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SUPREME COURT OF APPEALS OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0617

STATE OF WEST VIRGINIA,
PETITIONER,

VS.

PAUL EDWARD BOSTIC,
RESPONDENT,

BRIEF ON BEHALF OF RESPONDENT IN ANSWER TO THE QUESTIONS CERTIFIED TO THE COURT

JOHN M. BUTLER
COUNSEL FOR THE RESPONDENT
109 Clay Street
P. O. Box 700
St. Marys, West Virginia 26170-0700
State Bar ID No. 568
Telephone: 304-684-9258
E-mail jmbutlerwv@yahoo.com

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THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE TRIBUNAL BELOW

The Circuit Court of Pleasants County, West Virginia, the Honorable Robert Stone, Special Judge presiding, did on a previous date certify two Questions to this Court:

Question 1: Does the 1999 amendment of the West Virginia Code §15-1-1 et seq., which retroactively increased the registration period for certain sex offenders from ten (10) years to life based upon the age of the victim, violate the State Constitution, Art 3 §4, and Federal Constitution, Art. I, §10, prohibiting impairment of existing contract obligations, the contract obligations herein having been created under a

1997 plea agreement between the State of West Virginia and the defendant, a significant part of which required registration as a sex offender for a period of only ten (10) years, and not life?

Answer by the Circuit Court: No.

Question 2: Does the 1999 amendment of West Virginia Code §15-12-1 et seq., authorizing the State Police/Department of Public Safety, under certain circumstances, to impose an increase in the length of sex offender registration for earlier convicted sex offenders, from ten (10) years to life, without notice and right to a judicial hearing, violate the Federal Constitution and the West Virginia Constitution, Art. 5, §1, relating to the separation of powers?

Answer by the Circuit Court: No.

STATEMENT OF THE CASE

Paul Edward Bostic, Respondent, was indicted January 16, 1997 in Wood County, West Virginia in Case No. 97-F-12 for the offense of sexual abuse in the first degree Mr. Bostic was represented by Carl Bryant, a private court-appointed attorney, and pursuant to negotiations the plea agreement Mr. Bostic pled guilty to sexual abuse in the second degree ,a lesser included misdemeanor offense, charging sexual contact with a victim who had been mentally defective or mentally incapacitated. The trial court never found there was a factual basis for the plea nor ever determined the age of the victim. Age of the victim was irrelevant

to the plea. The plea information shows that Mr. Bostic had a ninth grade education and could barely read and write. He was required to execute a formal Notice of Sexual Offender Requirements which expressly stated he was to register as a sex offender for ten years. (App. at 13) Mr. Bostic failed to report properly and was charged in Magistrate Court in Wood County for failure to abide by the registration requirements for which he was adjudicated guilty as a first offense on August 24, 1998. This violation was during the ten year registration period created by the plea agreement in the 1997 Wood County conviction.

The Legislature subsequently enacted a law passed March 13, 1999 in effect 90 days from passage which enacted the "Sex Offender Registration Act" West Virginia Code, Chapter 15, Article 12, Section 1 *et seq*,. effective June 13, 1999 Section 4 under duration modified lifetime registration to include any sexual offense "involving a minor". Respondent was given written notice of the change to lifetime registration by the West Virginia State Police, Department of Public Safety (hereafter West Virginia State Police). No hearing opportunity was given him to contest whether the factual finding of the West Virginia State Police was in error. Nothing in the statute defines the parameters of "involving a minor" might include nor in retrospective application whether the original court or the West Virginia State Police were authorized to invoke the increased registration requirement.

After his original ten (10) year registration ended, Respondent was indicted in the Circuit Court of Pleasants County on January 11, 2010. Count One was for failure to provide Sex Offender registration change on June 10 , 2009 alleging Respondent terminated his telephone service on May 29, 2009 and failed to notify the West Virginia State Police within

ten days. Count Two was a charge of providing false information to the West Virginia State Police on July 9, 2008 and August 14, 2008 by failing to report active employment when asked. The error of charging two crimes on two dates in one count is not the direct focus of the Certified Questions before the Court. The third Count was for failure to provide Sex Offender registration change on July 18, 200 alleging Respondent became employed and and failed to notify the West Virginia State Police within ten days. This Count alleges a violation of "Chapter 15, Article 12, Section 8(b)(c) of the Code of the State of West Virginia, as last amended" which is a further error which is not before the Court. Each count carries a potential prison term of one to five years.

