

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, : Case No. 2008-2502

Plaintiff-Appellee, :

v. : On Appeal from the

CHRISTIAN N. BODYKE, : Sixth Appellate District,

Defendant-Appellant. : Huron County, Ohio

: Case Nos. H-07-040, H-07-041,

: H-07-042

**REPLY BRIEF OF AMICI CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER,  
 CUYAHOGA COUNTY PUBLIC DEFENDER, OHIO ASSOCIATION OF CRIMINAL  
 DEFENSE LAWYERS, AND OHIO JUSTICE AND POLICY CENTER IN SUPPORT  
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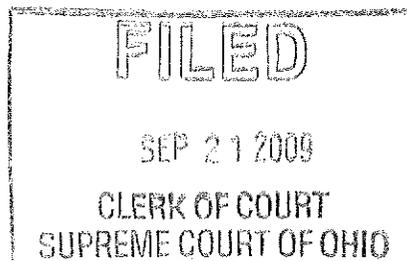
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**I. STATEMENT OF THE CASE AND FACTS**

Amici adopt by reference the statement of the case and facts set forth by Appellant Christian Bodyke.

**II. SUMMARY OF ARGUMENT**

The primary intent and effect of Senate Bill 10 is punishment. Senate Bill 10 does not protect the public. It does not help Ohio obtain federal funds. Further, through Senate Bill 10, the General Assembly empowered the Attorney General to change the terms of judicial orders in violation of the separation of powers. This Court should hold that Senate Bill 10 violates the Ohio Constitution's ban on retroactive punishment and that it violates the separation of powers.

**III. INTRODUCTION**

In 2007, Senate Bill 10 fundamentally changed Ohio's sex-offender classification and notification provisions. But Senate Bill 10 may not be constitutionally applied to crimes that occurred before the date of its enactment. Although different provisions of Senate Bill 10 came into effect at different times—some portions took effect on July 1, 2007 while other sections did not take effect until January 1, 2008—at the very least, the act may not be applied to a defendant whose alleged crime(s) occurred before July 1, 2007. Senate Bill 10, 127<sup>th</sup> General Assembly, Sections 2, 3, and 4 (2007).

Under Senate Bill 10, sex offenders are no longer classified based upon their risk to the public. Instead of judicial hearings focused on the risk that an offender might re-offend, Senate Bill 10 classification levels are based solely on the offense committed. Senate Bill 10 does not permit the sentencing judge to consider criteria that are relevant to the offender's risk of recidivism. Instead, the sentencing judge merely informs the offender which classification and duties attach to his or her conviction. R.C. 2950.03(A)(2).

The General Assembly's motivation in enacting Senate Bill 10 was largely financial. In 2006, Congress passed a bill known as the Adam Walsh Act. States were required to comply with this federal legislation by July 27, 2009, or risk losing 10% of a federal law-enforcement grant. Congress promised a funding bonus to states that enacted the statute by July 2007. As Ohio State Senator Steve Austria, Senate Bill 10's sponsor, explained during the May 16, 2007 Senate session: "Every state is required to implement the Adam Walsh Child Protection and Safety Act within three years, by July of 2009. However, if we are able to implement this Act by July of 2007..., we would be eligible to receive an additional ten percent to our state." Senate Session, Wednesday, May 16, 2007. Despite Senator Tom Sawyer's warning during the session that "[t]his bill is being moved as quickly as possible not because of what is best for children, but because there is money at stake from the Congress," the General Assembly passed the bill. *Id.*

It appears that the bonus money is purely illusory, as Congress has not appropriated any money for the bonus. See, generally, Fund Adam, <http://fundadam.org/news.html> (viewed, September 10, 2009); and the Adam Walsh Policy update of the National Conference of State Legislators, <http://www.ncsl.org/statefed/LAWANDJ.HTM#AdamWalsh> (updated, August 2009). Furthermore, Ohio has not met the minimum standards for federal compliance. See January 16, 2009 Letter from Laura L. Rogers, Director of the U.S. Dept. of Justice Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, to Nancy H. Rogers, former Ohio Attorney General.<sup>1</sup> According to Director Rogers, Ohio's new classification system has failed to adequately place various offenses into the proper tiers. *Id.* at pp. 1-5 of enclosure.

