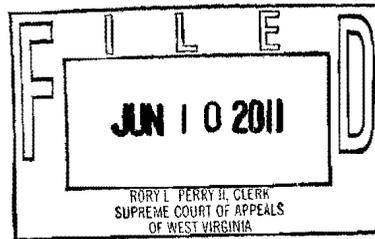

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0617



STATE OF WEST VIRGINIA,

Petitioner,

v.

PAUL EDWARD BOSTIC,

Respondent.

BRIEF ON BEHALF OF THE STATE OF WEST VIRGINIA
IN ANSWER TO THE QUESTIONS CERTIFIED TO THE COURT

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BRIEF ON BEHALF OF THE STATE OF WEST VIRGINIA
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Comes now the State of West Virginia, by counsel, Laura Young, Assistant Attorney General, and files the within brief on behalf of the State of West Virginia.

I.

CERTIFIED QUESTIONS

This matter appears before this Honorable Court upon an Order of Certification to the West Virginia Supreme Court of Appeals from the Circuit Court of Pleasants County. By scheduling order dated April 11, 2011, this Honorable Court placed the matter upon its docket. Those questions as certified by the circuit court are:

Question 1: Does the 1999 amendment of the West Virginia Code §§ 15-12-1 *et seq.*, which retroactively increased the registration for certain sex offenders from ten (10) years to life based upon the age of the victim violate the State Constitution, art. III, § 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 Respondent, a significant part of which required registration as a sex offender for a period of only ten years and not life? The circuit court answered this question in the negative.

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 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 circuit court likewise answered this question in the negative.

This brief on behalf of the State of West Virginia is filed to support the decision of the circuit court in answering both certified questions in the negative.

II.

STATEMENT OF THE CASE

The Respondent, Paul Bostic (hereinafter “the Respondent”), was charged by Indictment with the felony offense of “sexual abuse in the first degree” for an offense committed against an eleven-year-old child. That indictment was filed January 16, 1997. (App. at 2.) The Sexual Offender Registration statute in effect at the time, as contained in West Virginia Code §§ 15-12-1 *et seq.*, provided that individuals who committed certain offenses against minors were required to register for a period of ten years. The offense for which the Respondent was charged was a felony, which carried an indeterminate term of not less than one nor more than five years in the penitentiary and carried a lifetime registry requirement.

A plea agreement dated March 27, 1997, was entered into among the parties. According to the terms of that agreement, and this synopsis includes all of the pertinent terms of that agreement, the Respondent was to plead guilty to the lesser included misdemeanor offense of sexual abuse in the second degree. The State recommended twelve months incarceration—the maximum possible sentence. The Respondent was free to argue sentencing. The State, at the request of the victim’s parents, would request a permanent no-contact injunction. Finally, the agreement constituted the sole and complete agreement between the Respondent and the State of West Virginia, and no verbal or other statements, inducements or representations have been made or relied upon by either of the parties. (App. at 3.)

An order reflecting that the Respondent entered a voluntary and knowing guilty plea to the misdemeanor offense was entered on March 27, 1997. (App. at 4.) The Sexual Offender Registration statute in effect in 1997 required the Respondent to register for ten years, and he was given written notice of those requirement. (App. at 5.) By order entered May 22, 1997, the Respondent was sentenced to one year in jail, with credit for time served of 209 days, which left the Respondent with approximately three months left to serve, as opposed to the up to five years he could have received upon conviction of the felony. (App. at 6.)

In 1999, the West Virginia Legislature amended the Sexual Offender Registration statute to mandate, as pertinent to these certified questions, that individuals who committed sexual offenses against minors would have to register for life, even if the offense was a misdemeanor. Therefore, the crime of sexual abuse in the second degree, when committed against an eleven year old, as the Respondent’s victim was, became an offense for which a perpetrator had to register for life.

By an indictment filed on January 11, 2010, the Pleasants County Grand Jury indicted the Respondent for three felony offenses related to the Sexual Offender Registration requirements. The offenses charged including failure to notify the State Police of the termination of his telephone service, failing to report his employment, and lying to the State Police when asked about his employment. (App. at 7.)

