

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

GEORGE D. WILLIAMS,

Defendant-Appellant.

*
*
*
*
*
*
*
*

Case No. 2009-0088

**On Appeal from the
Warren County Court of
Appeals, Twelfth Appellate
District**

**Court of Appeals
Case No. CA2008-02-029**

MERIT BRIEF OF APPELLEE, STATE OF OHIO

RACHEL A. HUTZEL (#0055757)
Warren County Prosecutor

MICHAEL GREER (#0084352)
1400
STACY C. BROWN (#0085538)
Assistant Warren County Prosecutors

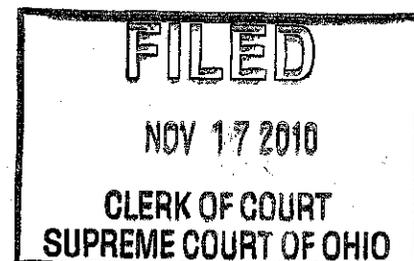
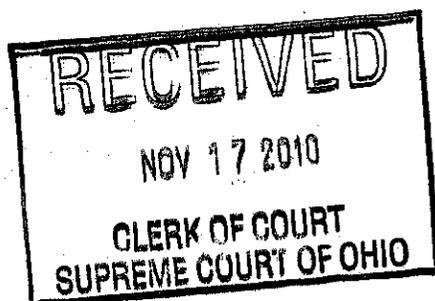
500 Justice Drive
Lebanon, Ohio 45036
(513) 695-1327
(513) 695-2962 [FAX]

COUNSEL FOR STATE OF OHIO

KATHERINE SZUDY (#0076729)
Assistant State Public Defender

250 East Broad Street – Suite
Columbus, Ohio 43215
(614) 466-5394
(614) 752-5167 [FAX]
Kathy.Szudy @OPD.Ohio.gov

COUNSEL FOR GEORGE
D. WILLIAMS



I. TABLE OF CONTENTS

II. STATEMENT OF THE CASE AND FACTS..... 1

III. ARGUMENT..... 2

APPELLEE’S RESPONSE TO APPELLANT’S PROPOSITION OF LAW 2

The application of Ohio’s Adam Walsh Act does not violate the Ex Post Facto or the Due Process Clauses of the United States Constitution or the Retroactivity Clause of Article II, Section 28 of the Ohio Constitution or the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution; Section 10, Article I of the United States Constitution; or Section 28, Article II of the Ohio Constitution.

Issue Presented:

A. Ohio’s Adam Walsh Act does not violate the Retroactivity Clause of Section 28, Article II of the Ohio Constitution.

Hyle v. Porter, 117 Ohio St. 3d 165, 2008-Ohio-542, 882 N.E.2d 899..... 2, 3

Slagle v. State (2008), 145 Ohio Misc. 2d 98, 2008-Ohio-593, 884 N.E.2d 109 3

State v. Bodyke, 126 Ohio St. 3d 266, 2010-Ohio-2424, 933 N.E.2d 753..... 1, 3

State v. Cook, 83 Ohio St. 3d 404, 1998-Ohio-291, 700 N.E.2d 570 3, 4

State v. Lyttle (December 22, 1997), Butler App. No. CA97-03-060, 1997 Ohio App. LEXIS 5705..... 4

Van Fossen v. Babcock & Wilcox Co. (1988), 36 Ohio St. 3d 100, 522 N.E.2d 489 3

B. Ohio’s Adam Walsh Act does not violate the Ex Post Facto Clause of the United States Constitution.

Beazell v. Ohio (1925), 269 U.S. 167, 169-170, 46 S.Ct. 68, 70 L.Ed. 216..... 5

In re G.E.S., Summit App. No. 24079, 2008-Ohio-4076..... 6

Smith v. Doe (2003), 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 5, 6, 7, 8

State v. Byers, Columbiana App. No. 07 CO 39, 2008-Ohio-5051 7, 8

State v. Cook, 83 Ohio St. 3d 404, 1998-Ohio-291, 700 N.E.2d 570 5, 6, 8, 9

State v. Holloman-Cross, Cuyahoga App. No. 90351, 2008-Ohio-2189 5

State v. King, Miami App. No. 08-CA-02, 2008-Ohio-2594 7

C. Ohio’s Adam Walsh Act does not violate the procedural due process rights of the Appellant.

State ex rel. Dickman v. Defenbacher (1955), 164 Ohio St. 142, 128 N.E.2d 59..... 9, 10

State v. Hayden, 96 Ohio St. 3d 211, 2002-Ohio-4169, 773 N.E.2d 502 9, 10, 11

<i>State v. Hochhausler</i> , 76 Ohio St. 3d 455, 1996-Ohio-374, 668 N.E.2d 457.....	9
<i>State v. Williams</i> , Warren App. No. CA2008-02-029, 2008-Ohio-6195	10
IV. <u>CONCLUSION</u>	12
V. <u>CERTIFICATE OF SERVICE</u>	13
VI. <u>APPENDIX</u>	14
<i>In re G.E.S.</i> , Summit App. No. 24079, 2008-Ohio-4076.....	A-1
<i>State v. Byers</i> , Columbiana App. No. 07 CO 39, 2008-Ohio-5051	A-2
<i>State v. Holloman-Cross</i> , Cuyahoga App. No. 90351, 2008-Ohio-2189	A-3
<i>State v. King</i> , Miami App. No. 08-CA-02, 2008-Ohio-2594	A-4
<i>State v. Lyttle</i> (December 22, 1997), Butler App. No. CA97-03-060, 1997 Ohio App. LEXIS 5705.....	A-5
<i>State v. Williams</i> , Warren App. No. CA2008-02-029, 2008-Ohio-6195	A-6

II. STATEMENT OF THE CASE AND FACTS

On November 13, 2007, George D. Williams was indicted for one count of Unlawful Sexual Conduct with a Minor, pursuant to R.C. 2907.04(A). The Appellant pleaded guilty to the indictment on December 14, 2007. During the plea hearing, the Court explained to the Appellant that there was a new law going into effect regarding reporting requirements for sex offenders. (December 14, 2007 T.p. 4). The Court explained to the Appellant that should the new reporting law apply to the Appellant, he would be able to withdraw his guilty plea if he so wished. *Id.* On January 1, 2008, Ohio's Adam Walsh Act (OAWA) became fully effective. On January 25, 2008, the Appellant filed a motion to be sentenced under the former sex offender reporting statute. This motion was denied, and, on January 31, 2008, the Appellant was classified as a Tier II offender. (January 31, 2008 T.p. 3-4).

The Appellant appealed his sex offender classification, which was affirmed by the Warren County Court of Appeals, Twelfth Appellate District. The Appellant appealed the decision to this Court, which accepted jurisdiction, but stayed briefing pending the outcome of this Court's decision in *State v. Bodyke*. See 4/22/2009 Case Announcements, 2009-Ohio-1820. In *Bodyke*, this Court excised R.C. 2950.031 and R.C. 2950.032 from OAWA because those sections violated the doctrine of the separation of powers. *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424, ¶66, 933 N.E.2d 753. Therefore, this case is currently before the Court to determine if OAWA violates the Ex Post Facto and Due

Process Clauses of the United States Constitution, and the Retroactivity Clause of the Ohio Constitution.

III. ARGUMENT

APPELLEE'S RESPONSE TO APPELLANT'S PROPOSITION OF LAW.

The application of Ohio's Adam Walsh Act does not violate the Ex Post Facto or the Due Process Clauses of the United States Constitution or the Retroactivity Clause of Article II, Section 28 of the Ohio Constitution or the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution; Section 10, Article I of the United States Constitution; or Section 28, Article II of the Ohio Constitution.

Issue Presented:

A. Ohio's Adam Walsh Act does not violate the Retroactivity Clause of Section 28, Article II of the Ohio Constitution.

Section 28, Article II of the Ohio Constitution prohibits the General Assembly from passing retroactive laws. The Appellant argues that because OAWA required a new classification in his case, that it must be unconstitutionally retroactive. Such an argument is in error. Statutes enjoy a presumption that they apply prospectively unless specifically made retroactive. R.C. 1.48. In determining whether a statute is unconstitutionally retroactive, courts must apply a two-part test. *Hyle v. Porter*, 117 Ohio St. 3d 165, 2008-Ohio-542, 882 N.E.2d 899.

Under this test, we first ask whether the General Assembly expressly made the statute retroactive. If it has, then we determine whether the statutory restriction is substantive or remedial in nature. The first part of the test determines whether the General Assembly "expressly made [the statute] retroactive," as required by R.C. 1.48; the second part determines whether it was empowered to do so.

Id. at ¶8, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 522 N.E.2d 489.

1. The mere fact that portions of OAWA are retroactive does not require the determination that OAWA is unconstitutional.

The Appellee concedes that portions of OAWA were intended to apply retroactively. R.C. 2950.031 and R.C. 2950.032 were intended to re-classify sex-offenders who already had a final judgment entered in their cases while R.C. 2950.03 imposed a duty to register and comply with the registration requirements “regardless of when the sexually oriented offense was committed.” However, this Court’s recent decision in *Bodyke* excised most of the retroactive portions of Ohio’s Adam Walsh Act. See *Bodyke*, 2010-Ohio-2424. The remaining portions of the Act are remedial and, therefore, constitutional.

2. Ohio’s Adam Walsh Act is a remedial statute.

Although the retroactive application of a substantive statute violates the Ohio Constitution, the retroactive application of a remedial statute does not. *Hyle*, 2008-Ohio-542, at ¶7. Generally, a statute is substantive if it “takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.” *Slagle v. State* (2008), 145 Ohio Misc. 2d 98, 2008-Ohio-593, ¶28, 884 N.E.2d 109, quoting *Van Fossen*, 36 Ohio St. 3d at 106. Conversely, it is generally true that laws that relate to procedures are ordinarily remedial in nature. *State v. Cook*, 83 Ohio St. 3d 404, 410-411, 1998-Ohio-291, 700 N.E.2d 570.

In the case at bar, the Appellant's claim must fail because OAWA is not a substantive statute. R.C. 2950 *et seq.* primarily concerns procedural technicalities like registration requirements and address verification. Moreover, a criminal conviction is part of the public record; consequently, there is no vested right that would protect convicted sex offenders from these notification provisions. Courts have repeatedly noted that "the harsh consequences of classification and community notification come not as a direct result of the sexual offender law, but instead as a direct societal consequence of the offender's past actions." *State v. Lyttle* (December 22, 1997), Butler App. No. CA97-03-060, 1997 Ohio App. LEXIS 5705 at *33.

Ohio's Adam Walsh Act contains detailed references to the General Assembly's "intent to protect the safety and general welfare of the people of this state" and to "assure public protection," in light of the legislative determination that "sex offenders and child-victim offenders pose a risk of engaging in further sexually abusive behavior even after being released from imprisonment." R.C. 2950.02. In fact, "[t]he General Assembly struck a balance between the privacy expectations of the offender and the paramount governmental interest in protecting members of the public from sex offenders." *Cook*, 83 Ohio St. 3d at 413. The Appellant's arguments that the General Assembly could have chosen a more effective method are unavailing and immaterial to the matter at hand. The General Assembly is free to choose the method used in their attempt to protect the safety and general welfare of its citizens.

As can be seen, Ohio's Adam Walsh Act is a remedial statute not a substantive one. Since it is not a substantive statute, OAWA does not violate the retroactivity clause.

B. Ohio's Adam Walsh Act does not violate the Ex Post Facto Clause of the United States Constitution.

Section 10, Article I of the United States Constitution prohibits ex post facto laws. An ex post facto law "punishes as a crime an act previously committed, which was innocent when done, [or] which makes more burdensome the punishment for a crime, after its commission." *Cook*, 83 Ohio St. 3d at 414, quoting *Beazell v. Ohio* (1925), 269 U.S. 167, 169-170, 46 S.Ct. 68, 70 L.Ed. 216. The Ex Post Facto Clause, however, only applies to criminal statutes. *Cook*, 83 Ohio St. 3d at 415.

The United States Supreme Court has provided a test to determine when legislation has violated the Ex Post Facto Clause. *State v. Holloman-Cross*, Cuyahoga App. No. 90351, 2008-Ohio-2189, ¶18, citing *Smith v. Doe* (2003), 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164. First, the Court must evaluate whether the legislative body expressly intended to create a civil remedial proceeding or a criminal punitive measure. *Holloman-Cross*, 2008-Ohio-2189, at ¶18. If the statute was expressly intended as punishment, then this ends the analysis, and the statute is deemed to have violated the Ex Post Facto Clause. *Id.* However, if the law was expressly intended to be civil in nature, then only "the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.*

To determine whether OAWA is a civil or criminal statute for purposes of an ex post facto analysis, we apply the “intent-effects” test. *Id.* We must first determine whether the legislature meant OAWA to be a civil statute and nonpunitive or to impose punishment. 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’s intent was to enact a regulatory scheme that is civil and nonpunitive, we must then determine whether the statutory scheme is so punitive either in purpose or effect as to negate the legislature’s intent. *Id.*, see also *Doe*, 538 U.S. at 92, 123 S.Ct. 1140, 155 L.Ed.2d 164, and *In re G.E.S.*, Summit App. No. 24079, 2008-Ohio-4076, ¶18.

1. The General Assembly intended for OAWA to be civil and remedial.

“A court must look to the language and the purpose of the statute in order to determine legislative intent.” *Cook*, 83 Ohio St. 3d at 416. OAWA is devoid of any language indicating an intent to punish; instead, the General Assembly has expressly declared that the intent of OAWA is “to protect the safety and general welfare of the people of this state,” which is “a paramount governmental interest,” and that “the exchange or release of [information required by this law] is not punitive.” R.C. 2950.02, see also *Cook*, 83 Ohio St. 3d at 416-417.

Despite this clearly stated intent, the Appellant argues that the General Assembly intended OAWA to be punitive because: (1) an offender’s classification and registration obligations depend solely on the offense committed, rather than the offender’s risk to the community or likelihood of reoffending; (2) OAWA criminalizes an offender’s failure to comply with the

registration and verification requirements; and (3) the General Assembly placed OAWA within Title 29, Ohio's Criminal Code. Such arguments again miss the mark.

The General Assembly's intent in enacting OAWA was not punitive simply because an offender's classification and registration obligations depend on the offense committed. Although the former provisions of R.C. 2950 *et seq.* considered the offender's risk to the community and likelihood of reoffending, the Miami County Court of Appeals, Second Appellate District, has stated that an "attempt to divine punitive intent from the absence of any individualized risk assessment under [Ohio's Adam Walsh Act] is unavailing." *State v. King*, Miami App. No. 08-CA-02, 2008-Ohio-2594, ¶12. Likewise, the United States Supreme Court has recognized that a legislature may enact statutes that take a categorical approach that involves no risk assessment without transforming it into a punitive statute. *Doe*, 538 U.S. at 104, 123 S.Ct. 1140, 155 L.Ed.2d 164.

Furthermore, failure to register was already a punishable offense before former R.C. Chapter 2950. See *Cook*, 83 Ohio St. 3d at 420-421. The former provisions of R.C. 2950 *et seq.* also criminalized an offender's failure to comply with the registration and verification requirements. See former R.C. 2950.06(G)(1); former R.C. 2950.99. Lastly, "[t]he location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." *Doe*, 538 U.S. at 94, 123 S.Ct. 1140, 155 L.Ed.2d 164. The former R.C. Chapter 2950 was within the criminal code as well, yet this Court determined that it was civil in nature. See *State v. Byers*, Columbiana App. No. 07 CO 39, 2008-

Ohio-5051, ¶27. Likewise, the placement of OAWA is, therefore, not dispositive. Since the Appellant has failed to rebut the stated intent of the General Assembly, OAWA is civil and remedial.

2. Ohio's Adam Walsh Act does not have a punitive effect.

Because it is the clear intent of the General Assembly that OAWA is remedial, the next step is to determine if the Appellant has supplied enough evidence to show that the effect of OAWA is punitive. "Only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Doe*, 538 U.S. at 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (internal citations omitted), see also *Cook*, 83 Ohio St. 3d at 418.

Appellant argues the effect of OAWA is similar to the act of shaming used as a punitive measure in colonial times. However, the Supreme Court of the United States has held that dissemination of truthful information, already available to the public, does not have the effect of punishment. *Doe*, 538 U.S. at 99, 123 S.Ct. 1140, 155 L.Ed.2d 164. Even though publication may have the effect of anything between mild embarrassment and social ostracism, this effect is not an integral part of the objective of the regulatory scheme. *Id.* As a result, publication is different than shaming and not punitive in nature. *Id.*

Moreover, this Court has found that "the registration and address verification provisions of R.C. Chapter 2950 are not punitive in nature because they are *de minimis* procedural requirements that are necessary to achieve the goals of R.C. Chapter 2950." *Cook*, 83 Ohio St. 3d at 412. Ohio has had a

registration requirement for sexual offenders since 1963, which has long been considered a valid regulatory technique with a remedial purpose. *Id.* at 411-412. These provisions are remedial because they aim to collect and disseminate information from sexual offender who may reoffend, and, despite the Appellant's claim to the contrary, the registration provisions of OAWA remain *de minimis* procedural requirements. Public dissemination of information is not punishment when it is done in furtherance of a legitimate governmental interest, such as "assuring public protection." Therefore, the Appellant has failed to provide clear evidence that overrides the General Assembly's intent and transforms a civil penalty into a punitive one.

C. Ohio's Adam Walsh Act does not violate the procedural due process rights of the Appellant.

Both the United States Constitution and the Ohio Constitution guarantee the right to procedural due process. Traditionally, to trigger the protections under these clauses, "a sexual offender must show that he was deprived of a protected liberty or property interest as a result of the registration requirements." *State v. Hayden*, 96 Ohio St. 3d 211, 2002-Ohio-4169, ¶6, 773 N.E.2d 502. The protections provided by due process include both notice and the opportunity to be heard. *Id.*, citing *State v. Hochhausler*, 76 Ohio St. 3d 455, 459, 1996-Ohio-374, 668 N.E.2d 457. In order to show that procedural due process rights have been violated, the complaining party bears the burden of proving a deprivation. In order to overcome this presumption, the Appellant must prove beyond a reasonable doubt that the statutory section and constitutional provisions are "clearly incompatible." *Hayden*, 2002-Ohio-4169, at ¶6-¶7, citing *State ex rel.*

Dickman v. Defenbacher (1955), 164 Ohio St. 142, paragraph one of the syllabus, 128 N.E.2d 59.

Appellant's argument centers on the claim that he is categorically barred from residing within 1,000 feet of a school, preschool, or day-care center. Initially, it is important to emphasize something noted by the Twelfth District: there is absolutely no evidence in the record—nor does the Appellant claim—that he currently resides within 1,000 feet of a school, preschool, or day-care center; that he was forced to move from an area due to his proximity to a school, preschool, or day-care center; or that he has any intention of moving to a residence within 1,000 feet of a school, preschool, or day-care center. See *State v. Williams*, Warren App. No. CA2008-02-029, 2008-Ohio-6195, ¶¶77-¶78.

In *State v. Hayden*, the Ohio Supreme Court reviewed the constitutionality of Ohio's sex offender classification, registration and notification laws, specifically R.C. 2950.04(A)(2), a provision which automatically classified the defendant based on the offense he committed. There, the defendant was convicted of rape, and was immediately, and without a hearing, ordered by the trial court to register as a sex offender. *Hayden*, 2002-Ohio-4169, at ¶1. On appeal, this Court affirmed the trial court's ruling that no hearing was required because it was not the trial court's duty to make an individual determination as the statute provided for automatic classification. *Id.* at ¶18. The Court emphasized that because the registration and classification requirements were not punishment, due process was not in play. *Id.* at ¶13-¶14. Therefore, the statute was deemed

constitutional, and the Court ruled that it was proper to automatically classify the defendant. *Id.* at ¶18.

Similar to *Hayden*, the Appellant in this present case does not allege a meritorious due process claim. The Appellant cannot sustain to any extent, certainly not beyond a reasonable doubt, that OAWA is “clearly incompatible” with his constitutional due process rights. To make a valid due process claim, the Appellant must prove that a deprivation of a liberty or property interest has occurred. Unquestionably, a claim of bodily restraint has not been alleged here. Thus, the Appellant must prove that OAWA is punitive in nature. However, the purpose expressly stated in the statute, precedent from various Ohio courts of appeal, and precedent from this Court have all indicated that the Act is in fact not punitive in nature; thus, OAWA does not violate the Appellant’s procedural due process rights.

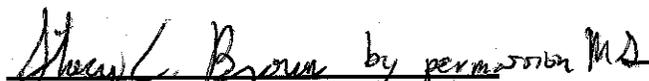
IV. CONCLUSION

Based on the foregoing analyses, the State contends Ohio's Adam Walsh Act does not violate the prohibition against retroactive laws found in the Ohio Constitution; does not violate the Ex Post Facto Clause set forth in the United States Constitution; and does not violate the Appellant's rights to due process. Consequently, the State asserts that the Appellant's proposition of law is without merit and should be overruled by this Court.

Respectfully submitted,



MICHAEL GREER (0084352)
Assistant Prosecuting Attorney



STACY C. BROWN (0085538)
Assistant Prosecuting Attorney
Warren County Prosecutor's
Office
500 Justice Drive
Lebanon, Ohio 45036
(513) 695-1325

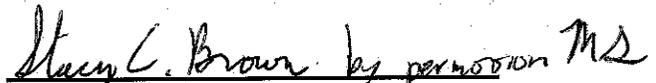
V. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was delivered upon Ms. Katherine A. Szudy at 250 East Broad Street, Suite 1400, Columbus, Ohio 4325 on this 12th day of November, 2010 by ordinary U.S. mail.

Respectfully submitted,



MICHAEL GREER (0084352)
Assistant Prosecuting Attorney



STACY C. BROWN (0085538)
Assistant Prosecuting Attorney
Warren County Prosecutor's
Office
500 Justice Drive
Lebanon, Ohio 45036
(513) 695-1325

VI. APPENDIX



LEXSEE 2008 OHIO APP LEXIS 3442



Caution
As of: Nov 08, 2010

IN RE: G. E. S.

C. A. No. 24079

COURT OF APPEALS OF OHIO, NINTH JUDICIAL DISTRICT, SUMMIT
COUNTY

2008 Ohio 4076; 2008 Ohio App. LEXIS 3442

August 13, 2008, Decided

SUBSEQUENT HISTORY: Discretionary appeal allowed by *In re G.E.S., 2009 Ohio 361, 2009 Ohio LEXIS 258 (Ohio, Feb. 4, 2009)*

PRIOR HISTORY: [**1]

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO. CASE No. DL06-08-003813.

In re G. E. S., 2008 Ohio 2671, 2008 Ohio App. LEXIS 2255 (Ohio Ct. App., Summit County, June 4, 2008)

DISPOSITION: Judgment affirmed.

COUNSEL: LARRY W. ZUKERMAN and S. MICHAEL LEAR, Attorneys at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and PHILIP D. BOGDANOFF, Assistant Prosecuting Attorney, for Appellee.

JUDGES: WHITMORE, Judge. SLABY, P. J., DICKINSON, J., CONCUR.

OPINION BY: BETH WHITMORE

OPINION

DECISION AND JOURNAL ENTRY

WHITMORE, Judge.

[*P1] Appellant, G.E.S., appeals from the order of the Summit County Court of Common Pleas, Juvenile Division, classifying him as a Tier III sexual offender and ordering him to comply with the various registration duties applicable to that classification. This Court affirms.

I

[*P2] G.E.S. was adjudicated a delinquent pursuant to his committing one count of sexual battery, as defined in *R.C. 2907.03(A)(2)*, for conduct occurring on or about April 15, 2006. See *In re G.E.S., 9th Dist. No. 23963, 2008 Ohio 2671* (affirming the lower court's adjudicatory disposition). On January 11, 2008, the trial court held a hearing on G.E.S.'s motion for judicial release and for the purpose of classifying G.E.S. as a sexual offender. G.E.S. filed a motion the morning of the hearing challenging the constitutionality [**2] of the newly enacted Adam Walsh Act ("AWA"). Without ruling on G.E.S.'s AWA challenge, the trial court granted G.E.S.'s motion for judicial release, classified him as a Tier III Sex Offender, and further classified him as a juvenile offender registrant. See *R.C. 2152.83(A)(1)* (ordering court to classify adjudicated delinquent as a juvenile offender registrant if the victim committed a sexually oriented offense on or after January 1, 2002, was sixteen or seventeen at the time of the offense, and not subject to mandatory juvenile offender registrant classification pursuant

A-1

to R.C. 2152.82). The court also ordered that G.E.S. was not a public registry qualified juvenile offender registrant and would not be subject to AWA's community notification provisions.

[*P3] On February 12, 2008, the trial court denied G.E.S.'s motion challenging AWA's constitutionality. On February 13, 2008, G.E.S. filed his notice of appeal in this Court. G.E.S.'s appeal as to his AWA classification is now before this Court and presents four assignments of error for our review. For ease of analysis, we rearrange several of the assignments of error.

II

Assignment of Error Number Two

"THE TRIAL COURT ERRED TO THE PREJUDICE OF [**3] [G.E.S.] BY APPLYING SENATE BILL 10, OHIO'S [AWA], OVER [G.E.S.]'S OBJECTIONS, AND CLASSIFYING [G.E.S.] AS A TIER III SEX OFFENDER[.]"

[*P4] In his second assignment of error, G.E.S. argues that the trial court erred in classifying him pursuant to AWA because AWA is unconstitutional. G.E.S. raises the following four specific challenges: (1) AWA violates Ohio's prohibition on retroactive laws pursuant to *Art. II, Sec. 28 of the Ohio Constitution*; (2) AWA constitutes an unconstitutional ex post facto law pursuant to *Art. I, Sec. 10 of the U.S. Constitution*; (3) AWA violates the separation of powers doctrine; and (4) AWA and *R.C. 2152.01, et seq.*, are unconstitutionally vague.

[*P5] Since legislative enactments enjoy a strong presumption of constitutionality, *In re Farris (2000), 2000 Ohio 6607, [WL] at *2*, citing *State v. Cook (1998), 83 Ohio St.3d 404, 409, 1998 Ohio 291, 700 N.E.2d 570*, we cannot declare a statute unconstitutional until a challenging party demonstrates, beyond a reasonable doubt, that the statute and cited constitutional provisions are incompatible. *Farris 2000 Ohio 6607, [WL] at *2*, citing *Cook, 83 Ohio St.3d at 409*. We review such a constitutional challenge de novo. *Medina v. Swec, 9th Dist. Nos. 03CA0068-M, 03CA0070-M, 03CA0071-M & 03CA0073-M, 2004 Ohio 2245, at P4, 157 Ohio App. 3d 101, 809 N.E.2d 78*.

Retroactive Clause [**4] Challenge

[*P6] Recently, the Ohio Supreme Court noted that two provisions of Ohio law limit the retroactive application of statutes. *Hyle v. Porter, 117 Ohio St.3d 165, 2008 Ohio 542, at P7, 882 N.E.2d 899*. The first is that "[a] statute is presumed to be prospective in its operation

unless expressly made retrospective." *R.C. 1.48*. The second is that "[t]he generally assembly shall have no power to pass retroactive laws[.]" *Ohio Const., Art. II, Sec. 28*. Thus, to determine whether a statute may apply retroactively, this Court must employ a two-part test. See *Hyle at P8*, citing *State v. Consilio, 114 Ohio St.3d 295, 2007 Ohio 4163, at P9-10, 871 N.E.2d 1167*. "[F]irst [we] ask whether the General Assembly expressly made the statute retroactive. If it did, then we determine whether the statutory restriction is substantive or remedial in nature." (Internal citation omitted.) *Hyle at P8*, citing *Consilio at P10*. A retroactive statute that attempts to impair a vested substantive right is unconstitutional. *Consilio at P9*. A retroactive statute will not violate the Retroactivity Clause, however, if it is "merely remedial in nature." *Hyle at P7*, citing *Consilio at P9*. [**5]

[*P7] Based on our review of AWA, we conclude that the Legislature intended the statute to apply retroactively with regard to children adjudicated as delinquent. *R.C. 2152.191* provides as follows:

"If a child is adjudicated a delinquent child for committing a sexually oriented offense ***, if the child is fourteen years of age or older at the time of committing the offense, and if the child committed the offense on or after January 1, 2002, both of the following apply:

(A) Sections 2152.82 to 2152.86 and *Chapter 2950. of the Revised Code* apply to the child and the adjudication.

(B) In addition to any order of disposition it makes of the child under this chapter, the court may make any determination, adjudication, or order authorized under sections 2152.82 to 2152.86 and *Chapter 2950. of the Revised Code* and shall make any determination, adjudication, or order required under those sections and that chapter."

This language expressly makes AWA applicable to offenses committed before AWA's enactment on January 1, 2008.

[*P8] Moreover, other provisions of AWA demonstrate the General Assembly's intention to apply the Act retroactively. For example, *R.C. 2152.83(A)(1)* permits a juvenile court to classify [**6] a child as a juvenile offender registrant and assign that child a sexual offender designation level either at the time of the child's disposition or at the time of the child's release from the department of youth services. When doing so the court must: 1)

find that "[t]he act for which the child *is or was* adjudicated *** is a sexually oriented offense *** committed *on or after January 1, 2002*," (Emphasis added.) *R.C. 2152.83(A)(1)(a)*, and 2) determine, after holding a hearing, whether the child is a Tier I, Tier II, or Tier III sex offender. *R.C. 2152.83(A)(2)* (including only the possibility of tier designations and not pre-AWA designations).

[*P9] Accordingly, the current version of *R.C. 2152.83(A)(1)* applies to a child whose: (1) sexually oriented offense took place on or after January 1, 2002, but before AWA's enactment; (2) adjudication for the same also took place before AWA's enactment; and (3) whose classification did not take place until after AWA's effective date. AWA also applies to delinquent children, previously classified under pre-AWA law, who were confined in an institution of the department of youth services for a sexually oriented offense as of December 1, 2007. *R.C. 2950.032* [**7] (The attorney general must reclassify confined delinquent children who have previously been classified as juvenile offender registrants). In addition, "failure to comply with the registration and verification requirements constitutes a crime *regardless* of when the underlying offense was committed." (Emphasis added.) *Cook, 83 Ohio St.3d at 410*; *R.C. 2950.06(G)(1)*; *R.C. 2950.99*. "Consequently, we find a clearly expressed legislative intent that *R.C. Chapter 2950* be applied retrospectively." *Cook, 83 Ohio St.3d at 410*.

[*P10] The next issue we must address is whether AWA, as it pertains to juveniles adjudicated as delinquent, is substantive or remedial in nature. See *Hyle at P7*. The retroactive application of a substantive statute offends the Ohio Constitution while the retroactive application of a remedial statute does not. *Id.* In *Cook*, the Ohio Supreme Court explained the distinction as follows:

"A statute is 'substantive' if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation, or liabilities as to a past transaction, or creates a new right. Conversely, remedial laws are those affecting only the remedy provided, [**8] and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right. A purely remedial statute does not violate *Section 28, Article II of the Ohio Constitution*, even if applied retroactively." (Internal citations omitted.) *Cook, 83 Ohio St.3d at 411*.

The Supreme Court analyzed the constitutionality of the former *R.C. Chapter 2950* and determined that the registration and verification provisions of that Chapter were remedial in nature. *Id. at 413*. Consequently, in reviewing whether AWA is remedial or substantive in nature, we need only consider the new provisions that were absent from *R.C. Chapter 2950* when the Supreme Court issued its decision in *Cook*. Additionally, we need not address the community notification, victim notification, or public registry-qualified juvenile offender provisions of AWA as the juvenile court did not impose any of these upon G.E.S.

[*P11] G.E.S. argues that AWA violates the Retroactivity Clause because it imposes an affirmative duty to register with the sheriff upon him; it imposes a felony as a penalty should he fail to register with the sheriff every ninety days; and it stigmatizes him by requiring him to provide personal [**9] information such as an address, vehicle description, email address, and other items. We disagree.

[*P12] As to G.E.S.'s arguments that AWA unconstitutionally imposes an affirmative duty to register with the sheriff upon him and a corresponding penalty for failure to do so, we find that the Supreme Court's decision in *Cook* resolves these issues. Both the duty to personally register and the corresponding penalty for failing to do so existed in pre-AWA Chapter 2950. In reviewing that law, the Supreme Court refused to hold that a change in the frequency or duration of a sex offender's reporting requirements transformed Chapter 2950 from a remedial statute to a substantive one. *Cook, 83 Ohio St.3d at 412*. Rather, the Court found that "the registration and address verification provisions of *R.C. Chapter 2950* are de minimis procedural requirements that are necessary to achieve the goals of *R.C. Chapter 2950*." *Id.* This was true even though pre-AWA law criminalized an offender's failure to comply with its registration and verification requirements. See *id. at 410-12*; former *R.C. 2950.06(G)(1)*; former *R.C. 2950.99*.

