ORIGINAL

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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REPLY ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Reply Argument for Proposition of Law No. 1

In their first proposition of law, appellants argued that 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.

With S.B. 10, the General Assembly upended Ohio's prior sexual offender and registration scheme. It replaced a scheme that had been designed "to protect members of the public against those most likely to reoffend," *State v. Cook* (1998), 86 Ohio St.3d 404, 421, with one wholly lacking in concern for the likelihood of recidivism. Rather than determining registration categories based on the probability of future harm, S.B. 10 focuses entirely on offense of conviction.

Appellants argued that this change, along with the increased burdens on those retroactively subjected to the new law's strictures, reveal that S.B. 10 is punitive in intent and in effect. Accordingly, its retroactive application violates the Ex Post Facto Clause. Clause 1, Section 10, Article I, United States Constitution. Appellee and its amici (collectively "appellees") reject this analysis insisting that the new law, like its predecessor, is remedial and that the Ex Post Facto Clause has, therefore, no relevance to its retroactive application.[1]

In support of their claims, appellees argue that the declaration of legislative intent in R.C. 2950.02, unchanged in substance from the prior law, indicates that there has been

[1] Actually, amicus Franklin County Prosecutor insists that changing previously imposed sexual offender classifications, and consequential registration and notification duties, is not retroactive at all. The argument, as Amicus seems to recognize, demands that this Court acknowledge that *Cook* was simply wrong about the retroactivity of Megan's Law. (Amicus brief, Franklin County Prosecutor, at 6.)

no substantive change. But while declarations of purpose may be relevant to determination of legislative intent, they are not dispositive. Other relevant considerations include the manner of codification the enforcement procedures of the law. *Smith v. Doe* (2003), 538 U.S. 84, 89. On those bases, the new law reflects a punitive purpose.

Moreover, the abandonment of a recidivism-based schema in favor of an offense-based one is highly probative. Appellees argue otherwise.

First, they insist it is not a change. Because the triggering fact of the old law was the conviction of a sexually oriented offense, the new law's concern exclusively with the offense of conviction is not new at all. By glossing over the difference between what triggers application of the law and the application itself, appellees misrepresent the differences in the law.

Second, they pretend that any change is irrelevant because the General Assembly could have adopted the current system years ago. Appellees, that is, point to *Smith* and its statement that an offense-based classification system is not, necessarily, a punitive one. But that assumes the system exists in a vacuum. Appellants do not claim that offense-based systems must, simply because they are offense-based, be understood to be punitive. Rather, they recognize that the nature of the new system and the nature of the **change** from the old system reveal that the new is not remedial.

Third, they simply deny that changes are changes. Thus, for instance, appellee State of Ohio asserts that S.B. 10's requirement that sex offender classification must be included in the sentencing entry is irrelevant to whether the classification is part of the sentence because, Megan's Law "required prison officials to cite on the prison file the Predator status of the offender." (Merit brief, State of Ohio, at 7.) Of course, judicially

imposed sentences are not the same as notations on a prison file. Indeed, as this Court has made clear, the executive has no power to impose a sentence. See *State ex rel. Bray v. Russell* (2000), 89 Ohio St.3d 132; see also *Woods v. Telb* (2000), 89 Ohio St.3d 504.

Fourth, although the residency restrictions in S.B. 10 may not be applied retroactively in light of *Hyle v. Porter* , 117 Ohio St.3d 165, 2008-Ohio-542, their inclusion in the law indicates an intent to punish by imposing restrictions typically associated with probation and parole on offenders.

Ultimately claims that the new system is remedial in intent fail because S.B. 10 stepped away from remediation, not toward it.

S.B. 10 is also punitive in effect. Registration requirements last longer and are more onerous under S.B. 10 than they were under Megan's Law.

Under Megan's Law, sexually oriented offenders had 10 year registration requirements and habitual sexual offenders had 20 year requirements. [2] Under S.B. 10, Tier I offenders have 15 year registration requirements and Tier II offenders have 25 year requirements. And, of course, the reclassifications under S.B. 10 were largely upward reclassifications. Thus, the number of Tier I offenders is very substantially lower than the number of sexually oriented offenders while the number of Tier III offenders is very substantially higher than the number of sexual predators.

Further, the registration requirements themselves have become more onerous. Tiered offenders must register where they live, where they work, where

[2] Amicus Franklin County Prosecutor is simply wrong to assert that appellant Schwab "faced lifetime registration as a habitual sex offender" under Megan's Law. (Amicus brief, Franklin County Prosecutor, at 5.)

they attend school. They must provide substantially more information than they were previously required to provide, and even where there is no community notification imposed, the law requires that a very substantial body of information be made available over the internet to anyone who wants it.

Finally, the registration requirements of S.B. 10 are excessive, indeed, they are counter-productive. The remedial idea behind sex offender registration and notification requirements is that they permit tracking and awareness. If we can keep tabs on a limited number of dangerous persons, the theory goes, we can protect ourselves from them.

But when everyone is dangerous, when we move from a system where we keep closer watch on those most likely to reoffend to keeping closest watch on those who were previously most deserving of punishment, when we significantly increase the number of those to whom we must most carefully attend, we do not make it easier to protect ourselves, we make it harder. In effect, S.B. 10 makes it harder to find the needle in the haystack by making the haystack bigger.

