ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	Case No. 09-1799
	)	
Plaintiff-Respondent-Appellant,	)	On Appeal from the
	)	Lake County Court of Appeals,
v.	)	Eleventh Appellate District
	)	
MICHAEL D. BACHE, JR.,	)	
	)	Court of Appeals Case No. 2008-L-061
Defendant-Petitioner-Appellee.	)	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT STATE OF OHIO

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

In *State v. Bache*, 11th Dist. No. 2008-L-061, the Eleventh District Court of Appeals misapplied longstanding principles of constitutional law and declared that the provisions of S.B. 10 were unconstitutional. In a decision with three separate and very different opinions, the court of appeals reversed the decision of the Lake County Court of Common Pleas finding that reclassification of a defendant pursuant to S.B. 10 was constitutional. Through its decision, the Eleventh District Court of Appeals created an inconsistency both within the district and among the district courts of appeals, ignored precedent from this Court, and tied the hands of the State in its efforts to protect the community.

This Court should accept jurisdiction for three important reasons. First, there are three constitutional provisions at issue in this case, and the interpretation of these provisions are the pivotal determinations that must be made by this Court. Second, the conflicts created by the *Bache* decision must be resolved for an effective administration of justice. Third, the issues in this case have far-reaching implications. Presently, there are 18,365 sex offenders in the State of Ohio, of which 288 reside in Lake County. See eSorn, Office of the Ohio Attorney General, http://www.esorn.ag.state.oh.us.

For these reasons, Appellant respectfully requests that this Honorable Court accept jurisdiction in this case in order to resolve the constitutional questions involving

the application of S.B. 10. Because *State v. Bodyke*, Case No. 2008-2502 (accepted April 8, 2009), raises the same constitutional issues that this case presents, the State requests that this Court accept jurisdiction and hold this case in abeyance until this Court decides *Bodyke*.

STATEMENT OF THE CASE AND FACTS

Petitioner-Appellee Michael D. Bache, Jr. previously convicted of one count of Gross Sexual Imposition, a felony of the third degree, in violation of R.C. 2907.05(A)(4) in Tuscarawas County Common Pleas Case No. 96-CR-080200. Prior to the enactment of Ohio's Adam Walsh Act, Mr. Bache was found to be a Sexually Oriented Offender and was therefore subject to registration verification requirements set forth in the former version of R.C. Section 2950.04 through 2950.06 for a period of ten years. Mr. Bache was reclassified as a Tier II Offender pursuant to the new version of R.C. Chapter 2950 with reporting requirements for 25 years.

On January 18, 2008, Mr. Bache filed a petition to contest his reclassification as a violation of his constitutional rights and a motion for appointment of counsel. The State responded to his petition, and a hearing was held on April 4, 2008. Having considered Mr. Bache's petition and its accompanying documents, as well as the State's response, in addition to statements by the parties, and all relevant information relative to the application of S.B. 10 to Mr. Bache, the trial court found that Mr. Bache was unable to prove, by clear and convincing evidence, that his new registration

requirements did not apply in the manner specified by the Attorney General. Thus, Mr. Bache was properly reclassified as a Tier II Offender.

Mr. Bache filed a timely notice of appeal, raising one assignment of error relating to the constitutionality of S.B. 10. After the issues were briefed and oral arguments were held, the Eleventh District Court of Appeals reversed, holding that S.B. 10 violated the ex post facto clause, retroactivity, and the double jeopardy clauses of the Ohio and United States Constitutions.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. I

RECLASSIFICATION OF A SEX OFFENDER, PURSUANT TO S.B. 10, DOES NOT CONSTITUTE A VIOLATION OF THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION.

On September 30, 2009, the Eleventh District Court of Appeals issued its opinion in *State v. Bache*, 11th Dist. No. 2008-L-061, wherein three judges provided three different analyses regarding the constitutionality of S.B. 10. The majority determined the defendant's reclassification pursuant to S.B. 10 constitutes a violation of the ex post facto clause of the United States Constitution. This holding is in conflict with the following decisions from other Ohio district courts of appeals: see, e.g., *State v. Desbiens*, 2nd Dist. No. 22489, 2008-Ohio-3375; *In re Smith*, 3rd Dist. No. 1-07-58, 2008-Ohio-3234; *State v. Longpre*, 4th Dist. No. 08CA3017, 2008-Ohio-3832; *In re Kristopher W.*, 5th Dist. No. 2008 AP 03 0022, 2008-Ohio-6075; *State v. Henning*, 6th Dist. No. 07-CR-133, 2009-Ohio-1466; *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-

5051; *State v. Blanchard*, 8th Dist. No. 90935, 2009-Ohio-1357; *In re E.B.*, 9th Dist. No. 24148, 2008-Ohio-5441; *In re S.R.P.*, 12th Dist. No. CA2007-11-027, 2009-Ohio-11.

PROPOSITION OF LAW NO. II

RECLASSIFICATION OF A SEX OFFENDER, PURSUANT TO S.B. 10, DOES NOT CONSTITUTE A VIOLATION OF THE RETROACTIVITY CLAUSE OF THE OHIO CONSTITUTION.

The majority determined the defendant's reclassification pursuant to S.B. 10 constitutes a violation of the retroactivity doctrine of the Ohio Constitution. This holding is in conflict with the following decisions from other Ohio district courts of appeals: see, e.g., *Sewell v. State*, 1st Dist. No. C-080503, 2009-Ohio-872; *State v. Legner*, 2nd Dist. No. 22971, 2009-Ohio-3029; *In re Smith*, 3rd Dist. No.1-07-58, 2008-Ohio-3234; *State v. Randlett*, 4th Dist. No. 08CA3046, 2009-Ohio-112; *State v. Gooding*, 5th Dist. No. 08 CA 5, 2008-Ohio-5954; *Montgomery v. Leffler*, 6th Dist. No. H-08-011, 2008-Ohio-6397; *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051; *State v. Blanchard*, 8th Dist. No. 90935, 2009-Ohio-1357; *In re E.B.*, 9th Dist. No. 24148, 2008-Ohio-5441; *In re A.R.*, 12th Dist. No. CA2008-03-036, 2008-Ohio-6566.

PROPOSITION OF LAW NO. III

RECLASSIFICATION OF A SEX OFFENDER, PURSUANT TO S.B. 10, DOES NOT CONSTITUTE A VIOLATION OF THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND OHIO CONSTITUTIONS.