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<sup>1</sup> [http://www.opd.ohio.gov/AWA\\_Information/AWA\\_SORNA\\_Compliance\\_Review.pdf](http://www.opd.ohio.gov/AWA_Information/AWA_SORNA_Compliance_Review.pdf)

And not only is Ohio's new classification scheme inadequate, but recent studies demonstrate that sex-offender registries are ineffective tools for increasing public safety. See Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, (December 2008), University of Chicago Economics Department<sup>2</sup> (Using three different sets of data, Agan concluded that rates of sexual offenses do not decline after the introduction of a registry; and sex offenders do not recidivate less when released into states with registries); Editorial, *The Problem of Sex Offenders*, N.Y. Times, September 11, 2009<sup>3</sup> ("California's online sex-offender registry is full of information about Phillip Garrido of 1554 Walnut Ave. in Antioch—a 6-foot-4 white male, born April 5, 1951, with blue eyes, brown hair, a scar on his abdomen and a rape conviction. But in the 18 years that Mr. Garrido dutifully met his obligations as a registered offender—checking in with the state every year— authorities charge that he kidnapped and held Jaycee Dugard, fathering two children with her and imprisoning them all in his backyard."); Monica Davey, *Case Shows Limits of Sex Offender Alert Programs*, N.Y. Times, September 1, 2009<sup>4</sup> ("Sex offender lists have made far more information readily available to the public and the police than before, but experts say little research is available to suggest that the registries have actually discouraged offenders from committing new crimes.").

#### IV. ARGUMENT

- A. **The application of Senate Bill 10, to crimes committed before July 1, 2007, violates the Ex Post Facto Clause of the United States Constitution.**

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<sup>2</sup> <http://ssrn.com/abstract=1437098>

<sup>3</sup> [http://www.nytimes.com/2009/09/12/opinion/12sat2.html?\\_r=2&th&emc=th](http://www.nytimes.com/2009/09/12/opinion/12sat2.html?_r=2&th&emc=th)

<sup>4</sup> [http://www.nytimes.com/2009/09/02/us/02offenders.html?\\_r=2&th&emc=th](http://www.nytimes.com/2009/09/02/us/02offenders.html?_r=2&th&emc=th)

## The Intent of Senate Bill 10

This Court must analyze the intent of Senate Bill 10, and determine whether the General Assembly's objective in promulgating Senate Bill 10 was penal or remedial. This Court must look to the language and purpose of the statute in order to determine legislative intent. *State v. S.R.* (1992), 63 Ohio St.3d 590, 594-595; *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105. The majority of the State's arguments rest upon the claim that Senate Bill 10 is civil in nature, and thus may be applied retroactively. Amicus Curiae, the Ohio Attorney General, noted that "the state appellate courts have repeatedly affirmed the constitutionality of S.B. 10." (Ohio Attorney General Brief, p. 11). But the Eleventh District Court of Appeals recently determined that the General Assembly intended Senate Bill 10 to be punitive:

The provisions of Senate Bill 10 demonstrate the General Assembly's intent for the new statutory scheme to be punitive. Similar to the 1997 version of R.C. Chapter 2950, Senate Bill 10 contains language stating the exchange or release of certain information is not intended to be punitive. However, also probative of legislative intent is the manner of the legislative enactment's "codification or the enforcement procedures it establishes...." *Smith v. Doe* (2003), 538 U.S. 84, 94, 123 S. Ct. 1140, 155 L. Ed. 2d 164. Placement of a statute "is not sufficient to support a conclusion that the legislative intent was punitive." *Id.* at 95; [s]ee, also, *In re G.E.S.*, 2008-Ohio-4076, at ¶22. While it is not dispositive, "[w]here a legislature chooses to codify a statute suggests its intent." *Mikaloff v. Walsh* (N.D. Ohio 2007), 2007 U.S. Dist. LEXIS 65076, at \*15. (Citation omitted.). The placement of Senate Bill 10, along with the text, demonstrates the General Assembly's intent to transform classification and registration into a punitive scheme.

Senate Bill 10 is placed within Title 29, Ohio's Criminal Code. The specific classification and registration duties are directly related to the offense committed. Further, failure to comply with registration, verification, or notification requirements subjects an individual to criminal prosecution and criminal penalties. R.C. 2950.99. Specifically, pursuant to R.C. 2950.99, failure to comply with provisions of R.C. Chapter 2950 is a felony.

The following mandates by the legislature are also indicative of its intent for the new classification to be a portion of the offender's sentence. First, R.C. 2929.19(B)(4)(a), which is codified within the Penalties and Sentencing Chapter, states: "[t]he court shall include in the offender's sentence a statement that the offender is a tier III sex offender...." (Emphasis added.). In addition, R.C.