Counsel for Respondent made a motion to dismiss the indictment. (App. at 8.) A hearing was held on that motion to dismiss. Factually, the matter became rather complicated because Carl Bryant was at the time of the hearing in June 2010, the Prosecuting Attorney for Pleasants County. However, Mr. Bryant had served as the Respondent's counsel in 1997. Therefore, the Pleasants County Prosecutor's Office is disqualified from the proceedings involving the Respondent. Mr. Bryant testified at the hearing that he remembered the name, but did not remember Mr. Bostic. (App. at 9, 17.) Mr. Bryant testified that he negotiated the plea, and that he regarded it as a benefit that the registration would be for ten years. (*Id.* at 19, 20.) The Respondent testified that the ten-year registration was a benefit of his plea. (*Id.* at 22.) Rather than dismissing the indictment as requested by the Respondent, the circuit court certified the above questions.

III.

SUMMARY OF THE ARGUMENT

The parties agree that there is no *ex post facto* implication with the retroactivity of the Sexual Offender Registration statute or with its amendments. Therefore, if, for some reason, the Respondent's guilty plea had been delayed until 1999, he could have legally been required to register for life for an offense which a mere two years earlier had been only a ten-year registration.

The State asserts that the West Virginia Sexual Offender Registration statute and its administration by the West Virginia State Police does not in any way violate the constitutional doctrine of separation of powers. The authority cited by the Respondent below dealt with an Ohio statute which is dissimilar to the West Virginia statute in an extremely important way. The Ohio Supreme Court in *State v. Bodyke*, 933 N.E.2d 753 (Ohio 2010), determined that an amendment to the Ohio Sexual Registration statute, which assigned to the office of the Attorney General of Ohio the responsibility to reclassify sexual offenders for the purpose of registration, violated the doctrine of separation of powers when those same individuals had been classified by a court. The Ohio court determined that, in effect, such reclassification by the Attorney General was having an executive office sit as an appellate court for a court's decision. The West Virginia statute contains no such provision. Who has to register, for what offense, for how long, and what information is determined solely by the Legislature in the statute. The West Virginia State Police have no power to reclassify offenders or to change their registration requirements. The West Virginia State Police serve as administrators and bookkeepers of the registration system, and investigate reported violations of the registration statute. Such administrative and investigative responsibilities in no way violate the doctrine of separation of powers.

Plea agreements are contractual in nature. The West Virginia and Federal Constitutions provide that no laws shall be passed that impair the obligation of contracts. No agreement was made in the plea in reference to sexual offender registry. The requirements of sexual offender registration are remedial conditions imposed upon offenders after release from prison and not punishment, and as such do not affect any plea agreement. Further, a convicted felon has no reasonable expectation that his criminal conduct would not be subject to future legislation and had no vested rights

concerning registration requirements. *Moran v. State of Ohio*, 2009 WL 1040086 (Ohio App. 12 Dist. 2009).

Therefore, the decision of the circuit court answering both certified questions in the negative is correct and should be affirmed.

IV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Although the certified questions present novel issues regarding the Sexual Offender Registration statute and the Respondent, your Petitioner believes that the issue will be adequately addressed in the briefs and record on appeal and that oral argument in this matter is not required.

V.

ARGUMENT

As referenced briefly in the Summary of the Argument, the parties agree that *ex post facto* application is not implicated in this matter. The West Virginia Supreme Court in *Hensler v. Cross*, 210 W. Va. 530, 558 S.E.2d 330 (2001), determined that the Sex Offender Registration Act was a regulatory statute which did not violate the prohibition against *ex post facto* laws. *Id.*, Syl. Pt. 5. The Sexual Offender Registration Act stated from the time of its enactment that its provisions applied both prospectively and retroactively. The *Hensler* Court determined that any disadvantages imposed upon a individual required to register were not sufficient to make the Act punitive, and determined that the Act was a regulatory statute. If the initial enactment of the registration statute requiring individuals to register for crimes committed before the effective date of the statute is regulatory and not punitive, then the change in the length of time of registration is similarly regulatory and not punitive. The United States Supreme Court in *Smith v. Doe*, 538 U.S.84, (2001),

determined that Alaska's Sex Offender Registration Act, which is similar to the West Virginia statute, required individuals to register who had committed sexual offenses prior to the date of the registration statute was a non-punitive, regulatory statute and that the *ex post facto* clause was not implicated.