Additionally, the majority determined the defendant's reclassification pursuant to S.B. 10 constitutes a violation of the double jeopardy clauses of the Ohio and United States Constitutions. This holding is in conflict with the following decisions from other

Ohio district courts of appeals: see, e.g., *Sewell v. State*, 1st Dist. No. C-080503, 2009-Ohio-872; *Downing v. State*, 3rd Dist. No. 8-08-29, 2009-Ohio-1834; *State v. Pletcher*, 4th Dist. No. 08CA3044, 2009-Ohio-1819; *State v. Roberts*, 5th Dist. No. 08CA0024, 2009-Ohio-2977; *State v. Case*, 6th Dist. No. H-08-009, 2009-Ohio-2923; *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051; *State v. Gildersleeve*, 8th Dist. Nos. 91515-91519, 91521-91532, 2009-Ohio-2031; *Brooks v. State*, 9th Dist. No. 08CA009452, 2009-Ohio-1825; *State v. Bell*, 12th Dist. No. CA2008-05-044, 2009-Ohio-2335.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and is a substantial constitutional question. Appellant respectfully requests that this Honorable Court accept jurisdiction in this case in order to resolve the constitutional questions involving the application of S.B. 10. Because *State v. Bodyke*, Case No. 2008-2502 (accepted April 8, 2009), raises the same constitutional issues that this case presents, the State requests that this Court accept jurisdiction and hold this case in abeyance until the Court decides *Bodyke*.

Respectfully submitted,

By: Charles E. Coulson, Prosecuting Attorney

By: _____

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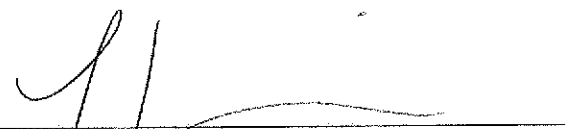
PROOF OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction of Appellant, State of Ohio, was sent by regular U.S. Mail, postage prepaid, to appellee, Michael D. Bache, Jr., *Pro se*, 225 Aspen Drive, Dover, OH 44622, and, pursuant to S.Ct.R. XIV, Section 2, the Ohio Public Defender, Timothy Young, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, on this 5th day of October, 2009.



Teri R. Daniel (0082157)
Assistant Prosecuting Attorney

TRD/klb

APPENDIX

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	OPINION
Plaintiff-Respondent-Appellee,	:	
- vs -	:	CASE NO. 2008-L-061
MICHAEL D. BACHE, JR.,	:	
Defendant-Petitioner-Appellant.	:	

FILED
COURT OF APPEALS
SEP 30 2009
MAUREEN G. KELLY
CLERK OF COURT
LAKE COUNTY, OHIO

Appeal from the Court of Common Pleas, Case No. 08 MS 000021.

Judgment: Reversed and remanded.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Respondent-Appellee).

Michael D. Bache, Jr., pro se, 225 Aspen Drive, Dover, OH 44622 (Defendant-Petitioner-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Michael D. Bache, Jr. ("Bache"), appeals the judgment of the Lake County Court of Common Pleas denying his petition contesting his reclassification to a Tier II sex offender, under R.C. Chapter 2950.

{¶2} In November 1996, Bache entered a plea of no contest to one count of gross sexual imposition, a third-degree felony under R.C. 2907.05(A)(4). The trial court conducted a sentencing hearing and Bache was ordered to serve 90 days in jail, 200

hours of community service, and a two-year probationary period. The trial court also expressly found that Bache should be designated as a sexually oriented offender under the version of R.C. Chapter 2950 that had taken effect in January 1997. In light of this finding, Bache was required to register with the local county sheriff for a period of ten years. Bache was due to complete all of his reporting requirements in November 2007.

{¶3} Bache received a letter from the Ohio Attorney General in November 2007 stating that, pursuant to the newly-enacted Adam Walsh Act, he had been reclassified as a Tier II sex offender, and that he now would be required to register with the county sheriff every 180 days for a period of 25 years.

{¶4} In response to this letter, Bache filed a petition in the Lake County Court of Common Pleas to contest the application of the new "sexual offender" law to his prior conviction. As part of this petition, he argued that the new statutory scheme should be declared unconstitutional for a number of reasons.

{¶5} Upon conducting an oral hearing on the matter, the trial court rendered its final judgment on the petition in April 2008. The trial court concluded that the classification and registration requirements of the Adam Walsh Act did not violate the constitutional principles of double jeopardy, retroactivity, ex post facto, separation of powers, and the basic right to contract. Accordingly, the trial court upheld Bache's reclassification as a Tier II offender and denied his petition to declare the new law unconstitutional.

{¶6} It is from this judgment that Bache filed a timely notice of appeal and asserts the following assignment of error:

{¶7} "The retroactive application of Ohio Senate Bill 10/Adam Walsh Act violates the Ex Post Facto, Due Process, and Double Jeopardy Clauses of the United States Constitution and the Retroactivity Clause of Section 28, Article II of the Ohio Constitution. Fifth, Eighth, and Fourteenth Amendments to the United States Constitution; Section 10, Article I of the United States Constitution; and Sections 10 and 28, Articles I and II, respectively of the Ohio Constitution."

{¶8} For ease of discussion, we will address Bache's arguments under the above assignment of error in a different order than Bache does in his appellate brief.

Ex Post Facto Clause

{¶9} Bache contends that Senate Bill 10 violates the "ex post facto" prohibition of the United States Constitution because it has the effect of increasing his basic punishment for the crime he committed in 1996. Based on the following, we determine this argument as advocated by Bache is with merit.

{¶10} Article I, Section 10 of the United States Constitution provides: "No State shall *** pass any *** ex post facto Law." Under this provision, "any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, *** is prohibited as *ex post facto*." *Beazell v. Ohio* (1925), 269 U.S. 167, 169-170.

{¶11} Under well-established precedent, this provision is intended to apply (1) when a new law seeks to punish a prior action which did not constitute a crime at the time of its commission, or (2) when a new law seeks to increase the punishment for a crime following its actual commission. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶30. (Citation omitted.)

{¶12} The "ex post facto" prohibition applies solely to criminal statutes. *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051, at ¶12. To determine whether a legislative enactment is to be considered civil or criminal for ex post facto purposes, the Supreme Court of Ohio has employed the "intent-effects" test. *State v. Cook* (1998), 83 Ohio St.3d 404, 415. (Citations omitted.) In *In re: G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076, at ¶18, this test was described in the following manner:

{¶13} "First, the court must ask whether the legislature intended for the statute to be civil and non-punitive or criminal and punitive. *** The Ex Post Facto Clause only prohibits criminal statutes and punitive schemes. *** Thus, a determination that the legislature intended the statute to be punitive ends the analysis and results in a finding that the statute is unconstitutional. *** If, however, the legislature intended for the statute to be civil and non-punitive, then the court must ask whether the statutory scheme is so punitive in nature that its purpose or effect negates the legislature's intent. *** Accordingly, to withstand the Ex Post Facto Clause, a statute must be civil and non-punitive with regard to both the legislature's intent in enacting it and its actual effect upon enactment." (Citations omitted.)