[*P13] G.E.S. fails to explain how the foregoing pre-AWA provisions differ from AWA's provisions [**10] such that *Cook's* logic no longer applies. See *App.R. 16(A)(7)*. While the frequency and duration of AWA's registration and verification requirements are stricter than the prior law in certain instances, these requirements are still merely procedural at heart. See *Cook, 83 Ohio St.3d at 411*, citing *Van Fossen v. Babcock & Wilcox Co. (1988)*, *36 Ohio St.3d 100, 107-08, 522 N.E.2d 489* (noting that laws relating to procedures are generally remedial in nature despite the occasional substantive effect).

[*P14] Since registration itself does not per se offend the Retroactivity Clause, we next consider whether

the content of the required registration exceeds constitutional bounds. AWA requires a sex offender to disclose more information than did pre-AWA law. Formerly, a delinquent child classified as a sexual predator had to give the sheriff a photograph and a signed form containing the following information: a current residence address; the name of any current employer, or future employer if known at the time of registration; the identification license plate number of each vehicle owned and any vehicle registered in the child's name; a statement that the child was adjudicated a sexual predator; and any other information [**11] required by the bureau of criminal identification and investigation. Former *R.C. 2950.04*.

[*P15] Under AWA, a delinquent child classified as a Tier III offender must additionally provide: copies of travel and immigration documents; any aliases; the child's social security number, date of birth, and any alternate social security numbers or dates of birth; a statement that the child is in the custody of the department of youth services, if the child registers before his confinement; additional employment information such as the general area where the child is or will be employed; additional vehicle information such as any vehicles the child operates as part of his employment, any vehicles regularly available to him, a description of where each vehicle is "habitually parked, stored, docked, or otherwise kept[.]" and a photograph of each vehicle if the bureau of identification and investigation requires it; any commercial driver's license number or state identification card number; a DNA specimen, the name of the sexually oriented offense committed, and a certified copy of the text of that offense, if the child committed a sexually oriented offense in another state or court; each professional [**12] and occupational license, permit, or registration of the child; any email addresses, internet identifiers, or telephone numbers registered to or used by the child; and any other information required by the bureau of criminal identification and investigation. *R.C. 2950.04*. The child must also send a written notice of intent to reside in a county to the sheriff of that county no less than twenty days before the child begins to reside there. *R.C. 2950.04(G)*. This duty to report to the sheriff applies regardless of whether the court ordered the child to comply with the community notification provision embodied in *R.C. 2950.11* (listing the persons and organizations that the sheriff must notify of an offender's presence including his name, address, and photograph). Under pre-AWA law, only children subject to community notification requirements had a duty to send notices of intent. Former *R.C. 2950.04(G)*.

[*P16] A remedial law may have some substantive effect without altering its overarching remedial purpose. *Cook*, 83 *Ohio St.3d* at 411, citing *Van Fossen*, 36 *Ohio*

St.3d at 107-08. Accordingly, despite the notable increase in disclosures required by a child sex offender under AWA, we do not find that [**13] quantum increase unconstitutional. It does not change AWA from a remedial to a substantive law. It is significant to our analysis that the additional disclosures required by AWA enable law enforcement officials to protect the public without making such information public. See *R.C. 2950.08*; *R.C. 2950.13* (requiring the attorney general to enter the child's information into a state registry, but restricting access to that registry to law enforcement officials and their representatives). AWA prohibits the bureau of criminal identification and investigation from posting what is arguably the most sensitive information, such as social security numbers, dates of birth, drivers license numbers, telephone numbers, and email addresses, on its public database. See *R.C. 2950.13(A)(11)*. Moreover, none of the aforementioned information will be publicly disclosed if the child is not a public registry-qualified juvenile. *R.C. 2950.13(A)(11)*. To be a public registry-qualified juvenile, a child must have been previously adjudicated for a sexually oriented or child-victim oriented offense. *R.C. 2152.82(A)(3)*. Thus, the Legislature restricted the public reporting requirements to juvenile recidivists; those [**14] who arguably pose the greatest risk and about whom society has the greatest interest in obtaining information.

[*P17] Moreover, in *Cook*, the Supreme Court noted the following:

"[A]n allegation that government dissemination of information or government defamation has caused damage to reputation, even with all attendant emotional anguish and social stigma, does not in itself state a cause of action for violation of a constitutional right; infringement of more 'tangible interests' must be alleged as well. Further, [t]he harsh consequences [of] classification *** come not as a direct result of the sexual offender law, but instead as a direct societal consequence of [the juvenile's] past actions." (Internal citations and quotations omitted.) *Cook*, 83 *Ohio St.3d* at 413.

While we recognize that AWA has a significant impact upon the lives of sex offenders, that impact does not offend Ohio's prohibition on retroactive laws. Public safety is the driving force behind AWA. See *R.C. 2950.02*. We have no reason to doubt that the additional disclosures, uniformly required, properly assist government in its pursuit of public safety. As such, "[w]e cannot conclude that the Retroactivity Clause bans the compilation

[**15] and dissemination of truthful information that will aid in public safety." *Cook*, 83 *Ohio St.3d* at 413-14. G.E.S.'s challenge to AWA based on the *Ohio Constitution's Retroactivity Clause* lacks merit.

Ex Post Facto Challenge

[*P18] Section 10, Article I of the U.S. Constitution prohibits the States from enacting any ex post facto laws. If a statute criminalizes an act that was innocent when performed or makes the punishment for that completed act more burdensome, then the statute is an unconstitutional ex post facto law. *Cook*, 83 *Ohio St.3d* at 414, quoting *Beazell v. Ohio* (1925), 269 *U.S.* 167, 169-70, 46 *S. Ct.* 68, 70 *L. Ed.* 216. To determine whether a statute constitutes an unconstitutional ex post facto law, a reviewing court must conduct a two-tiered analysis. *Smith v. Doe* (2003), 538 *U.S.* 84, 92, 123 *S. Ct.* 1140, 155 *L. Ed. 2d* 164. First, the court must ask whether the legislature intended for the statute to be civil and non-punitive or criminal and punitive. *Id.* See, also, *Cook*, 83 *Ohio St.3d* at 415. The Ex Post Facto Clause only prohibits criminal statutes and punitive schemes. *Doe*, 538 *U.S.* at 92. 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. [**16] *Id.* 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. *U.S. v. Ward* (1980), 448 *U.S.* 242, 248-49, 100 *S. Ct.* 2636, 65 *L. Ed. 2d* 742. 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. See *Doe*, 538 *U.S.* at 92.

[*P19] In assessing legislative intent, this Court first must look to see if the legislature "indicated either expressly or impliedly a preference for one label or the other." *Id.* at 93, quoting *Hudson v. U.S.* (1997), 522 *U.S.* 93, 99, 118 *S. Ct.* 488, 139 *L. Ed. 2d* 450. The General Assembly did not include any reference to punishment in its public policy declaration. See *R.C. 2950.02(A)*. *R.C. 2950.02(A)* simply discusses the importance of disseminating information to the public and to communities. AWA specifically provides the following with regard to the General Assembly's intent in enacting the statutory scheme:

"[I]t is the general assembly's intent to protect the safety and general welfare of the people of this state. The general assembly further [**17] declares that it is the policy of this state to require the exchange in accordance with this chapter of

relevant information about sex offenders and child-victim offenders among public agencies and officials and to authorize the release in accordance with this chapter 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 and that the exchange or release of that information is not punitive." *R.C. 2950.02(B)*.

Accordingly, the legislature expressly indicated a preference for a civil and non-punitive statutory scheme. See *Doe*, 538 *U.S.* at 92.

[*P20] G.E.S. argues that the legislature intended AWA to be punitive (despite the non-punitive language in *R.C. 2950.02(B)* quoted above) because: (1) the legislature placed AWA in the criminal Title of the Revised Code; (2) AWA criminalizes a sex offender's failure to register or verify the same; and (3) unlike pre-AWA law, AWA is not narrowly tailored to address a public concern. We disagree.

[*P21] In *Doe*, the United States Supreme Court analyzed Alaska's Sex Offender Registration Act ("SORA"). The Alaska Legislature also placed SORA's registration provisions [**18] in the criminal procedure section of its code. *Id.* at 94. In determining that SORA's placement was not dispositive of the Alaska Legislature's intent, the Supreme Court noted that "[t]he location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." *Id.* The Supreme Court further noted that Alaska's criminal procedure Title contained many provisions, which were unrelated to criminal punishment. *Id.* at 95 (describing laws in the criminal code that provided a procedure for the disposition of recovered and seized property, the protection of victims and witnesses, the governance of civil post-conviction actions, and other non-punitive provisions related to criminal administration).

[*P22] Based on the Supreme Court's decision in *Doe*, we find that AWA's placement in Title 29 does not establish the legislature's intent to make AWA punitive. Title 29 also contains numerous provisions, which are unrelated to criminal punishment. See *id.*; *R.C. 2901.30* through *R.C. 2901.42* (governing procedures regarding missing children and missing persons); *R.C. 2953.02* (governing appeals and the finality of orders); *R.C. 2930.11* (governing the treatment of a victim's [**19] property); *R.C. 2953.71* through *R.C. 2953.84* (governing DNA testing eligibility and procedure for inmates including laboratory selection, qualification, and preservation of samples); *R.C. 2969.21* through *R.C. 2969.27* (governing civil actions or appeals by inmates); and *R.C.*

2981 (governing forfeiture of property, including civil forfeiture). Furthermore, we do not believe that AWA's placement negates the legislature's expressly indicated non-punitive intent. See *R.C. 2950.02; Doe, 538 U.S. at 94* (indicating that statutory placement alone does not transform a civil remedy).

[*P23] As to G.E.S.'s argument that AWA's criminalization of an offender's failure to register or verify his registration shows that AWA is punitive, we note that we have already determined that these provisions do not impact AWA's remedial nature. The pre-AWA statutory scheme also criminalized an offender's failure to comply with the registration and verification requirements. See former *R.C. 2950.06(G)(1)*; former *R.C. 2950.99*. The Ohio Supreme Court specifically noted these provisions in its retroactivity discussion, but did not identify these provisions as presenting a problem in its *Ex Post Facto* analysis. See *Cook, 83 Ohio St.3d at 410-17*. [*20] See, also, *Doe, 538 Ohio St.3d at 101-02* (noting that criminal prosecution for failure to comply with SORA's reporting requirements is a proceeding separate from the individual's original offense). Furthermore, G.E.S. has not provided any law that demonstrates that AWA's penalties are more burdensome than the former penalties or make formerly innocent conduct criminal. See *Bezell, 269 U.S. at 169-70*. Thus, his argument with regard to AWA's penalty provisions lacks merit.

[*P24] Lastly, G.E.S. argues that AWA demonstrates the legislature's punitive intent because, unlike pre-AWA law, AWA is not narrowly tailored. G.E.S. avers that the Supreme Court upheld the pre-AWA statutory scheme in *Cook* because pre-AWA's provisions were directly tied to an offender's ongoing threat in the community. He argues that AWA no longer embodies this narrow focus because it now applies classifications and registration requirements based solely on the underlying offense, rather than on a demonstrated risk of recidivism by a particular offender and/or the potential risk to a specific community -- each of which might be alleviated by public notice of the offender's presence. Such an argument assumes, incorrectly, [*21] that the potential for recidivism and/or the effectiveness of public notice are the only legitimate non-punitive rationales for classification and registration requirements. We reject that analysis, first because of the inherent difficulty in predicting recidivism in a particular offender¹ and second because notice depends upon knowledge of the offender's presence in a given community. History teaches us that predictions of recidivism are not sufficiently reliable and that discovery of an offender's presence in a community often comes tragically too late. AWA's provisions are directly related to the second problem and seek to enhance law enforcements' awareness of the presence of potential offenders. The utility of such

knowledge is obvious and its use during a particular criminal investigation is no more suspect than use of the many data base resources presently available to law enforcement. While the enhancements in AWA cannot guarantee that sexual offenders will be identified before committing another offense, or caught thereafter, such enhancements have a rational and sufficient nexus to community safety and the public good.

1 See Ohio Office of Criminal Justice Services, *Report [**22] to the Ohio Criminal Sentencing Commission: Sex Offenders* (January 2006), available at: <http://www.ocjs.state.oh.us/Research/Sex%20Offender%20Report%20pdf.pdf> (explaining that while up to eight-five percent of sex offenders are first time offenders, offenders generally admitted "to having committed multiple offenses prior to being arrested" for which they were never caught and generally underreported the sex offenses that they committed). See, also, Scott I. Vrieze & William M. Grove, *Predicting Sex Offender Recidivism. I. Correcting for hem Overselection and Accuracy Overestimation in Scale Development. II. Sampling Error-Induced Attenuation of Predictive Validity Over Base Rate Information*, 32 *Law & Hum. Behav.* 266 (June 2008) (discussing various problems in methods used to calculate sex offender recidivism rates and the corresponding problems with the reliability of those results).

[*P25] The Ohio Supreme Court has concluded that the General Assembly's intent when enacting the pre-AWA statutory scheme was non-punitive as "evidenced by the General Assembly's narrowly tailored attack on this problem." *Cook, 83 Ohio St.3d at 417*. The Court specifically noted that pre-AWA notification provisions [*23] only applied automatically to sexual predators and that its registration provisions only sought to distribute information to those "most likely to be potential victims." *Id.* Our review of AWA as it applies to juveniles adjudicated as delinquents for sexually oriented offenses leads us to conclude that the General Assembly drafted AWA with a rational nexus to known deficiencies in the existing statutory framework and in a way that further enhances public safety.

[*P26] Under AWA, delinquent children receive multiple opportunities for reclassification. A delinquent child's classification must be reassessed upon the completion of his disposition. *R.C. 2152.84(A)(1)*. Furthermore, the delinquent child may petition the court for a mandatory hearing to reassess his classification after the passage of a designated number of years. *R.C. 2152.85(A)-(B)*. If a court classifies a delinquent child as a Tier III offender, the court has discretion whether to

impose victim and community notification provisions. R.C. 2152.83(C)(2). Moreover, delinquent children are only required to register their information on a public database if a court determines that they are public registry-qualified juveniles. R.C. 2950.13(A)(11). [**24] A public-registry qualified designation means that the juvenile has at least one prior sexually oriented or child-victim oriented offense. R.C. 2152.82(A). Thus, the legislature limited public registration to juvenile recidivists. We conclude that the legislature crafted AWA's enhancements narrowly when adding to the former statutory scheme. Accordingly, G.E.S.'s argument lacks merit, and we find that the legislature intended for AWA to be a civil, non-punitive scheme. See *Doe*, 538 U.S. at 92.

[*P27] We next must consider whether AWA has a punitive effect such that its effect negates the legislature's intent. *Id.* "Only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." (Internal quotations omitted). *Id.*, quoting *Hudson*, 522 U.S. at 100, quoting *Ward*, 448 U.S. at 249. Since the determination of "whether a retroactive statute is so punitive as to violate the constitutional prohibition against ex post facto laws is a 'matter of degree'[,]" the United States Supreme Court has "fashioned useful guideposts for determining whether a statute is punitive." *Cook*, 83 Ohio St.3d at 418, citing *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644. [**25] The guideposts are as follows:

"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[.]" (Footnotes omitted.) *Kennedy*, 372 U.S. at 168-69.

While useful, the *Mendoza-Martinez* factors are "neither exhaustive nor dispositive[.]" *Doe*, 538 U.S. at 97, quoting *Ward*, 448 U.S. at 249.

[*P28] G.E.S. argues that AWA subjects him to unreasonable public shame and humiliation and places significant restraints on his liberty. He argues that AWA's "obligations and burdens" apply regardless of whether they are necessary and impose "substantial and

intrusive registration requirements" that were not in effect at the time that he committed his crime. Accordingly, he argues that the overall effect of AWA transforms the statutory scheme into a punitive, [**26] rather than a non-punitive one. We disagree.

[*P29] In assessing the affirmative disability or restraint factor found in *Kennedy*, the United States Supreme Court determined that while an offender's underlying conviction might impose certain disabilities upon him, SORA's provisions did not. *Doe*, 538 Ohio St.3d at 100-02. The Supreme Court reasoned that while SORA required offenders to notify authorities if they changed address, place of employment, or physical appearance, the statute did not require offenders "to seek permission to do so." *Id.* at 101. Offenders were free to make these changes so long as they forewarned authorities. *Id.* While the Supreme Court did not have to consider the matter of in-person registration, as SORA contained no such requirement, the Ohio Supreme Court upheld the pre-AWA statutory scheme's in-person registration requirements in *Cook*. *Cook*, 83 Ohio St.3d at 418. The Court found that "[t]he act of registering does not restrain the offender in any way. Registering may cause some inconvenience[, but] *** the inconvenience is comparable to renewing a driver's license." *Id.*

[*P30] As with the statutory schemes in *Doe* and *Cook*, AWA does not impose any unconstitutional disabilities [**27] or restraints upon delinquent children who are classified as sexually oriented offenders. Delinquent children must provide and continually update certain required information, but AWA does not restrain them or otherwise forbid them from engaging in activities. Certainly, delinquent children may feel humiliated or ostracized as a result of AWA's reporting requirements, but freedom from humiliation and other disagreeable consequences is not a constitutional right. Such humiliation or ostracism may flow naturally from an underlying conviction (including convictions for non-sexually oriented offenses) regardless of AWA's applicability. We do not ignore the potential impact of AWA, but "whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the sting of punishment." (Internal quotations omitted.) *Id.*, quoting *Dept. of Revenue of Montana v. Kurth Ranch* (1994), 511 U.S. 767, 777, fn. 14, 114 S. Ct. 1937, 128 L. Ed. 2d 767, quoting *U.S. v. Halper* (1989), 490 U.S. 435, 447, 109 S. Ct. 1892, 104 L. Ed. 2d 487, overruled on other grounds, *Hudson v. U.S.* (1989), 490 U.S. 435, 440, 109 S. Ct. 1892, 104 L. Ed. 2d 487. Consequently, we cannot find that this factor weighs in favor of AWA having a punitive effect.

[*P31] When reviewing the [**28] historical nature of pre-AWA law, the Ohio Supreme Court noted that "[r]egistration has long been a valid regulatory tech-

nique with a remedial purpose." *Cook*, 83 Ohio St.3d at 418. The Court further noted that historically the "dissemination of such information in and of itself *** has never been regarded as punishment when done in furtherance of a legitimate governmental interest." *Id.* at 419, quoting *E.B. v. Verniero* (C.A.3, 1997), 119 F.3d 1077, 1099-1100. The United States Supreme Court echoed this logic in *Doe. Doe*, 538 U.S. at 98 ("Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment."). *Doe* rejected the argument that SORA's registration and notification provisions resembled traditional colonial shaming punishments, which were publicly displayed for the purpose of ridiculing the offender rather than informing the public. *Id.* at 98-99. The Supreme Court noted that not even SORA's Internet notification provision supported the contention that SORA unconstitutionally subjected offenders to public shaming. *Id.* at 99. While the "Internet is greater than anything which could have been designed in colonial [**29] times[,] *** [t]he purpose and the principal effect of notification are *** not to humiliate the offender." *Id.* "Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of valid regulation." *Id.*

[*P32] We do not find that AWA's provisions vary so greatly from those in *Cook* and *Doe* that the provisions would have been historically regarded as criminal punishment. See *Kennedy*, 372 U.S. at 168-69. As previously discussed, AWA does not require that all juvenile sexual offenders comply with its registration and notification provisions. AWA does not permit or mandate that all private information be publicly available. Moreover, there is no evidence that had modern information technologies and communications been available to our ancestors, the use of such media would have been considered punitive as opposed to informative and necessary for public safety. See *Doe*, 538 U.S. at 99 (noting that SORA's web site did not allow the public to post comments about offenders or otherwise give the public a mechanism to shame them). Consequently, this *Mendoza-Martinez* factor weighs in favor of AWA having a non-punitive effect.

[*P33] As to whether [**30] AWA requires a finding of scienter, we find that the result in *Cook* controls our analysis. In *Cook*, the Ohio Supreme Court held the following:

"There is no scienter requirement indicated in *R.C. 2950.04*. The General Assembly requires that [delinquent children] 'shall register' pursuant to *R.C. 2950.04(A)*. The act of failing to register alone, without more, is sufficient to trig-

ger criminal punishment provided in *R.C. 2950.99*. Accordingly, we find that *R.C. 2950.04* does not require scienter." *Cook*, 83 Ohio St.3d at 419-20.

AWA also lacks a scienter requirement and imposes a criminal punishment merely upon a delinquent child's failure to register. *R.C. 2950.04(A)*; *R.C. 2950.99*. Accordingly, this *Mendoza-Martinez* factor weighs in favor of AWA having a non-punitive effect.

[*P34] *Cook* also controls our determination of the fifth *Mendoza-Martinez* factor regarding whether the targeted behavior was already a crime under the former law. *Cook* provides as follows:

"Even prior to the promulgation of the current version of *R.C. Chapter 2950*, failure to register was a punishable offense. Thus, any such punishment flows from a failure to register, a new violation of the statute, not from a past sex offense. [**31] In other words, the punishment is not applied retroactively for an act that was committed previously, but for a violation of law committed subsequent to the enactment of the law." (Internal citations omitted.) *Cook*, 83 Ohio St.3d at 420-21.

As in *Cook*, the pre-AWA scheme made failing to register a punishable offense. "Accordingly, the behavior to which *R.C. Chapter 2950* applies is already a crime." *Id.* at 421.

[*P35] We next consider whether AWA promotes the traditional aims of punishment-retribution and deterrence. See *Kennedy*, 372 U.S. at 168-69. "Any number of governmental programs might deter crime without imposing punishment." *Doe*, 538 U.S. at 102. Furthermore, "even if one assumes that [a statute] would have some deterrent effect, deterrence alone is insufficient to make a statute punitive." *Cook*, 83 Ohio St.3d at 420. In applying these principles, the Ohio Supreme Court refused to find that the pre-AWA statutory scheme promoted traditional aims of punishment and deterrence. The scheme was not retributive in nature because it required offenders to comply for informational purposes, not merely to "seek vengeance for vengeance's sake[.]" *Id.* Furthermore, the Court doubted that the scheme [**32] had a deterrent effect because "[a]rguably, sexual predators are not deterred even by the threat of incarceration." *Id.* Our review of AWA convinces us that *Cook* applies to the vast majority of its provisions, which are targeted to maximize the flow of information to the public. AWA

attempts to "solve a problem" by keeping the public well informed of possible sources of danger. See *id. at 420*, quoting *Artway v. New Jersey Atty. Gen. (C.A.3, 1996)*, 81 F.3d 1235, 1255. We cannot say that any of the additions to the pre-AWA statutory scheme, which are comprised mainly of additional demands for information from offenders, transform the scheme into one that has either a noticeable retributive or deterrent effect.

[*P36] G.E.S. argues to the contrary and asserts that AWA is punitive because it classifies offenders by offense rather than likelihood to reoffend. Initially, we note that the United States Supreme Court considered this same issue in *Doe*. SORA also classified offenders by offense "without regard to their future dangerousness." *Doe*, 538 U.S. at 103. In upholding this structuring, the Supreme Court said:

"The Ex Post Facto Clause does not preclude a State from making reasonable categorical [**33] judgments that conviction of specified crimes should entail particular regulatory consequences. *** The State's determination to legislate with respect to convicted sex offenders as a Class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the Ex Post Facto Clause." *Id. at 103-04*.

[*P37] Moreover, G.E.S. misinterprets AWA. AWA vests a juvenile court with *full discretion* to determine whether to classify a delinquent child as a Tier I, Tier II, or Tier III offender. See *R.C. 2950.01(E)-(G)*. *R.C. 2950.01(E)* defines a "Tier I sex offender" as one of the following:

"(3) A sex offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing *any sexually oriented offense and who a juvenile court*, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier I sex offender/child-victim offender relative to the offense." (Emphasis added.)

R.C. 2950.01(F) and *R.C. 2950.01(G)* contain the identical provision with the exception of substituting the terms "Tier II sex offender" and "Tier III sex offender" for the references to "Tier I sex offender." None [**34] of the other provisions in *R.C. 2950.01(E)* through *R.C. 2950.01(G)*, which define the Tier I, Tier II, and Tier III

categories for adult offenders, depend on a court classifying an offender relative to any sexually oriented offense. The adult provisions define AWA's Tier levels solely by offense, such that the commission of one of the listed offenses results in a mandatory imposition of the applicable Tier level for that offense. Thus, our reading of AWA convinces us that the legislature intended to give juvenile courts the discretion to determine which Tier level to assign to a delinquent child, regardless of the sexually oriented offense that the child committed. AWA does not forbid a juvenile court from taking into consideration multiple factors, including a reduced likelihood of recidivism, when classifying a delinquent child. Accordingly, G.E.S.'s argument that in his case AWA is punitive because it imposes classifications without regard to potential recidivism lacks merit.²

2 In so deciding, we do not imply that the mandatory nature of adult classification is necessarily unconstitutional. See discussion, *supra*, quoting *Doe*, 538 U.S. at 103-04.

[*P38] The next consideration is whether [**35] AWA serves any alternate non-punitive purpose. See *Kennedy*, 372 U.S. at 168-69. The Ohio Supreme Court determined in *Cook* that public safety is a permissible alternate purpose. *Cook*, 83 Ohio St.3d at 421. The Court held that "protection of the public is a paramount governmental function enforced through the police power *** [and that] [t]he fact that released sex offenders have a high rate of recidivism demands that steps be taken to protect members of the public against those most likely to reoffend." *Id.* While *Cook* analyzed public safety in the context of a "high rate of recidivism," it does not necessarily follow that public safety is an impermissible purpose absent evidence of recidivism. Before the enactment of AWA, the Ohio Supreme Court favored presentation of expert testimony on the statutory requirement regarding the likelihood of recidivism. See *State v. Eppinger (2001)*, 91 Ohio St.3d 158, 163, 2001 Ohio 247, 743 N.E.2d 881. However, reliable expert testimony meeting the criteria of *Daubert* remains an elusive, and we suggest a costly, goal.³ The General Assembly has, in AWA, abandoned that laudable, but not yet attainable requirement for adult sexual offenders. Yet, with regard to juvenile offenders AWA [**36] permits consideration of recidivism in addition to the alternate remedial purpose of public safety. Moreover, in our view, AWA improves public safety by giving law enforcement additional timely information which is updated for a longer period of time. Accordingly, public safety weighs in favor of AWA having a non-punitive intent and non-punitive effect. See *Doe*, 538 U.S. at 92.

3 See Nicholas R. Barnes, *The Polygraph and Juveniles: Rehabilitation or Overreaction?* A

Case Against the Current Use of Polygraph Examinations on Juvenile Offenders, 39 U. Tol. L. Rev. 669 (2008) (discussing the reliability and efficacy of polygraph examinations performed on juvenile sex offenders); *In re D.S.*, 111 Ohio St.3d 361, 2006 Ohio 5851, at P7-16, 856 N.E.2d 921 (rejecting the juvenile court's order that a juvenile pass a "full disclosure polygraph" as a condition to probation while noting the "ongoing debate about the success of polygraph use with juvenile sex offenders").

[*P39] The last *Mendoza-Martinez* factor questions the excessiveness of the statutory scheme at issue in light of its alternate purpose. *Kennedy*, 372 U.S. at 168-69. In upholding the pre-AWA statutory scheme, the Ohio Supreme Court focused on the scheme's [**37] narrowness. *Cook*, 83 Ohio St.3d at 421-23. The Court reasoned that the scheme imposed the harshest registration and notification requirements upon the most probable recidivists and placed the vast majority of information solely in the hands of law enforcement officials. *Id.* at 421-22. Further, the Court noted that the scheme provided a mechanism for offenders to submit evidence and petition to have their classification label and its obligations removed. *Id.* The Court thus concluded that the pre-AWA statutory scheme was not excessive in light of its protective purpose. *Id.* at 423.

[*P40] With regard to delinquent children adjudicated as sexually oriented offenders, AWA shares many of the same attributes as the pre-AWA statutory scheme. As previously noted, juvenile courts have the discretion to determine which Tier classification should apply to delinquent children and may account for factors such as dangerousness in their classifications. See *R.C. 2950.01(E)-(G)*. Delinquent children also have multiple opportunities to challenge their classifications and to request that the court either assign them a new Tier level or remove their sex offender label entirely. See *R.C. 2152.84*; *R.C. 2152.85*. [**38] Although AWA requires delinquent children to submit more personal information in order to comply with registration requirements, the public has limited access to this information. See *R.C. 2950.13*. Furthermore, none of the delinquent child's information will be publicly available unless the juvenile court first determines that the child is a public registry-qualified juvenile. See *R.C. 2950.13(A)(11)*; *R.C. 2152.82* (defining public registry-qualified juvenile). Based on our review of the applicable portions of AWA, we cannot conclude that its provisions extend past those "reasonably necessary for the intended purpose of protecting the public." *Cook*, 83 Ohio St.3d at 423. Accordingly, we hold that AWA is not excessive with regard to its alternate purpose. See *Kennedy*, 372 U.S. at 168-69.

[*P41] In sum, this Court finds that AWA does not have an unconstitutional punitive intent/purpose or effect with respect to delinquent children adjudicated as sexually oriented offenders. See *Doe*, 538 U.S. at 92 (noting that to comport with the Ex Post Facto Clause, a retroactive statutory scheme must be civil and non-punitive in light of both the legislature's intent in enacting it and its effect upon enactment). [**39] G.E.S.'s argument that AWA violates the Ex Post Facto Clause lacks merit.

Separation of Powers Challenge

[*P42] G.E.S. argues that AWA violates the separation of powers doctrine and "unconstitutionally strip[s]" the judiciary of its discretion because it classifies delinquent children based solely on their offenses. He argues that AWA essentially gives the legislature the power to classify delinquent children because the Act removes the judiciary's authority to consider any factors other than the delinquent child's offense when conducting a classification. We have already determined, however, that AWA gives juvenile courts full discretion in determining what Tier level to assign delinquent children and does not prohibit those courts from considering the likelihood of the child to reoffend or any other relevant factor. See *R.C. 2950.01(E)-(G)*. Moreover, AWA vests the juvenile court with the discretion to decide whether the juvenile should be subject to the Act's community and victim notification provisions. See *R.C. 2152.83(C)(2)*. Consequently, G.E.S.'s separation of powers argument is overruled.

Void-for-Vagueness Challenge

[*P43] To prove that a statute is unconstitutionally vague, a party must demonstrate [**40] that the statute is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *State v. Schneider*, 9th Dist. No. 06CA0072-M, 2007 Ohio 2553, at P6, quoting *Coates v. Cincinnati* (1971), 402 U.S. 611, 614, 91 S. Ct. 1686, 29 L. Ed. 2d 214. The challenger bears the burden of showing that upon examination of the statute a person of ordinary intelligence would be unable to understand what the law requires of him. *Schneider* at P6, citing *State v. Anderson* (1991), 57 Ohio St.3d 168, 171, 566 N.E.2d 1224.

[*P44] G.E.S. argues that AWA and *R.C. 2152.01, et seq.* are unconstitutionally vague on their face and as applied. He argues that a reasonable person would not understand what criteria AWA employs for determining Tier classifications. In making this argument, G.E.S. concedes that AWA gives a juvenile court the discretion to choose the Tier level that will apply to a delinquent child. Thus, he argues, a delinquent child has no fore-

warning as to which Tier level a juvenile court will select or what criteria the court will employ in its selection.

[*P45] We agree with G.E.S. that AWA does not contain an express list [**41] of factors that the juvenile court must consider in classifying a delinquent child. We also agree that AWA gives juvenile courts a wide range of discretion in choosing which classification level to assign to delinquent children. We do not agree, however, that these truisms make AWA unconstitutionally vague. Although a juvenile court has the discretion to choose which classification applies to a delinquent child, the court's decision still must be based on some competent, credible evidence. See *State v. Wilson*, 113 Ohio St.3d 382, 2007 Ohio 2202, 865 N.E.2d 1264, syllabus. Discretion does not equate to arbitrariness. See *In re Jim's Sales, Inc.*, 9th Dist. No. 04CA008601, 2005 Ohio 4086, at P21, quoting *State v. Stallings*, 9th Dist. No. 20987, 150 Ohio App. 3d 5, 2002 Ohio 5942, at P12-13, 778 N.E.2d 1110. While AWA no longer sets forth an explicit set of guidelines for the juvenile court to employ in its classification analysis, AWA is not completely devoid of such guidance.