Respondent moved to dismiss the indictments on the basis that he was not required to register for life, an essential element of each Count. Respondent argued that these charges breached his 1997 plea agreement thus were a violation of the Contract clause of the Federal and State Constitutions and were a Federal and State Constitutional violation of the Legislature authorizing the Administrative branch, e. g. West Virginia State Police to unilaterally modify the registration requirement to life without any due process of hearing or challenge to that factual finding that he was now required to register for life. The trial court conducted a hearing and ultimately certified two questions to this Court. The only clear inaccuracy in the petitioners' factual statement relates to the status of Carl Bryant. Mr Bryant was court-appointed defense counsel for the Respondent in his 1997 Wood County case. At the time of the hearing on the motion to dismiss in Pleasants County Case No. 10-F-4 below Mr. Bryant was a privately practicing attorney, not the Prosecuting Attorney of

Pleasants County. Upon the death of the Honorable Robert Holland in September 2010, Timothy Sweeney, then Prosecuting Attorney, was appointed judge. Carl Bryant was appointed Prosecutor in Pleasants County in January 2011 and later disqualified from 10-F-4 since he had been a witness in the June 29, 2010 hearing (App. at 47)

POINTS AND AUTHORITIES

Paul Bostic was administratively required to register past his 10 year period of time for registration because of a change in the law. First reaction would be to question whether such change in registration would constitute an *ex post facto* law or retroactive law violation. In the case of *Hensler v. Cross* 210 W V 530, 558 S. E. 2d 330 (WV 2001) this Court heard the issue of whether the sex offender registration act violates the Constitutional provisions of the United States Constitution and West Virginia Constitutions as an *ex post facto* law. The Court ruled determined that the statute did not violate *ex post facto* principles. This standard has been universally accepted upon confirmation of such a ruling by the United States Supreme Court in *Smith v. Doe* 538 US 84 (2003) The case was affirmed by our Court in the case of *Haislop v. Edgell* 215 WV 88, 593 S.E. 2d 839 (2003)

The issues and argument before the Court are not the constitutionality of the statute as it relates to *ex post facto* application. The issues before the Court is primarily whether the Legislature can enact a statute which to the detriment of a defendant impairs a legitimate contract, namely a plea bargain, and further, whether the Legislature can authorize the administrative branch of government, namely the West Virginia State Police, to modify the judicial pronouncement of a ten (10) year registration period to a life registration through

unilateral administrative notice without violating the constitutional provisions of the separation of powers and due process.

Question 1: Does the 1999 amendment of the West Virginia Code §15-1-1 et seq., which retroactively increased the registration period for certain sex offenders from ten (10) years to life based upon the age of the victim, violate the State Constitution, Art 3 §4, and Federal Constitution, Art. I, §10, prohibiting impairment of existing contract obligations, the contract obligations herein having been created under a 1997 plea agreement between the State of West Virginia and the defendant, a significant part of which required registration as a sex offender for a period of only ten (10) years, and not life?

The plea bargain agreement in this case was for the reduction of a felony and its lifetime registration requirements to a misdemeanor with only a 10 year period of sex offender registration. The contract was entered into through the State of West Virginia through its duly elected officials namely the Wood County Prosecuting Attorneys office and the defendant in his own person and through the advice of his counsel. The collateral benefit of the plea was to reduce the registration of the defendant on the Sexual Offender registery from life to just ten (10) years. The trial court recognized the nature of the registration element as essential term of the plea agreement based upon the testimony as stated by the late Honorable Robert Holland:

"Courts in this state typically engage in plea bargain agreements and approvals of the plea by the courts that have been negotiated between counsel on a daily basis. To whether the import of the benefits exchanged in those pleas is legitimate benefit or not, the defendant in this case has made a valid argument that he entered a plea to a lesser included offense due to the fact that he would then be under a ten-year registration requirement.