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 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?

Your Petitioner posits that the West Virginia Sexual Offender Registration Act as contained in West Virginia Code §§ 15-12-1 *et seq.*, and its administration by the West Virginia State Police does not violate the separation of powers between the branches of government, particularly with respect to the factual situation in which the Respondent finds himself--a convicted sexual offender who, before the amendment, was required to register for ten years, but is now required to register for life.

As one might expect with a certified question, there is a paucity of law directly--or even closely related--on point with the issue raised in either of the certified questions. In West Virginia, this Honorable Court has long regarded the doctrine of separation of powers as sacrosanct and has examined closely those cases brought before it in order to determine that statutory enactments and legislative rules do not infringe upon the prerogatives and responsibilities of the separate branches of government.

In re Application of Dailey, 195 W. Va. 330, 465 S.E.2d 601 (1995), dealt with a statute which required circuit courts to issue licenses for permits to carry concealed weapons once an applicant demonstrated that he met the qualifiers. The Court stated emphatically in Syllabus Point 1 of its decision that the statute was a legislative delegation of powers and duties to the courts. Further those duties were non-judicial in character, were not incidental to the judicial function and the statute therefore was unconstitutional. Further, the Court noted in Syllabus Point 2 that some judicial discretion is a prerequisite to satisfying the judicial function test under the separation of powers doctrine. In Syllabus Point 1 of *State ex rel. Meadows v. Hechler*, 195 W. Va. 11, 462 S.E.2d 586 (1995), the Court reiterated that “Article V, section 1 of the Constitution of West Virginia which prohibits any one department of our state government from exercising the powers of the others, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed.” Additionally, as noted in Syl. Pt. 1, *State ex rel. Holmes v. Clawges*, 226 W. Va. 479, 702 S.E.2d 611 (2010), “The legislative, executive and judicial departments of the government must be kept separate and distinct, and each in its legitimate sphere must be protected.”

The West Virginia Constitution in article V, section 1, provides that “[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time”

At issue is whether the Sexual Offender Registration statute, specifically, by lengthening the terms of registration of some offenders from ten years to life violates the separation of powers among the branches of government. At the motion to dismiss below, the Respondent cited an Ohio case

which determined that the change in registration requirements of the Ohio statute did, in fact, result in a violation of the separation of powers doctrine. However, that statute is easily distinguishable from the West Virginia registration statute and its amendments.

State v. Bodyke, supra, was an appellate review of the Sexual Offender Registration statute in Ohio, after certain amendments of the statute were made retroactive to offenders whose cases were decided before the effective date of the statute. In Ohio, the registration statute prior to the questioned amendment required a court to determine whether or not an individual was a sexually oriented offender, a habitual sex offender, or a sexual predator, and the registration requirements differed as to the classification that the court determined to be proper for a particular offender. The challenged amendment did away with those classifications of offenders, and with classification hearings. Under the amendments, offenders were classed as Tier I, II, or III offenders based solely on the offense. The amendments further directed that as to individuals who had already had classification hearings before a court, and who had already been classified as a particular type of offender by a judge, the attorney general was to reclassify existing offenders. The reclassification process was administered solely by the attorney general, with no involvement by a court. The *Bodyke* court found that the portion of the amended statute which required the attorney general to reclassify offenders who previously had been classified by Ohio judges to be a violation of the separation of powers on two bases: The reclassification scheme vested the executive branch with the ability to review judicial decisions and further it required the reopening of final judgments. That is the Ohio court struck down the reclassification of previously classified offenders as violative of separation of powers because the executive branch was sitting as reviewing body for final judicial determinations.

The West Virginia Sexual Offender Registration Act, as contained in W. Va. Code §§ 15-12-1 *et seq.*, contained in 1997 no such classification of offenders. Persons convicted of certain enumerated offenses—specifically felonies—were required to register for life. Persons convicted of other offenses—primarily misdemeanors—had to register for ten years. There was no judicial classification of offenders into certain classes or types of offenders. Conviction of a sexual offense required registration for a definite period of time. The State Police had no authority in 1997 to increase an individual's registration requirements or to lengthen the time period of registration.