[*P46] Tier level designations for adult offenders are strictly, and clearly, broken down by category of offense. See R.C. 2950.01(E)-(G). The more egregious an offense, the higher the Tier level designation. See id. For instance, while gross sexual imposition as to an adult [**42] victim is a Tier I sex offense, gross sexual imposition of a victim under the age of thirteen is a Tier II sex offense. R.C. 2950.01(E)(1)(c); R.C. 2950.01(F)(1)(c). Similarly, while kidnapping with sexual motivation of an adult victim is a Tier II sex offense, kidnapping with sexual motivation of a minor is a Tier III sex offense. R.C. 2950.01(F)(1)(e); R.C. 2950.01(G)(1)(e). AWA reserves the Tier III sex offense designation for the most egregious offenses. See 2950.01(G) (defining a Tier III sex offender as one who commits an offense such as rape, sexual battery, aggravated and non-aggravated murder with sexual motivation, and the like). While AWA does not mandate the application of these offense categories to juveniles, such provisions provide guidance to juvenile courts. Logic dictates that the egregiousness of a delinquent child's offense should play a role in the classification that he or she receives because children who commit the most egregious offenses are arguably those most likely to pose the greatest future risk to the public. Similarly, logic dictates that the number of sex offenses that a delinquent child has committed should play a large role in the court's classification [**43] decision. See R.C. 2950.01(F)(1)(i) (imposing a Tier II designation upon any adult offender who commits a sex offense after previously having been classified as a Tier I sex offender); R.C. 2950.01(G)(1)(i) (imposing a Tier III designation upon any adult offender who commits a sex

offense after previously having been classified as a Tier II sex offender). The court is directed to consider whether the child has received any treatment as a consequence of the offense, R.C. 2152.84(A), and is permitted to consider the likelihood that the child might re-offend.

[*P47] G.E.S. criticizes AWA on the one hand for being too dogmatic and on the other for not being rigid enough. We reject such a polarized analysis. AWA properly endorses flexibility, an approach more suitable to rehabilitation of a delinquent child and one not inconsistent with protection of the public. See R.C. 2152.01(A). We decline to create an exhaustive list of factors that a juvenile court must consider when classifying a delinquent child. Moreover, we do not believe that a person of ordinary intelligence would be unable to understand the law or the parameters of the classification that G.E.S. might face as a result of his actions. [**44] See *Schneider* at P6. G.E.S.'s argument that the statutory scheme is unconstitutionally vague lacks merit.

[*P48] We reject G.E.S.'s constitutional challenges and find that the juvenile court did not err in classifying G.E.S. as a Tier III sexually oriented offender for the offense of sexual battery under the circumstance more fully set forth in *In re G.E.S.*, 9th Dist. No. 23963, 2008 Ohio 2671. Consequently, G.E.S.'s second assignment of error is overruled.

Assignment of Error Number Three

"THE TRIAL COURT ERRED TO THE PREJUDICE OF [G.E.S.] BY OVERRULING [G.E.S.]'S MOTION TO FIND AMENDMENT TO *ORC SECTIONS 2152.01, ET SEQ. AND 2950.01, ET SEQ. UNCONSTITUTIONAL*["

[*P49] In his third assignment of error, G.E.S. argues that the trial court erred in denying his oral objection and written motion based on the unconstitutionality of AWA. As we have already determined that AWA, as it applies to juveniles such as G.E.S., is not unconstitutional, this assignment of error is moot and we decline to address it. See *App.R. 12(A)(1)(c)*.

Assignment of Error Number One

"THE TRIAL COURT ERRED BY CLASSIFYING [G.E.S.] AS A TIER III SEX OFFENDER PURSUANT TO OHIO'S [AWA] AND ORDERING HIM TO COMPLY WITH REGISTRATION DUTIES [**45] PURSUANT TO R.C. 2950.041, 2950.05 AND 2950.06["

[*P50] In his first assignment of error, G.E.S. argues that the trial court erred in ordering him to comply with the registration duties contained in *R.C. 2950.041*, *R.C. 2950.05*, and *R.C. 2950.06*. Specifically, G.E.S. argues that: (1) *R.C. 2950.041* does not apply to him because he is not a "child-victim offender;" (2) because *R.C. 2950.05* and *R.C. 2950.06* depend upon *R.C. 2950.041*'s application, the trial court erred in ordering him to comply with those sections as well; and (3) even if the court ordered him to register as a "sex offender" pursuant to *R.C. 2950.04*, the legislature failed to make that statute retroactive.

[*P51] The term "sex offender" applies to a child whom the court has adjudicated delinquent for committing a sexually oriented offense. *R.C. 2950.01(B)(1)*. A "sexually oriented offense" includes sexual battery pursuant to *R.C. 2907.03*. *R.C. 2950.01(A)(1)*. To be termed a "child-victim offender," a child must have committed a child-victim oriented offense. *R.C. 2950.01(D)*. A child commits a "child-victim oriented offense" when he engages in an act that constitutes a violation of a specified kidnapping offense, or its substantial equivalent, [*46] and the victim was under eighteen years of age. *R.C. 2950.01(C)*.

[*P52] If the juvenile court commits a delinquent child to a secure facility without classifying the child, then at the time of the child's release the court shall issue "an order that classifies the child a juvenile offender registrant and specifies that the child has a duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code" if the three following items apply:

"(a) The act for which the child *** was adjudicated a delinquent child is a sexually oriented offense or a child-victim oriented offense that the child committed on or after January 1, 2002[;]

"(b) The child was sixteen or seventeen years of age at the time of committing the offense[;]

"(c) The court was not required to classify the child a juvenile offender registrant under section 2152.82 of the Revised Code[.]" *R.C. 2152.83(A)(1)*.⁴

R.C. 2950.04 governs the registration requirements for sexually oriented offenses. *R.C. 2950.041* governs the registration requirements for child-victim oriented offenses. By definition, a single offense cannot be both a sexually oriented offense and a child-victim oriented offense. See *R.C. 2950.01*.

4 Both the [*47] pre-AWA and the current AWA section 2152.83(A)(1) of the Revised Code contain the quoted language.

[*P53] G.E.S.'s delinquency adjudication pertained to his committing sexual battery, a sexually oriented offense. See *R.C. 2950.01(A)(1)*. By statutory definition, G.E.S. could only be classified as a sex offender. See *R.C. 2950.01(B)(1)*. Furthermore, the record reflects, and G.E.S. does not dispute, that all three statutory subsections of *R.C. 2152.83(A)(1)* applied to G.E.S. at the time of his classification. See *R.C. 2152.83(A)(1)* (applying to a child adjudicated as a delinquent, but not classified as a juvenile offender registrant, who was sixteen or seventeen when he committed a sexually oriented offense on or before January 1, 2002). Once the trial court determined that these subsections applied to G.E.S., the trial court was required to enter an order specifying that G.E.S. had "a duty to comply with sections 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code." *R.C. 2152.83(A)(1)*.

[*P54] At G.E.S.'s classification hearing, the trial court indicated that it was ordering G.E.S. to "comply with the registration duties imposed upon him, by the Revised Code, specifically 2950.04, 2950.041, [*48] 2950.05, and 2950.06."⁵ The court, however, specifically classified G.E.S. as a sex offender. The court never referred to G.E.S. as a child-victim offender, or to his crime as a "child-victim oriented offense." Furthermore, the court's January 14, 2008 journal entry provides that G.E.S. was "adjudicated delinquent for having committed a sexually oriented offense." (Emphasis added.). Because *R.C. 2950.11(A)(1)* defines sexual battery as a sexually oriented offense, the trial court properly classified G.E.S. as a sex offender and ordered him to comply with the registration requirements applicable to that classification and contained in *R.C. 2950.04*, *R.C. 2950.05*, and *R.C. 2950.06*. The trial court also apparently included *R.C. 2950.041* in its order because *R.C. 2152.83(A)(1)* mandates the inclusion of both *R.C. 2950.04* and *R.C. 2950.041*. We are perplexed by this mandatory inclusion because, by definition, a child who only commits one offense, designated as either a sexually oriented offense or a child-victim oriented offense, will be subject only to the registration requirements that govern that offense. See *R.C. 2950.04* (containing registration requirements for sexually oriented offenses); [*49] *R.C. 2950.041* (containing registration requirements for child-victim oriented offenses). Even so, we decline to address the issue on the merits because G.E.S. failed to object to the trial court's inclusion of both *R.C. 2950.04* and *R.C. 2950.041* below and has failed to assert plain error on appeal. See *State v. Payne*, 114 Ohio St.3d 502, 2007 Ohio 4642, at P23, 873 N.E.2d 306 (holding that a

party forfeits an issue for appeal and limits an appellate court's review to that of plain error when he fails to contemporaneously object to the error in the trial court); *Crim.R. 52(B)*; *State v. Hairston, 9th Dist. No. 05CA008768, 2006 Ohio 4925, at P11* (providing that this Court will not sua sponte undertake a plain error analysis).

5 The Court included the same statutory references in its journal entry determining G.E.S.'s classification.

[*P55] Next, G.E.S. argues that *R.C. 2950.05* and *R.C. 2950.06* cannot apply to him through *R.C. 2950.04* because the Legislature failed to make specific portions of *R.C. 2950.04* retroactive. We have already determined, however, that *Chapter 2950 of the Revised Code* [**50] applies retroactively to G.E.S. Consequently, this argument lacks merit. G.E.S.'s first assignment of error is overruled.

Assignment of Error Number Four

"THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT CLASSIFIED [G.E.S.] PURSUANT TO OHIO'S AWA AND ORDERED HIM TO COMPLY WITH THE REPORTING REQUIREMENTS SET FORTH THEREIN BECAUSE APPLYING OHIO'S AWA TO A JUVENILE ADJUDICATED DELINQUENT FOR COMMITTING A SEXUALLY ORIENTED OFFENSE VIOLATES THE JUVENILE'S RIGHT TO EQUAL PROTECTION OF THE LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND SECTION 2, ARTICLE I OF THE OHIO CONSTITUTION[.]"

[*P56] In his final assignment of error, G.E.S. argues that the trial court committed plain error in classifying him as a Tier III sex offender because AWA violates the *equal protection clause*. Specifically, he argues that AWA subjects him to the same reporting requirements and penalties for failing to comply with those reporting requirements as an adult without affording him the same due process rights, such as a jury trial on his underlying offense. We disagree.

[*P57] G.E.S. concedes that his counsel failed to raise this argument in the trial court. Accordingly, he relies on the doctrine [**51] of plain error to assert this argument on appeal. For plain error to exist, "(1) there

must be an error, i.e., a deviation from a legal rule, (2) the error must be plain, which means that it must be an obvious defect in the trial proceedings, and (3) the error must have affected substantial rights, which means that the trial court's error must have affected the outcome of the trial." (Internal quotations omitted.) *In re JP.-M, 9th Dist. Nos. 23694 & 23714, 2007 Ohio 5412, at P57*, quoting *State v. Gross, 97 Ohio St.3d 121, 134, 2002 Ohio 5524, at P45, 776 N.E.2d 1061*, quoting *State v. Barnes (2002), 94 Ohio St.3d 21, 27, 2002 Ohio 68, 759 N.E.2d 1240*.

[*P58] The *Equal Protection Clause of the Fourteenth Amendment to the United States Constitution* states that no state shall deny to any person the equal protection of the laws. It prevents a state from treating people differently under its laws on an arbitrary basis. *Harper v. Virginia State Bd. of Elections (1966), 383 U.S. 663, 681, 86 S. Ct. 1079, 16 L. Ed. 2d 169* (Harlan, J., dissenting). An equal protection claim arises, therefore, only in the context of an unconstitutional classification made by a state, i.e., when similarly situated individuals are treated differently. See *Conley v. Shearer (1992), 64 Ohio St.3d 284, 288-289, 1992 Ohio 133, 595 N.E.2d 862*. [**52] Accordingly, a law that operates identically on all people under like circumstances will not give rise to an equal protection violation. *Id. at 290*.

[*P59] Contrary to G.E.S.'s assertion, AWA does not subject him to the same requirements as an adult offender classified as a Tier III sexually oriented offender. As previously noted, AWA gives juvenile courts discretion over whether to apply a Tier III classification to an offender such as G.E.S. A trial court would have no choice, however, to impose a Tier III classification upon an adult offender who committed the same crime. See *R.C. 2950.01(G)(1)(a)*. The trial court also declined to impose a community notification requirement upon G.E.S.; a notification that an adult offender would be automatically ordered to comply with. See *R.C. 2152.83(C)(2)*; *R.C. 2950.11*. Finally, G.E.S. need not have his personal information displayed on AWA's public registry because he did not qualify as a public registry-qualified juvenile. See *R.C. 2152.82(A)*. A Tier III sexually oriented adult offender will automatically have the required personal information posted on the Internet purely as a result of being classified as such. See *R.C. 2950.13(A)(11)*. Accordingly, [**53] this Court finds that the trial court did not err in classifying G.E.S. as a Tier III sexually oriented offender with regard to the *Equal Protection Clause* because G.E.S. has not proven that delinquent children classified under AWA are similarly situated to adult offenders classified under AWA. Accordingly, G.E.S.'s fourth assignment of error is overruled.

[*P60] G.E.S.'s first, second, and fourth assignments of error are overruled. His third assignment of error is moot. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment [**54] to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to Appellant.

BETH WHITMORE

FOR THE COURT

SLABY, P. J.

DICKINSON, J.

CONCUR



LEXSEE 2008 OHIO APP LEXIS 4258



Caution

As of: Nov 08, 2010

STATE OF OHIO, PLAINTIFF-APPELLEE, - VS - MICHAEL BYERS, DEFENDANT-APPELLANT.

CASE NO. 07 CO 39

COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT,
COLUMBIANA COUNTY

2008 Ohio 5051; 2008 Ohio App. LEXIS 4258

September 30, 2008, Decided

PRIOR HISTORY: [**1]

Criminal Appeal from Columbiana County Municipal Court, Case No. 07CRB450.

DISPOSITION: Affirmed.

COUNSEL: For Plaintiff-Appellee: Attorney Robert Herron, Prosecuting Attorney, Attorney Ryan Weikart, Assistant Prosecuting Attorney, Lisbon, Ohio.

For Defendant-Appellant: Attorney Timothy Young, Ohio Public Defender, Attorney Katherine Szudy, Assistant State Public Defender, Columbus, Ohio.

JUDGES: Hon. Joseph J. Vukovich, Hon. Mary DeGenaro, Hon. Cheryl L. Waite. DeGenaro, P.J., concurs; see concurring opinion., Waite, J., concurs.

OPINION BY: Joseph J. Vukovich**OPINION**

VUKOVICH, J.

[*P1] Defendant-appellant Michael Byers appeals the decision of the Columbiana County Municipal Court labeling him a "Tier I Sex Offender/Child Victim Offender Registrant" in accordance with Senate Bill 10, which requires a 15 year registration period. Byers raises

six constitutional issues in this appeal. He contends that Senate Bill 10's revision of *R.C. Chapter 2950* violates: 1) the Ex Post Facto Clause of the United States Constitution; 2) the *Retroactivity Clause of the Ohio Constitution*; 3) the doctrine of separation of powers; 4) the prohibition against cruel and unusual punishment; 5) due process, and 6) the *Double Jeopardy Clause of the United States and Ohio Constitutions* [**2]. Byers also raises one nonconstitutional issue. Portions of Senate Bill 10 became effective July 1, 2007, while the remaining portions became effective January 1, 2008. Byers contends that the portions relevant to him were not effective on September 20, 2007, the date of his sentencing, and thus the trial court had no authority to sentence him under Senate Bill 10's sexual offender classification scheme. We find that his constitutional issues fail and that the trial court had the authority to inform him of his sexual offender classification under Senate Bill 10 at the time of his sentencing, despite the fact that portions of the bill were not effective on that date. In all, the judgment of the trial court is affirmed.

STATEMENT OF FACTS AND CASE

[*P2] On May 8, 2007, a complaint was filed against Byers alleging that on May 7, 2008, he had sexual contact with a 15 year old female in violation of *R.C. 2907.06(A)(4)*, sexual imposition, a third degree misde-

A-2

meanor. At the initial appearance, Byers entered a not guilty plea.

[*P3] Thereafter, the state and Byers entered into a plea agreement whereby the state amended the charge to attempted sexual imposition, a fourth degree misdemeanor [**3] and Byers pled no contest to the amended charge. (Tr. 3-4). The state, also in compliance with the plea agreement, recommended a 30 day jail sentence with 10 days suspended, a fine of \$ 250 and a three year term of probation. On September 20, 2007, the trial court accepted the plea agreement, found Byers guilty and sentenced him according to the terms set forth in the plea agreement. 09/20/07 J.E. At sentencing, the trial court informed Byers that he had been convicted of a sexually oriented offense/child victim offense as defined by Senate Bill 10's version of *R.C. 2950.01* and that he would be classified as a Tier I Sex Offender/Child Victim Offender Registrant. (Tr. 6). The court explained his registration requirements and informed him that those requirements last for 15 years. (Tr. 6-7).

[*P4] After sentencing, Byers informed the court that he was going to appeal the registration requirement. He then requested a stay of the registration requirement; the trial court granted his request.

ASSIGNMENT OF ERROR

[*P5] "THE RETROACTIVE APPLICATION OF SENATE BILL 10 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. [**4] FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; SECTION 10, ARTICLE I OF THE UNITED STATES CONSTITUTION; AND SECTIONS 10 AND 28, ARTICLE I AND II, RESPECTIVELY, OF THE OHIO CONSTITUTION. (SEPTEMBER 20, 2007 JUDGMENT ENTRY; T.PP. 11-12)."

[*P6] Recently, the General Assembly enacted Senate Bill 10, which amended numerous sections of Ohio's Revised Code. For our purposes, in this case, only the revisions to *R.C. Chapter 2950*, the sexual offender classification system in Ohio, are relevant. Thus, when Senate Bill 10 is discussed it is only pertaining to the revisions to *R.C. Chapter 2950*; it is not a discussion of the revisions of any other chapter of the Revised Code.

[*P7] Senate Bill 10 modified *R.C. Chapter 2950* so that it would be in conformity with the federal legislation, the Adam Walsh Act. The modification was accomplished by amending certain statutes, repealing others, renumbering a few sections, and adding new sections. The result is that a large portion of the chapter

changed. Those changes, however, did not all become effective on the same date. Portions of Senate Bill 10 became effective on July 1, 2007, while other portions did not become effective until [**5] January 1, 2008.

[*P8] The changes made to *R.C. Chapter 2950* by Senate Bill 10 altered the sexual offender classification system. Under pre-Senate Bill 10, depending on the crime committed and the findings by the trial court at the sexual classification hearing, an offender who committed a sexually oriented offense that was not registry exempt could be labeled a sexually oriented offender, a habitual sex offender, or a sexual predator. Each classification required registration and notification requirements. For instance, for a sexually oriented offender, the registration requirement was once annually for 10 years and there was no community notification requirement; for a habitual sex offender the registration requirement was for every 180 days for 20 years and the community notification could occur every 180 days for 20 years; and for a sexual predator, the registration duty was every 90 days for life and the community notification could occur every 90 days for life.

[*P9] Now, under Senate Bill 10, those labels are no longer used and the registration requirements are longer in duration. An offender who commits a sexually oriented offense is found to be either a "sex offender" or a "child-victim [**6] offender". Depending on what crime the offender committed, they are placed in Tier I, Tier II or Tier III. The tiers dictate what the registration and notification requirements are. Tier I is the lowest tier. It requires registration once annually for 15 years, but there are no community notification requirements. Tier II requires registration every 180 days for 25 years, but it also has no community notification requirements. Tier III, the highest tier and similar to the old sexual predator finding, requires registration every 90 days for life and the community notification may occur every 90 days for life.

[*P10] With all of that in mind, we now turn to Byers' seven arguments: 1) Senate Bill 10 violates the prohibition against ex post facto laws; 2) Senate Bill 10 violates the prohibition against retroactive laws; 3) Senate Bill 10 violates the separation of powers doctrine; 4) Senate Bill 10 as applied to Byers violates the prohibition against cruel and unusual punishments; 5) Senate Bill 10 was not effective when Byers was sentenced, therefore, it does not apply to him; 6) Senate Bill 10's residency requirements violate due process; and 7) Senate Bill 10 violates the *Double Jeopardy Clause of the United States and Ohio Constitutions* [**7]. These arguments will be addressed in the order they are raised.

[*P11] At the outset, we note that six of the seven arguments raise constitutional challenges to Senate Bill

10. Statutes enjoy a strong presumption of constitutionality. *State v. Cook* (1998), 83 Ohio St.3d 404, 409, 1998 Ohio 291, 700 N.E.2d 570, citing *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59. That presumption "cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution." *Cook*, 83 Ohio St.3d at 409, quoting *Xenia v. Schmidt* (1920), 101 Ohio St. 437, 130 N.E. 24, paragraph two of the syllabus. Thus, when addressing the constitutional issues we must be cognizant of the strong presumption of constitutionality. Furthermore, we additionally note these same constitutional arguments were made to the Ohio Supreme Court in *Cook*, 83 Ohio St.3d 404, 1998 Ohio 291, 700 N.E.2d 570, claiming that the 1997 version of *R.C. Chapter 2950* was unconstitutional. Thus, much of the analysis of the constitutional arguments refers to the analysis in *Cook*.

Ex Post Facto Clause

[*P12] Byers claims that applying Senate Bill 10 to crimes that occurred before January [**8] 1, 2008, violates the Ex Post Facto Clause of the United States Constitution. Section 10, Article I of the United States Constitution prohibits ex post facto laws. "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." *Bezell v. Ohio* (1925), 269 U.S. 167, 169-170, 46 S. Ct. 68, 70 L. Ed. 216. The Ex Post Facto Clause, however, only applies to criminal statutes. *Cook*, 83 Ohio St.3d at 415. So, if a statute is civil, then there can be no violation of the Ex Post Facto Clause. Therefore, we must determine whether Senate Bill 10 is civil or criminal legislation.

[*P13] As the *Cook* Court explained, the United States Supreme Court has not set out a specific test to determine whether a statute is civil or criminal. Rather, the United States Supreme Court has indicated that that determination is a matter of statutory interpretation. *Id.*, citing *Helvering v. Mitchell* (1938), 303 U.S. 391, 399, 58 S. Ct. 630, 82 L. Ed. 917, 1938-1 C.B. 317 and *Allen v. Illinois* (1986), 478 U.S. 364, 368, 106 S. Ct. 2988, 92 L. Ed. 2d 296. The *Cook* Court then used the "intent-effects" test to determine whether a statute is civil or criminal. *Cook*, 83 Ohio St.3d at 415.

[*P14] [**9] The first prong of the "intent-effects" test is the intent. The question we must decide is whether the General Assembly's intent in promulgating Senate Bill 10, the new version of *R.C. Chapter 2950*, was penal or remedial.

[*P15] The *Cook* Court found that the intent of enacting the 1997 version of *R.C. Chapter 2950* was remedial. *Id.* at 416. The legislation specifically indicated that its purpose was to protect the local community from sexual offenders and that the legislation was not punitive. *R.C. 2950.02* (1997 version). "Thus, *R.C. Chapter 2950*, on its face, clearly is not punitive because it seeks to 'protect the safety and general welfare of the people of this state,' which is a 'paramount governmental interest.'" *Cook*, 83 Ohio St.3d at 417.

[*P16] *R.C. 2950.02*, titled Legislative Findings; Public Policy Declaration, was amended by Senate Bill 10. However, the changes to that section were minimal. The Senate Bill 10 version states, in pertinent part:

[*P17] "(A) The general assembly hereby determines and declares that it recognizes and finds all of the following:

[*P18] "(1) If the public is provided adequate notice and information about offenders and delinquent children who commit sexually oriented offenses [**10] or who commit child-victim oriented offenses, members of the public and communities can develop constructive plans to prepare themselves and their children for the offender's or delinquent child's release from imprisonment, a prison term, or other confinement or detention. This allows members of the public and communities to meet with members of law enforcement agencies to prepare and obtain information about the rights and responsibilities of the public and the communities and to provide education and counseling to their children.

[*P19] "(2) Sex offenders and child-victim offenders pose a risk of engaging in further sexually abusive behavior even after being released from imprisonment, a prison term, or other confinement or detention, and protection of members of the public from sex offenders and child-victim offenders is a paramount governmental interest.

[*P20] " * * *

[*P21] "(6) The release of information about sex offenders and child-victim offenders to public agencies and the general public will further the governmental interests of public safety and public scrutiny of the criminal, juvenile, and mental health systems as long as the information released is rationally related to the furtherance of [**11] those goals"

[*P22] This is almost the exact language used in the 1997 version of *R.C. 2950.02* that the *Cook* Court relied on to find that the General Assembly's intent was remedial. The only change is instead of using the old classification labels, the new version uses the new tier classification labels.

[*P23] Byers argues two points that he believes indicate that despite the similarities between the prior version of *R.C. 2950.02* and the new version, the intent of Senate Bill 10 is punitive. He first argues that the old classification and registration requirements were tied directly to the ongoing threat to the community. However, according to him, under the new statutory scheme, an individual's registration and classification obligations depend on the convicted offense.

[*P24] Byers is correct that under the new system the offense type determines what tier an offender is placed in. For instance, Byers was labeled a Tier I sex offender. He was found guilty of attempted sexual imposition, a violation of *R.C. 2907.06*. *R.C. 2950.01(A)(1)* and *(12)* indicate the crime is a sexually oriented offense and Byers is a sex offender. *Subsection (E)(1)(a)* and *(g)* indicates that a sex offender who attempts to commit [**12] sexual imposition is a Tier I sex offender.

[*P25] However, the old version of *R.C. Chapter 2950's* classification was also partially tied to the offense. Under the old law, Byers would have been automatically labeled a sexually oriented offender because the offense he committed was defined as a sexually oriented offense under the prior version of *R.C. 2950.01(D)*. Only at the classification hearing would it be determined whether he should be a habitual sex offender due to a prior conviction of a sexually oriented offense or a sexual predator because of his possible likelihood to engage in a sexually oriented offense in the future. Thus, the habitual sex offender and sexual predator determinations were tied more to the ongoing threat to the community.

[*P26] Yet, it cannot necessarily be concluded that Senate Bill 10's tiers are not directly tied to the ongoing threat to the community that sex offenders pose. The types of offenses that are placed in Tier I are less severe sex offenses, Tier II are more severe, and Tier III are the most severe offenses. Also within these tiers are some factual determinations, such as if the offense was sexually motivated, age of victim and offender, and consent. Likewise, [**13] every time an offender commits another sexually oriented offense the tier level rises. *R.C. 2950.01 (F)(1)(i)* and *(G)(1)(i)*. This formula detailed by the legislature illustrates that it is considering protecting the public. Consequently, this new formula does not appear to change the spelled out intent of the General Assembly in *R.C. 2950.02*.

[*P27] Byers' second argument is that the General Assembly placed Senate Bill 10 within Title 29, Ohio's Criminal Code, and this shows an intent for it to be criminal. This argument is not persuasive. The prior version of *R.C. Chapter 2950* was within the criminal code, yet the Ohio Supreme Court determined that it was civil in nature. While it is in the criminal code, that placement

is not dispositive of the issue, especially since the legislature specifically indicated the intent to be civil.

[*P28] In conclusion, the above arguments lack merit. Further, given the similarities between the prior legislative intent that was specified in the version reviewed by the *Cook* Court and Senate Bill 10's legislative intent spelled out in *R.C. 2950.02*, we find that the intent of Senate Bill 10 as it pertains to *R.C. Chapter 2950* is remedial, not punitive.

[*P29] Thus, we move [**14] to the "effects" prong of the test. The fact that legislation is labeled remedial is not dispositive of the issue of whether the legislation is civil or criminal in effect; the remedial intent can be negated. However, in order to do so, only the clearest proof will be adequate to show that a statute has a punitive effect. *Cook, 83 Ohio St.3d at 418*, citing *Allen, 478 U.S. at 369*.

[*P30] The *Cook* Court then went through the *Kennedy v. Mendoza-Martinez (1963)*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644, guideposts for determining whether a statute is punitive in spite of its remedial label. *Cook, 83 Ohio St.3d at 418*. The guideposts are: 1) "whether the sanction involves an affirmative disability or restraint"; 2) "whether it has historically been regarded as a punishment"; 3) "whether it comes into play only on a finding of scienter"; 4) "whether its operation will promote the traditional aims of punishment-retribution and deterrence"; 5) "whether the behavior to which it applies is already a crime"; 6) "whether an alternative purpose to which it may rationally be connected is assignable for it," and 7) "whether it appears excessive in relation to the alternative purpose assigned". *Id.*, quoting *Kennedy, 372 U.S. at 567-568*.

[*P31] [**15] Regarding the first guidepost, disability or restraint, the *Cook* Court found that the prior version of *R.C. Chapter 2950* did not impose a new affirmative disability or restraint. *Cook, 83 Ohio St.3d at 418*. It explained that under the prior version of *R.C. 2950.04(A)* all sex offenders were required to register with the sheriff of the county where the offender resides. It held that while this registration may cause some inconvenience for the offender, it is a de minimis administrative requirement similar to renewing ones driver's license. *Id.* It also explained that former *R.C. Chapter 2950* required the dissemination of information to certain people. *Id.* The Court admitted that the information could have a detrimental effect on offenders, but it stated that remedial sanctions can carry a sting of punishment. *Id.* Furthermore, it added that the burden of dissemination was not imposed on the defendant but rather on law enforcement. *Id.*

[*P32] Dealing with the requirements for registration, first we must note that sex offender registration

under Senate Bill 10's *R.C. 2950.04* requires more than the version discussed in *Cook*. Senate Bill 10's version of *R.C. 2950.04* requires that for any sexually [*16] oriented offense, the offender must register with: 1) the sheriff of the county in which the offender resides; 2) the sheriff of the county in which the offender attends school or institution of higher education regardless of whether the offender resides in that county; 3) the sheriff of the county in which the offender is employed if the offender resides in this state and has been employed in that county for more than three days or for an aggregate period of fourteen or more days in that calendar year; 4) the sheriff of the county in which the offender is employed if the offender does not reside in this state and has been employed at any location in this state more than three days or for an aggregate period of fourteen or more days in that calendar year; and 5) the sheriff of the other state immediately upon entering into that state when the offender attends a school or institution of higher education in that state or upon being employed in that state for more than three days or for an aggregate period of fourteen or more days in that calendar year regardless of whether the offender resides in that state or a different state. *R.C. 2950.04(A)(2)(a)-(e)*. It further requires that the [*17] offender give to the sheriff a completed and signed registration form, a photograph of the offender, and copies of travel and immigration documents. *R.C. 2950.04(B)*. The registration form must contain: the offender's name and any aliases; the offender's social security number and date of birth; address of residence; name and address of employment; name and addresses of any school or institution of higher education that the offender is attending; license plate number of the vehicle the offender owns; the license plate number of the vehicle the offender operates as part of employment; description of where each vehicle is habitually parked or otherwise kept; driver's license number; a description of each professional and occupational license; e-mail addresses, internet identifiers or telephone numbers registered to or used by the offender; and any other information required by the bureau of criminal identification and investigation (BCI). *R.C. 2950.04(C)(1)-(11)*.

[*P33] As can be seen, these requirements are more involved than the registration requirements in the version discussed in *Cook*. However, the Ohio Supreme Court has continually stated that sex offender classifications are civil in nature. [*18] Most recently in *State v. Wilson*, 113 Ohio St.3d 382, 2007 Ohio 2202, P30, 865 N.E.2d 1264, the Court restated the decision in *Cook* that the sex offender classification laws are remedial, not punitive. The registration statute that was in effect in *Wilson*, is not too different from Senate Bill 10's version.

[*P34] However, in *Wilson*, Justice Lanzinger, in a concurring in part and dissenting in part opinion (joined

by Justice O'Connor and Judge Donovan) stated that the simple registration and notification process that was discussed in *Cook* does not exist anymore; the current laws are more complicated and restrictive. She opined that the registration and notification requirements can no longer be considered civil.

