

IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO

STATE OF OHIO	:	
	:	CASE NO.
Plaintiff-Respondent	:	
	:	
-vs-	:	<b>PETITION TO CONTEST APPLICATION</b>
	:	<b>OF THE ADAM WALSH ACT</b>
JOHN DOE	:	
	:	<b>(ORAL HEARING REQUESTED)</b>
Defendant-Petitioner	:	

Petitioner John Doe petitions, pursuant to R.C. 2950.031(E) and R.C. 2950.032(E), this Court for a hearing to contest the application of Ohio’s Adam Walsh Act.

1. Petitioner was convicted of \_\_\_\_\_ in violation of \_\_\_\_\_ in a judgment entered on \_\_\_\_\_ in Cuyahoga County, Ohio in CR \_\_\_\_\_. (Ex. A)
2. Petitioner resides in Cuyahoga County and registers as a sexually oriented offender with the sheriff of that county.
3. Petitioner received a Notice of New Classification and Registration Duties, based on Ohio’s Adam Walsh Act, from the Office of the Ohio Attorney General on or about December 1, 2007. (Ex. B)
4. Pursuant to R.C. 2950.031(E) and R.C. 2950.031(E), Petitioner requests, as a matter of right, a hearing to contest the application of Ohio’s Adam Walsh Act.
5. Petitioner submits that the State’s reclassification is improper and unconstitutional for the following reasons, which are explained in greater detail in the attached memorandum in support:

- a. The Retroactive Application of Ohio's AWA Violates the Prohibition on *Ex Post Facto* Laws in Article I, Section 10 of the United States Constitution.
- b. The Retroactive Application of Ohio's AWA Violates the Prohibition on Retroactive Laws in Article II, Section 28 of the Ohio Constitution.
- c. Reclassification of Petitioner Constitutes a Violation of the Separation of Powers' Doctrine.
- d. Reclassification of Petitioner Constitutes Impermissible Multiple Punishment Under the Double Jeopardy Clauses of the United States and Ohio Constitutions.
- e. The Residency Restrictions of the AWA Violate Due Process.
- f. Petitioner Cannot Be Subjected to the Community Notification Requirements Under the AWA Because He Was Not Subject to Community Notification Requirements Under Pre-AWA Law.

WHEREFORE, Petitioner respectfully requests that this petition be granted, and that the court grant the following relief:

- Enjoin the Sheriff of this County, or any other State official, pending the outcome of this litigation, from taking any action based on the attempted reclassification;
- Issue an order pursuant to R.C. 2950.031(E) or R.C. 2950.032(E) that petitioner cannot be reclassified under the Adam Walsh Act, that the new registration and notification requirements do not apply to petitioner, and that the residency restrictions in the Adam Walsh Act are unconstitutional;

- Provide that a copy of all orders be served on the Sheriff of this County, upon the Bureau of Criminal Identification and Investigation, and upon the office of the Attorney General of the State of Ohio.

Respectfully submitted,

ROBERT L. TOBIK  
Chief Public Defender

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## MEMORANDUM IN SUPPORT

### **A. Introduction**

Petitioner was initially classified as a sexually oriented offender under Ohio's Megan's Law (R.C. 2950.01, *et seq.*). On November 26, 2007, the Attorney General sent petitioner a letter informing that he was going to be reclassified under a newly enacted law, Ohio's Adam Walsh Act (AWA) (R.C. 2950.01, *et seq.*) as a "Tier III Sex Offender." (Ex. B). Enacted on June 30, 2007, Ohio's Adam Walsh Act (SB 10) fundamentally transforms Ohio's sex offender classification process and offender registration requirements, notification requirements, and residency restrictions. Unlike sex offender classifications under Ohio's Megan's Law which were based on an offender's likelihood of committing future sex offenses, Ohio's AWA assigns sex offenders to one of three tiers based solely on the offense of conviction with no consideration of the offenders' risk to the community or likelihood of reoffending. By tying sex offender classification decisions and obligations directly and solely to the crime of conviction, Ohio's AWA has created a sex offender classification law that is punitive.