The 1999 amendment changed the duration of the registration requirement for people convicted of offenses against minors—whether a felony or misdemeanor—to register for life. This amendment was an important recognition that one of the dangers that the sexual offender registry attempts to combat with community notification and offender monitoring is the threat to children, regardless of whether the sexual offense is classified as a felony or a misdemeanor. The amendment recognizes that a plea agreement reducing a felony to a misdemeanor may be offered for any number of good, and sometimes poor reasons, ranging from protecting an infant from the rigors of testifying to lawyers simply pleading a case down to get rid of it. Requiring registration based on the age of the victim rather than the name of the crime was a valid exercise of the legislature's statutory authority. The amendments, lengthening the registration requirements to life for those who have preyed upon minors and been permitted the grace of a misdemeanor plea do not vest the State Police with any of the powers of the other branches of government. The legislature has defined, in great detail, those individuals who must register with the State Police, and the types of information which are required to be registered. The legislature has defined how long a person must register for, how often he must update his information, and the types of triggering events; i.e., a change in employment

or residence which require an individual to update his registry information. The State Police has no power to include additional persons on the registry, to remove persons from the registry absent a court order, or to change the length of registration requirements or the types of information registered. The function of the State Police is to act, in a sense, as the repository of information, and to investigate violations of the statute. There is no judicial or legislative responsibility assigned to the police in its administration of the registration requirements. The State Police do not exercise any of the powers of any other branch of government. The State Police have a mandatory, non-discretionary duty to maintain the Sex Offender Registry, and the terms and conditions of that registration are set solely by the legislature. The West Virginia statute does not now have, nor did it have in 1997, or 1999, a classification system at all, let alone a classification system in which individuals were deemed by a court to be a certain type of sexual offender required to register for a certain period of time. The Ohio system had such a classification system, and Ohio judges had determined prior to the amendments that certain individuals were to be classified and register in certain ways. There has never been any such judicial determination of offenders in West Virginia. Lengthening the registration period was not a violation of separation of powers, but rather a legitimate exercise of the legislature's powers. The West Virginia State Police does not review judicial decisions, nor does it reclassify individuals. The 1999 amendment does not violate the doctrine of separation of powers, and the answer to this certified question is no, as determined by the circuit court.

DOES THE 1999 AMENDMENT OF THE WEST VIRGINIA CODE §§ 15-12-1 ET SEQ., WHICH RETROACTIVELY INCREASED THE REGISTRATION PERIOD FOR CERTAIN SEX OFFENDERS FROM TEN 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 OBLIGATIONS, THE CONTRACT OBLIGATIONS HEREIN HAVING BEEN CREATED UNDER A 1997 PLEA AGREEMENT BETWEEN THE STATE OF WEST VIRGINIA AND THE RESPONDENT A SIGNIFICANT PART OF WHICH REQUIRED REGISTRATION AS A SEX OFFENDER FOR A PERIOD OF ONLY TEN YEARS, AND NOT LIFE?

The Petitioner posits that the circuit court correctly answered the certified question in the negative. In reviewing the Wood County plea and the transcript of the June 2010 hearing, it is difficult to determine just how significant, if of any significance of all, the registration provisions actually were to the Respondent. The plea agreement (App. at 3) does not contain any reference whatsoever to the registration requirements. Sentencing and sentencing recommendations are delineated. A permanent injunction paragraph is included, which, anecdotally, is an unusual provision to include in any plea agreement. Further, the plea agreement states specifically that the written plea letter “constitutes the sole and complete agreement between the Respondent and the State of West Virginia, and no verbal or other statements, inducements or representations have been made or relied upon by either of the parties.” Additionally, at the hearing on the motion to dismiss, which led to these certified questions, Mr. Bryant who had been the Respondent’s defense counsel and the Respondent both testified as to the import of the registry provision. Mr. Bryant testified that life registration versus ten years was a significant issue for a defendant. (App. at 9, 19.) Mr. Bryant was not cross-examined. The Respondent testified that the benefit of the plea agreement was ten years’ registration. (*Id.* at 22.) The Respondent was not cross-examined. Only a cynic would opine that perhaps the reduction in potential exposure from one to five years in the penitentiary to one years in jail, which the Respondent discharged in approximately three months after his sentencing date, the fact that the Respondent would not incur a felony which could have recidivist complications