[*P35] "*R.C. Chapter 2950* has been amended since *Cook* and *Williams*, however, and the simple registration process and notification procedures considered in those two cases are now different. The following comparisons show that the current laws are more complicated and restrictive than those at issue in *Williams* and *Cook*. First, the label 'sexual predator' is now permanent for adult offenders, *R.C. 2950.07(B)(1)*, whereas previously, offenders had the possibility of having it removed. Former *R.C. 2950.09(D)*, [*19] Am.Sub.H.B. No. 180, 146 Ohio Laws, Part II, 2560, 2621-2623. Second, registration duties are now more demanding and therefore are no longer comparable to the inconvenience of renewing a driver's license, as *Cook* had analogized. *Cook*, 83 Ohio St.3d at 418, 700 N.E.2d 570. Persons classified as sex offenders must now personally register with the sheriff of the county in which they reside, work, and go to school. *R.C. 2950.04(A)*. Sexual predators must personally register with potentially three different sheriffs every 90 days, *R.C. 2950.06(B)(1)(a)*, which is hardly comparable to the slight inconvenience of having one's driver's license renewed every four years. Third, community notification has expanded to the extent that any statements, information, photographs, or fingerprints that an offender is required to provide are public record and much of that material is now included in the sex-offender database maintained on the Internet by the attorney general. *R.C. 2950.081*. In *Cook*, we considered it significant that the information provided to sheriffs by sex offenders could be disseminated to only a restricted group of people. *Cook*, 83 Ohio St.3d at 422, 700 N.E.2d 570. Fourth, new restrictions [*20] have been added to *R.C. Chapter 2950*. Enacted initially as part of Sub.S.B. No. 5, 125th General Assembly, approved July 31, 2003, *R.C. 2950.031* prohibits all classified sex offenders, not just those convicted of sex offenses against children, from residing within 1,000 feet of any school premises. And fifth, a sheriff is now permitted to request that the sex offender's landlord or the manager of the sex offender's residence verify that the sex offender currently resides at the registered address. *R.C. 2950.111(A)(1)*. According to *R.C. 2950.111(C)*, '[a] sheriff or designee of a sheriff is not limited in the number of requests that may be made under this section regarding any registration, provision of notice, or verification, or in the number of times that the sheriff or designee may attempt to confirm, in manners other than the manner provided in this section, that an offender * * * currently resides at the address in question.'

[*P36] "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 [**21] 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. *Id.*, 83 *Ohio St.3d* at 418, 700 *N.E.2d* 570. 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." *Wilson*, 113 *Ohio St.3d* 382, 2007 *Ohio* 2202, at P45-46, 865 *N.E.2d* 1264.

[*P37] While some may view the aforementioned reasoning to be persuasive and logical, we must follow the Supreme Court's decision in *Cook* and the majority decision in *Wilson* that offender classification is civil in nature and the registration requirement is still de minimus; *Cook* and *Wilson* are still controlling law.

[*P38] We now turn to the issue of dissemination of information on the offender to the public. It is noted that the dissemination requirements under the Senate Bill 10 version of *R.C. Chapter 2950* falls upon law enforcement, like the prior version, [**22] and puts none of this duty on the offender. Consequently, for the same reasoning as in *Cook*, we find that *R.C. Chapter 2950*, as changed by Senate Bill 10, does not impose a new affirmative disability or restraint.

[*P39] We will now address the six remaining guideposts set forth in *Kennedy*. The second guidepost is the historical view of registration. The *Cook* Court found historical support for the notification provisions in *R.C. Chapter 2950*. "The purpose of the notification provision, which is to protect the public, must prevail over any ancillary, detrimental effect that the limited dissemination of the registered information may have on a sex offender." *Id.* at 419. Thus, historically, it was remedial, not punitive.

[*P40] The third guidepost is the element of scienter. Senate Bill 10's version of *R.C. 2950.04* requires registration. Like the 1997 version, Senate Bill 10's version does not have a scienter element. The act of failing to register alone is sufficient to trigger criminal punishment under *R.C. 2950.99*.

[*P41] The fourth guidepost is retribution and deterrence. In *Cook*, it was argued that the effect of *R.C. Chapter 2950* embraced the traditional notions of punishment, including retribution and [**23] deterrence. The *Cook* Court disagreed with that argument. *Cook*, 83

Ohio St.3d at 420. It explained that the registration and notification provisions of *R.C. Chapter 2950* do not seek vengeance for vengeance's sake, nor does it seek retribution. *Id.* at 420. Rather, registration and notification were remedial because they seek to protect the public from registrants who may reoffend. *Id.* Similarly, it found that registration and notification are not a deterrent. The Court explained that registration and notification do not have much of a deterrent effect on a sex offender. Thus, it found that *R.C. Chapter 2950* does not promote the traditional aims of punishments, retribution and deterrence. This same reasoning applies to Senate Bill 10's version of *R.C. Chapter 2950*.

[*P42] The fifth guidepost is whether the behavior to which it applies is already a crime. The *Cook* Court concisely explained that any punishment for failing to register is a new offense that does not arise from the past sex offense:

[*P43] "Even prior to the promulgation of the current version of *R.C. Chapter 2950*, failure to register was a punishable offense. See former *R.C. 2950.00*, 130 Ohio Laws 671. Thus, any such punishment flows from [**24] a failure to register, a new violation of the statute, not from a past sex offense. In other words, the punishment is not applied retroactively for an act that was committed previously, but for a violation of law committed subsequent to the enactment of the law.

[*P44] "Accordingly, the behavior to which *R.C. Chapter 2950* applies is already a crime." *Id.* at 420-421.

[*P45] Like above, that same reasoning applies to Senate Bill 10's version of *R.C. Chapter 2950*.

[*P46] The sixth guidepost is the alternate remedial purpose. The *Cook* Court found that the alternate purpose of *R.C. Chapter 2950* was to protect the public. *Id.* at 421. It explained that sex offenders have a high rate of recidivism and that demands that steps be taken to protect the public against those most likely to reoffend. It held that the role of *R.C. Chapter 2950* was to accomplish that; "Notification provisions allow dissemination of relevant information to the public for its protection." *Id.*

[*P47] Senate Bill 10's version of *R.C. Chapter 2950*, like its predecessor, has the alternate purposes to protect the public. Given that there were no drastic changes to the statute, the *Cook* reasoning applies to Senate Bill 10. The one major change in the [**25] registration requirement is longer registration periods. However, this serves to protect the public for a longer duration than its predecessor.

[*P48] The last guidepost is excessiveness in relation to the alternate purpose. The Supreme Court in *Cook* found that the verification requirements of *R.C. Chapter*

2950 were narrowly tailored to comport with the respective danger and recidivism levels of the different sex offender classifications.

[*P49] As explained under the first guidepost, Senate Bill 10 does require more information to be given by the offender when registering. In *Cook*, the Supreme Court noted that under the 1997 version of *R.C. 2950.04* and *2950.07*, the offender must supply their name, addresses, business addresses, photographs, fingerprints, and, in some instances, license plate numbers, and a statement disclosing that they have been adjudicated a sexual predator or a habitual sex offender. Senate Bill 10's version of *R.C. 2950.04* requires that for any sexually oriented offense, the offender must register with the sheriff of the county in which the offender resides, goes to school and is employed. *R.C. 2950.04(A)(2)*. Thus, the offender may have to register in three different counties. [**26] Further, as discussed earlier, the registration form under *R.C. 2950.04(C)* requires more information than the prior version of *R.C. Chapter 2950* required.

[*P50] Similarly, while under prior versions of *R.C. Chapter 2950* the registration information was not available to any member of the general public, now it is more accessible to the general public. Admittedly, *R.C. 2950.08(A)* strictly prohibits public inspection of the registration data by the public. Only law enforcement officers, authorized employees of BCI for purposes of providing information to a board, administrator or person pursuant to *R.C. 109.57(F)* and *(G)*, and the registrar or employee of the registrar of motor vehicles for the purpose of verifying and updating any information upon the request from BCI are permitted to inspect the registration data. *R.C. 2950.08(A)(1)*, *(2)* and *(3)*. However, *R.C. 2950.08(B)* states that *subsection (A)* does not apply to any information that is contained in the internet sex offender database established by the Attorney General under *R.C. 2950.13(A)(11)*.

[*P51] The internet sex offender database, which was required to be operational by January 1, 2004, contains information for every offender who has committed [**27] a sexually oriented offense and registers in any county in Ohio. *R.C. 2950.13(A)(11)*. This requirement was not in effect at the time of *Cook*; it did not become a part of *R.C. Chapter 2950* until July 31, 2003. However, it is noted that *(A)(11)* does dictate that certain information is not permitted to be put on the sex offender database, such as the victim's name, the offender's social security number, name of school, name of place of employment, or license number. *R.C. 2950.13(A)(11)*.

[*P52] As all the above shows, more information now has to be provided for registration than it had to be under the 1997 version of *R.C. Chapter 2950* that was in effect at the time of *Cook*. Likewise, at that time, there

was no internet sex offender database. An internet database puts sex offender information more readily at the hands of the general public than it did before, thereby making the information more public. Now anyone can get on the Ohio Attorney General's web page and can search for sex offenders by name, school district, county, or zip code. www.esorn.ag.state.oh.us.

[*P53] The *Cook* decision stated that "[d]issemination of the information required by *R.C. 2950.11* is restricted to those most likely to have [**28] contact with the offender, e.g., neighbors, the director of children's services, school superintendents and administrators of preschool and day care centers." *Cook*, 83 Ohio St.3d at 422. That statement, however, is not accurate anymore. The information that is contained in the notification to the neighbors, school and others listed in *R.C. 2950.11(A)* is easily available to anyone with a computer because all of that information is on the internet database. As Justice Lanzinger pointed out in her concurring in part and dissenting in part opinion in *Wilson*, "community notification has expanded to the extent that any statements, information, photographs, or fingerprints that an offender is required to provide are public record and much of that material is now included in the sex-offender database maintained on the Internet by the attorney general." *Wilson*, 113 Ohio St.3d 382, 2007 Ohio 2202, P45, 865 N.E.2d 1264.

[*P54] Having stated that, we still find that the registration and notification provisions of *R.C. Chapter 2950* are nonpunitive and reasonably necessary for the intended purpose of protecting the public. While the information is available on the internet, a person must take an affirmative step to look [**29] at it; law enforcement is not sending out this information to everyone.

[*P55] In conclusion, Senate Bill 10's *R.C. Chapter 2950* may not be the narrowly tailored dissemination of information that was contemplated by *Cook*. However, as stated above, *Cook* is still controlling law and as of *Wilson*, the Supreme Court was still of the opinion that sex offender classification was still remedial and not punitive. Furthermore, four other appellate districts have reviewed Senate Bill 10 and have concluded that it does not violate the prohibition against ex post facto laws. *In re G.E.S.*, 9th Dist. No. 24079, 2008 Ohio 4076, P18-41; *State v. Longpre*, 4th Dist. No. 08CA3017, 2008 Ohio 3832, P15; *State v. Desbiens*, 2d Dist. No. 22489, 2008 Ohio 3375, P16-34; *In re Smith*, 3d Dist. No. 1-07-58, 2008 Ohio 3234, P24-40. See, also, *Slagle v. State*, 145 Ohio Misc.2d 98, 2008 Ohio 593, P40-50, 884 N.E.2d 109 (Clermont County Common Pleas Court). Admittedly, Senate Bill 10 does make some changes to the classification procedure. It changes the classification types from sexually oriented offender, habitual sex offender, and sexual predator to Tier I, Tier II and Tier III.

It also provides a more systematic determination of what [**30] offenses fall into what classification. Lastly, it increases the registration period. Tier I is 15 years, while a sexually oriented offender would only have been 10 years. Tier II is 25 years, while a habitual sex offender was 20 years. Tier III is a lifetime registration requirement, which sexual predator has always been. But those changes do not clearly indicate that *Wilson* and *Cook* are no longer controlling and that the sexual offender classification system is now punitive rather than remedial. Thus, we find no merit with the ex post facto argument.

Retroactivity Clause of the Ohio Constitution

[*P56] Next, Byers argues that Senate Bill 10 violates the *Retroactivity Clause of the Ohio Constitution*. The Retroactivity Clause argument was made in *Cook* and the Supreme Court found that *R.C. Chapter 2950* did not violate it. Likewise, the Retroactivity Clause argument was also made in *In re G.E.S., 9th Dist. No. 24079, 2008 Ohio 4076, P6-17* and *In re Smith, 3d Dist. No. 1-07-58, 2008 Ohio 3234, P24-40*. Those appellate courts found on the basis of *Cook* that Senate Bill 10 did not violate it. See, also, *Slagle, 145 Ohio Misc.2d 98, 2008 Ohio 593*.

[*P57] The Retroactivity Clause in the Ohio Constitution [**31] is found in *Article II, Section 28*. It provides that "[t]he general assembly shall have no power to pass retroactive laws."

[*P58] The Supreme Court in *Cook* explained that *R.C. 1.48* dictates that statutes are presumed to apply only prospectively unless specifically made retroactive. *Cook, 83 Ohio St.3d at 410*. Thus, before we can determine whether *R.C. Chapter 2950* can be constitutionally applied retrospectively, we must first determine whether the General Assembly specified that the statute would apply retroactively. *Id.* citing *Van Fossen v. Babcock & Wilcox Co. (1988), 36 Ohio St.3d 100, 522 N.E.2d 489*, paragraph one of the syllabus.

[*P59] Portions of Senate Bill 10 were intended to apply retroactively. *R.C. 2950.03(A)* indicates that "[e]ach person who has been convicted of, is convicted of, has pleaded guilty to or pleads guilty to a sexually oriented offense" and has a duty under *R.C. 2950.04* to register must be given notice of that duty. *Subsection (1)* states, "[r]egardless of when the person committed the sexually oriented offense * * * if the person is an offender who is sentenced to a prison term * * * and if on or after January 1, 2008, the offender is serving that term or is under that confinement * [**32] * * the official in charge of the jail, workhouse, state correctional institution * * * shall provide the notice to the offender before the offender is released." *Subsection 2* also states "[r]egardless of when the person committed the sexually

oriented offense * * * if the person is an offender who is sentenced on or after January 1, 2008 for any offense, * * the judge shall provide the notice to the offender at the time of sentencing." *Subsection (5)(a)* indicates that the tier classification system applies to offenders who prior to December 1, 2007 had registered under the old law.

[*P60] *R.C. 2950.031* also indicates that it is retrospective. It states that any time on or after July 1, 2007 and not later than December 1, 2007, the Attorney General shall determine for each offender who prior to December 1, 2007 had registered a residence, school or place of employment under the old law, their classification under the new law. *R.C. 2950.03(A)*. The Attorney General must send a letter indicating the changes in *R.C. Chapter 2950* and what the offender's new classification will be and what their requirements are under that new classification. *R.C. 2950.031 (B)*.

[*P61] Likewise, *R.C. 2950.032(A)* and *(B)* [**33] dictate these same responsibilities to the Attorney General for offenders who are serving prison terms for sexually oriented offenses, but were classified under the old law. These provisions provide that Senate Bill 10's classification system applies to incarcerated individuals who were sentenced before Senate Bill 10 was drafted and effective. *R.C. 2950.032(C)* states that for an offender, like Byers, who pled guilty to a sexually oriented offense after July 1, 2007, but before January 1, 2008, and was not sentenced to a prison term, the court at the time of sentencing, must instruct the offender of the notice requirements under *R.C. 2950.03* (the prior version) regarding the offender's duties. It also must provide the offender written notice of the changes to *R.C. Chapter 2950* and what tier level the offender will be placed in. The court then must provide written notice that the offender must comply with the old law until January 1, 2008 and then after that the offender will be required to follow the new law.

[*P62] Further, *R.C. 2950.033(A)(1)* provides that an offender who has duties to register and those duties are due to expire between July 1, 2007 and January 1, 2008, those requirements [**34] do not terminate but remain in effect for a longer duration that is allowed under Senate Bill 10 unless the trial court terminates the duty to comply with the new law.

[*P63] All of the above shows the General Assembly's express intention for those sections to be applicable to acts committed or facts in existence prior to the effective date of the statutes. *Hyle v. Porter, 117 Ohio St.3d 165, 2008 Ohio 542, P17, 882 N.E.2d 899*. Thus, Senate Bill 10's tier classification system was intended to apply retroactively to all offenders. That however, is not a determination that all of Senate Bill 10 applies retroactively, rather, it is only an opinion that the tier classifica-

tion system is intended to apply retroactively. (Later under the due process argument it is determined that Senate Bill 10's *R.C. 2950.034* residency restriction is not retroactive).

[*P64] As the tier system applies retroactively, our analysis now turns to whether it violates *Ohio's Retroactivity Clause*. The *Cook* Court succinctly explained that the test for this determination is whether *R.C. Chapter 2950* is substantive or remedial. *Cook*, 83 *Ohio St.3d* at 410, citing *Van Fossen*, 36 *Ohio St.3d* 100, 522 *N.E.2d* 489, paragraph three of the syllabus. It then explained [**35] the difference between substantive and remedial statutes:

[*P65] "A statute is 'substantive' if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation, or liabilities as to a past transaction, or creates a new right. Conversely, remedial laws are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right. A purely remedial statute does not violate *Section 28, Article II of the Ohio Constitution*, even if applied retroactively. Further, while we have recognized the occasional substantive effect, we have found that it is generally true that laws that relate to procedures are ordinarily remedial in nature." *Cook*, 83 *Ohio St.3d* at 411 (internal citations omitted).

[*P66] The *Cook* Court started its analysis under this test by noting that many of the requirements contained in the 1997 version of *R.C. Chapter 2950* were directed at officials rather than offenders. Only the registration and verification requirements required action by the defendant.

[*P67] The same can be said for Senate Bill 10's retroactive sections. The majority of requirements [**36] are directed at officials, department of corrections, judges, and the Attorney General. *R.C. 2950.03* (directing official in charge of jail or state correctional institution, judge, Attorney General, or sheriff to provide notice depending on the situation); *R.C. 2950.031* (requires Attorney General to act); *R.C. 2950.032* (requires Attorney General to act); *R.C. 2950.033* (Attorney General to send letter of non-termination of registration requirements); *R.C. 2950.043* (sheriff provide notice to Attorney General of registration); *R.C. 2950.10* (sheriff notify victim); *R.C. 2950.11* (sheriff to provide community notification); *R.C. 2950.11* (sheriff confirm reported address of offender); *R.C. 2950.13* (duties of Attorney General); *R.C. 2950.131* (duties of BCI and sheriff regarding internet sex offender database); *R.C. 2950.132* (additional duties of the Attorney General); *R.C. 2950.14* (duty of department of rehabilitation and correction); *R.C. 2950.16* (department of rehabilitation requirement

to adopt rules to treatment programs). Only the registration and verification provisions require the offender to act. *R.C. 2950.04* (requiring offender to register); *R.C. 2950.041* (requiring child-victim oriented [**37] offense duty to register); *R.C. 2950.042* (verification by offender); *R.C. 2950.05* (offender register notice of change of address of residence, school, or place of employment); *R.C. 2950.06* (verification of current resident, school or place of employment); *R.C. 2950.15* (Tier I offender after 10 years may request termination of registration duties).

[*P68] The *Cook* Court concluded that the registration and verification provisions of the 1997 version of *R.C. Chapter 2950* were remedial in nature. It stated that the registration and address verification provisions of *R.C. Chapter 2950* were de minimis procedural requirements that were necessary to achieve the goals of *R.C. Chapter 2950*, to protect the public. *Cook*, 83 *Ohio St.3d* at 412-413.

[*P69] As explained under the ex post facto analysis, there are differences between the 1997 version of *R.C. Chapter 2950* and Senate Bill 10's version. Now, there are possibly more counties an offender must register in and more information that the offender must provide when registering. Additionally, there is the internet sex offender database which anyone can access. Yet, as stated above, *Cook* and *Wilson* are still controlling law and we are bound to follow them; the [**38] Ohio Supreme Court has continued to indicate that sex offender classification is civil, not criminal in nature. Thus, Senate Bill 10 does not violate *Ohio's Retroactivity Clause*.

Separation of Powers

[*P70] Byers contends that "Senate Bill 10 violates the separation-of-powers principle that is inherent in Ohio's constitutional framework by unconstitutionally limiting the power of the judicial branch of government." He contends that Senate Bill 10 divests the judiciary branch of its power to sentence a defendant.

[*P71] The Constitution distributes the legislative power to the General Assembly, the executive power to the Governor, and the judicial power to the courts. Each branch acts as a check and balance for the other branches. The power and duty of the judiciary to determine the constitutionality and, therefore, the validity of the acts of the other branches of government have been firmly established as an essential feature of the Ohio system of separation of powers. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 *Ohio St.3d* 451, 462, 1999 *Ohio* 123, 715 *N.E.2d* 1062, citing *Beagle v. Walden* (1997), 78 *Ohio St.3d* 59, 62, 1997 *Ohio* 234, 676 *N.E.2d* 506. A statute that violates the doctrine

of separation of powers is unconstitutional. *Sheward*, 86 Ohio St.3d at 475.

[*P72] [**39] Senate Bill 10, however, does not violate the doctrine of separation of powers. The common pleas court in *Slagle* adequately explained:

[*P73] "In the case at bar, the General Assembly has not abrogated final judicial decisions without amending the underlying applicable law. See, e.g., *United States v. Gardner* (N.D.Cal.2007), 523 F.Supp.2d 1025. Instead, the 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." *Slagle*, 145 Ohio Misc.2d 98, 2008 Ohio 593, at P21, 884 N.E.2d 109. See, also, *In re Smith*, 3d Dist No. 1-07-58, 2008 Ohio 3234, P39. See, *In re G.E.S.*, 9th Dist. No. 24079, 2008 Ohio 4076, P42 (discussing in relation to child-victim offender).

[*P74] We agree with the above reasoning and adopt it as our [**40] own; Senate Bill 10 does not violate the separation of powers.

Cruel and Unusual Punishment

[*P75] Next, Byers argues that the 15 year registration period is excessive and violates the prohibition against cruel and unusual punishment. That argument has been rejected by our sister district. *In re Smith*, 3d Dist. No. 1-07-58, 2008 Ohio 3234, P37 (finding that Senate Bill 10 does not violate the prohibition against cruel and unusual punishment). Moreover, the *Cook* Court held that *R.C. Chapter 2950* and its registration requirements were remedial, not punitive. The Ohio Supreme Court in *State v. Williams* (2000), 88 Ohio St.3d 513, 528, 2000 Ohio 428, 728 N.E.2d 342, when addressing whether *R.C. Chapter 2950* violated the *Double Jeopardy Clause*, stated that *R.C. Chapter 2950* did not constitute punishment. Since the statutes in *R.C. Chapter 2950* were not criminal statutes and did not constitute punishment, there was no violation of the prohibition against cruel and unusual punishments. *State v. Bell*, 3d Dist. No. 9-01-60, 2002 Ohio 2182, P10; *State v. Bagnall*, 11th Dist. No. 99-L-062, 2001 Ohio 8785.

[*P76] Admittedly, Senate Bill 10 lengthens the registration period. For instance, Byers, if classified under the old law, would probably [**41] have been labeled a sexually oriented offender and would have to register for 10 years. Now, he is labeled a Tier I offender

and has to register for 15 years. Tier I is the lowest offender classification, just like sexually oriented offender was the lowest classification. So in that instance, he remains the same in that he is in the lowest level. However, as can be seen, the reporting period is extended by five years under the new law.

[*P77] It may seem excessive that a person convicted of a fourth degree misdemeanor of attempted sexual imposition has to register for 15 years, rather than 10 years. But, the fact that this is a longer period of time than was under the pre-Senate Bill 10 version does not impact the analysis. As long as *R.C. Chapter 2950* is viewed as civil, and not criminal - remedial and not punitive - then the period of registration cannot be viewed as punishment. Accordingly, it logically follows that it does not constitute cruel and unusual punishment since the punishment element is lacking. Further, we note that under Senate Bill 10, Byers, a Tier I offender, could move to terminate his registration requirement after 10 years. *R.C. 2950.15(A), (B), and (C)*. Thus, he may [**42] not have to register for 15 years if the motion is granted.

Effective Date of Senate Bill 10

[*P78] Byers argues that he could not be sentenced under Senate Bill 10 because it was not effective at the time of his sentencing. This argument is not a constitutional argument; rather, this is merely a statutory argument of when Senate Bill 10 became effective.

[*P79] Byers claims that portions of Senate Bill 10 became effective July 1, 2007, while other portions did not become effective until January 1, 2008. He contends that *R.C. 2950.09*, the prior version, which is the statute for the adjudication of an offender as a sexual predator, was repealed on July 1, 2007. That section established the sexual classification hearing to determine if an offender was a sexually oriented offender, habitual sex offender or sexual predator. He then asserts that *R.C. 2950.01*, Senate Bill 10 version, which dictates what tier an offender who commits a sexually oriented offense should be placed in, was not effective until January 1, 2008. Therefore, according to Byers, anyone like him who was sentenced between July 1, 2007 and December 31, 2007 cannot be subject to former *R.C. Chapter 2950*'s requirements nor to Senate Bill [**43] 10's reporting requirements,

[*P80] His argument is factually incorrect; he is incorrect in his statement that *R.C. 2950.09* was repealed on July 1, 2007. Senate Bill 10, the act, has six sections. The General Assembly in Section 1 of the act listed all of the sections of the Revised Code that were amended and renumbered. It also listed all the new sections that were added to the Revised Code. For our purposes, it is impor-

tant to acknowledge that Section 1 indicates that *R.C. 2950.01* was amended.

[*P81] Section 2 of Senate Bill 10 then listed all the sections of the Revised Code that were repealed. For our purposes, it is important to note that *R.C. 2950.09* is listed as a section that was repealed.

[*P82] Section 3 of the act dictates when the amendments, new enactments, renumbering and repeals take effect. It indicates that some of the amendments and repeals take effect January 1, 2008, while others take effect July 1, 2007. This section clearly indicates the amendment to *R.C. 2950.01* and the repeal of *R.C. 2950.09* were not effective until January 1, 2008:

[*P83] "The amendments to sections * * * *R.C. 2950.01* * * * of the Revised code that are made by Sections 1 and 2 of this act, * * * and the repeal of sections [**44] * * * *2950.09* * * * of the Revised Code by Section 2 of this act shall take effect on January 1, 2008." http://www.legislature.state.oh.us/BillText127/127_SB-10_EN-N.html.

[*P84] Byers cites to this in his brief, however, it appears that he failed to read the portion that indicated that the repeal of *R.C. 2950.09* became effective January 1, 2008. Thus, he is incorrect in his statement that neither the old law nor the new law were in effect at the time of his sentence. The old law was still in effect to determine sexual predator classification. However, the new law was not in effect. At first glance, this may seem to be a problem, but that is not the case when Senate Bill 10's version of *R.C. 2950.032* is examined.

[*P85] *R.C. 2950.032* is a new section that was added to *R.C. Chapter 2950* and became effective July 1, 2007. Section 1 and 3 of the Act. The statute is titled "Determination of sex offender classification tier for those serving prison term; juvenile offender; hearing; notice". *Subsection (C)* is the portion relevant for our review. It states:

[*P86] "(C) If, on or after July 1, 2007, and prior to January 1, 2008, an offender is convicted of or pleads guilty to a sexually oriented offense or a child-victim [**45] oriented offense and the court does not sentence the offender to a prison term for that offense * * *, the court at the time of sentencing * * *, shall do all of the following:

[*P87] "(1) Provide the offender * * * with the notices required under *section 2950.03 of the Revised Code*, as it exists prior to January 1, 2008, regarding the offender's * * * duties under this chapter as it exists prior to that date;

[*P88] "(2) Provide the offender * * * with a written notice that contains the information specified in divisions (A)(2)(a) and (b) of this section;

[*P89] "(3) Provide the offender * * * a written notice that clearly indicates that the offender * * * is required to comply with the duties described in the notice provided under division (C)(1) of this section until January 1, 2008, and will be required to comply with the duties described in the notice provided under division (C)(2) of this section on and after that date."

[*P90] This section applies to Byers because he was convicted of a sexually oriented offense after July 1, 2007 but prior to January 1, 2008. Further, he was not sentenced to a prison term for that offense, but rather received a jail term.

[*P91] Therefore, the trial court at the time of sentencing [**46] was to inform the offender of three things. First, it was required to provide Byers with the notice required under *R.C. 2950.03* as it existed prior to Senate Bill 10. *R.C. 2950.032(C)(1)*. *R.C. 2950.03* was amended by Senate Bill 10, but that amendment did not become effective until January 1, 2008. Section 3 of the Act. Thus, it was still in effect at the time of Byers' sentencing. Second, the trial court had an obligation under *R.C. 2950.032* to provide Byers with written notice of the changes in *R.C. Chapter 2950* that will be implemented on January 1, 2008 and inform the offender of his tier classification "as it will exist under the changes that will be implemented on January 1, 2008," his duties under Senate Bill 10, and the duration of those duties under Senate Bill 10. *R.C. 2950.032(A)(2)(a)-(b)* and (C)(2). Lastly, the trial court was to provide written notice indicating that until January 1, 2008, the offender is to comply with the old version of *R.C. 2950.03* and then on that date will be required to comply with the new law. *R.C. 2950.032(C)(3)*.

[*P92] Consequently, despite Byers argument, the statute clearly indicates that the trial court was required to inform Byers of his classification [**47] as a Tier I offender at sentencing. Admittedly, *R.C. 2950.01* defines what constitutes a Tier I, Tier II or Tier III offense and was not effective until January 1, 2008. This may seem problematic because one might question how a court can inform an offender which tier he will be in when the statute is not yet effective. That said, while the amendments to *R.C. 2950.01* were not effective, they were enacted on July 1, 2007. Section 4 of the Act. Thus, the courts had that section available for review. Furthermore, we note that the form the trial court gave to Byers at sentencing clearly indicates that this form is to be used after July 1, 2007 and before December 31, 2007 for duties commencing on or after January 1, 2008.

[*P93] Whether the trial court complied with all three requirements under *R.C. 2950.032(C)* is not argued here. Therefore, that issue is not examined. In conclusion, his argument as to the effective date of Senate Bill 10 is meritless.

Due Process

[*P94] This due process argument concentrates on Senate Bill 10's residency restrictions. Byers contends that Senate Bill 10 categorically bars him from residing within 1000 feet of a school, preschool or child day-care center. This requirement [*48] is contained in *R.C. 2950.034* (Senate Bill 10 version).

[*P95] Pre-Senate Bill 10 a similar residency restriction was found in *R.C. 2950.031*. The difference between pre-Senate Bill 10 *R.C. 2950.031* and Senate Bill 10 *R.C. 2950.034* is minimal. The prior version indicated that a person convicted of a sexually oriented offense could not "establish a residence * * * within one thousand feet of any school premises." *R.C. 2950.031 (A)*. Senate Bill 10, in addition to restricting residency within one thousand feet of any school premises, also restricts residency within one thousand feet of a "preschool or child day-care center premises." *R.C. 2950.034(A)*.

[*P96] Recently, the Ohio Supreme Court has reviewed pre-Senate Bill 10's residency restrictions (*R.C. 2950.031*) on classified sex offenders. *Hyle, 117 Ohio St.3d 165, 2008 Ohio 542, 882 N.E.2d 899*. In the syllabus the Court stated:

[*P97] "Because *R.C. 2950.031* was not expressly made retrospective, it does not apply to an offender who bought his home and committed his offense before the effective date of the statute."

[*P98] The *Hyle* Court found that the language in former *R.C. 2950.031* did not express a clear intention to make the residency restriction retroactive. *Id. at P19*. Thus, [*49] the prospective presumption could not be overcome.

[*P99] As explained above, Senate Bill 10 only made a slight change to the residency restriction by adding day-cares and preschools to the residency prohibition; no other drastic change in that statute was made. As such, *Hyle* is controlling. Therefore, if Byers bought his home and committed his offense before the effective date of the statute, *R.C. 2950.034* cannot be applied to his residency at that home. As the state points out, there is nothing in the record indicating that Byers resided in the restricted zone prior to the commission of the crime and enactment of the statute. Without an indication in the record that he purchased the residence prior to the en-

actment of the statement we cannot find merit with this argument.

Double Jeopardy Clause

[*P100] The *Double Jeopardy Clause* commonly is understood to prevent a second prosecution for the same offense. *Williams, 88 Ohio St.3d at 528*. Yet, the United States Supreme Court has also applied the clause to prevent a state from punishing twice, or from attempting a second time to criminally punish for the same offense. *Id. citing Kansas v. Hendricks (1997), 521 U.S. 346, 369, 117 S. Ct. 2072, 138 L. Ed. 2d 501; Witte v. United States (1995), 515 U.S. 389, 396, 115 S. Ct. 2199, 132 L. Ed. 2d 351. [**50]* Thus, the threshold question in a double jeopardy analysis is whether the government's conduct involves criminal punishment. *Williams, 88 Ohio St.3d at 528, citing Hudson v. United States (1997), 522 U.S. 93, 101, 118 S. Ct. 488, 139 L. Ed. 2d 450*.

