statute, through reclassification and increased registration requirements, to those who had already been punished, and even subjected to prior sexual classification and registration requirements, for their sexual offenses is an additional punishment.

Thus, the reclassification of any offender constitutes a second punishment and violates the protections against double jeopardy in the Fifth and Fourteenth Amendments of the United States Constitution and Section 10, Article I of the Ohio Constitution.

Proposition of Law No. 5: Application of S.B. 10, Ohio’s version of the Adam Walsh Act, to offenders who have previously been subject to the provisions of either the 1996 or 2003 version of Megan’s Law violates Due Process and constitutes cruel and unusual punishment as prohibited by the Ohio and United States Constitutions.

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<sup>6</sup> See discussion of Proposition of Law No. 1.

Both the Eighth Amendment to the United States Constitution and Section 9, Article I of the Ohio Constitution, protect against excessive sanctions. See *Atkins v. Virginia* (2002), 536 U.S. 304. The right flows from the basic “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” *Weems v. United States* (1910), 217 U.S. 349, 367. By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons. *Roper v. Simmons*, 543 U.S. at 560.

The prohibition against cruel and unusual punishments must be measured by reference to “the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles* (1958), 356 U.S. 86, 100-101 (plurality opinion).

When it comes to laws that involve sex offenders, the passions of the majority must be tempered with reason. Joseph Lester, *The Legitimacy of Sex Offender Residence and Employment Restrictions*, 40 Akron L. Rev. 339, 340 (2007). “Overborne by a mob mentality for justice, officials at every level of government are enacting laws that effectively exile convicted sex offenders from their midst with little contemplation as to the appropriateness or constitutionality of their actions.” *Id.* See, also, Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261, 1267 (Summer, 1998). (“That sex offenders are deserving of disdain is not the issue, for they surely are. The issue, rather, is whether they deserve the protection of the Constitution, which they surely do.”) Particularly for those offenders who have served their periods of incarceration and have previously been determined to be the least likely to reoffend, the extension of registration and notification under SB 10 is an additional punishment that is has no proportional relation to their crimes.

Proposition of Law No. 6: Application of S.B. 10, Ohio's version of the Adam Walsh Act, to offenders who, pursuant to agreement with the prosecutor and before the Act's effective date, entered pleas of guilty or no contest impairs the obligation of contracts as protected by the Ohio and United States Constitutions.

A plea agreement is a contract that binds the State and is governed by principles of contract law. *State v. Butts* (1996), 112 Ohio App.3d 683, 686. Moreover, "the law in effect at the time a plea agreement is entered is part of the contract." *Ridenour v. Wilkinson*, 10<sup>th</sup> Dist. No. 07AP-200, 2007-Ohio-5965, at ¶21, citing cases. The state, not just the county prosecutor, is contractually bound by the terms of a plea agreement. See *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St.3d 456, 2002-Ohio-6719.

Many offenders resolve the criminal charges against them by entering into plea agreements. Sex-offender classification and the attendant obligations imposed by the sex-offender law in existence at the time of a defendant's plea is a material part of the plea agreements. Retroactive application of S.B. 10 to reclassify any defendant who pleaded guilty or no contest imposes new and additional obligations, and constitutes a breach of the plea agreement. As such, it impairs contractual obligations in violation of Section 28, Article II, Ohio Constitution and Article I, Section 10, Clause 1, United States Constitution.

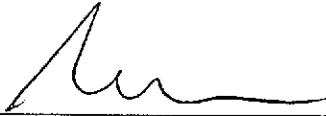
When a plea agreement is breached, the breach may be remedied by specific performance. *Santobello v. New York*, 404 U.S. 257. Accordingly, any defendant who entered into a plea agreement including sentence or sex classification is entitled to specific performance of the State's obligation to impose the sex-offender requirements

that are materially identical to those contemplated by the law in effect at the time of the plea agreement.

**CONCLUSION**

For all of these reasons, this Court should accept jurisdiction, adopt Mr. Phillips' propositions of law, hold all retroactive application of S.B. 10 unconstitutional, and reverse the decision of the court of appeals.