Thus, in both intent and effect, S.B. 10 is punitive and, therefore, its retroactive application violates the Ex Post Facto Clause of the United States Constitution.

Reply Argument for Proposition of Law No. 2

The Retroactivity Clause of the Ohio Constitution, Section 28, Article II, provides protections beyond those of the Equal Protection Clause. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 105, note 5. The protections of the

Retroactivity Clause are triggered by a retroactively applied statute that "impairs or takes away vested right, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction, or creates a new right." *Cook*, supra, at 411.

Under S.B. 10, rights imposed through judicially imposed orders, are impaired and taken away. For instance, a sexually oriented offender such as appellant Bodyke had a vested right in his registration period ending after 10 years. Under S.B. 10 that vested interest has been impaired, and he is wholly deprived of any opportunity ever to have the registration period end.

Even if this Court were to find that S.B. 10 affected no vested rights, it would violate the Retroactivity Clause. Appellant Bodyke's prior classification left him with the altogether reasonable expectation that at the end of 10 years, his registration requirement would be over. Under S.B. 10, that expectation of finality in the judgment and in his obligation is eviscerated. As such, S.B. 10 "imposes new burdens, duties, obligations, or liabilities as to a part transaction." *Id.*

Indeed, S.B. 10 imposes new obligations on every sexually oriented offender as it increases, by a minimum of 5 years, the registration requirement. It is an obligation which did not exist when the offense was committed or when the prior classification was imposed.

Appellees reject these arguments on the singular basis that since Megan's Law did not violate the Retroactivity Clause, neither does S.B. 10. The claim remains that the law has not changed. Denial, however, is not argument.

Thus, S.B. 10 violates the Retroactivity Clause of the Ohio Constitution.

Reply Argument for Proposition of Law No. 3:

Sexual offender classifications are not will-o'-the-wisps, to be blown about at random. Courts have routinely held that classification determinations are subject to res judicata effect. When they not timely appealed, classification determinations are binding on both offenders and the state. See, e.g., See *State v. Lucerno*, 8th Dist. No. 89039, 2007-Ohio-5537; *State v. Washington*, 11th Dist. No. 99-L-015, 2001-Ohio-8905.

Under the Separation of Powers doctrine "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." *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, paragraph one of the syllabus.

Despite repeated claims by appellees that under Megan's Law courts have no role in the determination and imposition of sexual offender classification, that is simply wrong. The Megan's Law scheme called upon courts to determine whether persons who committed sexually oriented offenses were sexual predators or habitual sexual offenders. If a court found by the evidence that an offender belonged in one of those categories, the court was required to impose that classification. If the court did not find by the evidence that an offender belonged in one of those categories, the person was determined to be a sexually oriented offender.

Certainly, all those who committed sexually oriented offenses ultimately were included in one of those categories, the determinations were within the discretion of the court based on evidence and on considerations set forth in statute. Appellees take from this the improper conclusion insofar as courts seemed to be imposing Megan's Law

classifications, their imposition was merely ministerial and the classifications were not judicially determined. But as the res judicata cases make clear, that is not so.

Moreover, to assume that the default of sexually oriented offender is not judicially determined and imposed simply because the law establishes that as the category of the person who has not been found something else it to assume the wrong thing. Consider an analogy. When a jury returns a finding in a civil trial that the defendant is not liable, or in a criminal trial that the defendant is not guilty, it's finding is essentially the same as the court's finding that the State has not proved the person guilty of a sexually oriented offense to be a sexual predator or an habitual sexual offender. And while the consequence (dismissal of the case, discharge of the defendant) is demanded by operation of law rather than by a discretionary act by the court, the result is nevertheless a judicially determined one which cannot be revisited by the legislature or the executive.

Thus, retroactive application of S.B. 10 violates the separation of powers.

Reply Argument for Proposition of Law No. 6

Plea agreements are contractual, *Santobello v. New York* (1971), 404 U.S. 257. Where a sexual offender classification was part of the contract in a plea agreement, alteration of that classification pursuant to S.B. 10 impairs the obligation of that contract in violation of Clause 1, Section 10, Article I, United States Constitution and Section 28, Article II, Ohio Constitution.

Appellees disagree, arguing essentially that the contract between the state and a defendant could not prevent the legislature from rewriting its laws.

Appellants do not disagree. The problem with appellees' analysis is that it's beside the point.

Appellants have not asserted that the General Assembly is forever prohibited from revising its laws because a contract (whether a plea agreement contract or another sort) is based on the law at the time of contracting. Rather, appellants assert that the General Assembly cannot void their contract.

The lesson of *Santobello* is that upon a breach of a plea agreement contract by the state,[3] a defendant may elect either to void the contract or to demand specific performance.

Thus, in cases of plea agreements, S.B. 10 impairs the obligation of contracts and the sexual offenders are entitled to specific performance.

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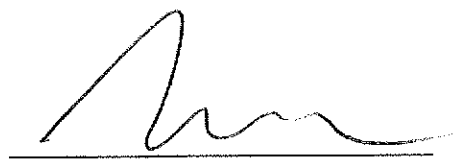
[3] For purposes of plea agreements, contracts are not between the defendant and the county prosecutor but between the defendant and the state. See *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St.3d 456, 2002-Ohio-6719.

CONCLUSION

For all of these reasons, as well as those reasons advanced in the Appellants' Merit Brief, 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 21st day of September, 2009.

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