[*P101] In *Williams*, the Ohio Supreme Court found no merit with the argument that former *R.C. Chapter 2950* violated the *Double Jeopardy Clause*. It explained that since that chapter was deemed in *Cook* to be remedial and not punitive, it could not violate the *Double Jeopardy Clause*:

[*P102] "This court, in *Cook*, addressed whether *R.C. Chapter 2950* is a 'criminal' statute, and whether the registration and notification provisions involved 'punishment.' Because *Cook* held that *R.C. Chapter 2950* is neither 'criminal,' nor a statute that inflicts punishment, *R.C. Chapter 2950* does not violate the *Double Jeopardy Clauses of the United States and Ohio Constitutions*. We dispose of the defendant's argument here with the holding and rationale stated in *Cook*." *Williams, 88 Ohio St.3d at 528*. See, also, *Wilson, 113 Ohio St.3d 382, 2007 Ohio 2202, P31, 865 N.E.2d 1264*.

[*P103] Since we find that Senate Bill 10's *R.C. Chapter 2950* sexual offender classification to be remedial like its predecessor, the above analysis from *Williams [**51]* is applicable and this argument fails. *In re Smith, 3d Dist. No. 1-07-58, 2008 Ohio 3234, P36; Slagle, 145 Ohio Misc.2d 98, 2008 Ohio 593, P51-54, 884 N.E.2d 109*. Thus, Senate Bill 10 does not violate the *Double Jeopardy Clause*. This assignment of error in its entirety is meritless.

MISCELLANEOUS ISSUE

[*P104] As an aside, we must note that Byers may have waived the above claims. He did not file a motion with the trial court claiming that Senate Bill 10 was unconstitutional. At sentencing, however, counsel stated that he was going to file an appeal and a stay motion so that Byers' name would not get into the system "in the

event that it does -- it is found to be unconstitutional." (Tr. 12).

[*P105] "Failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." *State v. Awan* (1986), 22 *Ohio St.3d* 120, 22 *Ohio B.* 199, 489 *N.E.2d* 277, syllabus. Nevertheless, it is recognized that the waiver doctrine is discretionary. *In re M.D.* (1988), 38 *Ohio St.3d* 149, 151, 527 *N.E.2d* 286.

[*P106] Regardless, considering the above analysis we do [**52] not need to rule on the issue of waiver. As is explained in great detail above, Senate Bill 10 is constitutional and the trial court did not error in classifying him under it.

CONCLUSION

[*P107] For the reason expressed above, despite the changes to Ohio's sex offender classification scheme, we find that we are bound by the Supreme Court's holding in *Cook* and *Wilson*, as they are controlling law. Thus, Senate Bill 10 does not violate the Ex Post Facto Clause of the United States Constitution, it does not violate the *Retroactivity Clause of the Ohio Constitution*, it does not violate the doctrine of separation of powers, it does not violate the prohibition against cruel and unusual punishment, it does not violate due process and it does not violate the *Double Jeopardy Clauses of the United States and Ohio Constitutions*. Also, portions of *R.C. Chapter 2950* were in effect at the time of sentencing that permitted the trial court to inform Byers that he would be a Tier I offender and would have to comply with the registration requirements under Senate Bill 10.

[*P108] For the foregoing reasons, the judgment of the trial court is hereby affirmed.

DeGenaro, P.J., concurs; see concurring opinion.

Waite, J., concurs.

CONCUR BY: DeGenaro

CONCUR

DeGenaro, [**53] J., concurs with separate concurring opinion.

[*P109] I concur with my colleagues, because, as alluded to in P37, as an inferior court, we are bound by the rationale in *Cook* and *Wilson*, as the Ninth, Fourth, Third and Second Appellate Districts have likewise held. However, I write separately because I find Justice Lanzinger's dissent in *Wilson* persuasive.

[*P110] As noted in *Cook*, Ohio first enacted a sex offender registration statute in 1963, which was rewritten in 1996, *Cook*, 83 *Ohio St.3d* at 406, and amended subsequently, most recently by Senate Bill 10. And each time *R.C. Chapter 2950* has been revised by the General Assembly and reviewed by the Ohio Supreme Court, the amendments passed constitutional muster because *incrementally* the changes were de minimus from the prior version.

[*P111] However, when comparing *R.C. Chapter 2950* as it is today to the version enacted in 1996, let alone the original version enacted in 1963, the requirements and restrictions are vastly different. This is why I find persuasive Justice Lanzinger's conclusion that we can no longer "continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should [**54] be recognized as part of the punishment that is imposed as a result of the offender's actions." *Wilson*, at P46, (Lanzinger, J., concurring in part and dissenting in part).

[*P112] Accordingly, I believe Senate Bill 10 warrants review by the Ohio Supreme Court to resolve the question raised by Judge Lanzinger in *Wilson*: whether *R.C. Chapter 2950* can still be considered remedial and civil, rather than criminal.



LEXSEE 2008 OHIO APP LEXIS 1868



Caution
As of: Nov 08, 2010

**STATE OF OHIO, PLAINTIFF-APPELLEE vs. VINCENT HOLLOMAN-CROSS,
DEFENDANT-APPELLANT**

No. 90351

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYA-
HOGA COUNTY**

2008 Ohio 2189; 2008 Ohio App. LEXIS 1868

May 8, 2008, Released

SUBSEQUENT HISTORY: Discretionary appeal not allowed by *State v. Holloman-Cross*, 119 Ohio St. 3d 1504, 2008 Ohio 5467, 895 N.E.2d 566, 2008 Ohio LEXIS 2996 (Ohio, Oct. 29, 2008)

PRIOR HISTORY: [**1]

Criminal Appeal from the Cuyahoga County Court of Common Pleas. Case No. CR-471652.
State v. Holloman-Cross, 2007 Ohio 290, 2007 Ohio App. LEXIS 274 (Ohio Ct. App., Cuyahoga County, Jan. 25, 2007)

DISPOSITION: Judgment affirmed.

COUNSEL: FOR APPELLEE: William D. Mason, Cuyahoga County Prosecutor, Jon W. Oebker, Assistant Prosecuting Attorney, Cleveland, Ohio.

FOR APPELLANT: Paul Mancino, Jr., Cleveland, Ohio.

JUDGES: BEFORE: Kilbane, J., Gallagher, P.J., and Dyke, J. SEAN C. GALLAGHER, P.J., and ANN DYKE, J., CONCUR.

OPINION BY: MARY EILEEN KILBANE

OPINION

JOURNAL ENTRY AND OPINION

MARY EILEEN KILBANE, J.:

[*P1] Defendant-appellant Vincent Holloman-Cross (Holloman-Cross) appeals the trial court's imposition of sentence entered on August 10, 2007.

[*P2] On October 18, 2005, a Cuyahoga County Grand Jury indicted Holloman-Cross on twenty counts of rape involving Jane Doe, a minor under thirteen years of age, and one count of unlawful sexual conduct with Jane Doe, a minor over the age of thirteen.

[*P3] On December 19, 2005, Holloman-Cross pleaded guilty to two counts of rape and one count of unlawful sexual conduct with a minor. The trial court nolledd the remaining counts.

[*P4] On February 10, 2006, the trial court sentenced Holloman-Cross to six years of imprisonment as follows: six years of imprisonment for each count of rape and six months of imprisonment for unlawful sexual [**2] conduct with a minor, all counts to be served concurrently. The trial court also designated Holloman-Cross as a sexually oriented offender.

[*P5] On May 15, 2006, Holloman-Cross filed a notice of appeal. On January 25, 2007, we affirmed in part, vacated in part, and remanded to the trial court for resentencing. See *State v. Holloman-Cross*, Cuyahoga

A-3

App. No. 88159, 2007 Ohio 290 (leave to appeal denied by the Supreme Court of Ohio on July 13, 2007).

[*P6] On April 16, 2007, Holloman-Cross filed a motion to withdraw his plea, which was denied on July 25, 2007. Holloman-Cross argued the following in his motion to withdraw his guilty plea: his guilty plea was induced by the implied promise that he would receive a minimum three-year sentence when in actuality, he was sentenced to six years of imprisonment; that his plea was not knowingly, intelligently, and voluntarily made because he was not fully informed of certain circumstances of the case, namely, that the victim testified in a related case against Holloman-Cross' biological mother, the victim's foster mother, that Holloman-Cross was under the age of eighteen when the alleged offenses occurred, and that she voluntarily engaged in sexual conduct [**3] with him.

[*P7] On August 10, 2007, the trial court resentenced Holloman-Cross to three years of imprisonment as follows: three years of imprisonment on each count of rape and eighteen months of imprisonment for unlawful sexual conduct with a minor, all counts to be served concurrently.

[*P8] On August 29, Holloman-Cross filed a notice of appeal and asserted two assignments of error for our review.

ASSIGNMENT OF ERROR NUMBER ONE

"Defendant was denied due process of law when the court overruled his motion to withdraw his plea without a hearing."

[*P9] Holloman-Cross argues that the trial court erred when it denied his motion to withdraw his guilty plea without a hearing.

[*P10] A trial court lacks jurisdiction, upon remand, to consider a *Crim.R. 32.1* motion to withdraw a guilty plea after affirmance by the appellate court of a judgment of conviction. *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas (1978)*, 55 *Ohio St.2d* 94, 378 *N.E.2d* 162; see, also, *State v. Craddock, Cuyahoga App. No. 89484, 2008 Ohio 448*.

[*P11] Furthermore, even if the trial court had jurisdiction to entertain Holloman-Cross' motion to withdraw his plea, his motion is barred by *res judicata*.

"Under the doctrine of *res judicata*, a final judgment [**4] of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that

judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial*, which resulted in that judgment of conviction, *or on appeal* from that judgment." *State v. Perry (1967)*, 10 *Ohio St.2d* 175, 226 *N.E.2d* 104, paragraph nine of the syllabus. (Emphasis in original.)

[*P12] Holloman-Cross raised the issue of the trial court's denial of his motion to withdraw his guilty plea in his direct appeal and, thus, further consideration is barred by the doctrine of *res judicata*. See *Craddock*.

[*P13] Holloman-Cross' first assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

"Defendant was denied due process of law when the court ordered that defendant be subject to the Adam Walsh Act."

[*P14] Holloman-Cross argues that he was denied due process of law when the court ordered that he be subject to the registration requirements set forth in the Adam Walsh Child Protection and Safety Act (Adam Walsh Act). Specifically, Holloman-Cross argues that the resulting increase in registration criteria violates the *ex post facto* clause [**5] because it punishes him for acts he committed before the enactment of the Adam Walsh Act.

[*P15] The *ex post facto* clause of Article I, Sections 9 and 10 of the United States Constitution prohibit:

"1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull (1798)*, 3 *U.S.* 386, 390, 1 *L. Ed.* 648, 3 *Dall.* 386.

[*P16] The Sex Offender Registration and Notification Act (SORNA) is contained in the Adam Walsh Act, enacted on July 27, 2006, which requires convicted

sex offenders to register in the jurisdiction in which he or she resides. SORNA is incorporated into Ohio law. See *R.C. 2950 et seq.*

[*P17] SORNA requires all jurisdictions to maintain a registry including the following information regarding sex offenders: names and aliases, social security number, residence, place of employment or school, vehicle information, physical description, criminal history, current photograph, fingerprints, palm prints, a DNA sample, and a photocopy [*6] of one's driver's license or identification card. 42 U.S.C. 16914. SORNA also sets forth the manner in which sex offenders are to register, namely, every ninety days, as applied in the case sub judice. 42 U.S.C. 16916.

[*P18] The Supreme Court of the United States set forth the framework for determining whether a statute violates the ex post facto clause:

"We must ascertain whether the legislature meant the statute to establish 'civil' proceedings. If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it 'civil.' Because we ordinarily defer to the legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith v. Doe* (2003), 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164. (Internal quotations and citations omitted.)

[*P19] Thus, we must first consider whether SORNA is civil or punitive in nature. SORNA is codified in Title 42 of the United States Code, a section [*7] reserved not for criminal punishment, but for "Public Health and Welfare." Furthermore, SORNA's purpose is to "protect the public from sex offenders and offenders against children ***." 42 U.S.C. 16901. Thus, "[i]t is clear that Congress intended SORNA to be civil in nature." *United States v. Mason* (M.D.Fla. 2007), 510 F.Supp.2d 923, 929. Therefore, we find that SORNA is civil and nonpunitive.

[*P20] Furthermore, we must consider whether SORNA's statutory scheme is so punitive either in purpose or effect as to negate the intent to deem it civil. A review of SORNA reveals that it deals primarily with

procedural issues, including collection and dissemination of a sex offender's information, which is indicative of a civil statutory framework. Thus, "there is insufficient evidence to transform SORNA from a civil scheme into a criminal penalty." *Mason*. The majority of courts that have addressed this issue as it pertains to failure to register pursuant to SORNA have found the same. See *United States v. Markel* (W.D.Ark. 2007), 2007 U.S. Dist. LEXIS 27102; *United States v. Manning* (W.D.Ark. 2007), 2007 U.S. Dist. LEXIS 12932; *United States v. Templeton* (W.D.Okla. 2007), 2007 U.S. Dist. LEXIS 8930; [*8] *United States v. Madera* (M.D.Fla. 2007), 474 F.Supp.2d 1257.

[*P21] Therefore, we find that SORNA, as set forth in the Adam Walsh Act does not violate Holloman-Cross' ex post facto protections. Holloman-Cross' second assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, P.J., and

ANN DYKE, J., CONCUR



LEXSEE 2008 OHIO APP LEXIS 2174



Caution
As of: Nov 08, 2010

STATE OF OHIO, Plaintiff-Appellee v. STEFANI KING, Defendant-Appellant

Appellate Case No. 08-CA-02

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, MIAMI COUNTY

2008 Ohio 2594; 2008 Ohio App. LEXIS 2174

May 30, 2008, Rendered

SUBSEQUENT HISTORY: Companion case at *State ex rel. King v. Welbaum*, 119 Ohio St. 3d 1469, 2008 Ohio 4911, 894 N.E.2d 329, 2008 Ohio LEXIS 2615 (2008)

Discretionary appeal allowed by, Motion granted by *State v. King*, 119 Ohio St. 3d 1471, 2008 Ohio 4911, 894 N.E.2d 331, 2008 Ohio LEXIS 2620 (2008)

Application granted by, Cause dismissed by *State v. King*, 2008 Ohio 6417, 2008 Ohio LEXIS 3502 (Ohio, Dec. 10, 2008)

PRIOR HISTORY: [**1]

(Civil Appeal from Common Pleas Court). Trial Court Case No. 07-CA-1030.

DISPOSITION:

COUNSEL: JAMES D. BENNETT, by JAMES R. DICKS, JR., Miami County Prosecutor's Office, Troy, Ohio, Attorney for Plaintiff-Appellee.

STEPHEN P. HARDWICK, Office of the Ohio Public Defender, Columbus, Ohio, Attorney for Defendant-Appellant.

JUDGES: WOLFF, P.J. BROGAN, J., concurs. FAIN, J., concurs in judgment only.

OPINION BY: WOLFF

OPINION

WOLFF, P.J.

[*P1] This matter comes before us upon Stefani M. King's appeal from the trial court's December 26, 2007 order overruling her motion for appointment of counsel to assist her in challenging her reclassification as a "Tier II" sex offender.

[*P2] The record reflects that King pleaded guilty to unlawful sexual conduct with a minor in 1997. She served five years of community control and completed ten years of registration as a sexually oriented offender. In December 2007, she received a letter from the Ohio Attorney General's office advising her of additional requirements being imposed on her under *R.C. 2950.031*, which was enacted in Senate Bill 10, effective January 1, 2008. Under S.B. 10, King automatically is reclassified as a "Tier II" offender based solely on the offense she committed. She also is required [**2] to register as a sex offender every six months for an additional fifteen years.

[*P3] As permitted under *R.C. 2950.031(E)*, King filed a petition in the trial court for a hearing to challenge her reclassification as a Tier II offender and the accompanying registration requirements. She also filed an affidavit of indigence and a two-page motion for the appointment of counsel to assist with her petition. The trial court summarily overruled the motion on December 26, 2007. This timely appeal followed.

A-4

[*P4] In her sole assignment of error, King contends the trial court erred in overruling her motion for the appointment of counsel. King asserts that she has a *Sixth Amendment* right to counsel because reclassification as a Tier II offender constitutes "the imposition of a new criminal penalty[.]" She also reasons that reclassification is a continuation of her original felony sentencing, which was a critical stage of the criminal proceedings. Finally, King argues that even if reclassification is civil and non-punitive, she has a right to counsel because S.B. 10 infringes on a liberty interest.¹

1 On its face, the present proceeding is a civil action commenced by King to challenge the Attorney General's [*3] administrative reclassification of her as a Tier II offender. Although S.B. 10 provides King with a right to a hearing, the legislation does not authorize the appointment of counsel. Therefore, King has no statutory right to counsel under S.B. 10.

[*P5] To establish a constitutional right to counsel, King first seeks to show that S.B. 10, unlike prior versions of Ohio law, imposes criminal punishment. She contends S.B. 10 fundamentally changes Ohio's sex offender classification and notification provisions by altering the frequency and duration of reporting, by increasing the amount of information offenders are required to disclose, and by placing offenders into one of three tiers based solely on the offense of conviction without any consideration of their individual likelihood of re-offending. Based on the premise that S.B. 10 is criminal and punitive in both purpose and effect, King insists that she has a *Sixth Amendment* right to counsel to assist her in challenging her reclassification.

[*P6] In *State v. Cook*, 83 Ohio St.3d 404, 1998 Ohio 291, 700 N.E.2d 570, the Ohio Supreme Court held that the registration and notification requirements in *R.C. Chapter 2950* are non-punitive in purpose and effect. *Id.* at 414-423. [*4] Thereafter, in *State v. Williams*, 88 Ohio St.3d 513, 2000 Ohio 428, 728 N.E.2d 342, the court reaffirmed its view that *R.C. Chapter 2950* is "neither 'criminal,' nor a statute that inflicts punishment[.]" *Id.* at 528. More recently, in *State v. Wilson*, 113 Ohio St.3d 382, 2007 Ohio 2202, 865 N.E.2d 1264, the court again concluded that "sex-offender-classification proceedings under *R.C. Chapter 2950* are civil in nature[.]" *Id.* at 389. *Wilson* produced a three-member dissent opining that the restrictions imposed under *R.C. Chapter 2950* have become more onerous since *Cook* and should be viewed as "part of the punishment that is imposed as a result of the offender's actions." *Id.* at 392.

[*P7] In the present case, King asserts that the registration and notification scheme in S.B. 10 is punitive, entitling her to appointed counsel to challenge her reclassification.

She advances several arguments in support. First, she contends the text and location of the legislation in the Revised Code reflect a punitive intent. In particular, she notes that the statute directly ties a person's classification level to the offense committed. She also parses the legislation in a semantic argument. She notes that S.B. 10 provides for an offender's [*5] classification level to be included in his or her "sentence." King then points out that a "sentence" consists of a sanction or combination of sanctions. Finally, she notes that a "sanction" has been defined as any penalty imposed as punishment for an offense. Therefore, she argues that classification under S.B. 10 is punitive. She also stresses that S.B. 10 is codified in the "penalties and sentencing" portion of the Revised Code and that a criminal penalty exists for failure to comply with the legislation's requirements.

[*P8] In a second line of attack, King asserts that "legislative history" reflects a punitive intent behind S.B. 10. In reality, she attempts to infer such intent from the language of the legislation itself. Unlike prior versions of *R.C. Chapter 2950*, which required an individualized judicial assessment of recidivism risk, King points out that an offender's personal likelihood of re-offending is irrelevant under S.B. 10. An offender's classification as a Tier I, II, or III offender, and the accompanying reporting and notification requirements, are linked directly to the crime committed. Therefore, King argues that some people who previously were found unlikely to re-offend [*6] are being reclassified and forced to register longer and to face community notification under S.B. 10. Insofar as S.B. 10 requires longer registration or community notification for people previously found unlikely to re-offend, King argues that it should be considered punitive.

[*P9] In a third line of attack, King argues that the effect of S.B. 10 is punitive. In particular, she contends the legislation imposes an affirmative disability or restraint insofar as it mandates longer, more frequent reporting and requires offenders to provide more information when reporting. She also asserts that S.B. 10 is analogous to historical "shaming" punishments insofar as it provides for widespread dissemination of personal information about offenders, reclassifies many lower-risk offenders into Tiers II and III, which misleads the public into believing they are dangerous when, in fact, courts already have determined that they are not. She additionally argues that S.B. 10 furthers traditional aims of punishment, i.e., retribution and deterrence, by reclassifying lower-risk offenders into higher tiers and requiring more lengthy and onerous reporting and by providing for widespread dissemination of personal [*7] information via the internet and postcards. King also claims S.B. 10 is not rationally related to a non-punitive purpose. She contends it arguably provides less community protection

than the old scheme, which was based on a judicial determination of dangerousness. Finally, King contends S.B. 10 is excessive in relation to its alleged non-punitive purpose of community protection. This is so, she argues, because many offenders previously found to be low risks now must register every ninety days for life.

[*P10] At the outset of our analysis, we note that King, a Tier II offender under S.B. 10, is not subject to the legislation's community notification provisions, which are reserved for Tier III offenders. Therefore, for present purposes, we need not decide whether S.B. 10's community notification provisions are punitive. The narrower issue before us is whether King's reclassification and the corresponding registration requirements are punitive in purpose or effect.

[*P11] Having reviewed S.B. 10, we do not find a legislative intent to impose punishment through the reclassification and registration process. As with prior versions of *R.C. Chapter 2950*, we believe the legislature intended to enact a [*8] civil, regulatory scheme rather than to impose criminal punishment. The new law includes a declaration about the risk of recidivism posed by sex offenders. *R.C. 2950.02(A)*. It also contains a declaration that its various requirements are intended to protect the safety and welfare of the population. *R.C. 2950.02(B)*. The General Assembly further declared that the release or exchange of information about sex offenders is not punitive. *Id.* We note too that S.B. 10 grants King a right to a hearing to contest her reclassification, but the legislation fails to provide her with a right to appointed counsel. It also states that the hearing shall be governed by the Ohio Rules of Civil Procedure. These facts bolster our belief that the legislature intended a civil, non-punitive proceeding. *Smith v. Doe (2003)*, 538 U.S. 84, 96, 123 S. Ct. 1140, 155 L. Ed. 2d 164.

[*P12] In reaching the foregoing conclusion, we do not deny the relevance of King's arguments about the phrasing of the new legislation, its placement in the criminal code, and the imposition of criminal sanctions for failure to comply. These attributes of S.B. 10 are probative of legislative intent, but they are not dispositive. *Id.* at 94-96. Moreover, King's attempt to divine [*9] punitive intent from the absence of any individualized risk assessment under S.B. 10 is unavailing. As noted above, the new legislation automatically places offenders into one of three tiers based solely on the offense of conviction and imposes corresponding registration requirements. In *Smith, supra*, the United States Supreme Court recognized that a legislature may take such a categorical approach without transforming a regulatory scheme into a punitive one. *Id.* at 104 ("The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punish-

ment[.]"). In the final analysis, and after considering the legislation as a whole, we are persuaded that the General Assembly through S.B. 10 once again intended to enact a civil, regulatory scheme.

[*P13] A more difficult issue is whether S.B. 10 is so punitive in effect as to negate the legislature's non-punitive intent. Despite finding ourselves sympathetic to much of King's argument on this point, and notwithstanding our agreement with the views expressed by the three dissenters in *Wilson*, we cannot ignore the precedent set by [*10] the Ohio Supreme Court in *Cook* and later reaffirmed in *Williams* and *Wilson*. Although S.B. 10 alters the landscape, we still do not find, in light of the foregoing cases and the United States Supreme Court's opinion in *Smith*, that the reclassification and registration requirements at issue have a punitive effect negating the General Assembly's intent to establish a civil, regulatory scheme. In *Cook*, the Ohio Supreme Court required "the clearest proof" to demonstrate "that a statute has a punitive effect so as to negate a declared remedial intention." *Cook*, 83 Ohio St.3d at 418.

[*P14] In support of her argument, King addresses five of seven factors applied in *Smith* and other cases to determine whether a sex-offender registration law has a punitive effect. These factors include: (1) whether it imposes an affirmative disability or restraint; (2) whether it is analogous to a historical form of punishment; (3) whether it promotes the traditional aims of punishment; (4) whether it is rationally related to a non-punitive purpose; and (5) whether it is excessive in relation to its non-punitive purpose. *Smith*, 155 L.Ed 2d at 1149.

[*P15] With regard to the first factor, King argues that S.B. 10 imposes an affirmative [*11] disability or restraint because it increases the frequency and duration of her registration requirement. She notes too that it requires the disclosure of more information when registering as a sex offender and allows this information to be disseminated via the Internet. King also points out that S.B. 10 prohibits offenders from living within 1,000 feet of a school, daycare, or preschool.

[*P16] In *Cook*, however, the court reasoned that the act of registering as a sex offender does not impose any restraint. *Cook*, 83 Ohio St.3d at 418. This remains true regardless of whether King is required to register once a year for ten years, as under the old law, or twice a year for twenty-five years, as S.B. 10 now requires. Although S.B. 10 also requires King to disclose a substantial amount of personal information that may be subject to dissemination over the Internet, the same was true in *Wilson*, as pointed out by the three-member dissent in that case, and in *Smith*. On this issue, we fail to see a constitutionally meaningful distinction between S.B. 10 and the version of *R.C. Chapter 2950* in effect when *Wil-*

son was decided. Likewise, while S.B. 10 precludes sex offenders from living within 1,000 feet [**12] of certain facilities, a similar restriction existed when the *Wilson* majority declared *R.C. Chapter 2950* to be non-punitive.² Therefore, in light of existing precedent, we do not find that S.B. 10 imposes an affirmative disability or restraint.

2 In *Hyle v. Porter*, 117 Ohio St.3d 165, 2008 Ohio 542, 882 N.E.2d 899, the court recently held that the 2003 version of *R.C. 2950.031*, which includes the 1,000-foot restriction, may not be applied retroactively absent a clear indication that the legislature intended retroactivity.

[*P17] Concerning the second factor, King insists that S.B. 10 is analogous to historical shaming punishments. A similar argument was rejected by the Ohio Supreme Court in *Cook* and the United States Supreme Court in *Smith*. The *Cook* court recognized that registration long has been regarded as a "valid regulatory technique[.]" *Cook*, 83 Ohio St.3d at 418. The court also noted that public dissemination of information about an offender traditionally has not been regarded as punishment. *Id.* at 419. In *Smith*, the majority reached the same conclusion, reasoning:

[*P18] " * * * Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the [**13] dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community. By contrast, the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. * * *

[*P19] "The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence [**14] of a valid regulation." *Smith*, 538 U.S. at 98-99 (citations omitted).

[*P20] King seeks to distinguish *Smith* in three ways. First, she contends *Smith* involved the dissemina-

tion of information about offenders via the Internet, whereas S.B. 10 subjects Tier III offenders to disclosure of information about them through the Internet and through the mailing of postcards to neighbors and others. This distinction has no relevance in the present case, however, because King, a Tier II offender, is not subject to dissemination of information through postcards. Second, King argues that her classification as a Tier II offender will mislead the public into believing she is dangerous. Therefore, she argues that the present case, unlike *Smith*, does not involve the dissemination of accurate information about a criminal record. We disagree. Under S.B. 10, King is classified as a Tier II offender based on the crime she committed. The public simply will be made aware of this fact. The new legislation makes no statement regarding her dangerousness. We are aware of no false or inaccurate information about her that will be subject to public disclosure as a result of S.B. 10. Third, King argues that S.B. 10 is [**15] a historical shaming punishment because some of the information she must disclose is non-public and not related to her criminal record. Again, we disagree. Most of the personal information King must provide when registering is already accessible by the public. Posting some of the information on the Internet merely makes a search for it easier.³ *Smith*, 538 U.S. at 98-99. To the extent that some of the information addressed by King might not be otherwise available to the public, we see nothing particularly "shaming" about its disclosure. We see little risk of public humiliation, for example, resulting from disclosure of King's e-mail address, her telephone number, her internet identifiers, or where she stores her automobiles.

3 We note that some of the information King must provide when registering as a sex offender is not subject to posting on the Internet. See *R.C. 2950.13(A)(11)*. The disclosure of some other information is left to the discretion of the Bureau of Criminal Identification. *Id.* Therefore, it is not apparent that all of the personal information addressed in King's appellate brief actually will be posted on the Internet.

[*P21] With regard to the third factor, King asserts that [**16] S.B. 10 has a punitive effect because it promotes traditional aims of punishment such as retribution and deterrence. King insists that reclassifying her as a Tier II offender "smacks of community outrage and retribution." She also argues that S.B. 10 sends a strong deterrent message by imposing its requirements regardless of an offender's individual dangerousness.

[*P22] In *Cook*, the court recognized that retribution is vengeance for its own sake. *Cook*, 83 Ohio St.3d at 420. The majority then concluded that "[t]he registration and notification provisions of *R.C. Chapter 2950* do

not seek vengeance for vengeance's sake, nor do they seek retribution." *Id.* We reach the same conclusion here. While King asserts that reclassifying a "low-risk" offender as a Tier II offender must be considered an act of retribution, we are unpersuaded. By tying an offender's classification to the offense committed rather than to an individual assessment of dangerousness, the General Assembly merely adopted an alternative approach to the regulation and categorization of sex offenders. In *Smith*, the United States Supreme Court expressly rejected an argument that Alaska's sex-offender registration obligations were retributive [**17] because they were based on the crime committed rather than the particular risk an offender posed. *Smith*, 538 U.S. at 102-104. The majority held that Alaska's approach was "reasonably related to the danger of recidivism" and "consistent with the regulatory objective." *Id.* at 102. With regard to deterrence, the *Cook* court recognized that requiring sex-offender registration might have some deterrent effect. *Cook*, 83 Ohio St.3d at 420. The court nevertheless concluded that any such effect was more remedial than punitive. *Id.* Similarly, the *Smith* court rejected the notion that deterrence resulting from Alaska's statute was sufficient to establish a punitive effect. *Smith*, 538 U.S. at 102.

[*P23] Concerning the fourth factor, King contends S.B. 10 has a punitive effect because it is not rationally related to a non-punitive purpose. The essence of her argument is that S.B. 10 is irrational because it disregards individual dangerousness and classifies offenders based solely on the offense committed. For example, she reasons that requiring a non-dangerous offender such as herself to register for another fifteen years as a Tier II offender dilutes the effectiveness of the entire registration scheme. [**18] Although we acknowledge the logic of King's argument about the potentially dilutive effect of S.B. 10, we do not agree that the new legislation is irrational. As noted above, S.B. 10 has a non-punitive purpose, namely protection of the public from sex offenders. The new legislation is rationally related to this non-punitive purpose because it alerts the public to the presence of sex offenders. *Smith*, 538 U.S. at 102-103. The fact that the General Assembly elected to categorize offenders based on the crime committed does not make S.B. 10 irrational. *Id.* We note too that "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Id.* at 103.

[*P24] Regarding the fifth factor, King claims S.B. 10 is excessive in relation to its non-punitive purpose. In support, she again asserts that the new legislation requires low-risk, non-dangerous offenders to register more frequently and for a longer duration. She also asserts that dissemination of information about offenders

on the Internet far exceeds what is necessary to protect the public.

[*P25] We reject King's argument for several reasons. First, we disagree with the premise, repeated [**19] throughout her briefs, that sexually oriented offenders under former *R.C. Chapter 2950* already have been found by a court to be non-dangerous and unlikely to commit future sex crimes. Under the former law, first-time sex offenders like King ordinarily were labeled by the trial court as either "sexually oriented offenders" or "sexual predators." In order to classify an offender as a sexual predator, the trial court was required to find, by clear and convincing evidence, that the offender was likely to commit another sex offense. *State v. Eppinger*, 91 Ohio St.3d 158, 2001 Ohio 247, 743 N.E.2d 881. Absent such a finding, the default classification was as a sexually oriented offender. Therefore, an offender's designation as a sexually oriented offender did not result from any judicial determination of non-dangerousness. Instead, it resulted from the lack of an affirmative finding, by clear and convincing evidence, that the defendant was dangerous. This distinction undermines King's argument that S.B. 10 is excessive because it is being applied to offenders who have been found non-dangerous and unlikely to re-offend. Her assertion is untrue.