Respectfully submitted,



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**PROOF OF SERVICE**

This is to certify that a copy of the foregoing Memorandum in Support of Jurisdiction of Appellant, Gerald E. Phillips was sent by regular U.S. Mail, postage prepaid, to Russell V. Leffler, Huron County Prosecutor, 12 E. Main Street, 4<sup>th</sup> Floor, Norwalk, Ohio 44857, this 16<sup>th</sup> day of January, 2009.



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VOL 16 PG 35

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IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
HURON COUNTY

State of Ohio

Court of Appeals Nos. H-07-040  
H-07-041  
H-07-042

Appellee

v.

Trial Court Nos. CRI-99-0463  
CRI-99-256  
CRI-93-630

Christian N. Bodyke  
David A. Schwab  
Gerald E. Phillips

**DECISION AND JUDGMENT**

Appellants

Decided: DEC 05 2008

\* \* \* \* \*

Russell V. Leffler, Huron County Prosecuting Attorney,  
for appellee.

Jeffrey M. Gamso and John D. Allton, for appellants.

\* \* \* \* \*

HANDWORK, J.

{¶ 1} This is a consolidated appeal from three judgments entered by the Huron County Court of Common Pleas. In each of the three cases, the trial court denied each appellant's petition contesting his reclassification as a Tier III sex offender under R.C. 2950.01, et seq., as amended by S.B.10, also known as the "Adam Walsh Act". Briefly, the relevant facts of each case are as follows.

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16/36

{¶ 2} On October 18, 1999, appellant, Christian N. Bodyke, entered an agreed plea of no contest to one count of breaking and entering, a violation of R.C. 2911.13(A) and a felony of the fifth degree and to one count of sexual battery, a violation of R.C. 2907.03(A)(3) and a felony of the third degree. The trial court sentenced Bodyke to six months in prison on his conviction for breaking and entering and two years in prison on his conviction for sexual battery; the prison sentences were ordered to be served concurrently. The court further determined that, under former R.C. 2950.01 ("Megan's Law"), he was a sexually oriented offender who was required to register as such with the sheriff of the county in which he resided for the next 10 years. Bodyke was not subject to any community notification requirements.

{¶ 3} In a letter dated November 26, 2007, the Attorney General of the state of Ohio notified Bodyke that his registration and notification duties would change as of January 1, 2008. This change was the result of the Ohio General Assembly's passage of the S.B. 10 amendments, effective on July 1, 2007 and January 1, 2008, to R.C. Chapter 2950, the Ohio Sexual Offender Registration and Notification Act. S.B. 10 abolished the prior classifications set forth in R.C. 2950.01. As a result of this statutory change, Bodyke was reclassified, pursuant to 2950.01(G)(1)(a), as a Tier III sex offender. A Tier III sex offender is required to personally register with the local sheriff every 90 days for life. In addition, under R.C. 2950.11(F)(2), the trial court had the discretion to impose a community notification requirement.

{¶ 4} On December 19, 2007, Bodyke filed, as permitted by R.C. 2950.031(E), a petition to contest his Tier III reclassification. He asserted that S.B. 10 abrogated the "separation of powers principle inherent in Ohio's Constitutional framework." He further argued that the new law violated Section 28, Article II, Ohio Constitution, which prohibits retroactive laws, the Ex Post Facto Clause of the United States Constitution, and the Double Jeopardy Clauses of both the Ohio and United States Constitution. Finally, Bodyke maintained that because his no contest plea was the result of a plea bargain, his reclassification was an impairment of an obligation of contract under Section 28, Article II, Ohio Constitution. Bodyke asked the court to find that the S.B. 10 changes to R.C. Chapter 2950 were not applicable to his case. The trial court denied Bodyke's request and ordered him to comply with the new registration requirements but did not order him to provide community notification.

{¶ 5} In May 1999, appellant, David Schwab, pled guilty to one count of attempted rape of a person who was less than 13 years of age, in violation of R.C. 2907.02(A)(1)(b) and 2923.02(A). He was sentenced to serve five years in prison. He was also classified as a habitual sex offender as set forth in R.C. 2950.01(B). Schwab was therefore required to register as a sex offender every 180 days for 20 years. Nonetheless, pursuant a plea agreement, community notification was not ordered in his case.

