

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	* Supreme Court Case No. 08-2502
	*
Appellee,	* On Appeal from the
	* Huron County Court of
vs.	* Court of Appeals, Sixth
	* Appellate District
CHRISTIAN N. BODYKE,	*
et al.,	* Court of Appeals
	* Case Nos. H-07-040
Appellants	* H-07-041
	* H-07-042

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS

i

TABLE OF AUTHORITIES

iii

STATEMENT OF THE CASE AND FACTS

1

SUMMARY OF ARGUMENT

6

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

8

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.

8

Punitive Intent

9

Punitive Effect

13

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.

17

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.

18

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.

22

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. 23

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. 25

CONCLUSION

27

CERTIFICATE OF SERVICE

28

APPENDIX

	Bodyke Amended Notice of Appeal	Appx 1
	Schwab Notice of Appeal	Appx 4
	Phillips Notice of Appeal	Appx 7
10	<i>State v. Bodyke</i> , 2008-Ohio-6387	Appx.
	United States Constitution	
21	Clause 1, Section 10, Article I	Appx.
21	Fifth Amendment	Appx.
21	Eighth Amendment	Appx.
21	Fourteenth Amendment	Appx.
	Ohio Constitution	
23	Section 9, Article I	Appx.

23	Section 10, Article I	Appx.
24	Section 28, Article II	Appx.

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Atkins v. Virginia</i> (2002), 536 U.S. 304	23
<i>Bartlett v. Ohio</i> (1905), 73 Ohio St.54	21
<i>City of South Euclid v. Jemison</i> (1986), 28 Ohio St.3d 157	20
<i>Crist v. Bretz</i> (1978), 437 U.S. 28	23
<i>Grava v. Parkman Twp.</i> (1995), 73 Ohio St.3d 379	22
<i>Grompf v. Wolfinger</i> (1902) 67 Ohio St. 144	21
<i>Hudson v. United States</i> (1997), 522 U.S. 93	23
<i>Hyle v. Porter</i> , 117 Ohio St.3d 165, 2008-Ohio-542	14
<i>Kansas v. Hendricks</i> , 521 U.S. at 369	22
<i>Kennedy v. Mendoza-Martinez</i> , 372 U.S. 144	13
<i>Kunkler v. Goodyear Tire & Rubber Co.</i> (1988), 36 Ohio St.3d 135	17
<i>Layne v. Ohio Adult Parole Auth.</i> , 97 Ohio St.3d 456, 2002-Ohio-6719	25
<i>Mikaloff v. Walsh</i> (N.D. Ohio Sept. 4, 2007), 2007 WL 2572268	10, 14
<i>Miller v. Florida</i> (1987), 482 U.S. 423	16
<i>Ridenour v. Wilkinson</i> , 10 th Dist. No. 07AP-200, 2007-Ohio-5965	25
<i>Roper v. Simmons</i> (2005), 543 U.S. 551	24
<i>Santobello v. New York</i> , 404 U.S. 257	26
<i>Sigler v. State</i> , (Aug. 11, 2008), Richland C.P. No. 07 CV 1863, unreported; reversed, 5 th District No. 08-CA-79, 2009-Ohio-2010	16
<i>Smith v. Doe</i> (2003), 538 U.S. 84	9, 14, 15
<i>Spangler v. State</i> , 11 th District, No. 2009-L-062, 2009-Ohio-3178	14, 15, 18