{¶14} The provisions of Senate Bill 10 demonstrate the General Assembly's intent for the new statutory scheme to be punitive. Similar to the 1997 version of R.C. Chapter 2950, Senate Bill 10 contains language stating the exchange or release of certain information is not intended to be punitive. However, also probative of legislative intent is the manner of the legislative enactment's "codification or the enforcement procedures it establishes ***." *Smith v. Doe* (2003), 538 U.S. 84, 94. Placement of a statute "is not sufficient to support a conclusion that the legislative intent was punitive."

Id. at 95; see, also *In re G.E.S.*, 2008-Ohio-4076, at ¶22. While it is not dispositive, "[w]here a legislature chooses to codify a statute suggests its intent." *Mikaloff v. Walsh* (N.D.Ohio 2007), 2007 U.S. Dist. LEXIS 65076, at *15. (Citation omitted.) The placement of Senate Bill 10, along with the text, demonstrates the General Assembly's intent to transform classification and registration into a punitive scheme.

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

{¶16} The following mandates by the legislature are also indicative of its intent for the new classification to be a portion of the offender's sentence. First, R.C. 2929.19(B)(4)(a), which is codified within the Penalties and Sentencing Chapter, states: "[t]he court *shall include in the offender's sentence* a statement that the offender is a tier III sex offender ***." (Emphasis added.) In addition, R.C. 2929.23(A), titled "Sentencing for sexually oriented offense or child-victim misdemeanor offense ***," codified under the miscellaneous provision, states: "the judge *shall include in the offender's sentence* a statement that the offender is a tier III sex offender/child victim offender [and] shall comply with the requirements of section 2950.03 of the Revised Code ***." (Emphasis added.) R.C. 2929.23(B) states: "[i]f an offender is being sentenced for a sexually oriented offense or a child-victim oriented offense that is a misdemeanor ***, the judge *shall include in the sentence* a summary of the offender's duties imposed under R.C.

2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code and the duration of the duties." (Emphasis added.)

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

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

{¶19} In *Cook*, the Supreme Court of Ohio analyzed the 1997 version of R.C. Chapter 2950 and concluded the provisions were not punitive, since the General Assembly's purpose was "to promote public safety and bolster the public's confidence in Ohio's criminal and mental health systems." *State v. Cook*, 83 Ohio St.3d at 417.

{¶20} The *Cook* Court emphasized the statutory scheme's "narrowly tailored attack on th[e] problem[,]" stating "the notification provisions apply automatically *only* to sexual predators or, *at the court's discretion*, to habitual sex offenders. *** Required dissemination of registered information to neighbors and selected community officials likewise is an objectively reasonable measure to warn those in the community who are most likely to be potential victims." Id. (Emphasis added and internal citations omitted.) The *Cook* Court noted that the dissemination of the required information was available for inspection *only by law enforcement officials and "those most likely to have contact with the offender, e.g., neighbors, the director of children's services, school*

superintendents, and administrators of preschool and day care centers." Id. at 422. (Emphasis added.)

{¶21} While the statute at issue in *Cook* restricted the access of an offender's information to "those persons necessary in order to protect the public[,]" Senate Bill 10 requires the offender's information to be open to public inspection and to be included in the internet sex offender and child-victim offender database. R.C. 2950.081. Not only does the public have unfettered access to an offender's personal information but, under Senate Bill 10, an offender has a legal duty to provide more information than was required under former R.C. Chapter 2950.

{¶22} As part of the general registration form, the offender must indicate: his full name and any aliases; his social security number and date of birth; the address of his residence; the name and address of his employer; the name and address of any type of school he is attending; the license plate number of any motor vehicle he owns; the license plate number of any vehicle he operates as part of his employment; a description of where his motor vehicles are typically parked; his driver's license number; a description of any professional or occupational license he may have; any e-mail addresses; all internet identifiers or telephone numbers that are registered to, or used by, the offender; and any other information that is required by the bureau of criminal identification and investigation. R.C. 2950.04(C). The offender's information is placed into an internet registry. R.C. 2950.081.

{¶23} Furthermore, the *Cook* Court determined that former R.C. Chapter 2950, on its face, "is not punitive because it seeks to 'protect the safety and general welfare of the people of this state ***.'" *State v. Cook*, 83 Ohio St.3d at 417, citing former R.C.

2950.02(B) and (A)(2). Recognizing this, the Supreme Court of Ohio, in *State v. Eppinger* (2001), 91 Ohio St.3d 158, 165, stressed the importance of a sexual offender classification hearing and the significance of classifying offenders appropriately, stating:

{¶24} "[I]f we were to adjudicate all sexual offenders as sexual predators, we run the risk of 'being flooded with a number of persons who may or may not deserve to be classified as high-risk individuals, with the consequence of diluting both the purpose behind and the credibility of the law. This result could be tragic for many.' *State v. Thompson* (Apr. 1, 1999), Cuyahoga App. No. 73492, unreported, 1998 WL 1032183. Moreover, the legislature would never have provided for a hearing if it intended for one conviction to be sufficient for an offender to be labeled a 'sexual predator.'"

{¶25} Also of significance, the *Eppinger* Court noted that "[o]ne sexually oriented offense is not a clear predictor of whether that person is likely to engage in the future in one or more sexually oriented offenses, particularly if the offender is not a pedophile. Thus, we recognize that one sexually oriented conviction, without more, may not predict future behavior." Id. at 162.

{¶26} In addition, former R.C. Chapter 2950 permitted trial courts to first conduct a hearing and consider numerous factors before classifying an individual as a sexual predator, a habitual sexual offender, or a sexually oriented offender. In the judicial review of prior legislation, such as Megan's Law and the original SORN Law, courts have noted with protective favor the ability of the trial courts to assess and classify offenders.