Moreover, Ohio's AWA imposes more onerous obligations and responsibilities on petitioner. If reclassified under Ohio's AWA, petitioner would, among other things, be required to register every **90 days for life** as a Tier III Sex Offender rather than **annually for 10 years** as a sexually oriented offender, be subject to community notification requirements for the first time, and be subject to more stringent restrictions on where petitioner could lawfully reside.

## B. Law and Argument

This petition presents several arguments that the State’s attempt to reclassify petitioner under Ohio’s AWA is both improper and unconstitutional. For the sake of clarity, each argument is presented as a separate “count.”

### Count One: The Retroactive Application of Ohio’s AWA Violates the Prohibition on *Ex Post Facto* Laws in Article I, Section 10 of the United States Constitution.

The retroactive application of Ohio’s Adam Walsh Act to petitioner constitutes an *ex post facto* law as proscribed by Article I, Section 10 of the United States Constitution.<sup>1</sup>

The *Ex Post Facto* Clause of Article I, Section 10 of the United States Constitution prohibits, among other things, any legislation that “changes the punishment, and inflicts 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, 390). The purpose of the *Ex Post Facto* Clause is to ensure that legislative acts “give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.” *Weaver v. Graham* (1981), 450 U.S. 24, 28-29.

In analyzing whether a challenged statute imposes retroactive punishment in violation of the federal prohibition on *ex post facto* laws, this Court must apply the intents-effect test. *State v. Cook* (1998), 83 Ohio St. 3d 404, 415. If the express or implied intent of the General Assembly was to create criminal punishment rather than a civil penalty, that “ends the inquiry” and the retroactive application of the statute is unconstitutional. *Smith v. Doe* (2003), 538 U.S. 84, 92. If, however, the intention of the General Assembly was to enact a regulatory scheme that

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<sup>1</sup> In 2003, the Ohio General Assembly increased petitioner’s obligations under Ohio’s Megan’s Law by imposing, among other things, restrictions on where petitioner could reside. The Ohio Supreme Court is currently considering whether or not Senate Bill 5, in part or in its entirety, can be retroactively applied to individuals, like petitioner, whose criminal conduct pre-dated its enactment. See *Hyle v. Porter*, Case No. 2006-2187 and *State v. Ferguson*, Case No. 2007-1427.

was civil and non-punitive, this Court must further consider whether the statutory scheme is “so punitive in effect as to negate the State’s intention to deem it civil.” *Id.* (citations and internal quotations omitted).

1. Intent of Legislation

In determining the General Assembly’s objective, this Court must examine the statute’s text and structure. *Smith*, 538 U.S. at 92. To do so, courts must first “ask whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other.” *Hudson v. United States* (1997), 522 U.S. 93, 99. In concluding that Ohio’s Megan’s law, as originally enacted in 1997, was not intended to be criminal punishment, the Ohio Supreme Court emphasized the statutory scheme’s “narrowly tailored attack on th[e] problem” of protecting the community for sex offenders. *Cook*, 83 Ohio St. 3d at 417. Under the original Megan’s Law, an individual’s classification and registration requirements was tied directly to an ongoing threat to the community. That is no longer the case. Under the AWA, an individual’s classification and obligations under the statute flow directly from the offense of conviction. Thus, the statutory scheme has been transformed from a narrowly tailored attempt to address a problem to a categorical one indicative of punitive statutory scheme.<sup>2</sup>

The formal attributes of a legislative enactment, such as the manner of its codification and/ or the enforcement procedures it establishes are also probative of legislative intent. *Smith*, 538 U.S. at 94. In this case, the legislature elected to place Ohio’s AWA squarely within Title

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<sup>2</sup> The punitive intent of the General Assembly is also evidenced by certain changes made to the statute in 2003 (e.g. residency restrictions and removal of ability to reconsider classification) by Senate Bill 5 and retained by the AWA. *C.f. Mikaloff v. Walsh* (N.D. Ohio 2007), 2007 U.S. Dist. LEXIS 65076, \* 13-23 (finding that “the Ohio General Assembly intended the residency restriction to be penal.”)