And the Court can see that that is a viable argument that he was bargaining for a position that had value to him. The State was willing, under the plea agreement, to give away the lifetime requirement that he could have been required to follow if he had been convicted on the indicted charge. "

(App. at 47, page 26-27)

Parties to a contract have the right to enforce that meeting of the minds of both as to its expressed terms and the naturally flowing consequences of the bargain. The agreement was to dismiss the charge of Sexual Abuse in the First Degree under Chapter 61, article 8B, Section 7[1] Respondent pled to a lesser -included charge, Sexual Abuse in the Second Degree,

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[1]Section 61-8B-7 Sexual abuse in the first degree

(a) A person is guilty of sexual abuse in the first degree when:
(1) Such person subjects another person to sexual contact without their consent, and the lack of consent results from forcible compulsion; or

(2) Such person subjects another person to sexual contact who is physically helpless; or

(3) Such person, being fourteen years old or more, subjects another person to sexual contact who is younger than twelve years old.

(b) Any person who violates the provisions of this section shall be guilty of a felony, and, upon

which did not specify age of the victim or age difference of the defendant versus victim under sexual abuse in the second degree.[2] For the Respondent, the benefits included avoiding a felony record, being able to possess a firearm in the future, being able to vote, only having a ten-year registry requirement, and no judicial determination of the age of the victim. Attempts to suggest that these natural consequences of the bargain are less important than the reduction from felony to misdemeanor or that the Respondent received the "majority" of the bargain is without merit. Neither the Court nor the Legislature should ever be permitted to decide which terms this 9th grade educated man should be allowed to rely upon, thus re-writing the contract.

This Court has stated in *State ex rel. Gardner v. WV DIV. OF CORR.*, 559 S.E.2d 929, 210 W.Va. 783 (W.Va., 2002) the following:

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conviction thereof, shall be imprisoned in a state correctional facility not less than one year nor more than five years, or fined not more than ten thousand dollars and imprisoned in a state correctional facility not less than one year nor more than five years.

(c) Notwithstanding the provisions of subsection (b) of this section, the penalty for any person violating the provisions of subsection (a) of this section who is eighteen years of age or older and whose victim is younger than twelve years of age, shall be imprisonment for not less than five nor more than twenty-five years and fined not less than one thousand dollars nor more than five thousand dollars.

[2]Section 61-8B-8 Sexual abuse in the second degree

(a) A person is guilty of sexual abuse in the second degree when such person subjects another person to sexual contact who is mentally defective or mentally incapacitated.
(b) Any person who violates the provisions of this section shall be guilty of a misdemeanor, and, upon conviction thereof, shall be confined in the county jail not more than twelve months, or fined not more than five hundred dollars and confined in the county jail not more than twelve months.

> We have recognized that "[a]s a matter of criminal jurisprudence, a plea agreement is subject to principles of contract law insofar as its application insures a defendant receives that to which he is reasonably entitled." State ex rel. Brewer v. Starcher, 195 W.Va. 185, 192, 465 S.E.2d 185, 192 (1995). Such agreements require "ordinary contract principles to be supplemented with a concern that the bargaining and execution process does not violate the defendant's right to fundamental fairness[.]" State v. Myers, 204 W.Va. 449, 458, 513 S.E.2d 676, 685 (1998). This Court made clear in syllabus point 4 of Myers, in part, that "[w]hen a defendant enters into a valid plea agreement with the State . . ., an enforceable `right' inures to both the State and the defendant not to have the terms of the plea agreement breached by either party." See State ex rel. Gray v. McClure, 161 W.Va. 488, 492, 242 S.E.2d 704, 707 (1978) ("The rule we follow . . . is that a prosecuting attorney . . . is bound to the terms of a plea agreement once the defendant enters a plea of guilty or otherwise acts to his substantial detriment in reliance thereon."). We have further recognized that "`[d]ue process concerns arise in the process of enforcing a plea agreement.'" Myers, 204 W.Va. at 457, 513 S.E.2d at 684 (quoting State v. Smith, 207 Wis.2d 258, 558 N.W.2d 379, 385 (1997)). Furthermore, in Gray we noted that "[p]ermitting the prosecution to breach a plea bargaining agreement has been characterized as `extremely detrimental to the administration of justice if it should be established.'" Gray, 161 W.Va. at 491, 242 S.E.2d at 706 (quoting People v. Siciliano, 185 Misc. 149, 152, 56 N.Y.S.2d 80, 82 (1945)). Thus, "when a plea rests in any significant degree on a promise or agreement . . . so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262, 92 S.Ct. 495, 499, 30 L.Ed.2d 427 (1971).