{¶27} Unlike the statute at issue in *Cook* and *Eppinger*, an individual's registration and classification obligations under Senate Bill 10 depend solely on his or

her crime, not upon his or her ongoing threat to the community. The result is a ministerial rubber stamp on all offenders, regardless of any mitigating facts in the individual case. The legislative basis for this seems to be expert analysis that puts *all* offenders in one of two categories: those who have offended more than once, and those who have offended only once, but are likely to offend again at some point in the future. This process, as delineated in Senate Bill 10, has stripped the trial court from engaging in an independent classification hearing to determine an offender's likelihood of recidivism: expert testimony is no longer presented; written reports, victim impact statements, and presentence reports are no longer taken into consideration, nor is the offender's criminal and social history. See, *State v. Eppinger*, 91 Ohio St.3d at 166-167. Gone are the notice, hearing, and judicial review tenants of due process. Thus, there is no longer an independent determination as to the likelihood that a given offender would commit another crime.

{¶28} While the legislature may be entitled to adopt this questionable approach to apply to offenders from the date of passing the legislation, neither the Ohio Constitution nor the United States Constitution permit the retroactive application of Senate Bill 10 in its current form to individuals such as Bache.

{¶29} Moreover, to date, the majority of the current justices on the Supreme Court of Ohio have objected to the characterization of Ohio's sex offender classification system as a "civil" proceeding. In *State v. Wilson*, Justice Lanzinger, whose dissenting opinion was joined by Justice O'Conner, stated the "restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions." *State v. Wilson*, 2007-

Ohio-2202, at ¶46. (Lanzinger, J., concurring in part and dissenting in part.) More recently, Justice Lanzinger again voiced her concern in a dissenting opinion in *State v. Ferguson*, where she stated "R.C. 2950.09 has been transformed from remedial to punitive." *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, at ¶45. (Lanzinger, J., dissenting.) Her dissenting opinion in *Ferguson* was joined by Justices Pfeifer and Stratton. Thus, at one time or another, Justices Pfeifer, O'Connor, Stratton, and Lanzinger have all expressed their belief that the former version of Ohio's sex offender classification system was punitive rather than remedial.

{¶30} Furthermore, even if it were construed that the General Assembly's intent was civil in nature, Senate Bill 10 is unconstitutional due to its punitive effect as applied to Bache. In assessing the effect of a statute, the United States Supreme Court has "provid[ed] some guidance" by indicating certain factors to be applied in resolving this point. The factors include:

{¶31} "Whether the sanction involves an affirmative disability or restraint, *** whether it has historically been regarded as a punishment, *** whether it comes into play only on a finding of *scienter*, *** whether its operation will promote the traditional aims of punishment – retribution and deterrence, *** whether the behavior to which it applies is already a crime, *** whether an alternative purpose to which it may rationally be connected is assignable for it, *** and whether it appears excessive in relation to the alternative purpose assigned ***[.]" *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, 168-169. (Internal citations omitted.)

{¶32} While the *Cook* Court concluded that (1) historically, the requirement of registration has been deemed a valid regulatory technique, and (2) the dissemination of

information is considered non-punitive when it supports a proper state interest; it analyzed the 1997 version of R.C. Chapter 2950. *State v. Cook*, 83 Ohio St.3d at 418-419.

{¶33} Since *Cook*, the sexual offender laws have been significantly modified. For example, the original version of the "sexual offender" law stated that the defendant only had to register with the sheriff of the county where he was a resident. See *State v. Cook*, 83 Ohio St.3d at 408. Under the latest version of the scheme, however, the places where registration is required have been expanded to now include: (1) the county where the offender lives; (2) the county where he attends any type of school; (3) the county where he is employed if he works there for a certain number of days during the year; (4) if the offender does not reside in Ohio, any county of this state where he is employed for a certain number of days; and (5) if he is a resident of Ohio, any county of another state where he is employed for a certain number of days. R.C. 2950.04. Not only is the offender now obligated to register in more counties, but he also has a legal duty to provide more information, as previously stated. Besides the change in the classification system, the increase in the duration and frequency of the requirements for registration, and the increase in the information provided, the access of the public to the information has been greatly increased through the use of an internet database that was previously established by the Ohio Attorney General.

{¶34} The Supreme Court of Alaska, in *Doe v. Alaska* (2008), 189 P.3d 999, recognized the effects of requiring an offender to place personal information on a public registry. The *Doe* Court stated:

{¶35} "*** [W]e agree with the conclusion of Justice Ginsburg, also dissenting in *Smith*, that ASORA [Alaska's Sex Offender Registration Act] 'exposes registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism.' *** In the decision reversed in *Smith*, the Ninth Circuit observed that '(b)y posting (registrants') names, addresses, and employer addresses on the internet, the Act subjects (registrants) to community obloquy and scorn that damage them personally and professionally.' *** The Ninth Circuit observed that the practical effect of this dissemination is that it leaves open the possibility that the registrant will be denied employment and housing opportunities as a result of community hostility. *** As Justice Souter noted in concurring in *Smith*, 'there is significant evidence of onerous practical effects of being listed on a sex offender registry.' *** Outside Alaska, there have been reports of incidents of suicide by and vigilantism against offenders on state registries. ***

{¶36} "***

{¶37} "*** ASORA requires release of information that is in part not otherwise public or readily available. Moreover, the regulations authorize dissemination of most ASORA registration information 'for any purpose, to any person.' *** Taken in conjunction with the Alaska Public Records Act, *** ASORA's treatment of this information, confirmed by the regulations, seems to require that the information be publicly available. By federal law, it is disseminated statewide, indeed worldwide, on the state's website. *** There is a significant distinction between retaining public paper records of a conviction in state file drawers and posting the same information on a state-sponsored website; this posting has not merely improved public access but has broadly

disseminated the registrant's information, some of which is not in the written public record of the conviction. As the Alaska Court of Appeals noted, 'ASORA does provide for dissemination of substantial personal and biographical information about a sex offender that is not otherwise readily available from a single governmental source.' *** We also recognized in *Doe A* that several sex offenders had stated that they had lost their jobs, been forced to move from their residences, and received threats of violence following establishment of the registry, even though the facts of their convictions had always been a matter of public record. *** We therefore conclude that the harmful effects of ASORA stem not just from the conviction but from the registration, disclosure, and dissemination provisions." Id. at *1009-1011. (Internal citations omitted.)

{¶38} After careful examination of this opinion, we agree with the reasoning and conclusion of the *Doe* Court.