in the future, and the fact that the Respondent served his sentence at the local level rather than facing prison where child molesters have a notoriously difficult time were at least as important considerations in deciding to take plea as the registration provision—which is not mentioned in the plea letter. The prosecuting attorney could not legally enter into a plea agreement which foreshadowed the amendment in the registration provisions and agree that the Respondent would not have to comply with the law and register for life.

It is well settled law in West Virginia that a plea agreement is essentially a contract between the defendant and the State, and that there are consequences if either party breaches the agreement. For example *State v. Martin*, 225 W. Va. 408, 693 S.E.2d 482 (2010), involved a plea agreement in which the State agreed to make a recommendation of probation, and then recommended the opposite at disposition. On 225 W. Va. at 412, 693 S.E.2d at 486, of the opinion the Court notes that there was a valid plea agreement, which the State breached. The Court found that such breach constituted plain error, and that the conduct of the State affected the fairness, integrity and public reputation of the proceeding. Therefore, the conviction was reversed, and the parties restored to their original positions, the Court noting on that same page of the opinion that the State is bound to the terms of the plea once the defendant acts to his detriment in reliance, on the plea and that when a plea rests on a promise or agreement of the prosecutor so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

No such breach occurred in the case at bar. The explicit terms of the plea agreement were fulfilled. There was no promise or inducement to take the plea in terms of the provision of the registry provisions.

However, even if the Court should regard the existent registry provisions at the time of the plea as a part of a contract, it is a defense to the performance of a contract that performance is an impossibility. For example, as early as 1916, in *Dorr v. C. & O. Ry.*, 78 W. Va. 150, 88 S.E. 666 (1916), the Court held that where a contract for a right of way was induced by the issuance of an annual pass for life, which annual pass was subsequently invalidated by an act of Congress, rescission of the contract was not warranted. Further, contracts which contain provisions which are against public policy are void and unenforceable, as demonstrated by the holding in *Gibson v. Northfield Insurance Co.*, 219 W. Va. 40, 631 S.E.2d 598 (2005). In *Gibson*, a motor vehicle insurance policy tended to limit coverage to less than mandated by statute. That provision which allowed defense costs and litigation expenses to be deducted from the limits of liability coverage was void and ineffective as against public policy. Syllabus Point 3 of *Wellington Power Corporation v. CNA Surety Corporation*, 217 W. Va. 33, 614 S.E.2d 680 (2005), states that “public policy favors freedom of contract which is the precept that a contract shall be enforced except when it violates a principle of even greater importance to the general public.” Later in that opinion at 217 W. Va. 39, 614 S.E.2d at 686, the Court notes that “no action can be predicated upon a contract . . . which is expressly forbidden by law or otherwise void.” To attempt to graft onto the plea in question a requirement that the Respondent be permitted to ignore the dictates of the statute—which was not even mentioned in his plea agreement—would be a provision utterly against public policy and therefore void and unenforceable.

Again, noting that there is a paucity of law closely related or directly on point, Ohio has entertained questions which are similar to this issue. In *State v. Paris*, 2000 WL 799090 (Ohio App. 3 Dist. 2000), a defendant entered a plea of guilty to a sexual offense well in advance of the

registration statute being passed. Following passage of that statute, a hearing was held which determined that Paris was a sexual predator. The defendant alleged that his adjudication as a sexual predator violated the contractual nature of the plea agreement. The court noted on page 2 of its opinion that felons have no reasonable right to expect that their conduct will never thereafter be made the subject of litigation. Further, since the Ohio registration and notification requirements were remedial conditions and not punishment—exactly the same as in West Virginia—those registration and notification requirements do not affect any plea agreement previously entered into. The registry falls outside the scope of the negotiated plea agreement, and does not constitute an impairment of his rights accruing by the plea agreement.