<i>State ex rel. Bryant v. Akron Metro. Park Dist.</i> (1929), 120 Ohio St. 464	21
<i>State ex rel. Johnston v. Taulbee</i> (1981), 66 Ohio St.2d 417	19
<i>State v. Bodyke</i> , 2008-Ohio-6387 5	
<i>State v. Butts</i> (1996), 112 Ohio App.3d 683	25
<i>State v. Cook</i> (1998), 83 Ohio St.3d 404	6, 9, 10, 12, 13, 17, 18
<i>State ex rel. Denton v. Bedinghaus</i> , 98 Ohio St.3d 298, 2003-Ohio-861	22
<i>State v. Dobrski</i> , Lorain App. No. 06CA008925, 2007-Ohio-3121	21
<i>State v. Eppinger</i> (2001), 91 Ohio St.3d 158	13
<i>State v. Ferguson</i> , 120 Ohio St.3d 7, 2008-Ohio-4824 6	
<i>State v. Hochhausler</i> (1996), 76 Ohio St.3d 455	19
<i>State v. Roberts</i> , 119 Ohio St.ed 294, 2008-Ohio-3835	23
<i>State v. Sterling</i> , 113 Ohio St.3d 255, 2007-Ohio-1790	19, 20
<i>State v. Thompson</i> (Apr. 1, 1999), Cuyahoga App. No. 73492, unreported	13
<i>State v. Washington</i> , Lake App., No. 99-L-015, 2001-Ohio-8905	21
<i>State v. Williams</i> , 114 Ohio St.3d 103, 2007-Ohio-3268	10
<i>Tison v. Arizona</i> (1987), 481 U.S. 137	15
<i>Trop v. Dulles</i> (1958), 356 U.S. 86	24
<i>Weaver v. Graham</i> (1981), 450 U.S. 24	16
<i>Weems v. United States</i> (1910), 217 U.S. 349	23
<i>Witte v. United States</i> (1995), 515 U.S. 389	22

Statutes

Ohio's Megan's Law

passim

S.B. 10	<i>passim</i>
Former R.C. 2950.01	6, 8
Former R.C. 2950.09 11	6, 8,
Former R.C. 2950.11	11, 12
R.C. 2950.034	14
R.C. 2950.04	15
R.C. 2950.081	14
R.C. 2950.11	14
R.C. 2950.13	14
R.C. 2950.132	14
R.C. 2950.99	10
R.C. 2953.82	19
Section 16925, Title 42 U.S. Code	11

Constitutions

UNITED STATES CONSTITUTION

Clause 1, Section 10, Article I	8, 16, 25
Fifth Amendment	8, 22, 23
Eighth Amendment	8, 23, 24
Fourteenth Amendment	8, 22, 23, 25

OHIO CONSTITUTION

Section 9, Article I	8, 23
Section 10, Article I	8, 22, 23

Section 28, Article II	8, 17, 22, 25
Section I, Article IV	19
<u>Other Authorities</u>	
<u>http://www.naag.org/podcast the adam walsh act possibilities and challenges for state management of sex offenders.php</u>	10
Adam Walsh Policy, National Conference of State Legislatures	11
Garvey, <i>Can Shaming Punishments Educate?</i> , 65 U. Chi. L. Rev. 733 (1998)	15
Lester, <i>The Legitimacy of Sex Offender Residence and Employment Restrictions</i> , 40 Akron L. Rev. 339 (1987)	24
Logan, <i>The Ex Post Facto Clause and the Jurisprudence of Punishment</i> , 35 Am. Crim. L. Rev. 1261 (Summer, 1998)	24

STATEMENT OF THE CASE AND FACTS

State v. Bodyke

In July 1999, Christian Bodyke was charged in a four-count indictment. He entered pleas of not guilty in the Court of Common Pleas of Huron County, Ohio. In October of that year, and by agreement with the State of Ohio, he entered a plea to one count of breaking and entering and one count of sexual battery. In December, he was sentenced to concurrent prison terms of six months for the breaking and entering and two years for the sexual battery.

Because he had not previously been adjudicated guilty of a sexually oriented offense, and because the court did not find him likely to commit a sexually oriented offense in the future, the court ordered that Mr. Bodyke should be classified as a sexually oriented offender. Under Ohio's version of Megan's Law, the sexual offender classification, registration, and notification system adopted effective January 1, 1997 as H.B. 180, and in effect in 1999, sexually oriented offender was the least serious of the categories of sex offenders. As a sexually oriented offender, Bodyke was required to register once a year for 10 years.