{¶39} As to whether the new registration and notification requirements must be viewed as consistent with historical forms of punishment, the United States Supreme Court, in *Smith v. Doe*, 538 U.S. at 98, held that the dissemination of truthful information concerning a sexual offender does not constitute a historical form of punishment when it is done in the furtherance of a legitimate governmental interest. As part of its analysis of an Alaskan sexual offender scheme, the *Smith* Court expressly rejected the argument that registration and notification requirements resemble the punishment of public shaming, as used in colonial times. Id., at 98-99. However, after the decision in *Smith* was rendered, the Supreme Court of Alaska, in *Doe*, determined that ASORA is punitive and in violation of the due process clause of the Alaska Constitution. *Doe v. State*, 189 P.3d at 1015, 1019. In analyzing whether the statute's effect has historically been

regarded as punishment, the *Doe* Court stated:

{¶40} "ASORA does not expressly impose sanctions that have been historically considered punishment. *** Because registration acts such as ASORA are 'of fairly recent origin,' courts addressing this issue have determined that there is no historical equivalent to these registration acts. *** Some courts have instead considered whether the acts are analogous to the historical punishment of shaming; these courts have concluded that they are not. *** But the dissemination provision at least resembles the punishment of shaming *** and the registration and disclosure provisions 'are comparable to conditions of supervised release or parole.' *** And these provisions have effects like those resulting from punishment. The fact that ASORA's registration reporting provisions are comparable to supervised release or parole supports a conclusion that ASORA is punitive." Id. at 1012.

{¶41} Furthermore, Senate Bill 10 cannot promote the goals of retribution and deterrence when the classification of an offender is based solely upon the nature of the crime committed, not on an individual's recidivism potential.

{¶42} The *Cook* Court stated that registration and notification requirements are not intended to deter the behavior of the offender, but are instead intended to help the public protect itself from the harmful behavior. *State v. Cook*, 83 Ohio St.3d at 420. Furthermore, with the enactment of Senate Bill 10, the legislature contends that the dissemination of an offender's personal information is intended to protect public safety. R.C. 2950.02. The general assembly makes the assertion that "[s]ex offenders and offenders who commit child-victim oriented offenses pose a risk of engaging in further

sexually abusive behavior even after being released from imprisonment, a prison term, or other confinement or detention ***." R.C. 2950.02(A)(2).

{¶43} However, under Senate Bill 10, every offender must provide identical information, and the information is published in the same manner for every offender. The only factor that differentiates the offenders is the frequency and duration of the registry. Furthermore, the offenders are not given the opportunity to petition the trial court to restrict the public dissemination of his or her personal information, since the public is allowed unrestricted access to the offender's personal information. If this were the case under Senate Bill 10, it is conceivable that the notification policy would promote the purpose of protecting the public from the offender's "harmful behavior."

{¶44} The new law as applied to this case resulted in an offender, with a clear expectation that his reporting was going to end in ten years, being legislatively resentenced to a 25-year reporting period. Based on the foregoing, Senate Bill 10 violates the ex post facto laws, as applied to Bache.

Retroactivity

{¶45} Bache further maintains that he cannot be subject to the new sex offender scheme because such an application will violate the constitutional prohibition against retroactive laws. In making this argument, Bache admits that the wording of the various provisions of Senate Bill 10 readily indicates that the General Assembly intended for many of those provisions to apply to offenders who had been subject to the prior sex offender laws. Nevertheless, he argues that such an application should not be allowed because it would have an adverse effect upon his substantive rights.

{¶46} Section 28, Article II of the Ohio Constitution states that "[t]he general

assembly shall have no power to pass retroactive laws." The courts have interpreted the constitutional prohibition against retroactive laws to apply "to laws affecting substantive rights but not to the procedural or remedial aspects of such laws." *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 137.

{¶47} A two-step standard is followed to decide if the retroactive application of a statute will be deemed to violate the constitutional clause. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, at ¶9-10. (Citation omitted.) Pursuant to the first prong of the "retroactive" test, the language of the statute is reviewed to see whether the legislature expressly stated that retroactive application was intended. Id. (Citation omitted.) If the wording of the General Assembly is sufficiently explicit to show a retroactive intent, the statute is then reviewed to determine if it affects a substantive or remedial matter. Id. (Citation omitted.)

{¶48} A review of various provisions in the present version of R.C. Chapter 2950 confirms that the General Assembly has clearly indicated that offenders who were classified under the prior version of the scheme are obligated to comply with the new requirements. See, e.g., R.C. 2950.03, 2950.03(A)(5)(a), 2950.031, 2950.032(A), 2950.033(A). Therefore, since the first prong of the test for retroactive application of a statute has been met, the analysis must focus on whether the provisions should be characterized as substantive or remedial. Such an application is not permitted in cases such as Bache's, since it has an adverse effect upon this offender's substantive rights.

{¶49} The *Cook* Court determined that applying Megan's Law to those convicted under prior law did not offend the Retroactivity Clause. *State v. Cook*, 83 Ohio St.3d at 414. In *Cook*, the Supreme Court of Ohio stated: "[t]o hold otherwise would be 'to find

that society is unable to protect itself from sexual predators by adopting the simple remedy of informing the public of their presence.'" Id. (Citation omitted.)

{¶50} In *State v. Wilson*, 2007-Ohio-2202, at ¶32, the Supreme Court of Ohio relied upon its prior holding in *Cook*, supra, to hold that sex offender classification proceedings under R.C. Chapter 2950 are civil in nature. However, as observed by Justice Lanzinger in the dissent of *State v. Wilson*, R.C. Chapter 2950 was amended subsequent to the *Cook* decision. Justice Lanzinger, joined by Justice O'Connor, stated: "R.C. Chapter 2950 has been amended since *Cook* and *Williams* *** and the simple registration process and notification procedures considered in those two cases are now different." Id. at ¶45. (Lanzinger, J., concurring in part and dissenting in part.)

{¶51} After distinguishing the then-current laws with those at issue under *Cook* and *Williams*, Justice Lanzinger stated:

{¶52} "While protection of the public is the avowed goal of R.C. Chapter 2950, we cannot deny that severe obligations are imposed upon those classified as sex offenders. All sexual predators and most habitual sex offenders are expected, for the remainder of their lives, to register their residences and their employment with local sheriffs. Moreover, this information will be accessible to all. The stigma attached to sex offenders is significant, and the potential exists for ostracism and harassment, as the *Cook* court recognized. *** Therefore, I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions." Id. at ¶46. (Internal citation omitted.)

{¶53} Thereafter, in *State v. Ferguson*, 2008-Ohio-4824, at ¶27-40, the Supreme Court of Ohio again relied upon *State v. Cook*, 83 Ohio St.3d 404, *State v. Williams*, 114 Ohio St.3d 103, 2007-Ohio-3268, and *State v. Wilson*, 2007-Ohio-2202, in determining that the amended provisions of R.C. Chapter 2950, under Senate Bill 5, were not in violation of the retroactivity clause of the Ohio Constitution.