[*P26] We note too that S.B. 10 is not excessive in relation to its [**20] non-punitive purpose because it applies to all sex offenders without regard to individual dangerousness. The *Smith* court expressly rejected this argument, reasoning;

[*P27] "Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. * * *

[*P28] "The *Ex Post Facto Clause* does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences. We have upheld against *ex post facto* challenges laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment." *Smith*, 538 U.S. at 103-104 (citations and footnotes omitted).

[*P29] Finally, we are unpersuaded by King's claim that dissemination of information about sex offenders on the Internet is excessive. Again, the *Smith* court rejected the same argument, recognizing that Internet notification was a "passive" system, that the Web site included a warning about committing crimes against sex offenders, and that Internet notification [**21] was reasonable in light of the mobility of the population and the

need for easy access. *Id.* at 105. These same considerations guide us to the same conclusion in the present case.

[*P30] Based on the reasoning set forth above, we reject King's argument that S.B. 10 is so punitive in effect that it negates the legislature's non-punitive intent. Having determined that the reclassification and registration scheme set forth in S.B. 10 is civil and non-punitive, we reject King's assertion that she has a *Sixth Amendment* right to counsel during the hearing to challenge her reclassification as a Tier II offender. For the same reasons, we are unpersuaded that the civil reclassification hearing is a continuation of King's criminal sentencing where punishment will be imposed. Therefore, she has not established a *Sixth Amendment* right to counsel. See, e.g., *State v. Furlong* (Feb. 6, 2001), *Franklin App. No. 00AP-637*, 2001 *Ohio App. LEXIS 390* (recognizing that the *Sixth Amendment* right to counsel is not implicated during a civil sex-offender classification hearing).

[*P31] Finally, we are unpersuaded by King's argument that even if S.B. 10 is civil and non-punitive, she has a right to counsel because the new legislation infringes on a [**22] liberty interest. "The right to be represented by counsel in a civil proceeding where the state seeks to take the defendant's life, liberty, or property is guaranteed by the *Fifth Amendment to the United States Constitution* as applied to the states by the *Fourteenth Amendment*." *Roth v. Roth* (1989), 65 *Ohio App.3d* 768, 776, 585 *N.E.2d* 482.

[*P32] In a supplemental brief filed after oral argument, King contends a protected liberty interest arose from her "settled expectation," under the former version of *R.C. Chapter 2950*, that she would be required to register as a sex offender for ten years. ⁴ King contends S.B. 10 deprives her of this liberty interest by obligating her to register for fifteen more years. In support, she cites *Doe v. Dept. of Public Safety* (2004), 92 *P.3d* 398. In *Doe*, the Alaska Supreme Court held that a defendant whose sex-offense conviction had been set aside could not be required to register as a sex offender. The court reasoned that after the set-aside order, the defendant no longer had the status of a convicted person. *Id.* at 408. The court further opined that the set-aside order gave rise to protected liberty interests under the Alaska Constitution that would be violated by requiring [**23] the defendant to register as a sex offender. *Id.* at 408-409.

⁴ In the trial court, King did not assert a *Fifth* and *Fourteenth Amendment* right to counsel based on the deprivation of a liberty interest. Instead, she alleged only the existence of a *Sixth Amendment* right to counsel because the "challenged reclassification has a punitive impact[.]" (Doc. # 2). Likewise, King's opening appellate brief did not discuss her *Fifth* and *Fourteenth*

Amendment right to counsel arising from infringement on a protected liberty interest. She asserted only that a *Sixth Amendment* right to counsel existed because S.B. 10 imposed criminal punishment. In her reply memorandum, however, King briefly argued that, even if S.B. 10 is civil and non-punitive, she has a right to counsel based on the deprivation of a liberty interest. King expands on this theme in a supplemental brief filed after oral argument. In its own supplemental brief, the State has addressed King's argument regarding the deprivation of a liberty interest. Therefore, we will address the issue herein.

[*P33] Upon review, we find *Doe* to be distinguishable for at least two reasons. First, as the Alaska Supreme Court emphasized, it was decided based strictly [**24] on an interpretation of the Alaska Constitution. Second, the "settled expectation" at issue in *Doe* arose when the defendant's conviction was set aside. In the present case, King's conviction has not been set aside. That fact is significant. In *Cook*, the Ohio Supreme Court determined that a convicted felon has no reasonable expectation that his or her criminal conduct will not be subject to future legislation. *Cook*, 83 *Ohio St.3d* at 412. For that reason, the *Cook* court held a former version of *R.C. Chapter 2950* could be applied to sex offenders who committed their crimes before the legislation took effect. Similarly, King, a convicted felon, could have no reasonable expectation that her criminal conduct would not be subject to future versions of *R.C. Chapter 2950*. Indeed, *Cook* indicates that convicted sex offenders have no reasonable "settled expectations" or vested rights concerning the registration obligations imposed on them. If the rule were otherwise, the initial version of *R.C. Chapter 2950* could not have been applied retroactively in the first place. Therefore, King has failed to show the deprivation of any protected liberty interest arising from a settled expectation regarding [**25] her registration obligation.

[*P34] Moreover, in *State v. Hayden*, 96 *Ohio St.3d* 211, 2002 *Ohio* 4169, 773 *N.E.2d* 502, the Ohio Supreme Court held that imposing a sex-offender registration requirement on a defendant without holding a hearing did not deprive the defendant of any protected liberty interest. *Id.* at 214. In light of *Hayden*, we fail to see how granting King such a hearing, albeit without the assistance of counsel, deprives her of any protected liberty interest. Requiring a convicted sex offender to register does not implicate a constitutionally protected liberty interest. *Id.* at 216 (Cook, J., concurring).

[*P35] Having found that King lacks a statutory or constitutional right to counsel in connection with her petition to challenge her reclassification as a Tier II of-

fender, we overrule her assignment of error and affirm the judgment of the Miami County Common Pleas Court.

Judgment affirmed.

....

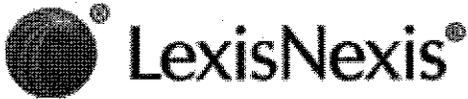
BROGAN, J., concurs.

CONCUR BY: FAIN

CONCUR

FAIN, J., concurs in judgment only:

[*P36] Whether Senate Bill 10, effective January 1, 2008, as *R.C. 2950.031*, is punitive in nature, so that it may not be applied retroactively, is an interesting and close question, but one that I find unnecessary to decide in this appeal. I agree with the [**26] State that even if the additional reporting requirements imposed upon King by virtue of the new law may be regarded as punitive in nature, King's incarceration is not one of the possible outcomes that may result from the proceeding for which she seeks the appointment of counsel, and, therefore, she is not entitled to the appointment of counsel at the State's expense. I would affirm on that basis alone, which I believe is the sole question that is presently properly before us, and leave for another day the issue of whether *R.C. 2950.031* is a punitive enactment that may not be applied retroactively.



LEXSEE 1997 OHIO APP LEXIS 5705



Caution
As of: Nov 08, 2010

STATE OF OHIO, Plaintiff-Appellee, - vs - DEAN SCOTT LYTTLE, Defendant-Appellant.

CASE NO. CA97-03-060

COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT, BUTLER COUNTY

1997 Ohio App. LEXIS 5705

December 22, 1997, Decided

DISPOSITION: [*1] Judgment of the trial court adjudicating Lyttle to be a sexual predator affirmed.

COUNSEL: John F. Holcomb, Butler County Prosecuting Attorney, Daniel G. Eichel, Thomas J. Slone, Hamilton, Ohio, for plaintiff-appellee.

Mary Lou Kusel, Hamilton, Ohio, for defendant-appellant.

Betty D. Montgomery, Ohio Attorney General, Todd R. Marti, David Gormley, Columbus, Ohio, amicus curiae.

JUDGES: YOUNG, P.J. WALSH and POWELL, JJ., concur.

OPINION BY: YOUNG

OPINION

OPINION

YOUNG, P.J. Defendant-appellant, Dean Scott Lyttle, appeals his adjudication as a "sexual predator." The trial court adjudicated Lyttle pursuant to Amended Substitute House Bill 180 ("H.B. 180"), partially codified in *R.C. Chapter 2950*, which establishes a comprehensive sex offender registration and community notification program. Under his single assignment of error, Lyttle

complains that because his classification as a sexual predator was triggered by convictions that predate the statute, the law violates the Ex Post Facto clause of the U.S. Constitution and the retroactive clause of the Ohio Constitution. This court now affirms Lyttle's classification as a sexual predator and, in doing so, holds that the sexual predator [*2] classification provision and attendant registration, address verification, and community notification requirements contained in the act (together, the "sexual predator law") violate neither the federal prohibition against ex post facto laws nor Ohio's prohibition against retroactive legislation.

I. PROCEDURAL POSTURE

On January 31, 1992, the Butler County Court of Common Pleas convicted Lyttle of four counts of gross sexual imposition and sentenced him to four consecutive two-year prison terms. ¹ On February 26, 1997, prior to Lyttle's scheduled release and in accordance with H.B. 180, the warden of the Pickaway Correctional Institution recommended that the trial court adjudicate Lyttle as a "sexual predator" or "habitual sex offender." See *R.C. 2950.09(C)(1)*. Following a hearing, the trial court determined by clear and convincing evidence that Lyttle is a "sexual predator." See *R.C. 2950.09*

¹ At the time, Lyttle had one previous conviction for gross sexual imposition.

A-S

[*3]

A. Sexual Predator Classification

H.B. 180, sometimes referred to as Ohio's "Megan's Law,"² sets forth a procedure for classifying criminal offenders who have been convicted of and sentenced for a "sexually oriented offense."³ See *R.C. 2950.09*. The classification provisions of the act became effective on January 1, 1997. The relevant provision here, *R.C. 2950.09(C)(1)*, outlines classification procedures for offenders who were convicted and sentenced prior to the effective date of that section and who were still imprisoned in a state correctional institution when the section became effective. Under the law, a sexual predator is "a person who has been convicted of or pleaded guilty to committing a sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses." *R.C. 2950.01(E)*.

2 In 1994, the New Jersey legislature passed "Megan's Law" in response to the rape and murder of seven-year-old Megan Kanka by a twice-convicted sex offender who lived across the street from her. That year, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act to encourage states to adopt effective registration systems for released sex offenders. *42 U.S.C. Section 14071*. A 1996 amendment to the Wetterling Act, the federal "Megan's Law," now encourages states to establish community notification systems for violent sex offenders released or paroled from prison.

[*4]

3 The definition of "sexually oriented offense" includes, but is not limited to: rape (*R.C. 2907.02*), sexual battery (*R.C. 2907.03*), gross sexual imposition (*R.C. 2907.05*), and felonious sexual penetration (former *R.C. 2907.12*). See *R.C. 2950.01(D)(1)*.

Prior to the release of a sexual offender, the department of rehabilitation and correction must determine whether to recommend to the trial court that the offender be adjudicated as a sexual predator. *R.C. 2950.09(C)(1)*.⁴ The trial court is not bound by the department's recommendation; the trial court may, without a hearing, deny such a recommendation and determine that the offender is not a sexual predator. *R.C. 2950.09(C)(2)*. The trial court, however, must conduct a hearing before it can determine that an offender is a sexual predator. *Id.* If the court schedules a sexual predator hearing, it must notify the offender and the applicable prosecutor's office, consider all relevant factors, and determine by clear and

convincing evidence whether the offender is a sexual predator. *Id.*⁵

4 *R.C. 2950.09(C)(1)* provides, in part:

(C)(1) if a person was convicted of *** a sexually oriented offense prior to the effective date of this section, if the person was not sentenced for the offense on or after the effective date of this section, and if, on or after the effective date of this section, the offender is serving a term of imprisonment in a state correctional institution, prior to the offender's release from the term of imprisonment, the department of rehabilitation and correction shall determine whether to recommend that the offender be adjudicated as being a sexual predator.

[*5]

5 Relevant factors include: the offender's age, prior criminal record, the age of the victim, whether the offense involved multiple victims, whether the offender used drugs or alcohol to impair the victim, participation in available programs for sex offenders, any mental illness or disability of the offender, the nature of the offender's conduct, whether the offender displayed cruelty while committing the offense, and any additional behavioral characteristics that contribute to the offender's conduct. *R.C. 2950.09(B)(1)(a) - (j)*.

B. Registration and Address Verification

Sexual offenders covered under the law, including sexual offenders classified as sexual predators, are subject to certain registration and reporting or verification requirements. These provisions, along with the notification provisions addressed below, became effective July 1, 1997. Sexual offenders must register with the sheriff in the county in which he or she resides. *R.C. 2950.04*.⁶ Any sexual offender required to register under the act must provide the sheriff with written notice of any change of address, *R.C. 2950.05*, [*6] and must periodically verify his or her current address. *R.C. 2950.06*. An offender adjudicated as a sexual predator must verify his or her registration in person every ninety days. *Id.* An adjudicated sexual predator must comply with the registration and verification provisions for life, unless the adjudicating court subsequently determines that the offender is no longer a sexual predator. *R.C. 2950.07(B)(1)*. Failure to comply with the registration and verification provisions is a crime. *R.C. 2950.99*.

6 A sexual offender registration form must include a current residential address, the name and address of the offender's employer, if applicable,

a photograph, and any other information required by the Criminal Identification and Investigation Bureau. R.C. 2950.04(C). Additionally a sexual predator registration form must include a specific declaration that the person has been adjudicated as a sexual predator, and the license plate number of each motor vehicle the offender owns or registers.

C. Community Notification

[*7] When an individual is classified as a sexual predator, the sheriff with whom that offender has registered is required to notify certain persons and institutions in a "specified geographical notification area." ⁷ R.C. 2950.11. Persons entitled to notice include occupants of adjacent residences and other neighbors specified under the attorney general's rule making authority, the executive director of the applicable public children services agency, certain educational authorities, the administrators of any child day care center within the area, and specified law enforcement agencies within the notification area. See R.C. 2950.11(1)-(9). In addition, R.C. 2950.10 provides for victim notification of a sexual offender's registration and any subsequent change of residence.

⁷ "Specified geographical notification area" means the areas within which the attorney general, through rule making authority set forth in R.C. 2950.13, requires notice to be given to identified parties. R.C. 2950.11(A). Such written notice must contain the offender's name, address, the offense for which the offender was convicted, and a statement that the offender "has been adjudicated as being a sexual predator and that, as of the date of the notice, the court has not entered a determination that the offender no longer is a sexual predator." R.C. 2950.11(B).

[*8] III. RETROACTIVE APPLICATION OF H.B. 180

A fundamental prerequisite to addressing violations of either the federal ex post facto clause or Ohio's retroactive clause is determining whether the law at issue is indeed retroactive. See *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 522 N.E.2d 489, paragraph two of the syllabus ("The issue of whether a statute may constitutionally be applied retrospectively does not arise until there has been a prior determination that the General Assembly has specified that the statute so apply"); R.C. 1.48 (a statute is presumed to apply prospectively unless expressly made retroactive). Therefore, before this court considers Lyttle's arguments under either constitutional provision, this court must first determine whether the sexual predator classification, registra-

tion, verification, and notification provisions contained in H.B. 180 apply retroactively.

In this court's view, the Ohio General Assembly unequivocally expresses its intention to have the provisions of the sexual predator law apply retroactively in numerous provisions of R.C. Chapter 2950. R.C. 2950.01(G)(3) states:

An offender is 'adjudicated as being a [*9] sexual predator' if *** prior to the effective date of this section, the offender was convicted of or pleaded guilty to, and was sentenced for, a sexually oriented offense, the offender is imprisoned in a state correctional institution on or after the effective date of this section, and, prior to the offender's release from imprisonment, the court determines *** that the offender is a sexual predator.

(Emphasis added). The registration provisions apply "regardless of when the sexually oriented offense was committed[.]" R.C. 2509.04(A). Sexual predators must verify their current residential address every ninety days "regardless of when the sexually oriented offense was committed[.]" R.C. 2950.06(B)(1). Classification as a sexual predator is expressly mandated both for offenders who were convicted of or pleaded guilty to an offense "prior to the effective date" of R.C. 2950.09, see R.C. 2950.09(C)(1), and for those who are to be sentenced on or after the effective date of the statute "regardless of when the sexually oriented offense was committed," see R.C. 2950.09(B). The community notification provisions apply to all sexual predators, which necessarily includes those who [*10] committed underlying offenses prior to the effective date of the statute. See R.C. 2950.11. Moreover, the seriousness of the penalty for failure to comply with the registration and verification provisions varies depending on "the most serious sexually oriented offense that was the basis of the registration, change of address notification, or address verification requirement that was violated *** ." R.C. 2950.99. (Emphasis added.) Again, this provision will also encompass offenses that were committed prior to the statute's enactment.

Despite these clear directives from the General Assembly, the state argues that the sexual predator law does not apply retroactively. The state claims that the sexual predator hearing is prospective because it addresses the future likelihood of recidivism. According to the state, any additional burdens, disabilities, or obligations adhering to the offender are based on a present determination that the offender is likely to re-offend in the future. See, e.g., *State v. Hater* (June 31, 1997), Preble C.P. No. 91-CR-6845, unreported. Cf., *Kansas v. Hendricks*, U.S. , 117 S. Ct. 2072, 2086, 138 L. Ed. 2d 501 (Kansas Sexually Violent [*11] Predator Act is not retroactive because involuntary confinement imposed subsequent to completion of original sentence is based upon a determi-

nation that offender currently suffers from mental abnormality and is likely to pose a future danger).⁸

8 The majority concluded that the Kansas act was not retroactive, noting that the act prescribed involuntary confinement based upon a determination that the person currently both suffers from a mental abnormality or personality disorder and is likely to pose a future danger to the public. *Id.* at , 117 S. Ct. at 2086. The majority wrote "to the extent that past behavior is taken into account, it is used, as noted above, solely for evidentiary purposes." *Id.* It concluded that the act does not criminalize conduct legal before its enactment, nor deprive the individual of any previously available defense. *Id.* Even the dissenting opinion suggested that the act's insistence on a prior crime did not make a critical difference in the analysis. *Id.* at , 117 S. Ct. at 2091. The dissent noted that such insistence may serve an important evidentiary function of screening out those whose past behavior does not demonstrate the existence of a mental problem or future danger. *Id.*

[*12] There is logic in the state's argument; this court recognizes that a statute "is not made retroactive merely because it draws upon antecedent facts for its operation." See *Cox v. Hart* (1922), 260 U.S. 427, 435, 43 S. Ct. 154, 157, 67 L. Ed. 332. Additionally, this court recognizes that classification as a sexual predator occurs only after a hearing that determines the offender's future risk of recidivism and threat to the community. However, the state overlooks the fact that the initial sexual predator classification hearing is triggered solely by the existence of a prior criminal conviction "regardless of when the sexually oriented offense was committed." See, e.g., *R.C. 2950.09(C)(1)*. This court will not ignore the nexus between the prior conviction and the invocation of *R.C. Chapter 2950*. Here, the prior conviction is more than simply an "antecedent fact;" a prior conviction is required to activate the entire legislative scheme.

Thus, this court concludes that the General Assembly intended the sexual predator law to operate retroactively, and the law is sufficiently retroactive to require further constitutional analysis. Therefore, this court will analyze the [*13] law in more detail under both the Ex Post Facto clause of the U.S. Constitution and the retroactive clause of the Ohio Constitution.

IV. THE EX POST FACTO CLAUSE

The Ex Post Facto Clause forecloses retroactive application of a law that "inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder v. Bull* (1798), 3 U.S. (Dall.) 386, 390-92, 1 L. Ed. 648. "The focus of the ex post facto inquiry is not on whether

a legislative change produces some sort of 'disadvantage,' *** but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *California Dept. of Corrections v. Morales* (1995), 514 U.S. 499, 506, 115 S. Ct. 1597, 1602 fn.3, 131 L. Ed. 2d 588, citing *Collins v. Youngblood* (1990), 497 U.S. 37, 41, 110 S. Ct. 2715, 2718, 111 L. Ed. 2d 30.

A. U.S. Supreme Court Decisions Discussing Punishment

The Supreme Court has not articulated a single "formula" for determining whether a statute or law violates the Ex Post Facto Clause, but has instead concluded that resolution of the issue is a matter of degree requiring case-by-case analysis. *Morales* [*14] at 506, 115 S. Ct. at 1603, citing *Beazell v. Ohio*, (1925), 269 U.S. 167, 171, 46 S. Ct. 68, 69, 70 L. Ed. 216. The Court recently considered the issue of punishment in two significant cases, *United States v. Ursery* (1996), U.S. , 116 S. Ct. 2135, 135 L. Ed. 2d 549, and *Kansas v. Hendricks* (1997), U.S. , 117 S. Ct. 2072, 138 L. Ed. 2d 501. Discussion of these two cases is appropriate here.

In *Ursery*, the Supreme Court held that application of in rem civil forfeiture proceedings against property allegedly used to grow marijuana was not "punishment" for purposes of the Double Jeopardy Clause.⁹ In reaching that conclusion, the Supreme Court employed the following two-part test:

9 *Ursery* construes the punitive nature of a provision imposed under the *Double Jeopardy Clause of the U.S. Constitution*, not the Ex Post Facto Clause. In that case, the Supreme Court cautioned against lifting a test for punishment from one constitutional provision and applying it to another. *Ursery* at , 116 S. Ct. at 2146. One year later, in *Hendricks*, however, the Court used the same test for punishment under the Double Jeopardy and Ex Post Facto Clauses, suggesting that the test for punishment is the same for both clauses. *Hendricks* at , 117 S. Ct. at 2081-86.

[*15] First, we ask whether Congress intended [the forfeiture] proceedings *** to be criminal or civil. Second, we turn to consider whether the proceedings are so punitive in fact as to "persuade us that the forfeiture proceedings may not legitimately be viewed as civil in nature," despite Congress' intent.

116 S. Ct. at 2147, quoting *United States v. One Assortment of 89 Firearms* (1984), 465 U.S. 354, 366, 104 S. Ct. 1099, 1107, 79 L. Ed. 2d 361 (citation and brackets omitted).

Addressing the first part of its test, the Supreme Court found that Congress intended the forfeiture provisions to be civil in nature. *Ursery at* , 116 S. Ct. at 2147. The court noted that Congress classified the provisions as "civil," that the provisions were directed toward property not people, and that various procedures associated with the provisions indicated an intent to create a civil sanction. *Id.*

The Supreme Court went on to consider the second stage in its analysis, whether the forfeiture proceedings "are so punitive in form and effect as to render them criminal despite Congress' intent to the contrary." *Id. at* , 116 S. Ct. at 2148. Importantly, the Supreme Court [*16] concluded that only the "clearest proof" of a punitive effect could overwhelm a non-punitive legislative purpose. *Id.* See, also, *Flemming v. Nestor (1960)*, 363 U.S. 603, 617, 80 S. Ct. 1367, 1376, 4 L. Ed. 2d 1435 (only the "clearest proof" would suffice to establish the unconstitutionality of a statute based upon an argument that the "history and scope" of the statute revealed a punitive purpose).

The Supreme Court concluded that the forfeiture provisions did not have a punitive effect. The most important consideration for the court was that the forfeiture provisions serve non-punitive goals, for example, encouraging property owners to carefully manage their property and prevent its use in illegal activity. *Ursery at* , 116 S. Ct. at 2148. The court also noted that in rem forfeiture sanctions have not historically been regarded as punishment, and that the provisions did not require the government to demonstrate scienter. *Id. at* , 116 S. Ct. at 2149. Although the court recognized that the provisions could have a deterrent effect, the court noted that deterrence could serve both criminal and civil goals. *Id.* Finally, the Supreme Court explained [*17] that although the forfeiture provisions are tied to criminal activity, that alone could not render them punitive. *Id.*

Ursery considers punishment under the Double Jeopardy Clause; in *Hendricks*, however, the Supreme Court analyzed the punishment issue under both the Ex Post Facto Clause and the Double Jeopardy Clause. In *Hendricks*, the Supreme Court considered the constitutionality of Kansas' Sexually Violent Predator Act, which establishes procedures for the civil commitment of persons who, due to a "mental abnormality" or "personality disorder," are likely to engage in "predatory acts of sexual violence." *Hendricks at* , 117 S. Ct. at 2076. In addressing the issue, the Supreme Court applied essentially the same test for punishment it used in *Ursery*:

We must initially ascertain whether the legislature meant the statute to establish "civil" proceedings. If so, we ordinarily defer to the legislature's stated intent.

* * *

Although we recognize that a civil label is not always dispositive, we will reject the legislature's manifest intent only where a party challenging the statute provides the clearest proof that the statutory scheme is so punitive [*18] either in purpose or effect as to negate the State's intention to deem it civil.

Id. at , 117 S. Ct. at 2081-82 (citation, brackets, and quotation marks omitted).

The Supreme Court first found that the legislative intent behind the Kansas act was non-punitive. In addressing the second stage of its analysis, whether the law has a punitive effect despite any non-punitive intent, the Supreme Court noted that the Kansas act implicates neither of the two primary objectives of criminal punishment, retribution nor deterrence, and does not turn on a finding of scienter. *Id. at* , 117 S. Ct. at 2082. More over, the court held that imposition of an affirmative restraint and sanction traditionally regarded as punishment does not override the act's non-punitive nature. *Id. at* , 117 S. Ct. at 2083. The court also rejected the argument that the state's use of procedural safeguards traditionally found in criminal trials rendered the proceeding criminal. *Id.* The court concluded that although the Kansas act provides for confinement of sexual predators in state institutions, the act does not impose punishment, and therefore does not violate either the [*19] Ex Post Facto or the Double Jeopardy Clauses of the Constitution. *Id. at* , 117 S. Ct. at 2085.

B. Decisions Addressing Sexual Offender Statutes in Other Jurisdictions

Although the Supreme Court has never considered the constitutionality of a sexual predator law like H.B. 180, three federal appellate courts have recently concluded that similar laws do not amount to "punishment," and do not, therefore, violate the Ex Post Facto Clause. *E.B. v. Verniero (C.A.3, 1997)*, 119 F.3d 1077; *Russell v. Gregiore (C.A.9, 1997)*, 124 F.3d 1079; *Doe v. Pataki (C.A.2, 1997)*, 120 F.3d 1263.

In *Russell*, the federal Ninth Circuit Court of Appeals adopted what it described as the "Ursery-Hendricks intent-effects test" to determine whether Washington's sexual offender registration and notification law imposed punishment. *Russell at* 1086. The circuit court first considered whether the legislature intended the law to be punitive, and then whether "the sanction is 'so punitive' in effect as to prevent the court from legitimately viewing it as regulatory or civil in nature, despite the legislature's intent." *Russell at* 1087. The Ninth Circuit Court of [*20] Appeals concluded that the Washington law did not violate the Ex Post Facto Clause.

The federal Second and Third Circuit Appellate Courts have also recently concluded that New Jersey's

"Megan's Law" does not impose punishment. *Verniero*, 119 F.3d 1077; *Roe*, 125 F.3d 47; *Doe v. Pataki*, (C.A.2, 1997), 120 F.3d 1263, 1265-66. The Verniero court wrote that once it determined the actual legislative purpose was remedial, it must uphold Megan's law against ex post facto challenge unless the law's objective purpose or its effect are sufficiently punitive to overcome a presumption favoring the legislative judgment. 119 F.3d at 1096.¹⁰ Both circuit courts concluded that the registration and notification laws were constitutional.

10 The Verniero court employed an "analytical framework" first developed in *Artway v. Attorney General of New Jersey* (C.A.3 1996), 81 F.3d 1235, 1263, and held that the "measure must pass a three-prong analysis -- (1) actual purpose, (2) objective purpose, and (3) effect -- to constitute non-punishment." 119 F.3d at 1093. The first prong of the test, like the first prong of the Russell court's "intent-effects" test, focuses on the legislative intent behind the law. *Id.* The second inquiry considers "objective purpose," and focuses on operation of the law, and on whether analogous measures have traditionally been regarded as punishment. *Id.* The final prong examines whether the effects or "sting" of a measure is so harsh "as a matter of degree" that it constitutes punishment." *Id.*

[*21] Nationally, the majority of courts that have considered the issue have concluded that similar sexual offender laws are constitutional. See, e.g., *Doe v. Kelley* (W.D.Mich., 1997), 961 F. Supp. 1105; *Doe v. Weld* (D.Mass., 1996), 954 F. Supp. 425; *W.P. v. Poritz*, (D.N.J., 1996), 931 F. Supp. 1199; *People v. Afrika* (N.Y.Sup.Ct., 1996), 168 Misc. 2d 618, 648 N.Y.S.2d 235; *Opinion of the Justices to the Senate* (1996), 423 Mass. 1201, 668 N.E.2d 738; *Doe v. Poritz* (1995), 142 N.J. 1, 662 A.2d 367; *State v. Costello* (1994), 138 N.H. 587, 643 A.2d 531, 533; *State v. Noble* (1992), 171 Ariz. 171, 829 P.2d 1217, 1224; *Kitze v. Commonwealth* (1996), 23 Va. App. 213, 475 S.E.2d 830; *State v. Manning* (Minn.Ct.App., 1995), 532 N.W.2d 244. But, see, *Roe v. Office of Adult Probation* (D.Conn., 1996), 938 F. Supp. 1080; *State v. Myers* (1996), 260 Kan. 669, 923 P.2d 1024; *Rowe v. Burton* (D.Alaska, 1994), 884 F. Supp. 1372 (holding registration is punitive where dissemination of information will result).

C. Ex Post Facto Analysis

In addressing the Ex Post Facto Clause, this court will apply the "intents-effects" test suggested by the Supreme [*22] Court's decisions in *Ursery* and *Hendricks*. Thus, this court will first consider the legislative intent behind the sexual predator law. The next and more diffi-

cult stage of the analysis involves consideration of the law's effects.

1. Legislative Intent

There is no indication that the General Assembly enacted *R.C. Chapter 2950* with an intent to impose punishment. To the contrary, the General Assembly has expressly declared that the intent of H.B. 180 is "to protect the safety and general welfare of the people of this state." *R.C. 2950.02(B)*. The General Assembly also expressly states that its policy regarding the exchange and release of relevant information about "sexual predators and habitual sex offenders" to the general public is not punitive.¹¹ *Id.* Accordingly, this court concludes that the General Assembly did not intend to impose punishment with enactment of H.B. 180.

11 In *R.C. 2950.02(A)*, the General Assembly also sets forth six findings that support its claim that the act is non-punitive.

[*23] 2. Punitive Effect

While Lyttle acknowledges the non-punitive legislative intent behind the law, he argues that the statute, nevertheless, has a punitive effect. This court disagrees.

There are a number of factors this court can consider in gauging the punitive effect of Ohio's sexual predator law, however, any assertion that the law's punitive effect outweighs the General Assembly's non-punitive goals must involve the "clearest proof."¹² See *Hendricks*, U.S. at , 117 S. Ct. at 2081-82; *Ursery*, U.S. at , 116 S. Ct. at 2148. Moreover, not all factors are equally weighted; the most important factor to consider is whether the law, "while perhaps having certain punitive aspects, serves important nonpunitive goals." *Id.*

12 Appropriate factors to consider in gauging the punitive effects of a statute include:

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 alternative purposes to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Kennedy v. Mendoza-Martinez (1963), 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68, 9 L. Ed. 2d 644. The Mendoza-Martinez list of considera-

tions is "helpful" but is "certainly neither exhaustive nor dispositive." *United States v. Ward* (1980), 448 U.S. 242, 249, 100 S. Ct. 2636, 65 L. Ed. 2d 742.

[*24] Here, Lyttle has not come forward with the "clearest proof" that the effect of the sexual predator law is so punitive that it overcomes the General Assembly's non-punitive intent. Most importantly, Ohio's sexual predator law serves an important non-punitive goal: alerting the community to the presence of dangerous sexual offenders adjudged likely to offend again. Moreover, unlike the Kansas act upheld in *Hendricks*, the provisions here impose no affirmative restraint or disability. There is also no element of scienter. See *Hendricks* at 117 S. Ct. at 2082.