{¶ 6} On November 26, 2007, Schwab received a notice that he was being reclassified as a Tier III sex offender pursuant to S.B. 10. Consequently, as of January 1,

2008, he was required to personally register "with the local sheriff's office every ninety (90) days for life." Schwab also filed a petition to contest his reclassification raising the same constitutional challenges to S.B. 10 as Bodyke. Again, the common pleas court denied Schwab's request and ordered him to comply with the new registration requirements but relieved him of the duty of community notification.

{¶ 7} On November 23, 1993, appellant, Gerald E. Phillips, pled guilty to one count of gross sexual imposition, a violation of R.C. 2907.05(A)(5) and a felony of the fourth degree. He also pled guilty to one count of sexual battery with a physical harm specification, a violation of R.C. 2907.03(A)(5) and former R.C. 2941.143, a felony of the third degree. On January 28, 2004, he was sentenced to two years in prison on his gross sexual imposition conviction and three to ten years in prison on his sexual battery conviction with the sentences to be served concurrently.

{¶ 8} After Megan's Law took effect, the Adult Parole Authority recommended that the state of Ohio should seek retroactive application of the new law to have Phillips classified a sexual predator. The Huron County Prosecutor informed the court that it would not seek that classification. Therefore, the court classified Phillips as a sexually oriented offender. As with the other two appellants, a November 26, 2007 notification advised Phillips that he was reclassified a Tier III sex offender and, therefore, was required to personally register with the local sheriff every 90 days for life. Phillips filed a petition to contest the reclassification raising the same constitutional issues as Bodyke and Schwab. The trial court denied the petition but did not order community notification.

{¶ 9} All three appellants filed notices of appeal from the trial court's judgments. Because all three cases involved common questions of law and fact, we, sua sponte, consolidated them for the purposes of appeal. Appellants raise the following assignments of error:

{¶ 10} "I. The retroactive application of Senate Bill 10 violates the Ex Post Facto, Due Process, and Double Jeopardy Clauses of the United States Constitution and the Retroactivity Clause of Section 28, Article II, Ohio Constitution. [sic] Fifth, Eighth, and Fourteenth Amendments United States Constitution, Section 10, Article I, United States Constitution; Article I, United States Constitution; Sections 9 and 10, Article I, Section 28, Article II, Ohio Constitution."

{¶ 11} "II. The retroactive application of Senate Bill 10 to persons whose convictions were obtained pursuant to pleas of guilty or no contest rather than through trial verdicts impairs the obligation of contract protected by Article I, Section 10, Clause I, United States Constitution and Section 28, Article II, Ohio Constitution."

{¶ 12} In their first assignment of error, appellants challenge the constitutionality of S.B. 10 on several bases. They first argue that the application of S.B. 10 to sex offenders whose crimes occurred before July 1, 2007 is unconstitutional because it violates the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution.

{¶ 13} We start with the proposition that statutes, including amendments to those statutes, that are enacted in Ohio are presumed to be constitutional. *State v. Ferguson*,

120 Ohio St.3d 7, 2008-Ohio-4824, ¶ 12. Therefore, unless appellants can demonstrate, beyond a reasonable doubt, that S.B. 10 is unconstitutional, it remains valid. *Id.* The Ex Post Facto Clause, that is, Section 10, Article I, United States Constitution, prohibits the passage of an enactment which may, inter alia, criminalize acts that were innocent when committed or "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Miller v. Florida* (1987), 482 U.S. 423, 429, quoting *Calder v. Bull* (1798), 3 Dall. 386. Likewise, the Retroactivity Clause, Section 28, Article II, Ohio Constitution, bans the enactment of retroactive statutes that impair vested, substantive rights, but not those rights that are merely remedial and civil in nature. *State v. Graves*, 4th Dist. No. 07CA3004, 2008-Ohio-5763, ¶ 11.