29, Ohio's Criminal Code. Furthermore, the enforcement mechanisms established by the statute are criminal in nature. The failure of an individual to comply with the registration, verification, or notification requirements of the statute subjects him or her to criminal prosecution and criminal penalties. *See generally*, R.C. 2950.99

Considering Chapter 2950 as amended by SB 5 in 2003 and SB10 in 2007, it is now apparent that the General Assembly's intent with regard to Chapter 2950 is punitive, not civil.

2. Effect of Legislation

Even if this Court were to determine that the General Assembly intended Ohio's AWA to operate as a remedial statute, it has a "punitive effect so as to negate a declared remedial intention." *Allen v. Illinois* (1985), 478 U.S. 364, 369. In assessing the punitive effects of a particular statute, this Court should consider whether the obligations imposed by Chapter 2950 were historically regarded as punishment; whether they operate as a disability or restraint; whether they further traditional notions of punishment, bear a rational connection to non-punitive purpose, and/or are excessive in relation to the alternative purposes assigned. *Smith v. Doe* (2003), 538 U.S. 84, 97 (citing *Kennedy v. Mendoza-Martinez* (1963), 373 U.S. 144, 168-69).

Ohio's AWA imposes burdens on defendants that are historically regarded as punishment and which operate as affirmative disabilities or restraints. While registration may cause adverse consequences on the defendant "running from mild personal embarrassment to social ostracism," the further limitation on where on an offender can live causes Chapter 2950 to resemble colonial punishments of "public shaming, humiliation, and banishment." *Smith*, 538 U.S. at 98. Unlike the law considered by the United States Supreme Court in *Smith*, Ohio's Adam Walsh Act does more than disseminate truthful information, it subjects offenders to significant restraints on their liberty not shared by the general citizenry akin to parole and probation. Moreover, because the

restraints are direct consequences of criminal conduct they further the traditional notions of punishment and deterrence and are no longer “narrowly tailored to comport with the respective danger and recidivism levels of the different classifications of sex offenders.” *Cook*, 83 Ohio St. 3d at 421-22. The imposition of obligations or burdens regardless of whether they are necessary in a particular case is clearly excessive, smacks of punishment, and is retribution for past conduct.

Count Two: The Retroactive Application of Ohio’s AWA Violates the Prohibition on Retroactive Laws in Article II, Section 28 of the Ohio Constitution.

Even if this Court concludes that Ohio’s AWA does not constitute an *ex post facto* law as applied to petitioner, Article II, Section 28 of the Ohio Constitution prohibits the retroactive application of the AWA to petitioner.

Article II, Section 28 of the Ohio Constitution expressly forbids the enactment of retroactive laws.<sup>3</sup> *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 106. With this guarantee, the Ohio 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. This constitutional bar on retroactive laws has been interpreted to apply to laws affecting substantive rights but not to procedural or remedial aspects of such laws. *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 137. A statute is substantive if it “impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation or liabilities as to a past transaction, or creates a new right.” *Cook*, 83 Ohio St. 3d at 411.

Ohio’s AWA is a substantive law which, among other things, eliminates the pre-existing right of citizens to reside where they wish and imposes new obligations and burdens which did not exist at the time petitioner committed his offense. *See Nasal v. Dover*, Miami App. No.

2006-CA-9, 2006 Ohio 5584, ¶ 23 (concluding that R.C. 2950.031 constitutes an unconstitutional retroactive law as applied to an individual who owned and occupied real estate prior to the enactment of the statute and whose predicate offense occurred prior to the enactment of the statute). Thus, it cannot be retroactively applied.

Count Three: Reclassification of Petitioner Constitutes a Violation of the Separation of Powers' Doctrine.