In November or December 2007, Mr. Bodyke received a letter from then Attorney General Mark Dann informing him that, pursuant to Senate Bill 10, 127th General Assembly, Sections 2, 3, and 4 (2007),¹ he had been reclassified as a Tier III sex

¹ Ohio's former sex offender classification and registration law will be referred to as "Ohio's 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."

offender. Tier III is the most serious sex offender classification under S.B. 10. Tier III offenders are required to register every 90 days for life.²

Mr. Bodyke filed a petition challenging the classification. Neither in the petition nor in the hearing on the petition, did he challenge the calculation that, under S.B. 10, his proper classification was Tier III. Rather, he asserted that the law could not properly be applied to him. He 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 useful purpose in his case. Bodyke TR at 4.

State v. Schwab

In April 1999 and by agreement with the State of Ohio, appellant David Schwab entered a plea of guilty in the Court of Common Pleas of Huron County, Ohio to a bill of information charging him with a single count of attempted rape. He was sentenced to serve 5 years in prison. The plea agreement specified that he would be classified as an habitual sexual offender but would not be subject to community notification. As an habitual sexual offender under Ohio's Megan's Law, Schwab was required to register every 180 days for 20 years.

In November or December 2007, Mr. Schwab received a letter from then Attorney General Marc Dann informing him that, pursuant to S.B. 10, he had been reclassified as a Tier III sex offender, required to register every 90 days for the rest of his life.

Mr. Schwab filed a petition challenging the classification. Neither in the petition nor in the hearing on the petition, did he challenge the calculation that, under S.B. 10, his proper classification was Tier III. Rather, he asserted that the law could not properly be

² Specific details of the requirements of S.B. 10 and of Ohio's Megan's Law, as they are relevant, are set forth in the discussion of the individual propositions of law.

applied to him. Mr. Schwab 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 useful purpose in this case. Schwab TR at 3-4.

State v. Phillips

In November 1993, pursuant to an agreement with the State of Ohio, appellant Gerald Phillips entered a guilty plea to one count of gross sexual imposition and one count of sexual battery in the Court of Common Pleas of Huron County, Ohio. He was sentenced to prison for an indefinite term of 3-10 years on the count of sexual battery and to a definite term of 2 years on the count of gross sexual imposition, the terms to be served concurrently. At the time, Ohio law included no sexual classification and registration system.

After Ohio's Megan's Law took effect, Mr. Phillips was recommended by the Adult Parole Authority for retroactive application of the law and classification as a sexual predator. In November 1997, the State of Ohio informed the trial court that it would not seek to have Mr. Phillips declared a sexual predator. Accordingly, he was classified as a sexually oriented offender.

In November or December 2007, Mr. Phillips received a letter from then Attorney General Marc Dann informing him that, pursuant to S.B. 10, he had been reclassified as a Tier III sex offender required to register every 90 days for the rest of his life. Mr. Phillips filed a petition challenging the classification. Neither in the petition nor in the hearing on the petition, did he challenge the calculation that, under S.B. 10, his proper classification was Tier III. Rather, he asserted that the law could not properly be applied to him. Mr. 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 useful purpose in this case. See Phillips TR at 4.

By Judgment Entries of December 26, 2007, the trial court held that Bodyke, Schwab and Phillips were properly reclassified a Tier III sexual offenders and that the reclassifications were lawful. The court also determined that none of them would be subject to community notification. All three pursued their appeals in the Court of Appeals for Huron County, Ohio, Sixth Appellate District. In consolidated appeals, the three raised two assignments of error:

Assignment of Error 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. Fifth, Eighth, and Fourteenth Amendments, United States Constitution; Sections 9 and 10, Article I, Ohio Constitution.

Assignment of Error 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.

The court of appeals affirmed the decisions of the trial court. *State v. Bodyke*, 2008-Ohio-6387. Appellant's filed timely notice of appeal and this Court granted jurisdiction. Case Announcements, 2009-Ohio-1638.

SUMMARY OF ARGUMENT

Ohio's Megan's Law, a comprehensive program of classification, registration, and notification designed to protect the public from recidivism by sex offenders, was enacted in 1996. Under Ohio's Megan's Law, when a person was found guilty of a sexually oriented offense, the trial court was to order the person placed in one of three categories of sexual offenders based on the likelihood that the person would commit another sexually oriented offense.