Lyttle compares the consequences of his classification as a sexual predator to "historical shaming punishments" like branding, whipping, the pillory, and banishment. This court, however, agrees with the federal Ninth Circuit that such an analogy is far from "clear proof of an overwhelming punitive effect." *Russell*, 124 F.3d at 1092. As the federal Third Circuit recently stated: "Public shaming, humiliation and banishment all involve more than the dissemination of information *** . Rather, these colonial practices inflicted punishment because they either physically held the person up before his or her fellow [*25] citizens for shaming or physically removed him or her from the community." *Verniero* at 1099. More over, historical analysis is not particularly helpful here because the classification and notification provisions of the law can be compared to both punitive and non-punitive antecedents. See *Russell* at 1092. For example, Ohio's sexual predator law is comparable to non-punitive historical antecedents including the use of "wanted posters," quarantine restrictions, and the dissemination of potentially damaging information to regulatory agencies or associations. *Id.*

This court recognizes that the sexual predator law may have a deterrent effect and that the law is tied to criminal activity, both attributes commonly associated with punishment. Deterrence can, however, serve both civil and criminal goals. *Ursery* at 116 S. Ct. at 2149 (citing *Bennis v. Michigan* (1996), 516 U.S. 442, 116 S. Ct. 994, 1000, 134 L. Ed. 2d 68). This court also finds that the law does not implicate the other primary objective of punishment, retribution, "because it neither labels the offender as more culpable than before (though his or her culpability may be more widely publicized)[.]" [*26] *Russell* at 1091. Moreover, the fact that the sexual predator law is linked to criminal activity is insufficient alone to render the sanction punitive. *Ursery* at 116 S. Ct. at 2149.

To summarize this court's Ex Post Facto Clause analysis, this court concludes that the General Assembly clearly intended the sexual predator law to be regulatory, not punitive. Weighing all of the considerations discussed above, this court also concludes that the possible effects of the notification and registration provisions are not so punitive in fact that the law cannot be viewed as regulatory and non-punitive in nature. Since the classification scheme and attendant registration, verification, and notification provisions set forth in *R.C. Chapter 2950* are not punitive, Lyttle's classification as a sexual predator under *R.C. 2950.09(C)* does not violate the Ex Post Facto Clause of the United States Constitution.

V. THE RETROACTIVE CLAUSE OF THE OHIO CONSTITUTION

Section 28, Article II of the Ohio Constitution prohibits the general assembly from passing retroactive laws. In contrast to ex post facto laws which apply to penal statutes only, retroactive laws concern [*27] criminal and civil matters. 16A American Jurisprudence 2d (1979) 586, Constitutional Law, Section 636. Whereas ex post facto laws are statutes that "retroactively alter the definition of crimes or increase the punishment for criminal acts," see *Collins v. Youngblood* (1990), 497 U.S. 37, 43, 110 S. Ct. 2715, 2717, 111 L. Ed. 2d 30, retroactive laws include statutes which attach or impose a new disability as well as those imposing punishments. See *State v. Thrower* (1989), 62 Ohio App. 3d 359, 575 N.E.2d 863; *State ex rel. Corrigan v. Barnes* (1982), 3 Ohio App. 3d 40, 443 N.E.2d 1034. Thus, the Ohio Constitution's prohibition against retroactive laws is broader than the federal constitutional prohibition under the Ex Post Facto clause.

A. Substantive and Remedial Retrospective Laws

Despite the Ohio constitutional prohibition against retroactive legislation, a purely remedial statute does not violate Ohio Constitution Section 28, Article II, even if applied retroactively; only a retroactive law that affects "substantive" rights violates the retroactive clause. *Van Fossen v. Babcock and Wilcox* (1988), 36 Ohio St. 3d 100, 107, 522 N.E.2d 489. A statute [*28] is "substantive" if it impairs or takes away vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations or liabilities as to a past transaction. *Id.* Remedial laws are those affecting only the remedy provided, and include laws which merely substitute a new or more appropriate remedy for the enforcement of an existing right. *Id.* Despite "the occasional substantive effect," laws that relate to procedures are ordinarily remedial in nature. 36 Ohio St. 3d at 107-108. The supreme court has acknowledged, however, that it is doubtful if a perfect definition of a "substantive"

or "remedial" law could be devised. *State ex rel. Holdridge v. Indus. Comm.* (1967), 11 Ohio St. 2d 175, 178, 228 N.E.2d 621.

As part of its "analytical framework" test, the federal Third Circuit Court of Appeals addressed the remedial nature of New Jersey's Megan's Law. *Verniero*, 119 F.3d 1077; *Artway v. Attorney General of State of N.J.* (C.A.3, 1996), 81 F.3d 1235. That court's discussion in those cases is helpful to this court's analysis. In *Artway*, the federal court only considered the registration component of the New Jersey sex offender law.¹³ [*29] The federal court concluded that the purpose of registration is remedial. *Id.* at 1264 ("Registration is a common and long-standing regulatory technique with a remedial purpose"). The court reasoned:

13 In that case, the court used the term "registration" to encompass both the registration and periodic verification requirements. See *Artway* at 1264.

The solely remedial purpose of helping law enforcement agencies keep tabs on these offenders fully explains requiring certain sex offenders to register. Registration may allow officers to prevent future crimes by intervening in dangerous situations. *** The remedial purpose of knowing the whereabouts of sex offenders fully explains the registration provision *** . And the means chosen -- registration and law enforcement notification only -- is not excessive in any way. Registration, therefore, is certainly "reasonably related" to a legitimate goal: allowing law enforcement to stay vigilant against possible re-abuse.

Id.

In *Verniero*, the federal [*30] court considered the remedial nature of the community notification component of Megan's Law. According to the court, the "primary sting" from classification and notification "comes by way of injury to what is denoted in constitutional parlance as reputational interests[, and] includes the burdens of isolation, harassment, loss of opportunities, and the myriad of more subtle ways in which one is treated differently by virtue of being known as a potentially dangerous sex offender." *Verniero*, 119 F.3d at 1102. The court went on to note, however, that "reputational interests" have not been accorded the same level of protection in our society as interests that have been found "implicit in the concept of ordered liberty." *Id.*, citing *Paul v. Davis* (1976), 424 U.S. 693, 713, 96 S. Ct. 1155, 1166, 47 L. Ed. 2d 405 (police distribution of flyer with accused shoplifter's picture did not deprive that individual of any "liberty" or "property" rights). Such interests are not among the fundamental rights that may be interfered

with "only by the most important of state interests." 119 F.3d at 1103.

Importantly, the Ohio Supreme Court has held that where no vested right has been created, [*31] "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." *State ex rel Matz v. Brown* (1988), 37 Ohio St. 3d 279, 281, 525 N.E.2d 805. In *Matz*, the statute at issue, R.C. 2743.60(E), prohibited persons who had been convicted of a felony within ten years from collecting a Victims of Crime Compensation Award. *Matz* was a crime victim who would have collected a compensation award except that he had been convicted of a felony within ten years. The felony conviction, however, occurred before the enactment of R.C. 2743.60(E). On appeal to the supreme court, *Matz* argued that the law was retroactive because it attached a new disability to the felony which he had committed before the law was enacted. The supreme court rejected that argument, writing: "Except with regard to constitutional protections against ex post facto laws *** felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation." 37 Ohio St. 3d at 281-82. (Emphasis added.)

This court is convinced [*32] that *Lyttle* has "no reasonable expectation of finality" with regard to his past felonious conduct. See *Id.* Under the supreme court's reasoning in *Matz*, the sexual predator law attaches no new disability or burden to his conviction which is, arguably, a past transaction. Instead, this court concludes that the requirements the law imposes on *Lyttle* are remedial. But, see, *State v. Cook*, 1997 Ohio App. LEXIS 3591 (Aug. 7, 1997), Allen App. No. 1-97-21, unreported (R.C. Chapter 2950 imposes new obligations and duties that were not present under the previous version of R.C. Chapter 2950). Furthermore, the registration and verification provisions do not impose a burden that exceeds the necessary cost of accomplishing the goals underlying R.C. Chapter 2950. The registration and verification requirements are no more than a de minimis administrative requirement with a wholly remedial purpose and do not, therefore, violate the Ohio Constitution's retroactive clause.

All convicted felons face the possibility that their past acts will have future consequences. See *Matz* at 282. Dissemination of information about criminal activity always increases the possibility that those involved in the activity [*33] will suffer serious negative consequences. A conviction, however, is a public record, and an offender does not have a vested right to prohibit future determinations based in part upon that conviction. Likewise, an offender does not have a vested right in prohibiting the dissemination of public information concerning

a prior conviction. The harsh consequences Lyttle expects from classification and community notification come not as a direct result of the sexual offender law, but instead as a direct societal consequence of his past actions.

Moreover, the classification and notification provisions are not excessive given the identified state interests involved. The classification hearing itself calls for a risk assessment based on objective criteria reasonably relevant to the individual degree of risk presented by the offender. Notification calls for the limited dispersal of a public record for the public's protection.

Having thoroughly considered the language and purpose of the sexual predator law, its consequences, and its potential impact, this court concludes that the requirements of the law are no more than a measured response to an identified problem -- protecting the public from [*34] the risk of recidivism posed by certain sexual offenders. This court now holds that with regard to Lyttle, application of *R.C. Chapter 2950* does not impair or take away any vested rights, affect an accrued substantive right, or impose new or additional burdens, duties, obligations or liabilities based upon his past conduct. Therefore, the law does not violate the Ohio constitutional prohibition of retroactive legislation.

The judgment of the trial court adjudicating Lyttle to be a sexual predator is affirmed.

WALSH and POWELL, JJ., concur.



LEXSEE 2008 OHIO APP LEXIS 5164



Caution
As of: Nov 08, 2010

STATE OF OHIO, Plaintiff-Appellee, - vs - GEORGE D. WILLIAMS, Defendant-Appellant.

CASE NO. CA2008-02-029

COURT OF APPEALS OF OHIO, TWELFTH APPELLATE DISTRICT, WARREN COUNTY

2008 Ohio 6195; 2008 Ohio App. LEXIS 5164

December 1, 2008, Decided

SUBSEQUENT HISTORY: Discretionary appeal allowed by *State v. Williams, 121 Ohio St. 3d 1449, 2009 Ohio 1820, 904 N.E.2d 900, 2009 Ohio LEXIS 1145 (2009)*

Decision reached on appeal by *State v. Williams, 2010 Ohio 3396, 2010 Ohio LEXIS 1875 (Ohio, July 22, 2010)*

PRIOR HISTORY: **[**1]**

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS. Case No. 07CR24610.

DISPOSITION: Judgment affirmed.

COUNSEL: Rachel A. Hutzler, Warren County Prosecuting Attorney, Mary K. Martin, Travis J. Vieux, Lebanon, OH, for plaintiff-appellee.

Thomas W. Kidd, Jr., Lebanon, OH, for defendant-appellant.

JUDGES: YOUNG, J. BRESSLER, P.J., and POWELL, J., concur.

OPINION BY: YOUNG

OPINION

YOUNG, J.

[*P1] Defendant-appellant, George Williams, appeals the decision of the Warren County Court of Common Pleas classifying him as a Tier II Sex Offender/Child Victim Offender Registrant ("Tier II Sex Offender") under Senate Bill 10, a law which was in effect on the date the trial court classified and sentenced appellant but which was not in effect on the date he committed the sexual offense. This appeal challenges the constitutionality of Senate Bill 10.

[*P2] Appellant was indicted in 2007 on one count of unlawful sexual conduct with a minor in violation of *R.C. 2907.04(A)*, a fourth-degree felony. According to the state, during the month of May 2007, then 19-year-old appellant engaged in sexual conduct with a 14-year-old girl. On December 14, 2007, appellant pled guilty as charged. He subsequently moved to be sentenced under former *R.C. Chapter 2950*, the sex offender [*P2] registration statute that was in effect at the time of his offense. The trial court denied the motion, and on February 1, 2008, sentenced appellant to three years of community control and classified him as a Tier II Sex Offender under Senate Bill 10.

[*P3] Appellant appeals, raising one assignment of error:

[*P4] "THE RETROACTIVE APPLICATION OF SENATE BILL 10 VIOLATES THE EX POST FACTO, DUE PROCESS, AND DOUBLE JEOPARDY

A-6

CLAUSES OF THE UNITED STATES CONSTITUTION AND THE RETROACTIVITY CLAUSE OF ARTICLE II, SECTION 28 OF THE OHIO CONSTITUTION; FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION; AND ARTICLE I, SECTION 10 AND ARTICLE II, SECTION 28 OF THE OHIO CONSTITUTION."

[*P5] In his assignment of error, appellant argues that Senate Bill 10 violates several constitutional rights. Specifically, appellant asserts that the application of Senate Bill 10 (1) violates the Ex Post Facto Clause of the United States Constitution; (2) violates the Ohio Constitution's prohibition on retroactive laws; (3) violates the doctrine of separation of powers; (4) violates the prohibition against cruel and unusual punishment; (5) violates his [**3] due process rights; and (6) amounts to double jeopardy.

[*P6] At this juncture, we note that on the record before us, appellant never raised his constitutional arguments in the trial court. It is well-established that "[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." *State v. Awan* (1986), 22 Ohio St.3d 120, 22 Ohio B. 199, 489 N.E.2d 277, syllabus. However, the "waiver doctrine announced in *Awan* is discretionary." *In re M.D.* (1988), 38 Ohio St. 3d 149, 151, 527 N.E.2d 286.

[*P7] Thus, we have discretion to address appellant's constitutional arguments under a plain-error analysis. *Id.*; *State v. Desbiens*, *Montgomery App. No. 22489*, 2008 Ohio 3375, P17. An error qualifies as plain error only if it is obvious and but for the error, the outcome of the proceeding clearly would have been otherwise. *Desbiens at P17*. Although appellant failed to raise his constitutional arguments below, we choose to exercise our discretion and address his claims on appeal.

[*P8] Before we address appellant's constitutional [**4] arguments, we first proceed with a brief overview of Ohio's sex offender registration legislation before Senate Bill 10.

[*P9] Ohio first enacted a sex offender registration statute in 1963. As it is now, the statute was contained within *R.C. Chapter 2950*. The law, however, became more complex in 1996 due in large part to New Jersey's 1994 passage of "Megan's Law" and the 1994 enactment of the federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (*Section 14071, Title 42, U.S.Code*). See *State v. Williams*, 88 Ohio St.3d 513, 516-517, 2000 Ohio 428, 728 N.E.2d

342. In 1996, against this backdrop, the Ohio Legislature repealed and reenacted *R.C. Chapter 2950's* sex offender registration statute ("former *R.C. Chapter 2950*"). In repealing and reenacting former *R.C. Chapter 2950*, the legislature stated its intent to "protect the safety and general welfare of the people of this state." As a result, the three sets of provisions within former *R.C. Chapter 2950*, to wit: the sex offender classification, registration, and community notification provisions, became more stringent.

[*P10] Under former *R.C. Chapter 2950*, a sentencing court was required to determine whether sex offenders [**5] fell into one of the following classifications: (1) sexually-oriented offender; (2) habitual sex offender; or (3) sexual predator. When determining whether a sex offender was a sexual predator, including for offenders in prison for sex offenses committed before July 1, 1997 (the effective date of the statute), the sentencing court was to hold a hearing and consider several factors to determine the individual's likelihood to engage in future sex offenses. The registration provisions applied to all three classifications of sex offenders, and applied to offenders sentenced on or after July 1, 1997 regardless of when the offense occurred. The registration provisions also applied to habitual sex offenders required to register immediately prior to the effective date. Finally, the community notification provisions applied to all sexual predators and to the habitual sex offenders upon whom the sentencing court had imposed the notification requirements.¹

1 For a more detailed overview of the three sets of provisions under former *R.C. Chapter 2950*, see *State v. Cook*, 83 Ohio St.3d 404, 1998 Ohio 291, 700 N.E.2d 570; and *State v. Williams*, 88 Ohio St.3d 513, 2000 Ohio 428, 728 N.E.2d 342.

[*P11] In *State v. Cook*, 83 Ohio St.3d 404, 1998 Ohio 291, 700 N.E.2d 570, [**6] the Ohio Supreme Court addressed whether former *R.C. Chapter 2950*, as applied to conduct prior to the effective date of the statute, violated the Ohio Constitution's prohibition on retroactive laws and the Ex Post Facto Clause of the United States Constitution. The supreme court noted that former *R.C. Chapter 2950* sought to "protect the safety and general welfare of the people of this state," which was a "paramount governmental interest." *Id. at 417*. The supreme court held that because the statute was remedial rather than punitive, the registration provisions of former *R.C. Chapter 2950* did not violate the Ohio Constitution's ban on retroactive laws. *Id. at 413*. The supreme court further held that in light of the statute's remedial nature, and because there was no clear proof that the statute was punitive in its effect, the registration and notification provisions of former *R.C. Chapter 2950* did not

violate the Ex Post Facto Clause of the United States Constitution. *Id.* at 423.

[*P12] Two years later, in *Williams*, 88 Ohio St.3d 513, 2000 Ohio 428, 728 N.E.2d 342, the supreme court addressed whether the registration and notification provisions of former R.C. Chapter 2950 amounted to double jeopardy. The supreme court held [**7] that because former R.C. Chapter 2950 was "neither 'criminal,' nor a statute that inflicts punishment," former R.C. Chapter 2950 did not violate the *Double Jeopardy Clauses of the United States and Ohio Constitutions*. *Id.* at 528. Subsequently, in *State v. Wilson*, 113 Ohio St.3d 382, 2007 Ohio 2202, 865 N.E.2d 1264, the supreme court reiterated that "the sex-offender-classification proceedings under [former] R.C. Chapter 2950 are civil in nature[.]" *Id.* at P32.

[*P13] Former Chapter 2950 was amended by Senate Bill 5, effective July 31, 2003. The amendments required that the designation "predator" and the concomitant duty to register remain for life; required sex offenders to register in three different counties (that is, county of residence, county of employment, and county of school) every 90 days (as opposed to registering only in their county of residence); and expanded the community notification requirements. In *State v. Ferguson*, 120 Ohio St. 3d 7, 2008 Ohio 4824, 896 N.E.2d 110, the Ohio Supreme Court addressed whether the Senate Bill 5 amendments, as applied to conduct prior to the effective date of the statute, violated the Ex Post Facto Clause of the United States Constitution and the Ohio Constitution's prohibition [**8] on retroactive laws. Once again, noting the civil, remedial nature of the statute, the supreme court held that the Senate Bill 5 amendments to former R.C. Chapter 2950 neither violated the *retroactivity clause of the Ohio Constitution* nor the Ex Post Facto Clause of the United States Constitution. *Id.* at P36, 40, and 43.

[*P14] On June 30, 2007, the Governor of the state of Ohio signed Senate Bill 10 into effect. Senate Bill 10 implements the federal Adam Walsh Child Protection and Safety Act which was passed by the United States Congress in 2006. Senate Bill 10 amended numerous sections of Ohio's Revised Code. However, for purposes of this appeal, only the revisions to former Chapter 2950 are relevant. Thus, when Senate Bill 10 is discussed in the case at bar, it is only pertaining to the revisions to former R.C. Chapter 2950, and not to the revisions of any other chapter of the Revised Code. See *State v. Byers*, *Columbiana App. No. 07 CO 39*, 2008 Ohio 5051. Senate Bill 10 went into effect on January 1, 2008.

[*P15] Senate Bill 10 classifies each sex offender subject to registration under a new three-tiered system, thereby abolishing the prior classifications in former R.C.

Chapter 2950. Designations [**9] such as "sexual predator" no longer exist, nor do the related hearings under former R.C. 2950.09.

[*P16] Now, under Senate Bill 10, an offender who commits a sex offense is found to be either a "sex offender" or a "child-victim offender." Then, depending on the sex offense the offender committed, the offender is placed in Tier I, Tier II, or Tier III. Trial courts no longer have discretion in imposing a certain classification on offenders, and an offender's likelihood to reoffend is no longer considered. Rather, offenders are now classified *solely* on the offense for which they were convicted. *State v. Clay*, 177 Ohio App.3d 78, 2008 Ohio 2980, P6, 893 N.E.2d 909. Offenders, however, are automatically placed into a higher tier if (1) they have a prior conviction for a sexually-oriented or child-victim-oriented offense, or (2) they have been previously classified as sexual predators. *Id.* at P7.

[*P17] Senate Bill 10 also provides for the reclassification of all offenders who were classified prior to its enactment. *In re Smith*, *Allen App. No. 1-07-58*, 2008 Ohio 3234, P32. The reclassification affords no deference to the prior classification given by the trial court. Rather, offenders are reclassified under Senate Bill [**10] 10 solely on the offense for which they were convicted. *Id.*

[*P18] Of the three tiers, Tier I is the lowest tier and Tier III is the highest tier. Each tier has registration requirements, but they differ in terms of the duration of the duty and the frequency of the in-person address verification. The registration requirements under Senate Bill 10 are also longer in duration than their counterparts under former R.C. Chapter 2950. Tier I offenders are required to register for 15 years and to verify their addresses annually, but there are no community notification requirements. Tier II offenders are required to register for 25 years and to verify their addresses every 180 days, but there are no community notification requirements. Finally, Tier III offenders (similar to the former sexual predator classification) are required to register for life and to verify their addresses every 90 days; community notification may occur every 90 days for life.

[*P19] We now turn to appellant's constitutional arguments. The crux of appellant's arguments is that by tying sex offender classification, registration, and community notification requirements solely to the crime committed by the offender, without any consideration [**11] of the offender's likelihood of reoffending, Senate Bill 10 has created a sex-offender registration scheme that is no longer remedial and civil in nature. Rather, sex offender registration under Senate Bill 10 is purely punitive and is in fact part of the original sentence.

[*P20] It is well-established that "statutes enjoy a strong presumption of constitutionality." *Cook*, 83 *Ohio St.3d* at 409. "A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality. That presumption of validity of such legislative enactment cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution." *Id.* (Internal citations omitted.)

[*P21] Accordingly, we begin with the strong presumption that Senate Bill 10 is constitutional.

THE RETROACTIVE CLAUSE OF THE OHIO CONSTITUTION

[*P22] Appellant argues that the classification, registration, and residency provisions of Senate Bill 10 violate the Ohio Constitution's prohibition on retroactive laws. We note that appellant also challenges the constitutionality of Senate Bill 10's [*12] residency provision on two other grounds, to wit: it violates the Ex Post Facto Clause of the United States Constitution and his due process rights. For purposes of clarity and concise analysis, we will address appellant's constitutional arguments regarding the residency provision under its own headline.

[*P23] *Section 28, Article II of the Ohio Constitution* provides that "[t]he general assembly shall have no power to pass retroactive laws." Further, statutes are presumed to apply only prospectively unless specifically made retroactive. *R.C. 1.48*. In determining whether a statute is unconstitutionally retroactive, courts must apply a two-part test. *Hyle v. Porter*, 117 *Ohio St.3d* 165, 2008 *Ohio* 542, P8, 882 *N.E.2d* 899. "Under this test, we first ask whether the legislature expressly made the statute retroactive. If it did, then we determine whether the statutory restriction is substantive or remedial in nature. The first part of the test determines whether the legislature 'expressly made [the statute] retroactive,' as required by *R.C. 1.48*; the second part determines whether it was empowered to do so." *Id.*, citing *Van Fossen v. Babcock Wilcox Co.* (1988), 36 *Ohio St.3d* 100, 522 *N.E.2d* 489.

Whether Senate Bill 10's classification [*13] and registration provisions apply retroactively

[*P24] We find that the classification and registration provisions of Senate Bill 10 were intended to apply retroactively. Under Senate Bill 10, *R.C. 2950.03* governs when a person "who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense or a child-victim oriented offense and who has a duty to register" must be given notice of that duty. *Subsections 1 and 2* of the provision

apply to sex offenders "[r]egardless of when the person committed the sexually oriented offense or child-victim oriented offense[.]" *Subsection 5* refers to sex offenders who prior to December 1, 2007 had registered under former *R.C. Chapter 2950*.

[*P25] *R.C. 2950.031* provides that at any time on or after July 1, 2007, and no later than December 1, 2007, the attorney general must determine for each offender who prior to December 1, 2007 had registered under former *R.C. Chapter 2950*, their new classification under Senate Bill 10. Likewise, *R.C. 2950.032* provides that at any time on or after July 1, 2007, and no later than December 1, 2007, the attorney general must determine for each offender who on December 1, 2007, will be [*14] serving a prison term for a sexually-oriented offense, their classification under Senate Bill 10. *R.C. 2950.04*, the registration provision of Senate Bill 10, imposes a duty to register and comply with registration requirements on every "offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a sexually oriented offense," "[r]egardless of when the sexually oriented offense was committed[.]"

[*P26] "All of the above shows the [legislature's] express intention for *those sections* to be applicable to acts committed or facts in existence prior to the effective date of [Senate Bill 10]." *Byers*, 2008 *Ohio* 5051, P63 (emphasis added). Thus, Senate Bill 10's tier classification system and its registration provision were intended to apply retroactively to all offenders. "That, however, is not a determination that all of Senate Bill 10 applies retroactively." *Id.* As our analysis regarding Senate Bill 10's residency provision shows below, the residency provision is *not* retroactive.

Whether Senate Bill 10 is remedial or substantive

[*P27] Having determined that the classification and registration provisions of Senate Bill 10 meet the threshold test for retroactive application [*15] under *R.C. 1.48*, we must now determine whether the provisions violate *Section 28, Article II of the Ohio Constitution*. That is, we must determine whether Senate Bill 10 is substantive or merely remedial. *Cook*, 83 *Ohio St.3d* at 410-411. The retroactive application of a substantive statute violates the Ohio Constitution but the retroactive application of a remedial statute does not. *Hyle*, 117 *Ohio St.3d* at P7.

[*P28] "A statute is 'substantive' if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation, or liabilities as to a past transaction, or creates a new right. Conversely, remedial laws are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the en-

forcement of an existing right. A purely remedial statute does not violate *Section 28, Article II of the Ohio Constitution*, even if applied retroactively. Further, while we have recognized the occasional substantive effect, it is generally true that laws that relate to procedures are ordinarily remedial in nature." *Cook at 411* (internal citations omitted).

[*P29] At the outset, we note that Senate Bill 10 is [**16] replete with references to the legislative's "intent to protect the safety and general welfare of the people of this state" and to "assur[e] public protection," in light of the legislative determination that "[s]ex offenders and child-victim offenders pose a risk of engaging in further sexually abusive behavior even after being released from imprisonment." *R.C. 2950.02*. This legislative intent was already in existence when the supreme court in *Cook* addressed whether the classification and registration provisions of former *R.C. Chapter 2950* violated *Section 28, Article II of the Ohio Constitution*.

[*P30] In *Cook*, the defendant attempted to challenge the 1997 version of former *R.C. Chapter 2950*, which changed the frequency and duration of the previous sex-offender registration requirements, and which increased the number of classifications from one to three different classifications (sexually-oriented offender, habitual sexual offender, and sexual predator). The supreme court rejected the argument that these provisions under the 1997 version of former *R.C. Chapter 2950* were substantive because they imposed additional burdens with respect to a past transaction:

[*P31] "However, under the former provisions, [**17] habitual sex offenders were already required to register with their county sheriff. *** Only the frequency and duration of the registration requirements have changed. Frequency of registration has increased ***. Duration has increased ***. Further, the number of classifications has increased from one *** to three[.] This court has held that where no vested right has been created, '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.' *** We held that '[e]xcept with regard to constitutional protections against *ex post facto* laws *** felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.'" *Cook*, 83 Ohio St.3d at 411-412, quoting *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 525 N.E.2d 805 (emphasis sic).

[*P32] The supreme court "conclude[d] that the registration and address verification provisions of [former] *R.C. Chapter 2950* are *de minimis* procedural requirements that are necessary to achieve the goals of

[former] *R.C. Chapter 2950*." *Cook at 412*. In so ruling, [**18] the supreme court concurred with the reasoning of the New Jersey Supreme Court in *Doe v. Poritz* (1995), 142 N.J. 1, 662 A.2d 367, which held that:

[*P33] "The Legislature reached the irresistible conclusion that if community safety was its objective, there was no justification for applying these laws only to those who offend or who are convicted in the future, and not applying them to previously-convicted offenders. *** The Legislature concluded that there was no justification for protecting only children of the future from the risk of reoffense by future offenders, and not today's children from the risk of reoffense by previously-convicted offenders, when the nature of those risks were identical and presently arose almost exclusively from previously-convicted offenders, their numbers now and for a fair number of years obviously vastly exceeding the number of those who, after passage of these laws, will be convicted and released and only then, for the first time, potentially subject to community notification." *Cook at 413*, quoting *Poritz*, 142 N.J. at 13-14, 662 A.2d at 373.

[*P34] As a result, the Ohio Supreme Court held that "the registration and verification provisions are remedial in nature [**19] and do not violate the ban on retroactive laws set forth in *Section 28, Article II of the Ohio Constitution*." *Cook at 413*. The supreme court further stated that "[t]he harsh consequences [of] classification and community notification come not as a direct result of the sexual offender law, but instead as a direct societal consequence of [the offender's] past actions." *Id.*, quoting *State v. Lyttle* (Dec. 22, 1997), *Butler App. No. CA97-03-060*, 1997 Ohio App. LEXIS 5705, *33.

[*P35] As noted earlier, Senate Bill 10 abolished the three prior classifications in former *R.C. Chapter 2950* and replaced them with a new three-tiered system. The designations have changed but the sex offenders are still classified into one out of three different categories. The registration requirements for the first two tiers under Senate Bill 10 are longer in duration than their counterparts under former *R.C. Chapter 2950*; however, whether a sex offender was classified as a sexual predator under former *R.C. Chapter 2950* or is classified as a Tier III Sex Offender under Senate Bill 10, the offender is required to register for life. The frequency of the in-person address verification for each tier under Senate Bill 10 is identical to the frequency [**20] required under former *R.C. Chapter 2950* for each classification.

[*P36] As the Clermont County Common Pleas Court noted in *Slagle v. State*, 145 Ohio Misc.2d 98, 2008 Ohio 593, 884 N.E.2d 109, "as it currently stands, *Cook* is good law and must be followed by this court." *Id. at P40*. The Ohio Supreme Court has continued to indicate the remedial nature of sex offender classification

statutes. See *Williams*, 88 Ohio St.3d at 528; *Ferguson*, 120 Ohio St. 3d 7, 2008 Ohio 4824, P29, 896 N.E.2d 110. As a result, we find that the classification and registrations provisions of Senate Bill 10 are remedial in nature and do not violate the ban on retroactive laws set forth in Section 28, Article II of the Ohio Constitution. *Slagle at P40; Byers*, 2008 Ohio 5051, P69.

EX POST FACTO

[*P37] Appellant argues that applying Senate Bill 10 to crimes that occurred before January 1, 2008, violates the Ex Post Facto Clause of the United States Constitution.

[*P38] Section 10, Article I of the United States Constitution prohibits ex post facto laws. An ex post facto law "punishes as a crime an act previously committed, which was innocent when done, [or] which makes more burdensome the punishment for a crime, after its commission." *Cook*, 83 Ohio St.3d at 414. The Ex Post Facto Clause, [**21] however, only applies to criminal statutes. *Id. at 415*.

[*P39] To determine whether Senate Bill 10 is a civil or criminal statute for purposes of an ex post facto analysis, we apply the "intent-effects" test. *Id.* We must first determine whether the legislature meant Senate Bill 10 to be a civil statute and nonpunitive, or to impose punishment. 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's intent was to enact a regulatory scheme that is civil and nonpunitive, we must then determine whether the statutory scheme is so punitive either in purpose or effect as to negate the legislature's intent. *Id.*; *Smith v. Doe* (2002), 538 U.S. 84, 92, 123 S.Ct. 1140, 155 L. Ed. 2d 164; *In re G.E.S.*, *Summit App. No. 24079*, 2008 Ohio 4076, P18.

The legislature's intent in enacting Senate Bill 10

[*P40] Upon reviewing Senate Bill 10, we find that the legislature's intent in enacting the statute was civil, not punitive. "A court must look to the language and the purpose of the statute in order to determine legislative intent." *Cook at 416*. Senate Bill 10 is devoid of any language indicating an intent to [**22] punish. To the contrary, and just as the supreme court found in *Cook* with regard to former R.C. Chapter 2950, the legislature has expressly declared that the intent of Senate Bill 10 is "to protect the safety and general welfare of the people of this state," which is "a paramount governmental interest;" and that "the exchange or release of [information required by this law] is not punitive." R.C. 2950.02; *Cook at 417*. In fact, the language in former R.C. Chapter 2950, which the supreme court in *Cook* relied on to

find that the legislature's intent was remedial, is almost identical to the language used in Senate Bill 10. The only difference is the use of the new tier classification labels in lieu of the former classification labels.