The legislative and executive branches' attempt to reclassify petitioner under Ohio's AWA violates the separation of powers doctrine by interfering with a prior judicial adjudication regarding petitioner's sex offender status.

A statute that violates the doctrine of separation of powers is unconstitutional. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St. 3d 451, 475. This doctrine is embedded in the very framework of the Ohio Constitution which defines "the nature of scope of powers designated to the three branches of government." *Id.* (quoting *State v. Hochhausler* (1996), 76 Ohio St. 3d 455, 463. As a part of this doctrine, courts "possess all powers necessary to secure and safeguard the free and untrammelled exercise of their judicial functions and cannot be directed, controlled or impeded therein by other branches of the government." *Zangerle v. Court of Common Pleas* (1943), 141 Ohio St. 70, paragraph two of the syllabus. Courts must "jealously guard the judicial power against encroachment from the other two branches of government" in order "to avoid the evils that would flow from legislative encroachments on our independence." *City of Norwood v. Horney* (2006), 110 Ohio St. 3d 353, 387.

Prior to the enactment of the AWA, the determination of whether and how an offender had to register as a sexual offender was specifically reserved to the judiciary. *Cf. State v. Eppinger* (2001), 91 Ohio St. 3d 158, 166. Indeed, the trial court had the responsibility to

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<sup>3</sup> Article II, Section 28 provides: "The general assembly shall have no power to pass retroactive

determine whether an individual was a sexual predator and/or habitual sex offender or simply a sexually oriented offender. *See* R.C. 2950.09 (pre-AWA). As such, the trial court makes a judicial determination regarding classification which the General Assembly seeks to unsettle with the retroactive application of the AWA. Such interference with previous judicial adjudications impermissibly encroaches on judicial authority and violates the separation of powers doctrine.

Count Four: Reclassification of Petitioner Constitutes Impermissible Multiple Punishment Under the Double Jeopardy Clauses of the United States and Ohio Constitutions.

Reclassification of petitioner under Ohio's AWA constitutes successive punishment and therefore a double jeopardy violation under the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution. These constitutional provisions forbid the imposition of multiple criminal punishments for the same offense in successive proceedings. *Hudson v. United States* (1997), 522 U.S. 93, 98-99; *State v. Martello* (2002), 97 Ohio St. 3d 398, 399-400.

As explained in Count One, the obligations and burdens imposed by Ohio's AWA are punitive in both intent and effect and therefore constitute additional punishment. If the State is permitted to reclassify petitioner under Ohio's AWA, petitioner will have been punished twice in successive proceedings in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article I, Section 10 of the Ohio Constitution. Petitioner was first punished when he was sentenced for his criminal conduct and classified under Ohio's prior sex offender law. Now, several years later, the State seeks to enhance his punishment by subjecting him to the new sex offender's law more onerous requirements. Because petitioner's reclassification

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laws. . . .”

under the AWA adds punishment at a successive proceeding, it is unconstitutional and therefore impermissible.

Count Five: The Residency Restrictions of the AWA Violate Due Process.

Although petitioner maintains that the application of the AWA in its entirety cannot be applied to him, he also maintains that the residency restrictions added by Senate Bill 5 in 2003 and enhanced by Ohio's AWA violate the substantive component of the due process clause in the Fourteenth Amendment of the United States Constitution and in Section 16, Article I of the Ohio Constitution as well as the right to privacy guaranteed by Section 1, Article I of the Ohio Constitution.

In addition to procedural protections, the Due Process Clause contains a substantive component which “which forbids the government to infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.” *Reno v. Flores* (1993), 507 U.S. 292, 301-302 (emphasis in original); *State v. Burnett* (2002), 93 Ohio St. 3d 419, 428. Even when a fundamental liberty interest is not implicated, the due process clause requires state legislation to “rationally advance[] some legitimate governmental purpose.” *Reno*, 507 U.S. at 306; see also *Fabrey v. McDonald Village Police Dep’t* (1994), 70 Ohio St. 3d 351, 354.