If it were proved by clear and convincing evidence that the person was likely to commit a sexually oriented offense in the future, the court was to classify the person as a sexual predator. Former R.C. 2950.01(E)(2). If the person was not found to be a sexual predator, but the court found that the person had previously been convicted of a sexually oriented offense, the court was to classify the person as an habitual sexual offender. Former R.C. 2950.09(C)(2)(c)(ii).

Because Ohio's Megan's Law 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. Rather, it had a remedial purpose **and** it was narrowly targeted to track likely recidivists.

In 2003, the General Assembly adopted the first major revisions of Ohio's Megan's Law. Although the revisions made the law more onerous than the 1996 enactment, they did not fundamentally disrupt the scheme of tripartite classification built on judicial determinations of future dangerousness. In *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, and 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 Ohio's Megan's Law entirely. S.B. 10, abandoned the narrowly-focused, targeted scheme aimed at protecting the public from likely recidivists, and replaced it with sweeping new classification and registration requirements. Under S.B. 10, previously classified offenders must be reclassified under the new system. And it arbitrarily treats those previously found unlikely to reoffend the same as those found the most likely to reoffend. The underlying mechanism for this change is reliance on the offense of conviction rather than the likelihood of recidivism. Thus, under S.B. 10, those who commit the worst crimes face the harshest requirements for no reason other than that they committed the worst crimes.

In fine, the S.B. 10 system abandons all concern with future dangerousness. It creates a classification system resting entirely on the offense of conviction. For most people, the system increases the frequency and duration of registration requirements, and mandates additional registrations in multiple locations. In all of this, S.B. 10, it replaces remediation and regulation with punishment.

As appellants argue below, S.B. 10, with its focus on punishment rather than remediation, violates explicit constitutional prohibitions against ex post facto and retroactive legislation, against double jeopardy, and against cruel and unusual punishment. As important, it violates the Separation of Powers Doctrine and the principles of res judicata. Finally, in cases where classifications had been determined pursuant to negotiated pleas, S.B. 10 impairs contracts.

All told, and along with the doctrines of Separation of Powers and res judicata,

the retroactive application of S.B. 10 violates Sections 9 and 10, Article I and Section 28, Article II of the Ohio Constitution as well as Clause 1, Section 10, Article I and the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

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 an evidentiary hearing at which a court would determine the likelihood of recidivism and impose the appropriate classification: sexually oriented offender, habitual sexual offender, or sexual 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 burdensomeness 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 General Assembly so declared in enacting the law, *Cook*, supra, at 406, and the law itself, with its narrow focus on the likelihood of recidivism made that

evident. The classification, registration, and notification system advanced that purpose. *Id.*, at 421 (Ohio’s 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 rather than 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.

Punitive Intent

Although S.B. 10 retains from Ohio’s Megan’s Law language denying any 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 of legislative intent. *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).³ 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

³Available in a podcast at http://www.naag.org/podcast_the_adam_walsh_act_possibilities_and_challenges_for_state_management_of_sex_offenders.php

¶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 Ohio’s 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 that matters is the offense of conviction. S.B. 10 replaced a “narrowly tailored” solution, *Cook*, supra, at 417, with simple punishment that reflects neither risk to the community nor likelihood of reoffending. Unlike Ohio’s Megan’s Law which required hearings and determinations of dangerousness, S.B. 10 classifies and reclassifies sex offenders solely on the offense of conviction.

The retroactive application is particularly telling in this regard. Deliberately requiring, as S.B. 10 does, persons who have undergone judicial screening for future dangerousness and been found not dangerous to register for the rest of their lives eviscerates the prior law’s remedial purposes and reveals the fiction behind the declaration of legislative intent. It underscores the General Assembly’s actual intent to make S.B.10 a criminal statute.