{¶ 14} Appellants set forth a number of arguments that purportedly support a finding that S.B. 10 is not civil and remedial, but is punitive in nature and, as a result, violates their constitutional rights. For example, appellants make the argument that S.B. 10 deprives them of the right to a hearing, i.e., procedural due process, on the question of their individual future dangerousness. In other words, appellants contend that reclassifying them as Tier III sex offenders without a hearing ties the reclassification solely to their original conviction for a sex offense, thereby rendering the statute purely punitive. We disagree. In *Smith v. Doe* (2003), 538 U.S. 84, 104, the United States Supreme Court held: "The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment [.]". See, also, *State v. Longpre*, 4th Dist. No.

08CA3017, 2008-Ohio-3832, ¶ 14; *State v. Desbiens*, 2d Dist. No. 22489, 2008-Ohio-3375, ¶ 25. Consequently, appellants' argument on this issue fails.

{¶ 15} Appellants further assert that S.B. 10's residency restrictions, as found in R.C. 2950.034, barring sex offenders from living within 1,000 feet of a school, preschool, or child daycare center are additional or new punishments or burdens, and, therefore, are a violation of substantive due process. The only modification of the statute made by S.B. 10 was to add daycare centers and preschools. The statute was not expressly made retroactive. Therefore, the Ohio Supreme Court's holding with regard to the pre-S.B. 10 amendments in *Hyle v. Porter* (2008), 117 Ohio St.3d 165, 2008-Ohio-542, syllabus, is controlling. Specifically, the *Hyle* court held: "Because [former] 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." Thus, if appellants purchased their homes near daycare centers, preschools, or schools prior to the effective date of S.B. 10, the new version of the statute is inapplicable. Because there is no evidence in the record of this cause that appellants purchased residences in restricted areas prior to the enactment of S.B. 10, we must find the substantive due process argument related to the alleged punitive nature of S.B. 10 is without merit. *Montgomery v. Leffler*, 6th Dist. No. H-08-011, 2008-Ohio \_\_\_, ¶ 29 n. 1; *State v. Byers*, 7th Dist. No. 07-CO-39, 2008-Ohio-5051, ¶ 99.

{¶ 16} Finally, appellants claim that S.B. 10 is punitive in nature because a sheriff is required to disseminate their personal information, including photographs, to a wide

variety of persons, including schools, school superintendents and principals, and volunteer organizations where contact with minors may occur. See R.C. 2950.11(A)-(F). In discussing this question involving pre-S.B. 10 dissemination of sex offenders' personal information, the Ohio Supreme Court held:

{¶ 17} "Similarly, we believe that the General Assembly's findings also support the conclusion that the more burdensome registration requirements and the collection and dissemination of additional information about the offender as part of the statute's community notification provisions were not born of a desire to punish. Rather, we determine that the legislative history supports a finding that it is a remedial, regulatory scheme designed to protect the public rather to punish the offender.

{¶ 18} "Ferguson [the defendant-appellant] may be adversely affected by the amended provisions, just as he was affected by the former provisions. But 'the sting of public censure does not convert a remedial statute into a punitive one.' *Cook*, 83 Ohio St.3d at 423, 700 N.E.2d 570, citing *Montana Dept. of Revenue v. Kurth Ranch* (1994), 511 U.S. 767, 777 fn. 14. And although the scorn of the public may be the result of a sex offender's conviction and his ensuing registration and inclusion in the public database, we do not believe that scorn is akin to colonials' clearly punitive responses to similar offenses, which ranged from public shaming to branding and exile. See *Smith*, 538 U.S. at 97-98, 123 S.Ct. 1140, 155 L.Ed.2d 164. If a legislative restriction is an incident of the state's power to protect the health and safety of its citizens, it should be considered as evidencing an intent to exercise that regulatory power rather than as an intent to punish. *Id.* at 92-93, 123 S.Ct. 1140, 155 L.Ed.2d 164." *Ferguson*, supra, at ¶ 36-37.