[*P41] Appellant nevertheless argues that the legislature intended Senate Bill 10 to be punitive because (1) an offender's classification and registration obligations depend solely on the offense committed, rather than the offender's risk to the community or likelihood of reoffending; (2) Senate Bill 10 criminalizes an offender's failure to comply with the registration and verification requirements; and (3) the legislature placed Senate Bill 10 within Title 29, [**23] Ohio's Criminal Code. We disagree.

[*P42] Appellant's first argument was rejected by two appellate courts. In *State v. King*, *Miami App. No. 08-CA-02*, 2008 Ohio 2594, the Second Appellate District stated: "[The offender's] attempt to divine punitive intent from the absence of any individualized risk assessment under S.B. 10 is unavailing. As noted above, the new legislation automatically places offenders into one of three tiers based solely on the offense of conviction and imposes corresponding registration requirements. In [*Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164], the United States Supreme Court recognized that a legislature may take such a categorical approach without transforming a regulatory scheme into a punitive one." *King at P12*; see, also, *Desbiens*, 2008 Ohio 3375.

[*P43] Likewise, the Seventh Appellate District stated: "However, [former] R.C. Chapter 2950's classification was also partially tied to the offense. *** [I]t cannot necessarily be concluded that Senate Bill 10's tiers are not directly tied to the ongoing threat to the community that sex offenders pose. The types of offenses that are placed in Tier I are less severe sex offenses, Tier II are more severe, and Tier III are the most severe offenses. Also [**24] within these tiers are some factual determination, such as if the offense was sexually motivated, age of victim and offender, and consent. Likewise, every time an offender commits another sexually oriented offense the tier level rises. R.C. 2950.01(F)(1)(i) and (G)(1)(i). This formula detailed by the legislature illustrates that it is considering protecting the public. Consequently, this new formula does not appear to change the spelled out intent of the General Assembly in R.C. 2950.02." *Byers*, 2008 Ohio 5051, P25-26.

[*P44] We agree with the foregoing analyses. The legislature's intent in enacting Senate Bill 10 was not punitive simply because an offender's classification and registration obligations depend on the offense committed, rather than on the offender's risk to the community or likelihood of reoffending.

[*P45] Next, appellant argues that the legislature intended Senate Bill 10 to be punitive because the statute criminalizes an offender's failure to comply with the registration and verification requirements. We disagree.

[*P46] Failure to register was already a punishable offense before former *R.C. Chapter 2950*. See *Cook*, 83 *Ohio St.3d* at 420. As the Ninth Appellate District stated, "these provisions [**25] do not impact [Senate Bill 10's] remedial nature. The pre-[Senate Bill 10] statutory scheme also criminalized an offender's failure to comply with the registration and verification requirements. See former *R.C. 2950.06(G)(1)*; former *R.C. 2950.99*. [In *Cook*], the Ohio Supreme Court specifically noted these provisions in its retroactivity discussion, but did not identify these provisions as presenting a problem in its Ex Post Facto analysis. *** See, also, *Doe*, 538 [U.S.] at 101-102 (noting that criminal prosecution for failure to comply with SORA's reporting requirements is a proceeding separate from the individual's original offense). Furthermore, [the offender] has not provided any law that demonstrate that [Senate Bill 10's] penalties are more burdensome than the former penalties or make formerly innocent conduct criminal." *In re G.E.S.*, 2008 *Ohio* 4076, P23.

[*P47] We therefore find that the legislature's intent in enacting Senate Bill 10 was not punitive simply because Senate Bill 10 criminalizes an offender's failure to comply with the registration and verification requirements.

[*P48] Finally, appellant argues that because the legislature placed Senate Bill 10 in Ohio's Criminal Code, it intended [**26] Senate Bill 10 to be punitive. This argument is not persuasive. "The location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." *Doe*, 538 *U.S.* at 94. As the Seventh Appellate District aptly stated, "[former] *R.C. Chapter 2950* was within the criminal code, yet the Ohio Supreme Court determined that it was civil in nature. While [Senate Bill 10] is in the criminal code, that placement is not dispositive of the issue, especially since the legislature specifically indicated the intent to be civil." *Byers*, 2008 *Ohio* 5051, P27; see, also, *King*, 2008 *Ohio* 2594, P12; *In re G.E.S.*, 2008 *Ohio* 4076, P21-22.

[*P49] We therefore find that the legislature's intent in enacting Senate Bill 10 was remedial, not punitive.

Whether Senate Bill 10 has a punitive effect

[*P50] We now move to the "effects" prong of the test and determine whether Senate Bill 10 has a punitive effect such that its effect negates the legislative intent. "[O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a

civil remedy into a criminal penalty." *Doe*, 538 *U.S.* at 92; *Cook*, 83 *Ohio St.3d* at 418. The United States Supreme Court has "fashioned [**27] useful guideposts for determining whether a statute is punitive." *Cook*, citing *Kennedy v. Mendoza-Martinez* (1963), 372 *U.S.* 144, 83 *S.Ct.* 554, 9 *L. Ed.* 2d 644. The guideposts are as follows:

[*P51] "[1] whether the sanction involves an affirmative disability or restraint; [2] whether it has historically been regarded as a punishment; [3] whether it comes into play only on a finding of scienter; [4] whether its operation will promote the traditional aims of punishment -- retribution and deterrence; [5] whether the behavior to which it applies is already a crime; [6] whether an alternative purpose to which it may rationally be connected is assignable for it; and [7] whether it appears excessive in relation to the alternative purpose assigned." *Cook* at 418. While useful, the following guideposts are "neither exhaustive nor dispositive." *Doe* at 97.

[*P52] On appeal, although he cites five of the foregoing guideposts, appellant only addresses three of the guideposts. Specifically, appellant argues that Senate Bill 10 imposes burdens that operate as affirmative disabilities and restraints; is analogous to colonial punishments; and furthers the traditional aims of punishment. We find that appellant has not come forward [**28] with the "clearest proof" that the effect of Senate Bill 10 is so punitive that it overcomes the legislature's non-punitive intent.

[*P53] Appellant first asserts that Senate Bill 10 imposes a new affirmative disability or restraint. In *Cook*, the supreme court found that former *R.C. Chapter 2950* imposed no new affirmative disability or restraint: "The act of registering does not restrain the offender in any way. Registering may cause some inconvenience for offenders. However, the inconvenience is comparable to renewing a driver's license. Thus we find that the inconvenience of registration is a de minimis administrative requirement.

[*P54] "[Former] *R.C. Chapter 2950* also requires that information be disseminated to certain persons. Admittedly, that information could have a detrimental effect on offenders, causing them to be ostracized and subjecting them to embarrassment or harassment. However, 'whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the "sting of punishment.'" In addition, the burden of dissemination is not imposed on the defendant, but rather on law enforcement." *Cook* at 418 (internal citations omitted).

[*P55] In [**29] *King*, the Second Appellate District held that: "In *Cook*, *** the court reasoned that the act of registering as a sex offender does not impose any restraint. This remains true regardless of whether King is

required to register once a year for ten years, as under the old law, or *** for twenty-five years, as S.B. 10 now requires. Although S.B. 10 also requires King to disclose a substantial amount of personal information that may be subject to dissemination over the Internet, the same was true in [the Ohio Supreme Court's decision in *Wilson*] as pointed out by the three-member dissent in that case, and in [*Doe*]. On this issue, we fail to see a constitutionally meaningful distinction between S.B. 10 and the version of *R.C. Chapter 2950* in effect when *Wilson* was decided. *** Therefore, in light of existing precedent, we do not find that S.B. 10 imposes an affirmative disability or restraint." *King*, 2008 Ohio 2594, P16.

[*P56] The Ninth Appellate District likewise rejected appellant's argument: "The [United States] Supreme Court reasoned [in *Doe*] that while SORA required offenders to notify authorities if they changed address, place of employment, or physical appearance, the statute did not require [**30] offenders 'to seek permission to do so.' *** Offenders were free to make these changes so long as they forewarned authorities. While the Supreme Court did not have to consider the matter of in-person registration, as SORA contained no such requirement, the Ohio Supreme Court upheld the [former *R.C. Chapter 2950*] statutory scheme's in-person registration requirement in *Cook*.

[*P57] "As with the statutory schemes in *Doe* and *Cook*, [Senate Bill 10] does not impose any constitutional disabilities or restraints[.] *** [Senate Bill 10] does not restrain [sex offenders] or otherwise forbid them from engaging in activities. *** [F]reedom from humiliation and other disagreeable consequences is not a constitutional right. Such humiliation or ostracism may flow naturally from an underlying conviction (including convictions for non-sexually oriented offenses) regardless of [Senate Bill 10's] applicability. We do not ignore the potential impact of [Senate Bill 10], but 'whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the sting of punishment.'" *In re G.E.S.*, 2008 Ohio 4076, P29-30 (internal citations omitted).

[*P58] In *Byers*, the Seventh [**31] Appellate District acknowledged that "sex offender registration under Senate Bill 10 *** requires more than the version discussed in *Cook*" as Senate Bill 10 requires sex offenders to register in several counties and to provide a substantial amount of personal information. *Byers*, 2008 Ohio 5051, P31-32. "As can be seen, these requirements are more involved than the registration requirements in the version discussed in *Cook*. However, the Ohio Supreme Court has continually stated that sex offender classifications are civil in nature. Most recently, in [*Wilson*], the Court restated the decision in *Cook* that the sex offenders classification laws are remedial, not punitive.

The registration statute that was in effect in *Wilson*, is not too different from Senate Bill 10's version. *** We must follow the Supreme Court's decision in *Cook* and the majority decision in *Wilson* that offender classification is civil in nature and the registration requirement is still de minimis; *Cook* and *Wilson* are still controlling law." *Id.* at P37. See, also, *Ferguson*, 120 Ohio St. 3d 7, 2008 Ohio 4824, 896 N.E.2d 110 (finding that amendments to former *R.C. Chapter 2950* expanding registration and notification requirements did not violate the Ex Post Facto Clause; [**32] reaffirming that sex offenders classification laws are remedial; and stating that the dissent in *Wilson* had no precedential value).

[*P59] With regard to the issue of dissemination of information on the offender to the public, the Seventh Appellate District held that: "It is noted that the dissemination requirements under the Senate Bill 10 version of *R.C. Chapter 2950* falls upon law enforcement, like the prior version, and puts none of this duty on the offender. Consequently, for the same reasoning as in *Cook*, we find that *R.C. Chapter 2950*, as changed by Senate Bill 10, does not impose a new affirmative disability or restraint." *Byers* at P38.

[*P60] We agree with the foregoing analyses and find them to be persuasive. We therefore find that Senate Bill 10 does not impose a new affirmative disability or restraint.

[*P61] Next, appellant asserts that Senate Bill 10 is analogous to "colonial punishments of 'public shaming, humiliation, and banishment,'" and that the wide dissemination of sex offenders' personal information "resemble shaming punishments intended to inflict public disgrace." We disagree.

[*P62] We initially note that in *Cook*, the supreme court recognized that registration has long been a valid regulatory [**33] technique with a remedial purpose; Ohio has had a registration requirement since 1963; and public dissemination of registered information about a sex offender has not been regarded as punishment when done in furtherance of a legitimate governmental interest. *Cook*, 83 Ohio St.3d at 418-419.

[*P63] In *Doe*, the United States Supreme Court addressed, and rejected, a similar argument:

[*P64] "Any initial resemblance to early punishment is, however, misleading. *** Even punishments that lacked the corporal component, such as public shaming, humiliation, and banishment, involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community. By contrast, the stigma of Alaska's Megan's Law results not from public display for ridicule and shaming but from the dis-

semination of accurate information about a criminal record, most of which is already public. Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. *** The publicity may cause adverse consequences for the convicted defendant, running from mild embarrassment to social ostracism. [**34] In contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme.

[*P65] "The fact that Alaska posts the information on the Internet does not alter our conclusion. It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." *Doe*, 538 U.S. at 98-99.

[*P66] In light of the foregoing, we find that Senate Bill 10 is not analogous to colonial punishments; nor does the wide dissemination of sex offenders' personal information resemble shaming punishments. *King*, 2008 Ohio 2594, P17-20; *In re G.E.S.*, 2008 Ohio 4076, P31; see, also, [**35] *Byers*, 2008 Ohio 5051, P49-54 (finding that the registration and notification provisions of Senate Bill 10 were non-punitive and reasonably necessary for the intended purpose of protecting the public, even though Senate Bill 10 requires more information to be given by the offender when registering than under former *R.C. Chapter 2950*, and even though information about a sex offender is more widely and readily available than at the time *Cook* was decided).

[*P67] Finally, appellant asserts that Senate Bill 10 furthers the traditional aims of punishment, to wit: retribution and deterrence.

[*P68] "Retribution is vengeance for its own sake. It does not seek to affect future conduct or solve any problem except realizing justice. Deterrent measures serve as a threat of negative repercussions to discourage people from engaging in certain behavior. Remedial measures, on the other hand, seek to solve a problem, for instance by removing the likely perpetrators of future corruption." *Cook*, 83 Ohio St.3d at 420, quoting *Artway v. New Jersey Atty. Gen.* (C.A.3, 1996), 81 F.3d 1235, 1255.

[*P69] Relying on these definitions, the supreme court in *Cook* found that the registration and notification

provisions of former *R.C. Chapter 2950* [**36] neither sought vengeance for vengeance's sake nor retribution. *Cook* at 420. Rather, the provisions were remedial because they sought to collect and disseminate information to protect the public from registrants who may reoffend. *Id.* The supreme court further found that former *R.C. Chapter 2950* did not have a deterrent effect as sex offenders "are not deterred even by the threat of incarceration." *Id.* Further, "deterrence alone is insufficient to make a statute punitive." *Id.*

[*P70] We find that the same reasoning applies to Senate Bill 10. *Byers* at P41. "Our review of [Senate Bill 10] convinces us that *Cook* applies to the vast majority of its provisions, which are targeted to maximize the flow of information to the public. [Senate Bill 10] attempts to 'solve a problem' by keeping the public well informed of possible sources of danger. We cannot say that any of the additions to the [former *R.C. Chapter 2950*] statutory scheme, which are comprised mainly of additional demands from offenders, transform the scheme into one that has either a noticeable retributive or deterrent effect." *In re G.E.S.* at P35 (internal citations omitted).

[*P71] Further, "[b]y tying an offender's classification to the offense [**37] committed rather than to an individual assessment of dangerousness, the [legislature] merely adopted an alternative approach to the regulation and categorization of sex offenders. In [*Doe*], the United States Supreme Court expressly rejected an argument that Alaska's sex-offender registration obligations were retributive because they were based on the crime committed rather than the particular risk an offender posed. *** Similarly, the [*Doe*] court rejected the notion that deterrence resulting from Alaska's statute was sufficient to establish a punitive effect." *King* at P22.

[*P72] We find that Senate Bill 10 does not promote the traditional aims of punishment -- retribution and deterrence.

[*P73] We note that the remaining *Kennedy* guideposts, which were not argued by appellant with regard to Senate Bill 10, were addressed by Ohio appellate courts and found to be inapplicable. See *Byers* at P39, 40, 42-54; *In re G.E.S.* at P33-34, 38-40; *King* at P23-29.

[*P74] In light of all of the foregoing, we reject appellant's argument that Senate Bill 10 is so punitive in effect that it negates the legislature's non-punitive intent. Appellant cannot show, much less by the clearest proof, that the effects of Senate Bill [**38] 10 negate the legislature's intent to establish a civil regulatory scheme. The guideposts set forth in *Kennedy* and argued by appellant indicate that Senate Bill 10 serves the solely remedial purpose of protecting the public. While the notification requirements may be a detriment to registered sex offenders, "the sting of public censure does not convert a

remedial statute into a punitive one." *Cook*, 83 *Ohio St.3d* at 423.

[*P75] We therefore find that Senate Bill 10 is remedial, and not punitive, and that the retroactive application of its classification, registration, and notification provisions do not violate the Ex Post Facto Clause of the United States Constitution.

SENATE BILL 10'S RESIDENCY PROVISION

[*P76] Appellant argues that Senate Bill 10's residency provision violates the Ohio Constitution's ban on retroactive laws, the Ex Post Facto Clause of the United States Constitution, and his due process rights. The residency provision prohibits any "person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense [from] establish[ing] a residence or occupy[ing] residential premises within [1,000] feet of any school premises or preschool or [**39] child day-care center premises." The crux of appellant's arguments is that (1) because the legislature has mandated that Senate Bill 10 be applied retroactively, the residency provision is unconstitutionally retroactive, and (2) the residency provision operates as a direct restraint on a person's liberty and infringes a person's right to live and work where they wish.

[*P77] Appellant challenges the fact that under Senate Bill 10, he "is categorically barred from residing within 1,000 feet of a school, preschool, or day-care center." We note that there is absolutely no evidence in the record before us, nor does appellant claim, that he currently resides within 1,000 feet of a school, preschool, or day-care center. Nor has appellant alleged he was forced to move from an area due to his proximity to a school, preschool, or day-care center, or that he has any intention of moving to a residence within 1,000 feet of a school, preschool, or day-care center.

[*P78] Assuming, arguendo, that appellant currently resides within 1,000 feet of a school, preschool, or day-care center *and that he was residing there before July 1, 2007* (the effective date for Senate Bill 10's residency provision), we find that [**40] the Ohio Supreme Court's decision in *Hyle*, 117 *Ohio St.3d* 165, 2008 *Ohio* 542, 882 *N.E.2d* 899, applies. Appellant committed his offense before July 1, 2007.

[*P79] In *Hyle*, the supreme court was asked to determine whether the residency provision in former *R.C. Chapter 2950*, which prohibited certain sexually-oriented offenders from living within 1,000 feet of a school, could be applied to an offender who had bought his home and committed his offense before the effective date of the statute. The provision at the time provided that "[n]o person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to either a sexually

oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within [1,000] feet of any school premises."

[*P80] The supreme court held that the residency provision in former *R.C. Chapter 2950* did not apply retroactively to an offender who had bought his home or resided in a home and had committed sex offenses prior to the statute's effective date:

[*P81] "On review of the text of [the former residency provision], we find that neither the description of convicted sex offenders nor the description of prohibited acts includes a clear declaration [**41] of retroactivity. Although we acknowledge that the language of [the provision] is ambiguous regarding its prospective or retroactive application, we emphasize that ambiguous language is not sufficient to overcome the presumption of prospective application. The language in [the provision] presents at best a *suggestion* of retroactivity, which is not sufficient to establish that a statute applies retroactively.

[*P82] ****

[*P83] "Our conclusion that [the residency provision] was not expressly made retrospective precludes us from addressing the constitutional prohibition against retroactivity. *** We hold that because [the provision] was not expressly made retroactive, it does not apply to an offender who bought his home and committed his offense before the effective date of the statute." *Hyle* at *P13, 24*.

[*P84] When comparing the language of the residency provision in Senate Bill 10 and its counterpart in former *R.C. Chapter 2950*, the only differences between the two provisions are that Senate Bill 10's residency provision prohibits all sexually-oriented offenders, and not certain sexually-oriented offenders, from living within 1,000 feet of a preschool or day-care center, in addition to a school. Those [**42] differences are minor and do not impact the analysis in *Hyle*. The reasoning in *Hyle* therefore applies. Accordingly, we find that Senate Bill 10's residency provision does not apply to an offender who bought his home or resided in a home and committed his offense before July 1, 2007, the effective date of Senate Bill 10's residency provision. See *Byers*, 2008 *Ohio* 5051, *P98-99*.

[*P85] Next, appellant argues that the residency provision violates the Ex Post Facto Clause of the United States Constitution because it imposes an affirmative disability or restraint and resembles colonial punishments. We disagree.

[*P86] In *King*, the Second Appellate District noted that "we fail to see a constitutionally meaningful distinction between S.B. 10 and the version of *R.C. Chapter 2950* in effect when [the supreme court's deci-

sion in *Wilson*] was decided. Likewise, while S.B. 10 precludes sex offenders from living within 1,000 feet of certain facilities, a similar restriction existed when the *Wilson* majority declared [former] *R.C. Chapter 2950* to be non-punitive. Therefore, in light of existing precedent, we do not find that S.B. 10 imposes an affirmative disability or restraint." *King, 2008 Ohio 2594, P16.*

[*P87] In *Coston v. Petro (S.D. Ohio 2005)*, 398 *F.Supp.2d* 878, [**43] the district court held that the residency provision in former *R.C. Chapter 2950* was neither a criminal provision nor did it have a punitive effect. As noted earlier, Senate Bill 10 only made a slight change to the residency provision in former *R.C. Chapter 2950* by adding day-cares and preschools to the residency prohibition; no drastic change was made. The reasoning in *Coston* was as follows:

[*P88] "[The residency provision] does not, however, impose punishment and accordingly is not a criminal statute. [The provision] on its face imposes no criminal sanctions *** and the expressed intent of the sex offender registration statute is to protect the safety and general welfare of the public. ***

[*P89] "****

[*P90] "[A]lthough [the provision] prohibits sex offenders from living within the designated areas, this statute is unlike the traditional punishment of banishment because sex offenders are not expelled from the community or even prohibited from accessing these areas for employment or conducting commercial transactions. *** [The provision] does impose an affirmative restraint or disability in that registered sex offenders are precluded from living within designated areas of the state. Nevertheless, [the [**44] provision] imposes no physical restraint on sex offenders and in fact is less restrictive than the involuntary commitment provisions for mentally ill sex offenders held to be nonpunitive in *Kansas v. Hendricks*, 521 U.S. 346, 363-65, 117 S.Ct. 2072, 138 L. Ed. 2d 501 (1997). [S]ex offenders are free to move about within the zone, but they cannot establish a permanent residence there. Therefore, the Court cannot conclude that this relatively limited restraint on sex offenders constitutes punishment." ² *Coston*, 398 *F.Supp.2d* at 885-886. But see, contra, *Mikaloff v. Walsh (N.D. Ohio 2007)*, 2007 U.S. Dist. LEXIS 65076, 2007 WL 2572268 (declaring that Senate Bill 10's residency provision violated the Ex Post Facto Clause of the United States Constitution and enjoining prosecutors from enforcing the provision against the plaintiff, a sex offender who was living within 1,000 feet of a school). ³

² See, also, *Hyle v. Porter*, 170 *Ohio App.3d* 710, 2006 *Ohio* 5454, 868 *N.E.2d* 1047, overruled on other grounds in *Hyle*, 117 *Ohio St.3d*

165, 882 *N.E.2d* 899 (Although the rule affirmatively restrains or disables in the sense that convicted sex offenders may not *live* within 1,000 feet of a school, we cannot say that this restriction rises to the level of restraint that constitutes punishment. [**45] We note that the rule does not physically restrain or otherwise impede sexually-oriented offenders from [1] traveling through school zones, [2] entering these areas for employment, or [3] conducting commercial transactions within the zone. Moreover, the rule does not prohibit an offender from *owning, renting, or leasing* a home within 1,000 feet of a school. Sexually-oriented offenders are simply prohibited from *living* within 1,000 feet of a school. The restriction does not affirmatively disable or restrain offenders so severely as to be penal).

3 In *Mikaloff*, after being ordered by prosecutors to move out of his residence because it was within 1,000 feet of a school, the plaintiff sought to enjoin the enforcement of Senate Bill 10's residency provision against him. The plaintiff had committed his sex offenses and resided in his home before the effective date of the residency provision. We find that *Mikaloff* is not applicable to the case at bar. Unlike in the case at bar, the plaintiff in *Mikaloff* was ordered to move out of his residence because it was within 1,000 feet of a school. Thus, the plaintiff sought to avoid suffering an actual deprivation of his property rights by operation [**46] of the residency provision. Further, *Mikaloff* was decided before the Ohio Supreme Court's decision in *Hyle*.

[*P91] Finally, appellant argues that the residency provision violates his due process rights. Assuming appellant's argument is based on an assumption that the provision will eventually affect him, we decline to address appellant's argument. As noted earlier, appellant has not alleged he was forced to move from an area due to his proximity to a school, preschool, or day-care center, or that he has any intention of moving to a residence within 1,000 feet of a school, preschool, or day-care center. Appellant has failed to show he has suffered any actual deprivation of his rights by operation of Senate Bill 10's residency provision.

[*P92] It follows that appellant lacks standing to raise constitutional challenges to Senate Bill 10's residency provision: "It has been held that a defendant lacks standing to challenge the constitutionality of [the residency provision] where the record fails to show whether the defendant has suffered an actual deprivation of his property rights by operation of [the residency provision]." *State v. Amos*, *Cuyahoga App. No. 89855*, 2008 *Ohio* 1834, P43 (addressing a constitutional [**47] chal-

lenge to the residency provision in former *R.C. Chapter 2950*).

[*P93] "The constitutionality of a state statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied and who has not been injured by its alleged unconstitutional provision." *State v. Bruce, Cuyahoga App. No. 89641, 2008 Ohio 926, P12*. "[Defendant] has failed to provide any evidence to demonstrate an injury in fact or an actual deprivation of his property rights or his right to privacy. Neither can he prosecute a facial challenge in order to assert the rights of third parties not before the court." *Id.*, citing *Coston, 398 F.Supp.2d at 884* (both decisions addressing a constitutional challenge to the residency provision in former *R.C. Chapter 2950*).

[*P94] We therefore find that Senate Bill 10's residency provision does not apply to a sex offender who bought his home or resided in a home and committed his offense before July 1, 2007, the effective date of the residency provision; the provision does not violate the Ex Post Facto Clause of the United States Constitution; and appellant lacks standing to challenge the constitutionality [**48] of Senate Bill 10's residency provision on due process grounds.

SEPARATION OF POWERS

[*P95] Appellant argues that Senate Bill 10 violates the separation-of-powers doctrine "inherent in Ohio's constitutional framework by unconstitutionally limiting the powers of the judicial branch of the government." Specifically, "Senate Bill 10 divests the judiciary branch of its power to sentence a defendant [b]y automatically directing a trial court to place an offender in a specific tier based on the crime with which a defendant is convicted[.]"

[*P96] The Ohio Constitution vests the legislative power of the state in the General Assembly, the executive power in the Governor, and the judicial power in the courts. "A statute that violates the doctrine of separation of powers is unconstitutional." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St.3d 451, 475, 1999 Ohio 123, 715 N.E.2d 1062*. "The principle of separation of powers is embedded in the constitutional framework of our state government. The Ohio Constitution applies the principle in defining the nature and scope of powers designated to the three branches of the government. It is inherent in our theory of government 'that each of the three grand divisions [**49] of the government, must be protected from the encroachments of the others, so far that its integrity and independence may be preserved.'" *Id.* (internal citations omitted).

[*P97] Senate Bill 10, however, does not violate the doctrine of separation of powers.

[*P98] As the Third Appellate District stated in *In re Smith, 2008 Ohio 3234*:

[*P99] "However, we note that the classification of sex offenders has always been a legislative mandate, not an inherent power of the courts. Without the legislature's creation of sex offender classifications, no such classification would be warranted. Therefore, *** we cannot find that sex offender classification is anything other than a creation of the legislature, and therefore, the power to classify is properly expanded or limited by the legislature." *Id. at P39* (internal citation omitted).

[*P100] Or, as the Clermont County Common Pleas Court stated in *Slagle, 2008 Ohio 593, 884 N.E.2d 109*:

[*P101] "[The legislature] has not abrogated final judicial decisions without amending the underlying applicable law. Instead, the [legislature] 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 [**50] 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." *Id. at P21*. See, also, *Byers, 2008 Ohio 5051, P73-74* (adopting the reasoning of *Slagle* as its own).

[*P102] In light of the foregoing, we find that Senate Bill 10 does not violate the separation-of-powers doctrine.

CRUEL AND UNUSUAL PUNISHMENT

[*P103] As a Tier II Sex Offender, appellant is required to register for 25 years. Appellant argues that the 25-year registration period is excessive and violates the prohibition against cruel and unusual punishment. We disagree.

[*P104] The *Eighth Amendment of the United States Constitution* and *Section 9, Article I of the Ohio Constitution* prohibit the imposition of cruel and unusual punishment. In *Cook*, the supreme court held that the registration and community notification provisions of former *R.C. Chapter 2950* were not punishment or punitive in nature. *Cook, 83 Ohio St.3d at 417, 423*. [**51] Rather, these provisions were remedial in nature, designed to ensure public safety. *Id.*; see, also, *Williams, 88 Ohio St.3d 513, 2000 Ohio 428, 728 N.E.2d 342*; *Ferguson, 120 Ohio St. 3d 7, 2008 Ohio 4824, 896 N.E.2d 110*.

Based on the holding in *Cook*, the Third and Seventh Appellate Districts found that the protections against cruel and unusual punishment were not implicated; thus, Senate Bill 10 did not violate the prohibition against cruel and unusual punishment. *In re Smith, 2008 Ohio 3234, P37; Byers at P75*. We agree.

[*P105] Likewise, the fact that the registration period is longer under Senate Bill 10 than it was under former *R.C. Chapter 2950* "does not impact the analysis. As long as *R.C. Chapter 2950* is viewed as civil, and not criminal, remedial and not punitive, then the period of registration cannot be viewed as punishment. Accordingly, it logically follows that it does not constitute cruel and unusual punishment since the punishment element is lacking." *Byers at P77*.

[*P106] We therefore find that Senate Bill 10 does not violate the prohibition against cruel and unusual punishment.

DOUBLE JEOPARDY

[*P107] Appellant argues that Senate Bill 10 violates the *Double Jeopardy Clause* contained in the *Fifth Amendment of the United States Constitution* and in *Section 10, Article I of the Ohio Constitution*. [**52] Specifically, appellant argues that because Senate Bill 10 is punitive in its intent and effect, the registration and community notification provisions of the statute unconstitutionally inflict a second punishment upon a sex offender for a singular offense.

[*P108] The *Double Jeopardy Clause of the Fifth Amendment of the United States Constitution* states that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." *Section 10, Article I of the Ohio Constitution* likewise provides that "[n]o person shall be twice put in jeopardy for the same offense." "Although the *Double Jeopardy Clause* was commonly understood to prevent a second prosecution for the same offense, the United States Supreme Court has applied the clause to prevent a state from punishing twice, or from attempting a second time to criminally punish for the same offense. The threshold question in a double jeopardy analysis, therefore, is whether the government's conduct involves criminal punishment." *Williams, 88 Ohio St.3d at 528* (internal citations omitted).

[*P109] As noted earlier, the supreme court in *Williams* found no merit with the argument that former *R.C. Chapter 2950* violated the *Double Jeopardy Clause*. [**53] The supreme court explained that since former *R.C. Chapter 2950* was remedial and not punitive, it could not violate the *Double Jeopardy Clause*:

[*P110] "This court, in *Cook*, addressed whether [former] *R.C. Chapter 2950* is a 'criminal' statute, and

whether the registration and notification provisions involved 'punishment.' Because *Cook* held that [former] *R.C. Chapter 2950* is neither 'criminal,' nor a statute that inflicts punishment, [former] *R.C. Chapter 2950* does not violate the *Double Jeopardy Clauses of the United States and Ohio Constitutions*." *Williams at 528*.

[*P111] Since we found earlier in this decision that Senate Bill 10 is a civil, remedial statute, and not a criminal, punitive statute, the above analysis in *Williams* applies. We therefore find that Senate Bill 10 does not violate the *Double Jeopardy Clauses of the United States and Ohio Constitution*. See *In re Smith, 2008 Ohio 3234, P36, 38; Byers, 2008 Ohio 5051, P103; and Slagle, 2008 Ohio 593, P54, 884 N.E.2d 109*.

CONCLUSION

[*P112] In light of all of the foregoing, we find that the classification and registration provisions of Senate Bill 10 do not violate the Ohio Constitution's ban on retroactive laws, nor do they violate the Ex Post Facto Clause of the United States Constitution. [**54] Senate Bill 10 does not violate the doctrine of separation of powers; does not violate the prohibition against cruel and unusual punishment; and does not violate the *Double Jeopardy Clauses of the United States and Ohio Constitutions*. Further, based upon the supreme court's decision in *Hyle, 117 Ohio St.3d 165, 2008 Ohio 542, 882 N.E.2d 899*, Senate Bill 10's residency provision does not apply to a sex offender who bought his home or resided in a home and committed his offense before July 1, 2007, the effective date of the residency provision. The residency provision also does not violate the Ex Post Facto Clause of the United States Constitution. Finally, appellant lacks standing to challenge the constitutionality of the residency provision on due process grounds.

[*P113] The trial court, therefore, did not err by classifying appellant under Senate Bill 10. Appellant's assignment of error is overruled.

[*P114] Judgment affirmed.

BRESSLER, P.J., and POWELL, J., concur.