Finally, the legislative history of S.B. 10 indicates that the General Assembly did not enact the law to protect the public. The primary motivation was to comply with an unfunded federal mandate to all states to pass the Adam Walsh Act or risk a loss of federal funds with no regard to the effect on public safety. See 42 U.S.C.A. §16925. See also “Adam Walsh Policy,” National Conference of State Legislatures, available online at

<http://www.ncsl.org/statefed/LAWANDJ.HTM#AdamWalsh> (identifying problems with the federal Adam Walsh Act, and stating that “[m]any of the provisions of the Adam Walsh Act were crafted without state input or consideration of current state practices. The mandates imposed by the Adam Walsh Act are inflexible and, in some instances, not able to be implemented.”)

Aside from financial concerns, S.B. 10 was enacted, as Senator Lance Mason noted, to “stiffen penalties”: “[T]he easiest thing to do when you are in this hallowed hall is to pass a bill that stiffens penalties for offenders. It doesn’t take any knowledge of the criminal justice system. It doesn’t require any thoughtfulness because the public has a knee jerk reaction to penalizing those who have offended us and aggrieved us.” Senate Session, Wednesday, May 16, 2007.

Under Ohio’s Megan’s Law, classification and registration duties were based on an offender’s re-offense risk. The lowest risk offenders registered once a year for 10 years, and the highest risk offenders registered every 90 days for life. Additionally, the community was notified only of the most dangerous offenders. As the *Cook* court observed, the legislative intent to protect the public “is further evidenced by the General Assembly’s narrowly tailored attack on this problem. For example, the notification provisions apply automatically only to sexual predators or, at the court’s discretion, to habitual sex offenders.” Former R.C. 2950.11(A), 2950.11(F), and 2950.09(E). *State v. Cook* (1998), 83 Ohio St.3d 404, 417.

By contrast, an offender’s likelihood of committing future sexual offenses is utterly irrelevant under S.B.10’s new offense-based classification system. Instead, offenders who were previously adjudicated as unlikely to re-offend have been reclassified

into Tier II and Tier III.⁴ Of the 18, 277 low risk sexually oriented offenders, only 3031 were reclassified as Tier I offenders. Indeed, 7,467 low-risk sexually oriented offenders were reclassified into Tier II and 7,779 were reclassified into Tier III.⁵ The Tier III non-dangerous offenders must now register for the rest of their lives despite the fact that courts have determined they are unlikely to reoffend.

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. These offenders complied with their court orders, some for the full 10 years, and were not convicted of any additional sex crimes. Yet, now they have been reclassified as "worst of the worst" Tier III offenders for the rest of their lives. The only possible legislative motivation is a desire to punish persons who have committed sex offenses.

Reviewing the legislative history of S.B. 10 "compels a conclusion that the statute's primary function is to serve as an additional penalty" for sex offenders. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169.

The point is that this is a changed law. The legislature took a law "narrowly tailored," to deal with the dangers of recidivism, *Cook*, supra at 417, and replaced it with one that not only stretches broadly but that protects less well (if at all) because it now

⁴ Under Ohio's Megan's Law, appellants Bodyke and Phillips were adjudicated sexually oriented offenders. Appellant Schwab was adjudicated an habitual sexual offender. Under S.B. 10, each has become a Tier III sexual offender, although both the state and the court agree that there is no significant likelihood that any of them will reoffend and, therefore, that no good purpose would be served by community notification.

⁵ Assistant Attorney General Erin Rosen provided these statistics in a telephone conversation with Margie Slagle of the Ohio Justice and Policy Center on January 24, 2008. The numbers was accurate as of December 21, 2007.

ignores the very idea of determining risk, focusing instead solely on the degree of the underlying misconduct.⁶

Punitive Effect

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.

In *Cook*, supra, this Court held that the registration requirements of Ohio’s Megan’s Law

may cause some inconvenience for offenders. However, the inconvenience is comparable to renewing a driver’s license. Thus we find that the inconvenience of registration is a de minimis administrative requirement.

83 Ohio St.3d at 418.

What may have been true of Ohio’s Megan’s Law is not true of the law as enacted in S.B. 10.

As applied to most defendants, the laws contained in R.C. Chapter 2950 are more comprehensive and restrictive than those previously analyzed by the Supreme Court of Ohio. Under S.B. 10, the registration and verification requirements have been modified substantially.