As a reclassified sex offender under Ohio's AWA, petitioner would be categorically barred from residing within 1000 feet of a school, pre-school, or child day-care center. R.C. 2950.034. Moreover, these restrictions “loom[]” over any residence selected by petitioner because of “the possibility of being repeatedly uprooted and forced to abandon homes” if a pre-school or day-care center opens near his residence. *See Mann v. Georgia Dept. of Corr* (Nov. 21, 2007), Georgia Sup.Ct. No. *SO7A1043*. These restrictions operate as direct restraint on a

petitioner's liberty and infringe his fundamental right to live where he wishes as well as his right to privacy. Freedom from physical restraint has always been recognized "as the core of the liberty protected by the Due Process Clause." *Kansas v. Hendricks* (1997), 521 U.S. 346, 356 (quoting *Foucha v. Louisiana* (1992), 504 U.S. 71, 80); see also *Youngberg v. Romeo* (1982), 457 U.S. 307, 316. Although the residency restrictions may constitute a less intrusive restraint than incarceration, civil commitment, or other types of physical custody, they nonetheless constitute "other restraints on a man's liberty, restraints not shared by the public generally." See *Jones v. Cunningham* (1963), 371 U.S. 236, 240 (explaining that parole constitutes such a restraint); *Hensley v. Municipal Court, San Jose Milpitas Judicial Dist.* (1973), 411 U.S. 345, 351 (explaining that an individual released on "his own recognizance" is subject to such restraints). Like a parolee or a convicted offender released on his own recognizance, a sex offender subject to Ohio's residency restrictions labors under a significant and tangible restraint on his liberty which is not suffered by the general public. Therefore, the residency restrictions impose a direct restraint on the liberty of sex offenders.

Even if Ohio's residency restrictions do not constitute a direct restraint on petitioner's liberty, these restrictions nonetheless implicate other fundamental rights and liberty interests for which the due process clause "provides heightened protection against government interference." *Glucksberg* (1997), 521 U.S. at 720-21. One such fundamental right, protected by the due process clause and implicated by the residency restriction, is the right to "live and work where he [or she] will" and establish a residence of his or her own choosing. *Meyer v. Nebraska* (1923), 262 U.S. 390, 399; *Kramer v. United States* (C.A. 6 1945), 147 F.2d 756, 759; *Valentyne v. Ceccacci*, Cuyahoga No. 83725, 2004 Ohio 4240, ¶ 47. By restricting sexually oriented offenders to residences that are not located within 1000 feet of any school, pre-school, or day-

care facility, R.C. 2950.034 clearly infringes an individual's constitutional right to establish the residence of their own choosing.

Whether conceived as a component of the right to privacy<sup>4</sup> or as a liberty interest in its own right, the fundamental right to decide where to live is protected by the substantive component of the due process clauses of both the United States and Ohio Constitutions. Accordingly, infringement of that right is constitutionally permissible only if the legislative action is narrowly tailored to serve a compelling state interest.

Given that residency restrictions impair a fundamental liberty interest, they must be struck down unless they are narrowly tailored to serve a compelling state interest. "A statute is narrowly tailored if it targets and eliminates the exact source of the 'evil' it seeks to remedy." *State v. Burnett* (2002), 93 Ohio St. 3d 419, 249 (quoting *Frisby v. Schultz* (1998), 487 U.S. 474, 485).

Assuming that the residency restrictions on sex offenders in R.C. 2950.034 were designed to promote the safety of children and that this constitutes a compelling state interest, the State cannot meet its high burden of demonstrating narrow tailoring. The residency restrictions are not rationally related, let alone narrowly tailored, to serve the interest of protecting school children from sex offenders. By imposing the restrictions on all sex offenders even those whose sole crime involved an adult, the statute fails to discriminate between offenders who actually present an ongoing risk to children and those who do not. Finally, empirical research indicates that the residency restrictions are wholly ineffective as a mechanism for protecting children and may actually be counterproductive by destabilizing the lives of offenders and undermining the