{¶54} Justice O'Connor, writing for the majority, noted that she had joined Justice Lanzinger's dissent in *Wilson*, supra, "but it did not garner sufficient votes to form the majority ***." *State v. Ferguson*, 2008-Ohio-4824, at ¶30, fn. 4. After a close reading of *Ferguson*, however, it appears to be distinguishable from *Wilson*. In writing for the majority, Justice O'Connor made a very important distinction, as Ferguson had been previously classified a sexual predator with a potential of lifetime reporting. Id. at ¶4. The opinion stated:

{¶55} "[W]e observe that an offender's classification as a sexual predator is a collateral consequence of the offender's criminal acts rather than a form of punishment per se. Ferguson has not established that he had any reasonable expectation of finality in a collateral consequence that *might* be removed. Indeed, the record before us is entirely devoid of such an argument and of any evidence that would support a reasonable conclusion that Ferguson was likely to have his classification removed. Absent such an expectation, there is no violation of the Ohio Constitution's retroactivity clause." Id. at ¶34. (Emphasis sic.)

{¶56} While the prohibition against ex post facto laws applies only to criminal cases, the retroactivity provisions of the Ohio Constitution apply in criminal and civil cases. As a result, this reasonable "expectation of finality" described by Justice

O'Connor in *Ferguson*, supra, may be outcome-determinative in the instant case regardless of the classification of Senate Bill 10. To reiterate, the Supreme Court of Ohio has held that a "'later enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, *unless the past transaction or consideration created at least a reasonable expectation of finality*.'" *Cook*, 83 Ohio St.3d at 412. (Emphasis added.) For instance, where a litigant's case comes to a conclusion, he or she *may* have a right to a reasonable "expectation of finality." This reasonable "expectation of finality" is applicable to all offenders except the most heinous offenders, labeled sexual predators, as noted by Justice O'Connor in *Ferguson*, supra.

{¶57} In this regard, the same conclusion should not be reached for offenders in the following scenarios: Offender #1 committed a rape and was declared a sexual predator with potential reporting and residency restrictions for the rest of his life, such as the offender in *State v. Ferguson*, 2008-Ohio-4824; Offender #2, like Bache, pled no contest to one count of gross sexual imposition, a third-degree felony. Bache has served almost his entire ten-year reporting period but under Senate Bill 10 has been legislatively reclassified as a Tier II offender, subject to residency restrictions and reporting for 25 years.

{¶58} In the case sub judice, Bache was classified under Megan's Law as a sexually oriented offender, the least dangerous sex offender classification, which required him to register annually for a period of ten years. However, under the Adam Walsh Act, Bache was automatically classified as a Tier II offender. Under this classification, Bache is required to register every 180 days for 25 years. Also, Bache is now subject to additional reporting requirements, as outlined above, severe criminal

penalties for failure to comply with the reporting requirements, and restrictions placed on his residency.

{¶59} Bache certainly had a reasonable expectation that his classification and attendant requirements were to last a finite period of ten years. Yet, through the enactment of Senate Bill 10, Bache is subject to reporting requirements for a period of 25 years. The prospect of this result could have easily changed his decision to enter a no contest plea in his case and instead proceed to trial.

{¶60} Based on the foregoing and when applied retroactively to offenders such as Bache, Senate Bill 10 violates the Ex Post Facto Clause of the United States Constitution and Section 28, Article II of the Ohio Constitution when an offender had a reasonable expectation of finality. The same result would not necessarily be true where an offender had been adjudicated a sexual predator, or if the offender, at the time of his conviction, had not yet been classified but could have been classified as a sexual predator. This is primarily due to the fact, as observed by Justice O'Connor, that these individuals never had any expectation that their registration requirements would end prior to the passage of Senate Bill 10. However, those individuals who had been classified with resulting specific, terminable reporting requirements should be given the protections afforded by the United States and Ohio Constitutions.

Double Jeopardy

{¶61} Under this argument, Bache submits that the application of the new registration and notification requirements in his case has resulted in a violation of the constitutional prohibition against double jeopardy.

{¶62} Both parties agree that the resolution of this argument turns on whether Senate Bill 10 is considered criminal or civil in nature. In our analysis of Bache's retroactivity and ex post facto arguments, we concluded that Senate Bill 10 is punitive in nature as applied to him. Furthermore, as previously stated, at one time or another, Justices Pfeifer, O'Connor, Stratton, and Lanzinger have all expressed their belief that the former version of Ohio's sex offender classification system was punitive rather than remedial.

{¶63} Now, through the enactment of Senate Bill 10, Ohio's sex offender classification system has been revamped, increasing the frequency, duration, and extent of the reporting requirements. Of specific concern is the "automatic" nature of the new classification system. An offender's classification status is *solely* based on the crime he or she has committed. If an offender commits an offense set forth in R.C. 2950.01(G), or attempts to commit one of those offenses, he or she is classified as a Tier III offender and is forced to comply with the onerous registration requirements for the rest of his or her life. Moreover, unlike the former version of the statute, the offender is not entitled to a hearing where a judge could make an independent evaluation of the offender's specific likelihood of recidivism, based on the offender's criminal history, psychiatric evaluations, age, and facts of the underlying offense. In light of this significant change, our analysis of Bache's retroactivity and ex post facto arguments, and the reasons set forth in Justice Lanzinger's above-noted dissenting opinions, Ohio's sex offender classification system is clearly punitive in nature.

{¶64} The Supreme Court of Ohio has held:

{¶65} "The Fifth Amendment to the United States Constitution provides that '(n)o person shall *** be subject for the same offence to be twice put in jeopardy of life or limb.' Similarly, Section 10, Article I, Ohio Constitution provides, 'No person shall be twice put in jeopardy for the same offense.'" *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, at ¶16.

{¶66} The double jeopardy provision has been interpreted to apply in two basic situations: (1) when the state tries to pursue a second prosecution based upon the same facts; and (2) when the state attempts to impose a second punishment for the same offense. *State v. Byers*, 2008-Ohio-5051, at ¶100. However, the double jeopardy prohibition can only be invoked when the conduct of the government involves criminal punishment. *State v. Williams* (2000), 88 Ohio St.3d 513, 528.

{¶67} In this matter, Bache entered a plea of no contest to one count of gross sexual imposition. He was sentenced for this offense and adjudicated a sexually oriented offender. He had an expectation of finality in that his reporting requirements would end in 2007. Now, additional punitive measures have been placed on Bache, as he is required to comply with the new registration requirements every 180 days for a period of 25 years. Essentially, Bache is being punished a second time for the same offense. Accordingly, the application of the current version of R.C. 2950 to Bache violates the Double Jeopardy Clauses of the Ohio and United States Constitutions.