Spangler v. State, 11th District, No. 2009-L-062, 2009-Ohio-3178, ¶ 75 (Cannon, J., concurring in part and concurring in judgment only in part).

S.B. 10 imposes burdens that have historically been regarded as punishment and operate as affirmative disabilities and restraints. Limitations regarding where offenders

⁶ As this Court noted making this very point years before S.B. 10, labeling sexual offenders sexual predators without consideration of their specific likelihood of reoffending has “the consequence of diluting both the purpose behind and the credibility of the law. This result could be tragic for many.” *State v. Eppinger* (2001), 91 Ohio St.3d 158, 163, quoting *State v. Thompson* (Apr. 1, 1999), Cuyahoga App. No. 73492, unreported.

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.⁷ R.C. 2950.034.

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 records, R.C. 2950.081(A) – and by statutory mandate posted on the internet for ease of public access. R.C. 2950.13.

Judge Cannon noted in *Spangler*:

While the statute at issue in *Cook* restricted the access of an offender’s information to “those persons necessary in order to protect the public[.]” S.B. 10 requires the offender’s information to be open to public inspection and to be included in the internet sex offender and child-victim offender database. R.C. 2950.081. Not only does the public have unfettered access to an offender’s personal information, but under S.B. 10 an offender has a legal duty to provide more information than was required under former R.C. Chapter 2950..

Spangler, supra, at ¶ 83 (concurring in part and concurring in judgment only in part).

Dissemination of that personal information, including photographs, addresses, e-mail addresses, travel documents, license plate numbers, fingerprints, and DNA samples resembles shaming punishments intended to inflict public disgrace. R.C. 2950.04(B);

⁷Although the residency restrictions have been determined not to apply retroactively, *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, they do indicate the punitive effect of the law. Moreover, since *Hyle* was decided on the basis of statutory interpretation, a simple amendment to the statute could, subject to further litigation, impose the residency restrictions retroactively.

2950.04(C). See 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.

And while it is certainly not dispositive of the question, one judge has observed that to those classified under it, the law certainly seems punitive:

An observer who visits a courtroom when sex offenders are sentenced will see that sex offenders usually view the sex offender labeling, registration and community notification requirements as the most punitive and most odious part of their sentence. Being publicly branded as a pariah is the most lasting part of their sentences. It has sometimes been an invitation to vigilante action. Except for those who receive the longest prison terms, it is the aspect of the sentence which will restrict where they live and work the rest of their lives.

Only a person protected by legal training from the ordinary way people think could say with a straight face that this terrible consequence of a sex offender's conviction is not punishment. To say it only protects the public and is not punitive is misleading. It protects the public in the same way that probation conditions protect the public. Probation conditions also restrict the ability of offenders to re-offend by requiring them to report regularly and restricting where they live and work. But no one contends

that probation is therefore not punishment or that someone sentenced to community control has not been punished.

Sigler v. State, (Aug. 11, 2008), Richland C.P. No. 07 CV 1863, unreported at *6-7; reversed, 5th District No. 08-CA-79, 2009-Ohio-2010.

A law violates the ex post facto prohibition if it is retrospective and disadvantages those it affects. *Miller v. Florida* (1987), 482 U.S. 423, 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.

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.

Yet even if this Court were to find that S.B. 10 affects no vested rights, it "imposes new and additional burdens, duties, obligation, or liabilities as to a past transaction." *Id.* In *Cook*, this Court explained that a law will not do that "unless the past transaction or consideration * * * created at least a reasonable expectation of finality." *Id.* at 412, quoting *State v. Matz* (1988), 37 Ohio St.3d 279, 281. Those persons who had previously been classified as sexually oriented offenders, had a reasonable expectation that at the end of ten years, their registration requirement would be over.

Under S.B. 10, however, those 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. See *Spangler*, *supra*, at ¶ 75 (Cannon, J., concurring in part and concurring in judgment only in part).

Because it applies retrospectively, and because it both takes away vested rights and imposes additional duties, burdens, obligations, and liabilities on previous transactions as to which sexual offenders had an expectation of finality, retroactive application of S.B. 10 violates the Retroactivity Clause of the Ohio Constitution.