2929.23(A), titled “Sentencing for sexually oriented offense or child-victim misdemeanor offense...,” codified under the miscellaneous provision, states: “the judge *shall include in the offender’s sentence* a statement that the offender is a tier III sex offender/child victim offender [and] shall comply with the requirements of section 2950.03 of the Revised Code...” (Emphasis added.). R.C. 2929.23(B) states: “[i]f an offender is being sentenced for a sexually oriented offense or a child-victim oriented offense that is a misdemeanor..., the judge *shall include in the sentence* a summary of the offender’s duties imposed under R.C. 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code and the duration of the duties.” (Emphasis added.).

As defined by the Ohio Revised Code, “sentence” is “the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense.” R.C. 2929.01 (E)(E). “Sanction” is defined in R.C. 2929.01 (D)(D) as “any penalty imposed upon an offender who is convicted of or pleads guilty to an offense, *as punishment for the offense.*” (Emphasis added.).

Therefore, the placement of Senate Bill 10 in the criminal code, along with the plain language of the bill, evidences the intent of the General Assembly to transform classification and registration into a punitive scheme.

*State v. Ettenger*, 11<sup>th</sup> Dist. No. 2008-L-054, 2009-Ohio-3525, at ¶14-16. Indeed, as argued by Mr. Bodyke in his merit brief, and by Amici, the legislature changed the purpose of the sex-offender registration and classifications laws when it enacted Senate Bill 10.

Despite the numerous factors pointing to the General Assembly’s intent to make sex-offender classification and registration into a punitive scheme, including longer and more arduous registration requirements, the State attempts to dilute the legislature’s new statutory scheme by claiming that the registration requirements are not “quite as tough as [they] look[.]” because the registration period “includes the [defendant’s] prison time.” (State’s Merit Brief, p. 4). Revised Code Section 2950.07(A)(1) states that a defendant, whose duty to register falls under 2950.04(A)(1)(a), must comply with the registration statutes “immediately after the entry of the judgment of conviction.” Revised Code Section 2950.04(A)(1)(a) applies to “an offender who is convicted of or pleads guilty to a sexually oriented offense and is sentenced to a prison term, a term of imprisonment, or any other type of confinement” on or after January 1, 2008.

At first glance, it would seem that the State is correct, and a defendant's registration period begins to run at the time that he or she is convicted. However, R.C. 2950.07(A)(1) must be read in pari materi with R.C. 2950.07(D). See *State ex rel. Choices for South-Western City Schools v. Anthony*, 108 Ohio St.3d 1, 2005-Ohio-5362, at ¶46 (statutes that relate to the same subject matter must be construed in pari materia and harmonized so as to give full effect to the statutes); *State v. Hassler*, 115 Ohio St.3d 322, 2007-Ohio-4947, at ¶24 (same). Revised Code Section 2950.07(D) states:

(D) The duty of an offender or delinquent child to register under this chapter is tolled for any period during which the offender or delinquent child is returned to confinement in a secure facility for any reason or imprisoned for an offense when the confinement in a secure facility or imprisonment occurs subsequent to the date determined pursuant to division (A) of this section. The offender's or delinquent child's duty to register under this chapter resumes upon the offender's or delinquent child's release from confinement in a secure facility or imprisonment.

Accordingly, a defendant's duty to register is tolled during the time in which he or she is "returned to confinement or imprisoned for an offense" after the initial registration with the sheriff. The duty to register resumes upon his or her release from such confinement.

#### The Effect of Senate Bill 10

Even if this Court were to determine that the General Assembly intended Senate Bill 10 to operate as a remedial statute, the statute has a "punitive effect so as to negate a declared remedial intention." *Allen v. Illinois* (1985), 478 U.S. 364, 369. The Attorney General attempts to negate the effect-portion of the ex post facto analysis by arguing that "Amici's reliance on statistical data and social science research is not relevant for deciding whether a retroactive law is civil or criminal." (Ohio Attorney General Brief, p. 28). But in fact, such empirical research demonstrates the punitive effects that Senate Bill 10 has had on the numerous people that have been reclassified by the statute. (See Merit Brief of Amici Curiae Office of the Ohio Public

Defender, Cuyahoga County Public Defender, Ohio Association of Criminal Defense Lawyers, and Ohio Justice and Policy Center in Support of Appellant Christian Bodyke, pp. 8-14).

Recent studies suggest that Senate Bill 10's residency restrictions are analogous to banishment, a historical form of punishment. *Smith v. Doe*, 538 U.S. at 97-98. In a report titled *Assessing Housing Availability Under Ohio's Sex Offender Residency Restrictions* by Beth Red Bird, the following statistics were disclosed:

1. More than 65% of the county is "off limits" to sex offenders;
2. More than 80% of property in high-poverty areas are off limits; and
3. If the retroactivity gap is closed, and broad-scale enforcement begins, more than 500 (one third) sex offenders in Franklin County would be subject to eviction.