A plea agreement once approved by the trial court becomes binding and enforceable by both sides as to its particular terms and the natural expected consequences of such agreement. Breach of the agreement because of mistake in the ability of the Prosecutor or Court to uphold the terms nullifies the plea agreement. State ex rel. Gessler v. Mazzone, 212 W.Va. 368, 572 S.E.2d 891 (W.Va., 2002)

However, the constitutional provisions about impairing obligations of contracts has been found not to be absolute. *Shelby v. Metropolitan Life Insurance Company* 181 WV 16, 380 S.E. 2d 183 (1989) The test to determine whether a contract clause violation has occurred is a three step process. The initial inquiry is whether the statute has substantially impaired the

contractual rights of the parties. If a substantial impairment is shown, the second step of the test is to determine whether there is a significant and legitimate public purpose behind the Legislation. Finally, if a legitimate public purpose is demonstrated, the Court must determine whether the adjustment of the rights and responsibilities of the contracted parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation adoption.

The expansion of the Respondent's registration from ten years to lifetime clearly substantially impaired an existing contract right flowing naturally from the Court-approved plea agreement. The first Certified Question states as its permise that the trial court held that the duration of registration to be a significant part of the plea agreement. The regulatory burden imposed upon a registrant is broad and significant, even if it is not penal in nature. The daily monitoring of a registrant is as restrictive of individual liberty as home confinement, the alternative to incarceration. But there is a legitimate public purpose in sex offender registration requirements that was being regulated at the time of the contract creation. The intent and findings of West Virginia Code, Chapter 15, Article 12 Section 1a are stated:

> (a) It is the intent of this article to assist law-enforcement agencies' efforts to protect the public from sex offenders by requiring sex offenders to register with the state police detachment in the county where he or she shall reside and by making certain information about sex offenders available to the public as provided in this article. It is not the intent of the Legislature that the information be used to inflict retribution or additional punishment on any person convicted of any offense requiring registration under this article. This article is intended to be regulatory in nature and not penal. (b) The Legislature finds and declares that there is a compelling and necessary public interest that the public have information concerning persons convicted of sexual offenses in order to allow members of the public to adequately protect themselves and their children from these persons. (c) The Legislature also finds and declares that persons required to

register as sex offenders pursuant to this article have a reduced expectation of privacy because of the state's interest in public safety.

Respondent argues that there is no legitimate police power expressed in modifying the terms and conditions of his plea bargain agreement and its application in his life. The intent The intent as stated fails to mention or explain why sexual offenses involving minors is a targeted concern of the newly-enacted legislation, or on what basis one could conclude that lengthening registration for offenses involving minors would further the stated purposes. The State of West Virginia in 1997 legitimately had the power at the time to enter into the plea bargain agreement and the terms and conditions were expressly made known to the defendant by the Court requiring him to sign a specific notice which is a part of the record. A reasonable defendant may well have chosen not to accept the plea bargain offer and to contest the case in Court simply because of the life registration requirement. Certainly the statute change substantially impaired the contractual rights of the parties. The issue becomes whether there is a legitimate purpose behind the legislation which would probably be answered yes since it is for the registration of sexual offenders and the notification to people of their residence. It becomes difficult to imagine that the purpose of registration of sex offenders can be argued as a non-legitimate purpose. The Courts have addressed this issue as to the reasonableness of a procedure and process for the dissemination of information about the living and working circumstances of certain sexual offenders in the past.

The final leg of the test asks if upon a legitimate purpose is demonstrated, whether

the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the Legislation adoption. In essence, is it a fair tradeoff for the public good to require sex offenders who were only required to register for 10 years under a prior statute to now be registered for life because the victim was a minor? The manner of application is far beyond the stated purpose.