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 infringing on 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 *Sterling*, *supra*, 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.

Although the Court in *Sterling* was speaking of sentencing, the same rule applies to other judicial acts. Simply put, 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.

It is of little legal consequence whether the Attorney General’s role in this is active or passive. If the Attorney General is active, an agent of the Executive Branch is infringing upon the Judicial Branch. If the Attorney General is passive, engaging in ministerial acts carrying out the mandates of the General Assembly, then it is the Legislative Branch infringing on the Judicial. The effect and the violation are the same, since “the legislature cannot annul, reverse or modify a judgment of a court already rendered.” *Bartlett v. Ohio* (1905), 73 Ohio St.54, 58.

The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others.

State ex rel. Bryant v. Akron Metro. Park Dist. (1929), 120 Ohio St. 464, 473. See also *State ex rel. Johnston v. Taulbee*, supra.

The point, ultimately, is a simple syllogism. “[A] judgment which is final by the statutes existing when it is rendered is an end to the controversy, . . . [and] legislation to affect remedies by which rights are enforced must precede their final adjudication.”

Grompf v. Wolfinger (1902) 67 Ohio St. 144, paragraph three of the syllabus.

Determinations of classification under Ohio’s Megan’s Law were final orders. See *State*

v. *Washington*, Lake App., No. 99-L-015, 2001-Ohio-8905, *9; *State v. Dobrski*, Lorain App. No. 06CA008925, 2007-Ohio-3121, ¶ 6. Once the period for filing an appeal from a final order has passed, the order becomes binding under the doctrine of res judicata.

As this Court has explained, “Under the doctrine of res judicata, ‘[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action.’ ” *State ex rel. Denton v. Bedinghaus*, 98 Ohio St.3d 298, 2003-Ohio-861, ¶ 14, quoting *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, syllabus.

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,⁸ 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 and Fourteenth Amendments, 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

⁸ See discussion of Proposition of Law No. 1.

same offense. See *Kansas v. Hendricks*, 521 U.S. at 369; *Witte v. United States* (1995), 515 U.S. 389, 396.

“A primary purpose served by [the Double Jeopardy Clause] is akin to that served by the doctrines of res judicata and collateral estoppel - to preserve the finality of judgments.” *State v. Roberts*, 119 Ohio St.ed 294, 2008-Ohio-3835, ¶ 11, quoting *Crist v. Bretz* (1978), 437 U.S. 28, 33.

Although it is only “punitive” sanctions which 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 interferes with the finality of the prior judgment, 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.

Both the Eighth Amendment to the United States Constitution and Section 9, Article I of the Ohio Constitution, protect against excessive sanctions. See, e.g., *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. See *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 (1987). “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.

Moreover, as amici Iowa Coalition Against Sexual Assault, Jacob Wetterling Foundation, and Association for the Treatment of Sexual Abusers explain, S.B. 10 bears no rational relationship to its purported end. As such, it is arbitrary and capricious in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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*, 10th 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,

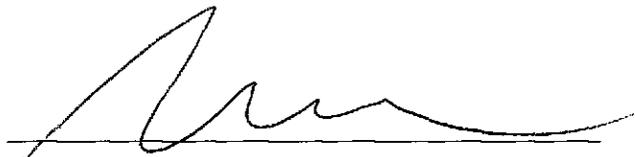
Article II, Ohio Constitution and Clause 1, Section 10, Article I, United States Constitution.

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, application of S.B. 10 to those whose crimes were committed before the law's effective date is unconstitutional. Accordingly, this Court should adopt the propositions of law put forth by appellants Bodyke, Schwab, and Phillips and should reverse the judgment of the Court of Appeals of Huron County, Ohio.