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{¶ 19} Accordingly, we reject all of appellants' arguments with regard to the allegation that S.B. 10 is punitive, rather than remedial, in nature. Consequently, we shall follow the law set forth in *Montgomery* wherein we decided the question of retroactivity challenges to S.B. 10 and determined that this legislation is civil and remedial in nature. In that appeal, we concluded that the S.B. 10 amendments "are not unconstitutional on retroactivity grounds." *Id.* at ¶ 23. See, also, *Byers*, supra, ¶69; *Graves*, supra, ¶ 13; *State v. Honey*, 9th Dist. No. 08-C0018-M, 2008-Ohio-4943; *Desbiens*, supra, ¶ 30.

{¶ 20} Appellants also maintain that S.B. 10 violates the Eighth Amendment to the United States Constitution because it imposes cruel and unusual punishment. They further assert that and that S.B. 10 abridges the Double Jeopardy Clause of the United States Constitution and Section 10, Article I, Ohio Constitution, by inflicting a second punishment on a sex offender for a single offense. We also determined that these contentions were unfounded in *Montgomery*. Specifically, we held that the Eighth Amendment prohibition did not apply because the S.B. 10 amendments are not punitive. *Id.* at ¶ 24. See, also, *Byers*, supra, ¶ 107 (S.B. 10 is not violative of the Eighth Amendment to the United States Constitution.). The same is true with regard to appellants' double jeopardy arguments. *Id.* See, also, *In re Gant*, 3d Dist. No. 1-08-11, 2008-Ohio-5198, ¶ 20-21; *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234, ¶ 36. Thus, appellants' assertions on these questions are meritless.

{¶ 21} Appellants also argue that S.B. 10 violates the separation of powers doctrine by unconstitutionally limiting the powers of the judicial branch because it

"divests the judiciary of its power to sentence a defendant." The rationale for separating the powers of government into three branches is that the powers properly belonging to one of the departments should neither "be directly and completely" administered by another department nor should any one of those departments directly or indirectly have any overruling influence over one of the others. *State v. Sterling* (2007), 113 Ohio St.3d 255, 2007-Ohio-1790, ¶ 23, quoting *State v. Bryant Park v. Akron Metro Park Dist.* (1929), 120 Ohio St. 464, 473. Therefore, under the separation of powers doctrine, the administration of justice by the judiciary cannot be interfered with by either the executive or legislative branches of government in the exercise of their respective powers. *Id.* at ¶ 24 (Citations omitted.).

{¶ 22} In *Montgomery* at ¶ 26, we noted that sexual offenders have previously been classified by offense and found that we failed to see how this violated the separation of powers doctrine. Accord, *In re Smith*, supra, ¶ 39 ("[T]he classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts."); *Byers*, supra, at ¶ 74 (The application of different sexual offender classifications and time spans for registration requirements does not order a court to reopen a final judgment. It simply changes a classification scheme and does not, therefore encroach on judiciary power.). As a result, we find that appellants' argument on this issue lacks worth.

{¶ 23} For all of the foregoing reasons, appellants' Assignment of Error No. I is found not well-taken.

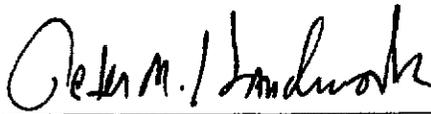
{¶ 24} Appellants' Assignment of Error No. II contends that the retroactive application of S.B. 10 to those sexual offenders who pled not guilty or no contest to their offenses impairs the obligation of contract protected by Article I, Section 10, Clause I of the United States Constitution and Section 28, Article II, Ohio Constitution. This court has already decided that this contention is meritless. See *Montgomery*, supra, ¶ 39. See, also, *Desbiens*, supra, ¶ 33. Appellants' Assignment of Error No. II is, therefore, found not well-taken.

{¶ 25} The judgment of the Huron County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal in equal shares pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Huron County.

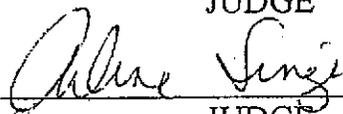
JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

  
JUDGE

Arlene Singer, J.

  
JUDGE

Thomas J. Osowik, J.  
CONCUR.

  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/rod/newpdf/?source=6>.