Reasons for finding that the statute is too far reaching in this third leg of the test are obvious. First, the enacted statute requires there be registration for life if the crime involves a minor. The statute does not say under 14, under 11, under 16, just simply a minor. The Statute fails to define the scope and determination of such involvement. One could envision a claim where the defendant was charged with undesired sexual contact with an adult while a child slept in the room as falling within this standard. The statute allows an administrative agency, the West Virginia State Police to modify the judicial pronouncement of the Circuit Court of Wood County declaring a ten year registration for this Respondent, to unilaterally establish the facts in support of lifetime registration and impose the enhancement of lifetime registration without notice, hearing or any other due process protection before the original trial court or an established administrative tribunal charged with hearing and deciding contests to enhanced registration.

The contract bargained for by the Respondent was the reduction of an age-based sexual offense under Chapter 61, Article 8B, Section 7, *supra* , to a lesser charge of sexual contact with a person who is mentally defective or mentally incapacitated which is defined

without regard to age. [3]

The statute is too broad based upon its legitimate purpose of registering serious sex offenders for life. The classification used under the statute to enhance the registration from ten years to life is simply the age status of the victim. It ignores sexual offenses against mentally defective persons. It is further important to understand that this process of enhancement is done by the administrative branch of government without notice or due process of law. The crime to which the Respondent pled did not have age as an element. The 1999 registration statute precludes any discretion. The purposes of the legislation are not served by the broad nondiscretionary application and should not override the validity of a binding contract.

Second, the statute fails to require that there be any determination by a Court as to how it would apply retroactively so that due process and notice are not violated in the application of the statute. West Virginia Code, Chapter 15, Article 12, section 2(a) states "(T)he provisions of the article apply both retroactively and prospectively."

In the case before the Court the defendant with a ninth grade education was given notification he was now required to register for life without any opportunity afforded to him

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[3]Section 61-8B-1 Definition of terms

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(3) "Mentally defective" means that a person suffers from a mental disease or defect which renders that person incapable of appraising the nature of his or her conduct.

(4) "Mentally incapacitated" means that a person is rendered temporarily incapable of appraising or controlling his or her conduct as a result of the influence of a controlled or intoxicating substance administered to that person without his or her consent or as a result of any other act committed upon that person without his or her consent.

to contest it or determine its validity to his circumstances. The Legislature provided a method for judicial determination of making a finding if a crime was sexually motivated and to declare the defendant a sexual predator[4], yet made the extension of registration for any

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[4] Section 15-12-2 Registration (a) The provisions of this article apply both retroactively and prospectively. (b) Any person who has been convicted of an offense or an attempted offense or has been found not guilty by reason of mental illness, mental retardation or addiction of an offense under any of the following provisions of chapter sixty-one of this code or under a statutory provision of another state, the United States Code or the Uniform Code of Military Justice which requires proof of the same essential elements shall register as set forth in subsection (d) of this section and according to the internal management rules promulgated by the superintendent under authority of section twenty-five, article two of this chapter: (1) Article eight-b, including the provisions of former section six of said article, relating to the offense of sexual assault of a spouse, which was repealed by an Act of the Legislature during the year two thousand legislative session; (2) Article eight-c; (3) Sections five and six, article eight-d; (4) Section fourteen, article two; (5) Sections six, seven, twelve and thirteen, article eight; or (6) Section fourteen-b, article three-c, as it relates to violations of those provisions of chapter sixty-one listed in this subsection. (c) Any person who has been convicted of a criminal offense and the sentencing judge made a written finding that the offense was sexually motivated shall also register as set forth in this article. (d) Persons required to register under the provisions of this article shall register in person at the West Virginia State Police detachment in the county of his or her residence, the county in which he or she owns or leases habitable real property that he or she visits regularly, the county of his or her place of employment or occupation and the county in which he or she attends school or a training facility, and in doing so, provide or cooperate in providing, at a minimum, the following when registering: (1) The full name of the registrant, including any aliases, nicknames or other names used by the registrant; (2) The address where the registrant intends to reside or resides at the time of registration, the address of any habitable real property owned or leased by the registrant that he or she regularly visits: *Provided,* That a post office box may not be provided in lieu of a physical residential address, the name and address of the registrant's employer or place of occupation at the time of registration, the names and addresses of any anticipated future employers or places of occupation, the name and address of any school or training facility the registrant is attending at the time of registration and the names and addresses of any schools

defendant of a crime "involving a minor" a unilateral administrative function.