Beth Red Bird, *Assessing Housing Availability Under Ohio's Sex Offender Residency Restrictions*, (March 25, 2009), The Ohio State University, p. 5.<sup>5</sup> Accordingly, many sex offenders are being "expelled" from communities. *Smith v. Doe*, 538 U.S. 98. And such expulsion is more than the registration requirements that were at issue in *State v. Cook* (1998), 83 Ohio St.3d 404, 419 ("Dissemination of such [registered] information is obviously detrimental to the reputation of the defendant, who is presumed innocent until proven guilty. But, dissemination of such information in and of itself however, has never been regarded as punishment when done in furtherance of a legitimate governmental interest."). Internal citation omitted. See, also, *State v. Williams*, 88 Ohio St.3d 513, 526, 2000-Ohio-428 ("There is nothing in the community notification provisions in R.C. Chapter 2950 that hampers the right to seek out or acquire property. Notification is based upon the geographic area around the offender's residence. R.C. 2950.11(A)(1) through (9). Thus, before the community can be notified, the

offender must have obtained a temporary or permanent residence, *and the right to acquire property has not been implicated.*"). Emphasis added.

And even though Senate Bill 10's residency restriction currently may only be enforced prospectively, the General Assembly is attempting to pass a new bill in which the residency restriction will be enforced retroactively. According to Senate Bill 42, any person convicted of a sexually oriented offense will have to vacate his or her residence if neither the defendant nor his or her spouse owns the property at which the offender resides. Senate Bill 42 proposes the following changes to R.C. 2950.034:

(A) ~~No~~ Regardless of whether the person committed the offense prior to, on, or after the effective date of this amendment, no person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense or a child-victim oriented offense shall establish do any of the following:

(1) Establish a residence or occupy residential premises within one thousand feet of any school premises or, provided that this prohibition does not apply to a person who establishes a residence by occupying residential premises within one thousand feet of school premises if the person or the person's spouse is the owner of record of those residential premises at the time of the occupancy and also was the owner of record of those residential premises prior to July 31, 2003;

(2) Establish a residence within one thousand feet of any preschool or child day-care center premises, provided that this prohibition does not apply to a person who establishes a residence by occupying residential premises within one thousand feet of preschool or child day-care center premises if the person or the person's spouse is the owner of record of those residential premises at the time of the occupancy and also was the owner of record of those residential premises prior to July 1, 2007;

(3) Regardless of whether the occupancy began prior to, on, or after the effective date of this amendment, occupy residential premises within one thousand feet of any school premises, provided that this prohibition does not apply to a person who occupies residential premises within one thousand feet of school premises if the person or the person's spouse is the owner of record of those residential premises at the time of the occupancy and also was the owner of record of those residential premises prior to July 31, 2003;

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<sup>5</sup>[http://www.redbird.net/ASSESSING\\_HOUSING\\_AVAILABILITY\\_UNDER\\_OHIO'S\\_SEX\\_OFFENDER\\_RESIDENCY\\_RESTRICTIONS.pdf](http://www.redbird.net/ASSESSING_HOUSING_AVAILABILITY_UNDER_OHIO'S_SEX_OFFENDER_RESIDENCY_RESTRICTIONS.pdf)

(4) Regardless of whether the occupancy began prior to, on, or after the effective date of this amendment, occupy residential premises within one thousand feet of any preschool or child day-care center premises, provided that this prohibition does not apply to a person who occupies residential premises within one thousand feet of preschool or child day-care center premises if the person or the person's spouse is the owner of record of those residential premises at the time of the occupancy and also was the owner of record of those residential premises prior to July 1, 2007.

S.B. 42, 128<sup>th</sup> General Assembly, § 2950.034 (2009).

As such, if a person was convicted in 2000 of a sexually oriented offense, and that person was released from prison in 2007 and moves in with a relative (not a spouse) who lives within 1,000 feet of a school, and then the former inmate is reclassified in accordance with Senate Bill 10, he or she may be removed from that residence. This Court's failure to draw a line as to the General Assembly's implementation of retroactive sex-offender registration and classification laws will result in ongoing litigation as to every new piece of legislation that is passed. And Senate Bill 42 is the first example of the General Assembly's willingness to pass harsher laws increasing the punitive effects of Senate Bill 10 and its progenies.