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<sup>4</sup> An individual's right to privacy under Section 1, Article I of the Ohio constitution "runs parallel to those rights of privacy guaranteed by the Fourteenth Amendment to the United States Constitution," *Williams*, 88 Ohio St. 3d at 525, and is therefore also implicated in this case.

public safety aims of the statute. *See e.g.* MINN. DEP'T OF CORRECTIONS, LEVEL THREE SEX OFFENDERS RESIDENTIAL PLACEMENT ISSUES, 2003 REPORT TO THE LEGISLATURE, 9 (2003) (“Enhanced safety due to proximity restrictions may be a comfort factor for the general public, but it does not have any basis in fact;” “[N]o evidence points to *any effect* on offense rates of school proximity residential restrictions;” “[B]lanket proximity restrictions on *residential* locations of [sex offenders] do not enhance community safety”)

Accordingly, because R.C. 2950.034 burdens fundamental liberty interests and is not narrowly tailored to serve a compelling state interest, it must be struck down as unconstitutional.

Count Six: Petitioner Cannot Be Subjected to the Community Notification Requirements Under the AWA Because He Was Not Subject to Community Notification Requirements Under Pre-AWA Law.

Although petitioner contends that Ohio’s AWA cannot be applied to him, he also argues, in the alternative, that, if it does apply and he is reclassified as a Tier III Sex Offender, he cannot be subject to the community notification requirements under R.C. 2950.11.

While Ohio’s AWA generally imposes community notification requirements on Tier III Sex Offenders, it provides a specific exception for individuals who “would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment. R.C. 2950.11(F).

Prior to January 1, 2008, petitioner was classified under former R.C. Chapter 2950 as a sexually oriented offender. As such, the trial court determined that petitioner was not subject to community notification. Because petitioner was not subject to the community notification

requirements under the former law, he cannot, pursuant to the exception set forth in R.C. 2950.11(F), be subject to the community notification requirements of the AWA.<sup>5</sup>

Upon information and belief, petitioner states that community notification pursuant to R.C. 2950.11 will commence shortly after January 1, 2008, and that any community notification will cause irreparable harm to petitioner. He therefore requests that this Court issue a preliminary order enjoining the sheriff from applying community notification requirements to him pending the resolution of this litigation.

### **C. Conclusion**

For the reasons set forth above, petitioner prays that this Court grant him a hearing on the merits of his petition and afford him the following relief. On Counts One, Two, Three and Four, petitioner respectfully requests that this Court hold that the State's attempt to reclassify petitioner under Ohio's Adam Walsh Act is unconstitutional. On Count Five, petitioner respectfully requests that this Court hold that the residency restrictions in R.C. 2950.034 are unconstitutional and cannot be applied against him. On Count Six, petitioner respectfully requests an order that that he is not subject to the community notification requirements of R.C. 2950.11.

Respectfully submitted,

ROBERT L. TOBIK  
Chief Public Defender

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CULLEN SWEENEY, ESQ.  
PAUL KUZMINS, ESQ.  
Counsel for Defendant-Petitioner

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<sup>5</sup> As discussed in petitioner's previous arguments, the addition of community notification also violates principles of separation of powers by abrogating a prior judicial order and violates several of petitioner's constitutional rights.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing Petition to Contest Application of the Adam Walsh Act was hand-delivered to William D. Mason, Cuyahoga County Prosecutor, and/or a member of his staff, at the Justice Center, 9<sup>th</sup> Floor, 1200 Ontario Street, Cleveland, Ohio 44113 and was served by ordinary mail on Attorney General Marc Dann, 30 East Broad Street, Columbus, OH 43215, and/or a member of his staff, this \_\_\_\_\_ day of December, 2007.