The State of Ohio has looked at the issue under the federal as well as state constitutional provisions regarding impairment of contracts and determined that it is not an impairment of a contract to reclassify a sex offender to a life registration. Ohio had a similar change in statute in retroactive application. In the case of *Nixon v. State*, 2010 Ohio 767 (Ohio App. 3/5/2010), 2010 Ohio 767 (Ohio App., 2010) while the court ruled there was no contract expectation to be enforced, Judge Mallory in a concurring opinion specifically stated that there may be a case where the record demonstrated that the terms of the plea agreement between the State and the sexual offender constitute a valid a contract as to the offenders classification and registration requirements. He simply stated that in the case before the Court there was insufficient evidence created at the court level such that the ruling was a factual denial of the claim not a legal denial.. The Respondent herein does not have that issue as he and his defense lawyer both testified that registration time was an important element of his plea agreement unrefuted.

While Ohio has ruled primarily against the defendant's position in this case it leaves open the possibility that in a better demonstrated case that such a registration was an essential element of the contract between the Prosecutor and the State, that a violation of the contractual constitution provisions should be considered.

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or training facilities the registrant expects to attend; (3) The registrant's social security number; (4) A full-face photograph of the registrant at the time of registration;

(5) A brief description of the crime or crimes for which the registrant was convicted;

Question 2: Does the 1999 amendment of West Virginia Code §15-12-1 et seq., authorizing the State Police/Department of Public Safety, under certain circumstances, to impose an increase in the length of sex offender registration for earlier convicted sex offenders, from ten (10) years to life, without notice and right to a judicial hearing, violate the Federal Constitution and the West Virginia Constitution, Art. 5, §1, relating to the separation of powers?

The second issue raised under these Certified Questions asks this Court to consider the effect of empowering an administrative agency to make fact-finding and impose increased registration requirements for convicted sexual offenders. The petitioner, in its' brief, denies any judicial function by the West Virginia State Police in implementing the enhanced registration requirements. The Legislature had already provided for the court to decide if any crime were sexually motivated and therefore subject to registration, W. Va. Code §15-12-2(c) and whether a convicted defendant qualified to be deemed a sexual violent predator and subject to enhanced registration. W. Va Code §15-12-2a The new scheme requires a determination of whether the crime was "involving a minor" and grants an administrative agency the power to adjudicate that factual determination and impose a more stringent registration. The State cannot fairly distinguish the Ohio decision *State v. Bodyke*, 933 N.E.2d 753 (Ohio 2010) from this matter due to the judicial fact-finding inherent in both statutes. What the State fails to acknowledge is that the 1999 amendment to the West Virginia statute W. Va. Code §§15-12-1 *et seq* requires the West Virginia State Police to

reopen the criminal case and reclassify the offender beyond the conviction statute and do fact-finding as to the age of the victim for a change and enhancement in length of registration which, by any reasonable interpretation, is a judical function as applied to the Respondent.

The current West Virginia statute requires registration for out-of-state persons that are required to register under the laws of another state which implies that a judicial determination of these requirement has been completed. [5]

The Ohio statute or procedure directed the Attorney General of the State of Ohio to

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[5]Section 15-12-9 Registration of out-of-state offenders

(a) When any probation or parole officer accepts supervision of and has legal authority over any person required to register under this article from another state under the terms and conditions of the uniform act for out-of-state parolee supervision established under article six, chapter twenty-eight of this code, the officer shall give the person written notice of the registration requirements of this section and obtain a signed statement from the person required to register acknowledging the receipt of the notice. The officer shall obtain and submit to the State Police the information required in subsection (d), section two of this article.
(b) Any person:

(1) Who resides in another state or federal or military jurisdiction;

(2) Who is employed, carries on a vocation, is a student in this state, is a visitor to this state for a period of more than fifteen continuous days or owns or leases habitable real property in this state that he or she regularly visits; and

(3) Who is required by the state, federal or military jurisdiction in which he or she resides to register in that state, federal or military jurisdiction as a sex offender, or has been convicted of a violation in that state, federal or military jurisdiction that is similar to a violation in this article requiring registration as a sex offender in this state, shall register in this state and otherwise comply with the provisions of this article.