**B. The application of Senate Bill 10, to crimes committed before July 1, 2007, violates the Retroactivity Clause of the Ohio Constitution.**

Section 28, Article II of the Ohio Constitution forbids the enactment of retroactive laws. *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 106. Ohio's Constitution affords its citizens greater protection against retroactive laws than does the Ex Post Facto Clause of the United States Constitution. *Van Fossen*, 36 Ohio St.3d at 105, footnote 5 (“[Ohio’s Constitution of 1851 provides a] much stronger prohibition than the more narrowly constructed provision in Ohio’s Constitution of 1802. Section 16, Article VIII of th[e 1802] Constitution stated: “No ex post facto law, nor any law impairing the validity of contracts, shall ever be

made,” merely reflecting the terms used in Section 10, Article I of the United States Constitution.”).

Although the United States Supreme Court held that Alaska’s Sex Offender Registration Act (ASORA) did not violate the federal ex post facto clause, *Smith v. Doe*, 538 U.S. 84, the Supreme Court of Alaska found ASORA to violate the ex post facto clause of the state constitution. *Doe v. State of Alaska* (2008), 189 P.3d 999. Similar to some of Ohio’s Senate Bill 10 registration requirements, ASORA required sex offenders to:

Register with the Alaska Department of Corrections, the Alaska State Troopers, or local police. It requires registrants to disclose their names, addresses, places of employment, date of birth, information about their conviction, all aliases used, driver’s license numbers, information about the vehicles they have access to, any identifying physical features, anticipated address changes, and information about any psychological treatment received. It authorizes registrants to be photographed and fingerprinted. Registrants must periodically re-register and update their disclosures: those convicted of aggravated crimes must re-register quarterly; those not convicted of aggravated crimes must re-register annually. A sex offender who changes residences must give notice to the state trooper office or municipal police department closest to his new residence within one working day.

*Doe v. Alaska*, 189 P.3d at 1001. The Supreme Court of Alaska recognized that the federal ex post facto analysis did not supersede or limit the state court’s independent consideration of Alaska’s ex post facto prohibition. *Id.* at p. 1005. The court further explained that federal interpretation of the federal ex post facto prohibition did not prevent the state court from reaching a different, and more protective, result under the Alaska Constitution. *Id.*

Using the intent-effects test, the Alaska Supreme Court began with the effects-portion of the analysis. In concluding that ASORA was punitive in its effects, the state supreme court used the seven factors that the United States Supreme Court listed in *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144. *Doe v. Alaska*, 189 P.3d at 1008. The main findings of the Alaska Supreme Court were: (1) ASORA imposes significant affirmative obligations and a severe

stigma on every person to whom it applies; (2) the dissemination provision at least resembles the punishment of shaming and the registration and disclosure provisions are comparable to conditions of supervised release or parole; (3) ASORA's application to a broad spectrum of crimes regardless of their inherent or comparative seriousness refutes any argument that the registration and dissemination provisions are not retributive; (4) the fact that a statute applies only to behavior that is already, and exclusively, criminal supports a conclusion that its effects are punitive; and (5) although protecting the public from sex offenders is a primary governmental interest, in the context of an ex post facto inquiry, a court has an obligation to determine whether the means chosen to carry out the legitimate purpose is excessive, i.e., not close enough to be classified as non-penal. *Doe v. Alaska*, 189 P.3d at 1008-1016.

Similar to ASORA, Senate Bill 10's effects are punitive. (See July 13, 2009 Merit Brief of Christian Bodyke, pp. 12-15; Argument A, pp. 6-10, supra). Additionally, R.C. 2950.034 eliminates the right of any defendant who has been convicted of a sex offense, and who has been reclassified under Senate Bill 10, to live where he or she wishes. *State v. Cook*, 83 Ohio St.3d 404, 411, 1998-Ohio-291 (A statute is substantive—and therefore unconstitutional if applied retroactively—if the statute “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.”). (See Appellant Christian Bodyke's Merit Brief, pp. 16-17; Argument A, pp. 8-12, supra). Consequently, Senate Bill 10 not only violates the Ex Post Facto Clause of the United States Constitution, but it also violates the Retroactivity Clause of Section 28, Article II of the Ohio Constitution.

**C. Senate Bill 10 violates the separation-of-powers doctrine.**

Any original classification under former R.C. Chapter 2950 constituted a final judgment and, as such, is beyond the legislature's power to vacate, nullify, or otherwise modify. “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, at paragraph one of the syllabus. “[I]t is well settled that the legislature cannot annul, reverse or modify a judgment of a court already rendered.” *Bartlett v. Ohio* (1905), 73 Ohio St. 54, 58. See, also, *Plaut v. Spendthrift Farm, Inc.* (1995), 514 U.S. 211, 219 (Congress may not interfere with the power of the federal judiciary “to render dispositive judgments” by “commanding the federal courts to reopen final judgments”) (internal citation omitted).