Due Process Clause and Separation of Powers

{¶68} Bache further argues that Senate Bill 10 violates the due process clause of the Ohio Constitution and the separation of powers doctrine.

{¶69} The Seventh District evaluated a similar claim in *State v. Byers*, 2008-Ohio-5051 and found no violation of the doctrine of separation of powers. The Seventh District adopted the following analysis provided in *State v. Slagle*, 145 Ohio Misc.2d 98, 2008-Ohio-593:

{¶70} "'[T]he Assembly has enacted a new law, which changes the different sexual offender classifications and time spans for registration requirements, among other things, and is requiring that the new procedures be applied to offenders currently registering under the old law or offenders currently incarcerated for committing a sexually oriented offense. Application of this new law does not order the courts to reopen a final judgment, but instead simply changes the classification scheme. This is not an encroachment on the power of the judicial branch of Ohio's government.'" *Byers*, at ¶73, quoting *Slagle*, at ¶21 and also citing *In re Smith*, 3d Dist No. 1-07-58, 2008-Ohio-3234, at ¶39 and *In re G.E.S.*, 2008-Ohio-4076, at ¶42.

{¶71} The judiciary is empowered to hear a controversy between adverse parties, ascertain the facts, and apply the law to the facts to render a final judgment. *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, at ¶99, citing *Fairview v. Giffee* (1905), 73 Ohio St. 183, 190. In the criminal context, the judiciary is empowered to determine if a crime has been committed and the penalty to be imposed on a defendant.

{¶72} No abrogation of final judicial decisions occurs when a previously convicted offender such as Bache is reclassified subject to additional requirements.

{¶73} Furthermore, this court has addressed these arguments as advocated by Bache. In *State v. Swank*, 2008-Ohio-6059, this court found the arguments that are

raised in the instant appeal to be without merit. Id. at ¶98-107. Therefore, these arguments lack merit.

{¶74} Thus, the new law as applied to someone in Bache's situation does not violate the doctrine of separation of powers or the due process clauses of the Ohio Constitution.

Contract Clause

{¶75} Additionally, Bache asserts that the provisions of Senate Bill 10 cannot be applied to him because it would violate the terms of his plea agreement and would result in a breach of his contract with the state. According to Bache, the state had agreed as part of their plea bargain to leave the "sexual predator" determination to the discretion of the trial court. In light of this, he now submits that the Attorney General cannot attempt to reclassify him without breaching the terms of the agreement.

{¶76} We recognize a plea agreement is considered a contract between the state and a criminal defendant; as a result, such an agreement is subject to the general laws of contracts. *State v. Butts* (1996), 112 Ohio App.3d 683, 685-686. Therefore, if one side violates a term of a plea agreement, the other party has a right to pursue certain remedies, including the rescission of the agreement. *State v. Walker*, 6th Dist. No. L-05-1207, 2006-Ohio-2929, at ¶13.

{¶77} There is no evidence in the record the state promised Bache that, pursuant to his plea agreement, his sex offender registration duties would be of a particular period of time or be of a particular frequency.

{¶78} Therefore, in the instant matter, the enactment of the new sexual offender scheme under Senate Bill 10 does not constitute a breach of Bache's prior plea

agreement. Bache's contention that his reclassification constitutes an impairment of a contract is without merit.

Conclusion

{¶79} Bache's assignment of error has merit to the extent indicated.

{¶80} The result in this case would not necessarily be the same for someone who either was, or could have been, adjudicated a sexual predator under prior law. Even though the current law is determined to be punitive in nature, unless the record would establish otherwise, the disparity of impact of the current law on an individual classified as a sexual predator is likely to be de minimus. That would significantly alter the analysis in this case, since a lifetime of reporting is a lifetime of reporting.

{¶81} The judgment of the Lake County Common Pleas Court is hereby reversed, and this matter is remanded for proceedings consistent with this opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion,

COLLEEN MARY O'TOOLE, J., concurs in judgment only with a Concurring Opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

{¶82} I concur with the judgment ultimately reached by the primary writing judge, that Bache may not be constitutionally reclassified under the provisions of the Adam Walsh Act. However, I disagree entirely with the analysis employed by the primary writing judge. Accordingly, I concur in judgment only. Bache's duty to register as a sex

offender and provide appropriate notification as required by his original sentencing order remains in full force and effect.[1]

{¶83} The application of the Adam Walsh Act, amending Ohio's Sex Offender Registration and Notification Act, to previously journalized final sentencing judgments or orders violates the constitutional doctrine of separation of powers because it legislatively vacates the settled and journalized final judgments of the judicial branch of government. *Plaut v. Spendthrift Farm, Inc.* (1995), 514 U.S. 211, 222, quoting The Federalist No. 81 (J. Cooke ed. 1961), at 545 ("[a] legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases").

{¶84} The doctrine of separation of powers limits the ability of the General Assembly to exercise the powers of and exert an influence over the judicial branch of government. "The administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers." *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, at paragraph one of the syllabus.

{¶85} "[I]t is well settled that the legislature cannot annul, reverse or modify a judgment of a court already rendered." *Bartlett v. Ohio* (1905), 73 Ohio St. 54, 58; *Gompf v. Wolfinger* (1902), 67 Ohio St. 144, at paragraph three of the syllabus ("[a] judgment which is final by the laws existing when it is rendered cannot constitutionally be made subject to review by a statute subsequently enacted"). Cf. *Plaut*, 514 U.S. at

1. According to Bache's Appellate Brief, he was due to complete his reporting requirements in November 2007 pursuant to a stipulation entered into at the time of sentencing. A copy of the original sentencing Judgment Entry, however, has not been included in the record. The possibility exists, then, that Bache's duty to register has already expired.

219 (Congress may not interfere with the power of the federal judiciary "to render dispositive judgments" by "commanding the federal courts to reopen final judgments") (citation omitted).

{¶86} A determination of an offender's classification under former R.C. Chapter 2950 constituted a final judicial order. *State v. Washington*, 11th Dist. No. 99-L-015, 2001-Ohio-8905, 2001 Ohio App. LEXIS 4980, at *9 ("a defendant's status as a sexually Oriented offender *** arises from a finding rendered by the trial court, which in turn adversely affects a defendant's rights by the imposition of registration requirements"); *State v. Dobrski*, 9th Dist. No. 06CA008925, 2007-Ohio-3121, at ¶6 ("[i]nasmuch as a sexual predator classification is an order that affects a substantial right in a special proceeding, it is final and appealable"); cf. *State v. Nader*, 10th Dist. No. 05AP-91, 2005-Ohio-5171, at ¶1 (the State appealed the trial court's finding that the offender was not a sexually oriented offender); *State v. Williamson*, 5th Dist. No. 04 CA 75, 2005-Ohio-3524, at ¶8 (the offender appealed the trial court's finding that he was a sexually oriented offender).