Similarly, the increase in the duration of the Respondent's registration requirements under the remedial and not punitive conditions of the West Virginia Sex Offender Registration Act does not affect the plea agreement, falls outside the scope of that negotiated plea agreement, and does not constitute an impairment of any right accruing by that agreement.

Burbrink v. Ohio, 923 N.E.2d 626 (Ohio 2009), held explicitly that retroactive application of the registration requirements did not violate the Contract Clause of either the State or Federal Constitution and did not constitute a breach of the plea agreement. Burbrink was classified as the lowest tier offender before the amendments, and reclassified into a higher tier after the statute was amended. At a hearing on the issue of reclassification, the lower court judge noted that “as part of the plea we talked about what classification he was going to be, and that was all part of the whole agreement of the case.” (*Id.* at 627). The state appealed. The Ohio Constitution and the United States Constitution both provide that no law shall be passed which impairs the obligation of contracts. Plea agreements are contracts, and principles of contract law are applicable to plea

agreements. The Ohio court noted that whatever the law in effect at the time a plea bargain was entered into, a legislature could change things, and

ex post facto and retroactivity principles do allow the general assembly to impose new community notification on prior offenders. 'Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.'

(*Id.* at 628.) The *Burbrink* court noted that the defendant had "no reasonable expectation that his sex offenses would never be made the subject of future sex-offender legislation and no vested right concerning his registration duties The state could not and did not contract to bar the legislature from modifying sex offender registration and notification statutes. *Burbrink* had no vested contractual right with which the legislature could interfere." (*Id.* at 628-29, footnote omitted.) The same principles apply to the certified question. The State could not and did not contract away future legislation which, being remedial and not punitive in nature lacks *ex post facto* consideration. The Respondent had no vested contract right. Additionally, sex offenders have claimed in challenges in Illinois and California that their plea agreements were breached by the enactment or amendment of sexual offender registration statutes. (See *Foster v. Powers*, 2005 WL 2436475 (E.D. Cal. 2005), and *People v. Logan*, 705 N.E.2d 152, (Ill. Dec. 1998). In particular, *Logan* held that notification provisions are a collateral consequence of a plea, and the fact that the plea did not include community notification of the conviction did not violate the defendant's right to due process, nor render his plea involuntary.

In *Nixon v. State*, 2010 WL 746693 (Ohio App. 1 Dist. 2010), a lower court determined that to reclassify the defendant following the amendment of the registration statute constituted a breach of the plea agreement and an impairment of an obligation of contract, because the plea agreement

was a contract with Ohio that he would be obligated to register as a sex offender for only ten years. The Court noted, again, that an offender at the time of a plea has no reasonable expectation that his offense would never be made the subject of future legislation and no vested right concerning his registration duties. A similar result was reached in *Ritchie v. State*, 2009 WL 1040084 (Ohio App. 12 Dist. 2009) and *Nixon v. State*.

Therefore, no contractual right of the respondent was implicated. He had no expectation that his offense would never be made the subject of future legislation and no vested right concerning his registration duties.

Therefore, the clear weight of authority supports answering the certified question in the negative, as did the circuit court.

VI.

CONCLUSION

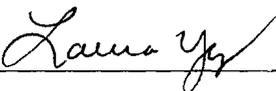
Therefore, for the reasons stated herein, the State respectfully requests that the Court affirm the judgment of the Circuit Court of Pleasants County answering each of the certified questions in the negative.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Petitioner,

By counsel

DARRELL V. MCGRAW, JR.
ATTORNEY GENERAL

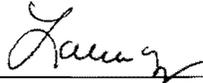


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CERTIFICATE OF SERVICE

I, LAURA YOUNG, Assistant Attorney General and counsel for the Petitioner, do hereby verify that I have served a true copy of the "Brief on Behalf of the State of West Virginia in Answer to the Questions Certified to the Court" upon counsel for the Respondent by depositing said copy in the United States mail, with first-class postage prepaid, on this 10th day of June, 2011, addressed as follows:

To: John Butler, Esq
109 Clay Street
Saint Marys, WV 26170



LAURA YOUNG