“A judgment which is final by the laws existing when it is rendered cannot constitutionally be made subject to review by a statute subsequently enacted.” *Gimpy v. Wolfinger* (1902), 67 Ohio St. 144, at paragraph three of the syllabus. “That the conclusions are uniform upon the proposition that a judgment which is final by the statutes existing when it is rendered is an end to the controversy, will occasion no surprise to those who have reflected upon the distribution of powers in such governments as ours, and have observed the uniform requirement that legislation to affect remedies by which rights are enforced must precede their final adjudication.” *Id.* at 152-153.

A determination of an offender’s classification under former R.C. Chapter 2950 constituted a final order. *State v. Washington*, 11<sup>th</sup> Dist. No. 99-I-015, 2001-Ohio-8905, at \*9 (“a defendant’s status as a sexually oriented offender...arises from a finding rendered by the trial court, which in turn adversely affects a defendant’s rights by the imposition of registration requirements”); *State v. Dobrski*, 9<sup>th</sup> Dist. No. 06CA008925, 2007-Ohio-3121, at ¶6 (“[i]nasmuch as a sexual predator classification is an order that affects a substantial right in a special proceeding, it is final and appealable”). The prosecuting attorney had a statutory right,

and a duty, to appeal a classification decision that might be adverse to the State's interests. Law of December 31, 2007, Ohio Rev. Code Ann. § 2950.09(C)(2) (repealed January 1, 2008).

Accordingly, if either party failed to appeal such a determination within thirty days, as provided for in App.R. 4(A), the judgment became settled. Subsequent attempts to overturn such judgments have been barred under the principles of res judicata. See *State v. Lucerno*, 8<sup>th</sup> Dist. No. 89039, 2007-Ohio-5537, at ¶9 (applying res judicata to a case in which the State failed to appeal the lower court's determination that House Bill 180/Megan's Law was unconstitutional: "the courts have barred sexual-predator classifications when an initial classification request had been dismissed on the grounds that the court believed R.C. Chapter 2950 to be unconstitutional") (citations omitted).

Furthermore, contrary to the Attorney General, trial courts exercised broad discretion under former R.C. Chapter 2950 during a defendant's classification hearing. Before adjudicating a defendant as a sexual predator, a trial court was required to take the following factors into account:

- (a) The offender's or delinquent child's age;
- (b) The offender's or delinquent child's prior criminal or delinquency record regarding all offenses, including, but not limited to, all sexual offenses;
- (c) The age of the victim of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made;
- (d) Whether the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made involved multiple victims;
- (e) Whether the offender or delinquent child used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;
- (f) If the offender or delinquent child previously has been convicted of or pleaded guilty to, or been adjudicated a delinquent child for committing an act that if committed by an adult would be, a criminal offense, whether the offender or delinquent child completed any sentence or dispositional order imposed for the prior offense or act and, if the prior offense or act was a sex offense or a sexually

oriented offense, whether the offender or delinquent child participated in available programs for sexual offenders;

(g) Any mental illness or mental disability of the offender or delinquent child;

(h) The nature of the offender's or delinquent child's sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;

(i) Whether the offender or delinquent child, during the commission of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made, displayed cruelty or made one or more threats of cruelty; and

(j) Any additional behavioral characteristics that contribute to the offender's or delinquent child's conduct.

Law of December 31, 2007, Ohio Rev. Code Ann. § 2950.09(B)(3) (repealed January 1, 2008).

Moreover, the list provided by former R.C. 2950.09(B)(3) was not exhaustive, and required the trial court to "consider all relevant factors, including, but not limited to," the factors listed above.

Id. Indeed, such a decision in which a trial court must exercise its discretion and issue a binding, legal judgment is anything but "ministerial." (Ohio Attorney General Brief, p. 37).

Accordingly, any classification under House Bill 180 (sexually oriented offender; habitual sexual offender; sexual predator) constituted a final order of the lower court. And under separation-of-powers and res judicata principles, the legislature cannot now reclassify those defendants under the provisions of Senate Bill 10.