(c) Any person changing residence to this state from another state or federal or military jurisdiction who is required to register as a sex offender under the laws of that state or federal or military jurisdiction shall register as a sex offender in this state.

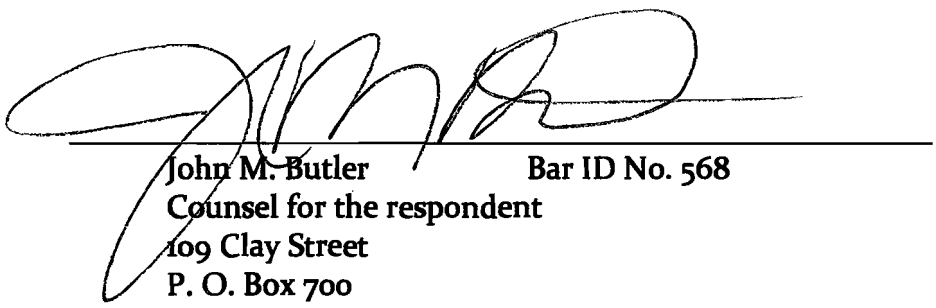
reclassify prior sex offenders under the old statute to comply with the new statute. In the Supreme Court Case of State v. Bodyke, _Ohio St.3d_, 2010-Ohio-2424, _N.E.2d_ 2010 the Supreme Court of Ohio ruled that the Constitutional provisions of violation of separation of powers was involved in the passing of legislation to reclassify sexual offenders such that it had previously been addressed in 2001. The Ohio Court determined that the scheme of determining registration was assigned to the Attorney Generals office and the Court no longer had any authority under the new system to make fact finding and make a determination as to the sex offender status for registration purposes and therefore was unconstitutional.

The same situation is true under the West Virginia statute insofar as the new statute requires the reclassification and it is being administratively implemented by the West Virginia State Police. Because the enhancement required additional fact-finding about the underlying crime not made before the original court, legislative assignment of this function to the West Virginia State Police was a violation of the separation of powers provisions under both Federal and State Constitutions. In followup, the Ohio Court reversed and otherwise affirmed this ruling of the violation of the separation of powers clause for 144 pending appeals in *In re Sexual Offender Reclassification Cases.*, 2010 Ohio 3753, 126 Ohio St.3d 322, 933 N.E.2d 801 (Ohio, 2010)

CONCLUSION

Both Certified Questions should be answered in the affirmative.

PAUL EDWARD BOSTIC, RESPONDENT
By counsel

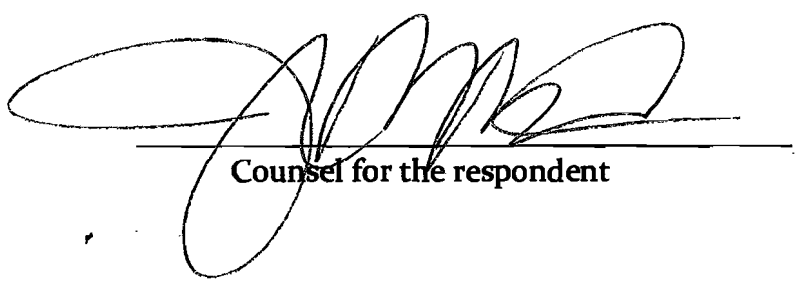


John M. Butler Bar ID No. 568
Counsel for the respondent
109 Clay Street
P. O. Box 700
St. Marys, WV 26170-0700
(304) 684-9258 Telephone
(304) 684-9259 FAX

CERTIFICATE OF SERVICE

I, John M. Butler, counsel for the respondent, hereby certify that the foregoing Respondent's Brief was duly served upon the following party of interest by depositing a true copy with the United States Mail Service postage prepaid addressed as follows on this the 25th day of July, 2011:

Darrell V. McGraw, Jr.
Attorney General
Laura Young
Assistant Attorney General
812 Quarrier Street, 6th Floor
Charleston, WV 25301



Counsel for the respondent