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CULLEN SWEENEY  
Assistant Public Defender

**EXHIBIT A**

**EXHIBIT B**

## **Petitioner Specific Arguments**

### **I. For Individuals Who Pleaded Guilty:**

#### **Reclassification of Petitioner Constitutes a Breach of Contract and a Violation of the Right to Contract Under the Ohio and United States Constitutions.**

Petitioner resolved the criminal charges against him by entering into a plea agreement with the State of Ohio. Petitioner's sex offender classification and the attendant obligations imposed by the sex offender law in existence *at the time* of petitioner's plea were material parts of petitioner's plea agreement. The State of Ohio's retroactive application of Senate Bill 10 to reclassify defendant and impose new and additional obligations constitutes a breach of that plea agreement. This breach also involves an impairment of an obligation of contract prohibited by Section 28, Article II of the Ohio Constitution and Article I, Section 10, Clause 1 of the United States Constitution ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts).

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; *see also Layne v. Ohio Adult Parole Authority* (2002), 97 Ohio St. 3d 456. Moreover, "the law in effect at the time a plea agreement is entered is part of the contract. *Ridenour v. Wilkinson*, Franklin App. No. 07AP-200, 2007 Ohio 5965, ¶ 21. When a plea agreement is breached, the breach may be remedied by specific performance. *Santobello v. New York* (1971), 404 U.S. 257.

When petitioner entered into a plea agreement resulting in his classification as a sex offender, there was a different sex offender law in effect at the time of the plea, Ohio's Megan's Law, which was a part of the agreement. By enacting Senate Bill 10 and applying it retroactively to petitioner, the State has materially breached petitioner's plea agreement by subjecting petitioner to an enhanced sex offender classification with more onerous obligations. As such, petitioner is entitled to specific performance of the State's obligation to impose sex

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

**II. For Individuals Who Were Reclassified into Tier III and Faced Community Notification for the First Time:**

See Count Six above.

**III. For Individuals Who Were Misclassified Excluding Sexual Predators (examples):**

The State Has Incorrectly Attempted to Reclassify Petitioner as a Tier III Sex Offender Instead of a Tier II Sex Offender.

Although petitioner contends that Ohio's AWA cannot be applied to him, he also argues, in the alternative, that the State has improperly reclassified him under the AWA.

Petitioner was convicted of gross sexual imposition in violation of R.C. 2907.05. (Ex. A). Under the AWA, such an offense is statutorily defined as a *Tier II* sex offense when, as here, the victim is under the age of thirteen.<sup>6</sup> R.C. 2950.01(F)(1)(c). Moreover, although the statutory definition of Tier III sex offender generally includes those previously classified as sexual predators, it specifically excludes those individuals who, because of their offense of conviction, should be reclassified as a Tier I or Tier II sex offender. R.C. 2950.01(G)(5)(a). Accordingly, the State's attempt to reclassify petitioner as a Tier III sex offender is improper.

Therefore, even if the AWA can be applied to petitioner, this Court should conclude that petitioner can be reclassified as a Tier II sex offender only.

The State Has Incorrectly Attempted to Reclassify Petitioner as a Tier II Sex Offender Instead of a Tier I Sex Offender.

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<sup>6</sup> Senate Bill 10 (AWA) also created a new subsection under the gross sexual imposition statute (R.C. 2907.05(B)) and made a violation of that newly enacted subsection the only type of GSI conviction that is a Tier III offense. Because this subsection did not exist when petitioner was convicted, it obviously does not apply to petitioner.

Although petitioner contends that Ohio's AWA cannot be applied to him, he also argues, in the alternative, that the State has improperly reclassified him under the AWA.

Petitioner was convicted after a jury trial of gross sexual imposition of a 15 year-old victim, in violation of R.C. 2907.05. (Exs. A and C). Under the AWA, such an offense is statutorily defined as a **Tier I** sex offense. R.C. 2950.01(E)(1)(c). It is only a Tier II sex offense if the victim was under the age of thirteen. R.C. 2950.01(F)(1)(c). Because the victim in this case was *not* under the age of thirteen, the State's attempt to reclassify petitioner as a Tier II offender is improper.

Therefore, even if the AWA can be applied to petitioner, this Court should conclude that petitioner can be reclassified as a Tier I sex offender only.