**D. The application of Senate Bill 10 to offenders who entered into a plea agreement with the State before Senate Bill 10 went into effect impairs the right to contract as protected by the Ohio and United States Constitutions.**

When analyzing whether a law violates the ban against the impairment of contracts, this Court applies a three-part test. *State ex rel. Horvath v. State Teachers Retirement Bd.*, 83 Ohio St.3d 67, 76, 1998-Ohio-424. First, there must be a determination that a contractual relationship

exists. *Id.* If it does, the next question is whether a change in the law impairs that relationship. *Id.* Finally, this Court must determine if that impairment is substantial. *Id.*

A plea agreement is viewed as a contract between the State and a criminal defendant. *Santobello v. New York* (1971), 404 U.S. 257. Accordingly, if one side breaches the agreement, the other side is entitled to either rescission or specific performance of the plea agreement. *Id.* at 262-263. Ohio courts have noted that the contract is completely executed once the defendant has pleaded guilty, and the trial court has sentenced him or her. See, e.g., *State v. McMinn*, 9<sup>th</sup> Dist. No. 2927-M, 1999 Ohio App. LEXIS 2745, at \*11; accord, *State v. Pointer*, 8<sup>th</sup> Dist. No. 85195, 2005-Ohio-3587, at ¶9. However, to the extent that the plea agreement contains further promises, the contract remains executory, and may be enforced by either party. See, e.g., *Parsons v. Wilkinson* (S.D. Ohio 2006), Case No. C2-05-527, 2006 U.S. Dist. LEXIS 54979 (allegation by inmate that plea agreement superseded parole board's authority regarding timing of parole hearing sufficient to withstand state attorney general's motion to dismiss in Section 1983 action), citing *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St. 3d 456, 2002-Ohio-6719, at ¶28; see, also, *McMinn*, *supra*, at \*11, fn. 6.

When former R.C. 2950 was still in place, prior to the enactment of Senate Bill 10, an alleged sex-offender's classification was frequently the subject of plea negotiations. Usually, a defendant's plea agreement contained additional terms, beyond his or her agreement to plead guilty to certain charges, and followed by a sentencing hearing. As a consequence of the plea agreement, the defendant would have been labeled a sexually oriented offender; a habitual sexual offender; or a sexual predator. Thus, the plea, as a matter of law, contained the terms that the offender comply with the registration requirements attendant upon his or her classification. Consequently, any plea agreement with the State remained an executory contract at the time of

any reclassification hearing under Senate Bill 10, meeting the first requirement for determining if a law breaches the ban on impairment of contracts.

The second part of the test—whether a change in the law has impaired the contract established between a defendant and the State—is also met by a Senate Bill 10 reclassification hearing. By changing a defendant’s original classification to a Tier I, II, or III offender, the State has unilaterally imposed new affirmative duties upon the defendant in relation to the contract. Furthermore, the third part of the test for determining if a law unconstitutionally impairs a contract—whether the impairment is substantial—is obviously fulfilled, since the duties imposed upon Tier I, II, or III offenders are greater in number and duration than those which were imposed upon a sexually oriented offender, habitual sexual offender, or sexual predator, respectively.

Accordingly, the application of Senate Bill 10 to anyone who has already been classified via a guilty plea violates the prohibition in Section 28, Article II of the Ohio Constitution against laws impairing the obligation of contracts. See *State v. Nixon*, Hamilton County Case No. SP-0800089, March 27, 2009 Entry Granting, In Part, Petition to Contest Application of the Adam Walsh Act, attached (“As Petitioner’s original case was resolved by way of a plea agreement, reclassification of Petitioner constitutes a breach of contract and a violation of the right to contract under the Ohio and United States Constitution.”); *Sigler v. State* (August 11, 2008), Richland Common Pleas No. 07 CV 1863, p. 8, unreported; reversed, 5<sup>th</sup> Dist. No. 08-CA-79, 2009-Ohio-2010; September 16, 2009, jurisdiction accepted by this Court, held pending the decision in the case sub judice (“Like contracts, judicially sanctioned plea agreements are binding on both the State and the defendant. Moreover, the laws in place when and where a contract is made enter into and form a part of the contract itself. This court cannot accept an argument that grants parties license to renege on their contractual obligations.... [I]f the Adam

Walsh Act requires the State to breach its agreement with Mr. Sigler, it would be an unconstitutional interference with the right of contract guaranteed by the Ohio Constitution.”).

Footnotes omitted.

**E. Remedies.**

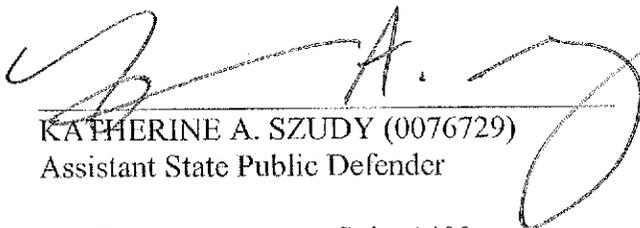
If this Court determines that Senate Bill 10 may not be applied retrospectively, it should reverse any Senate Bill 10 classification to any defendant whose criminal activity occurred prior to the enactment of Senate Bill 10. This case does not challenge the ability to apply Senate Bill 10 prospectively. See *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, at ¶24 (“because R.C. 2950.031 was not expressly made retroactive, it does not apply to an offender who bought his home and committed his offense before the effective date of the statute”). But any original classification under former R.C. Chapter 2950 should be governed by House Bill 180.