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

State v. Dignan, 11th Dist. No. 2008-T-0044, 2008-Ohio-3732, at ¶7 (dismissing, as untimely, offender's appeal of his sex offender classification).

{¶88} In the present case, Bache's status as a sexually oriented offender became final when it was journalized by the trial court on January 7, 1997. Good legislative intentions notwithstanding, that status cannot be legislatively vacated by the subsequent application of the Adam Walsh Act.

{¶89} The primary writing judge's analysis rests on the erroneous conclusion that the Adam Walsh Act is punitive and, thus, violates the Ex Post Facto Clause of the United States Constitution, the Retroactivity Clause (Section 28, Article II) of the Ohio Constitution, and the constitutional prohibitions against double jeopardy. In reaching this conclusion, the primary writing judge engages in much unwarranted speculation regarding the Legislature's motivations for enacting the Adam Walsh Act.

{¶90} The Legislature's intent in passing the Act is expressly stated: "it is the general assembly's intent to protect the safety and general welfare of the people of this state" and "the policy of this state to require the exchange *** of relevant information about sex offenders and child-victim offenders among public agencies and officials and to authorize the release *** of necessary and relevant information about sex offenders and child-victim offenders to members of the general public as a means of assuring public protection *** is not punitive." R.C. 2950.02(B).[2]

{¶91} In the absence of such a statement, consideration of the Act's placement within the criminal code and the provisions commanding that an offender's classification

2. It should also be recognized that Ohio was required by federal law to pass the Adam Walsh Act or risk losing "10 percent of the funds that would otherwise be allocated *** to the jurisdiction under *** the Omnibus Crime Control and Safe Streets Act of 1968." Section 16925(a), Title 24, U.S.Code.

be included in his or her sentence would be relevant. Given the Legislature's express statement of intent, however, such inquiry is unnecessary.

{¶92} It is also unnecessary to comment on what the primary writing judge considers the Legislature's "questionable approach" to protecting the public from sexual offenders. "Any constitutional analysis must begin with *** the understanding that it is not this court's duty to assess the wisdom of a particular statute." *Groch v. GMC*, 117 Ohio St.3d 192, 2008-Ohio-546, at ¶141.

{¶93} I also disagree with the primary writing judge's conclusion that the effects of the Act's provisions are punitive, regardless of the Legislature's motives for enacting them. In support, the primary writing judge notes that sexual offenders are "now obligated to register in more counties," "provide more information," and, for some offenders, the registration period is extended.[3]

{¶94} These aspects of the Adam Walsh Act, however, were already present in prior amendments to R.C. Chapter 2150 as part of Am.Sub.S.B. No. 5. In *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, the Ohio Supreme Court held that these amendments could be applied retroactively.

{¶95} In *Ferguson*, the appellant argued the retroactive application of the following provisions violated the Ex Post Facto and Retroactivity Clauses: "sex offenders are required to personally register with the sheriff in their county of residence,

3. The primary writing judge asserts that the Adam Walsh Act "cannot promote the goals of retribution and deterrence when the classification of an offender is based solely upon the nature of the crime committed, not on an individual's recidivism." This fact actually supports the conclusion that the effect of the Act is regulatory rather than punitive. The "goals of retribution and deterrence" are quintessentially punitive goals. Cf. R.C. 2929.11(A) ("[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender"). Moreover, the United States Supreme Court has held that "[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences". *Smith v. Doe* (2003), 538 U.S. 84, 103.

the county in which they attend school, and the county in which they work, and ***they must do so every 90 days"; and "any statements, information, photographs, and fingerprints required to be provided by the offender [for the purposes of community-notification] are public records and are included in the Internet database of sex offenders maintained by the Attorney General's office." Id. at ¶9 and ¶10, respectively.

{¶96} With respect to the Retroactivity Clause, the Supreme Court rejected the argument that "the General Assembly has transmogrified the remedial statute into a punitive one by the provisions enacted through S.B. 5." Id. at ¶32. Since amended R.C. Chapter 2950 still constituted "a civil, remedial statute," it did not violate the Ex Post Facto Clause. Id. at ¶43.

{¶97} The changes enacted by the Adam Walsh Act are not qualitatively different from those enacted by S.B. 5. Under *Ferguson*, therefore, their application to persons previously classified does not violate the Ex Post Facto or Retroactivity Clauses.

{¶98} Finally, I do not agree with the primary writing judge's conclusion that only sexual offenders who were subject to "specific, terminable reporting requirements" possessed a reasonable expectation of finality in the conditions of their classification. The expectation of finality does not derive from the eventual termination of the classification, but, rather, from the fact that one's classification was rendered as part of the trial court's final judgment. An offender who is sentenced for life has just as much expectation that he will serve a life sentence as the offender who is sentenced for ten years expects to serve a ten-year sentence.

{¶99} Therefore, I concur for the reasons stated above. Bache's duty to register as a sex offender and provide appropriate notification as required by his original sentencing order remains in full force and effect. See fn. 1.

COLLEEN MARY O'TOOLE, J., concurs in judgment only with Concurring Opinion.

{¶100} I concur in judgment only with the majority to reverse the judgment of the trial court and remand the matter for further proceedings based on the analysis in my dissenting opinion in *Ball v. State*, 11th Dist. No. 2008-L-053, 2009-Ohio-4099.

STATE OF OHIO)
)SS.
COUNTY OF LAKE)

IN THE COURT OF APPEALS

ELEVENTH DISTRICT

STATE OF OHIO,

Plaintiff-Respondent-Appellee,

- vs -

MICHAEL D. BACHE, JR.,

Defendant-Petitioner-Appellant.

JUDGMENT ENTRY

CASE NO. 2008-L-061

COURT OF APPEALS
SEP 30 2009
MAUREEN G. KELLY
CLERK OF COURT
LAKE COUNTY, OHIO

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is reversed, and this matter is remanded to the trial court for further proceedings consistent with the opinion. Costs to be taxed against appellee.

JUDGE TIMOTHY P. CANNON

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

COLLEEN MARY O'TOOLE, J., concurs in judgment only with a Concurring Opinion.