Respectfully submitted,



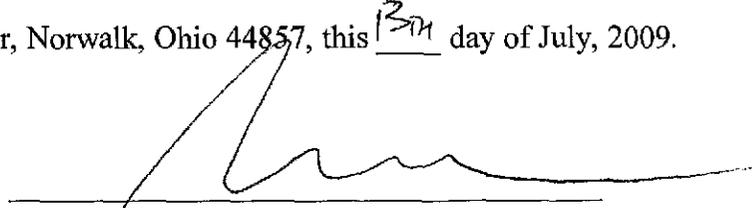
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CERTIFICATION

This is to certify that a copy of the foregoing Merit Brief of Appellants was sent by regular U.S. Mail, postage prepaid, to Russell V. Leffler, Huron County Prosecuting Attorney, 12 E. Main Street, 4th Floor, Norwalk, Ohio 44857, this 13th day of July, 2009.



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APPENDIX

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Appellee,

vs.

CHRISTIAN N. BODYKE,

Appellant.

- * Supreme Court Case No.: 2008-2502
- *
- * On Appeal from the
- * Huron County Court of
- * Appeals, Sixth Appellate
- * District
- *
- * Court of Appeals
- * Case Nos. H-07-040
- * H-07-041
- * H-07-042

**AMENDED NOTICE OF APPEAL,
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FILED
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 SUPREME COURT OF OHIO

AMENDED NOTICE OF APPEAL

CHRISTIAN N. BODYKE, APPELLANT

Christian N. Bodyke gives notice of appeal to the Supreme Court of Ohio from the judgment of the Huron County Court of Appeals, Sixth Appellate District, in case numbers H-07-040, H-07-041, and H-07-042 which was issued and journalized December 5, 2008.

This case involves a substantial constitutional question and concerns a matter of public or great general interest.

Respectfully submitted,



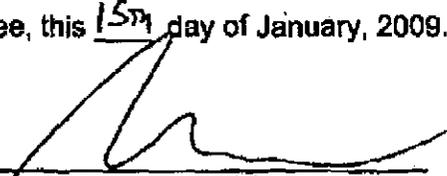
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IN THE SUPREME COURT OF OHIO **08-2502**

STATE OF OHIO,

Appellee,

vs.

DAVID A. SCHWAB,

Appellant.

- * Supreme Court Case No.:
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DAVID A. SCHWAB, APPELLANT

David A. Schwab hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Huron County Court of Appeals, Sixth Appellate District, in case numbers H-07-040, H-07-041, and H-07-042 which was issued and journalized December 5, 2008.

This case involves a substantial constitutional question and concerns a matter of public or great general interest.

Respectfully submitted,



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IN THE SUPREME COURT OF OHIO 08-2502

STATE OF OHIO,

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vs.

GERALD E. PHILLIPS,

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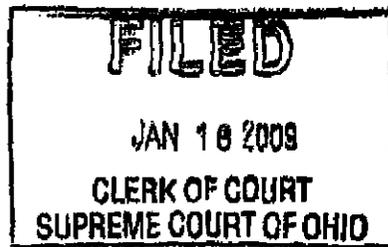
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GERALD E. PHILLIPS, APPELLANT

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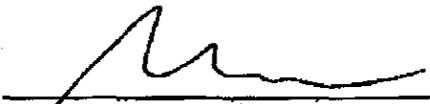
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IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio

Appellee

v.

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

Appellants

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

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

DECISION AND JUDGMENT

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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{¶ 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.

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{¶ 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,

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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.

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{¶ 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.

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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

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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. 1 is found not well-taken.

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{¶ 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.

Peter M. Handwork

JUDGE

Arlene Singer, J.

Arlene Singer

JUDGE

Thomas J. Osowik, J.
CONCUR.

Thomas J. Osowik

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>.

UNITED STATES CONSTITUTION

Clause 1, Section 10, Article I

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment .

Section. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

OHIO CONSTITUTION

Section 9, Article I. Bail; cruel and unusual punishments.

All persons shall be bailable by sufficient sureties, except for a person who is charged with a capital offense where the proof is evident or the presumption great, and except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. Where a person is charged with any offense for which the person may be incarcerated, the court may determine at any time the type, amount, and conditions of bail. Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.

The General Assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community. Procedures for establishing the amount and conditions of bail shall be established pursuant to Article IV, Section 5(b) of the Constitution of the state of Ohio.

Section 10, Article I. Trial for crimes; witness.

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

Section 28, Article II. Retroactive laws.

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.