**V. CONCLUSION**

For the foregoing reasons, and for the reasons stated in Appellant’s and Amici’s merit briefs, this Court should reverse the decision of the Sixth District Court of Appeals.

Respectfully Submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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**CERTIFICATE OF SERVICE**

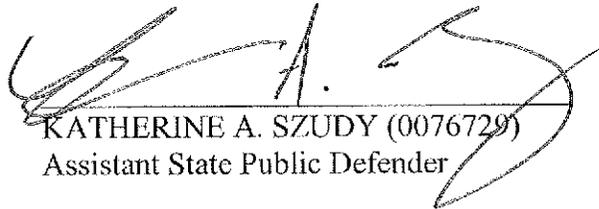
I hereby certify that a true copy of the foregoing **Reply Brief of Amici Curiae Office of the Ohio Public Defender, Ohio Association of Criminal Defense Lawyers, Ohio Justice and Policy Institute, and Cuyahoga County Public Defender in Support of Appellant Christian Bodyke** was served by regular U.S. mail, this 21<sup>st</sup> day of September, 2009, upon the following:

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**IN THE SUPREME COURT OF OHIO**

STATE OF OHIO, : Case No. 2008-2502  
Plaintiff-Appellee, :  
v. : On Appeal from the  
CHRISTIAN N. BODYKE, : Sixth Appellate District,  
Defendant-Appellant. : Huron County, Ohio  
Case Nos. H-07-040, H-07-041,  
H-07-042

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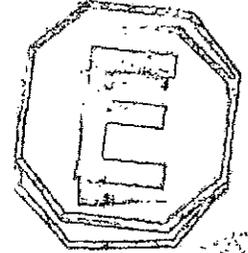
**APPENDIX TO  
REPLY BRIEF OF AMICI CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER,  
CUYAHOGA COUNTY PUBLIC DEFENDER, OHIO ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS, AND OHIO JUSTICE AND POLICY CENTER IN SUPPORT OF  
APPELLANT CHRISTIAN BODYKE**

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COURT OF COMMON PLEAS  
HAMILTON COUNTY, OHIO



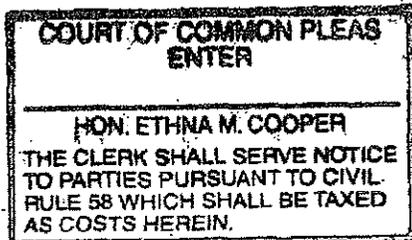
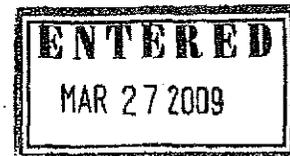
STATE OF OHIO : Case No.: SP-0800089  
*Plaintiff-Respondent* : (Judge Ethna M. Cooper)  
 v. : ENTRY GRANTING, IN PART,  
 : PETITION TO CONTEST  
 BRAD L. NIXON : APPLICATION OF THE ADAM  
 : WALSH ACT  
*Defendant-Petitioner* :

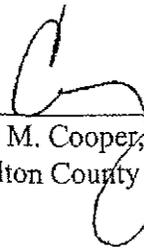
Pursuant to R.C. 2950.031(E), the Court has considered all relevant information and/or testimony presented by all parties in this matter, and hereby finds that Petitioner has proven by clear and convincing evidence that the new classification and expanded registration requirements as specified in the Attorney General's letter do not apply to him. As Petitioner's original case was resolved by way of a plea agreement, reclassification of Petitioner constitutes a breach of contract and a violation of the right to contract under the Ohio and United States Constitutions.

Therefore, the Court hereby orders that the registration requirements as set forth in R.C. 2950.05 and R.C. 2950.06 are not applicable under the new law (Adam Walsh Act), and that the registration requirements, which apply, are under the old law as a Sexually Oriented Offender.

In all other respects, Petitioner's challenges to the validity of the Adam Walsh Act are overruled in accordance with Sewell v. State (February 27, 2009), Hamilton County App. No.: C-080503, 2009 Ohio 872, 2009 Ohio App. LEXIS 711.

So ordered,



  
 Ethna M. Cooper, Judge  
 Hamilton County Court of Common Pleas