[Cite as *Naples v. State*, 2009-Ohio-3938.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

MICHAEL J. NAPLES, JR.,	:	**O P I N I O N**
Petitioner-Appellant,	:	**CASE NO. 2008-T-0092**
- vs -	:	
STATE OF OHIO, et al.,	:	
Respondent-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2008 CV 831.

Judgment: Reversed.

Thomas R. Wright, Rossi & Rossi, 26 Market Street, 8th Floor, P.O. Box 6045, Youngstown, OH 44501-6045 (For Petitioner-Appellant).

Dennis Watkins, Trumbull County Prosecutor, and *Deena L. DeVico*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Respondent-Appellee).

DIANE V. GRENDELL, J.

{¶1} Petitioner-appellant, Michael J. Naples, appeals the Judgment Entry of the Trumbull County Court of Common Pleas, in which the trial court granted the Motion for Summary Judgment filed by respondent-appellee, the State of Ohio. The fundamental principles of the "separation of powers" doctrine as written by our forefathers in our United States Constitution is inviolate, and, therefore, mandates reversal of the decision

of the court below. However, Naples must still comply with the notification and registration requirements under his original sentence.

{¶2} On June 7, 2000, Naples pleaded guilty to two counts of Rape, in violation of R.C. 2907.02(A)(1)(b). He was sentenced to serve a definite prison term of five years on one count and six years on the other count, to be served consecutively. He was classified as a sexual predator. Naples received notice from the Ohio Attorney General's Office on January 7, 2008, of his reclassification as a Tier III sex offender pursuant to R.C. 2950.031(A)(1).

{¶3} On March 6, 2008, Naples filed a petition contesting his reclassification. The State subsequently filed a Motion for Summary Judgment. The trial court found that it was proper for the Attorney General to reclassify Naples as a Tier III sex offender and, as a result, granted summary judgment in favor of the State.

{¶4} Naples timely appeals and raises the following assignments of error:

{¶5} "[1.] The trial court erred in granting summary judgment to appellees. The retroactive application of Ohio's Adam Walsh Act violates the prohibition of *Ex Post Facto* laws in Article I, Section 10, of the United States Constitution.

{¶6} "[2.] The retroactive application of Ohio's Adam Walsh law violates the prohibition on retroactive laws in Article I, Section 28, of the Ohio Constitution.

{¶7} "[3.] Reclassification of Appellant constitutes a violation of the separation of powers' [sic] doctrine.

{¶8} "[4.] Reclassification and placing additional obligations upon Appellant constitutes impermissible multiple punishment under the double jeopardy clauses of the United States and Ohio Constitutions.

{¶9} "[5.] The residency restrictions of the Adam Walsh Act violate due process.

{¶10} "[6.] Appellant cannot be subjected to registration under the community notification requirements of the Adam Walsh Act that he was not subject to under pre-Adam Walsh Act.

{¶11} "[7.] The statutory scheme violates procedural due process.

{¶12} "[8.] The new laws applied to appellant amount to a breach of contract."

{¶13} Senate Bill 10, also known as the Adam Walsh Child Protection and Safety Act (AWA), passed in June 2007, with an effective date of January 1, 2008, amended the sexual offender classification system found in R.C. 2950.01. *In re Gant*, 3d Dist. No. 1-08-11, 2008-Ohio-5198, at ¶11. Under the prior classification system, the trial court determined whether the offender fell into one of three categories: (1) sexually oriented offender, (2) habitual sex offender, or (3) sexual predator. Former R.C. 2950.09; *State v. Cook*, 83 Ohio St.3d 404, 407, 1998-Ohio-291. In determining whether to classify an offender as a sexual predator, former R.C. 2950.09(B)(3) provided the trial court with numerous factors to consider in its determination. *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234, at ¶28.

{¶14} Under the new classification system, adopted by the AWA, the trial court must designate the offender as either a Tier I, II, or III sex offender. R.C. 2950.01(E), (F) and (G); *Gant*, 2008-Ohio-5198, at ¶15. The new classification system places a much greater limit on the discretion of the trial court to categorize the offender, as the AWA requires the trial court to simply place the offender into one of the three tiers based on the offender's offense.

{¶15} An appellate court's review of the trial court's decision to grant or deny a motion for summary judgment is de novo, as it only involves questions of law. *Bertrand v. Lax*, 11th Dist. No. 2004-P-0035, 2005-Ohio-3261, at ¶13; *Landmark Ins. Co. v. Cincinnati Ins. Co*., 11th Dist. No. 2000-P-0093, 2001-Ohio-4311, at ¶9 (citation omitted). Summary judgment is proper when three conditions are satisfied: 1) there is no genuine issue of material fact; 2) the moving party is entitled to judgment as a matter of law; and 3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made. Civ.R. 56(C); *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385, 1996-Ohio-389; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66. This court applies the same standard a trial court is required to apply, which is to determine whether any genuine issues of material fact exist and whether the moving party is entitled to judgment as a matter of law. *Grafton v. Ohio Edison Co*., 77 Ohio St.3d 102, 105, 1996-Ohio-336.

{¶16} In general, statutes enjoy a strong presumption of constitutionality. "An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *Cook*, 83 Ohio St.3d at 409, quoting *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, at paragraph one of the syllabus. "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." Id. (citation omitted). "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. quoting *Xenia v. Schmidt* (1920), 101 Ohio St. 437, at paragraph two of the syllabus; *State ex rel. Durbin v. Smith* (1921), 102 Ohio St. 591, 600; *Dickman*, 164 Ohio St. at 147.

{¶17} Naples' assignments of error will be considered out of order for the sake of clarity of presentation.

{¶18} Naples first argues that the AWA violates Section 10, Article I of the United States Constitution. Section 10, Article I of the United States Constitution provides that no State may enact an ex post facto law. Naples claims that the AWA imposes burdens on defendants that have historically been regarded as punishment and operate as affirmative disabilities and restraints.

{¶19} 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 (citation omitted).

{¶20} "To determine whether a statute constitutes an unconstitutional ex post facto law, a reviewing court must conduct a two-tiered analysis." *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076, at ¶18, citing *Smith v. Doe* (2003), 538 U.S. 84, 92. Since the ex post facto clause only prohibits criminal statutes and punitive schemes, the court must first ask "whether the legislature intended for the statute to be civil and non-punitive or criminal and punitive." Id. (citations omitted). If "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." Id. quoting *United States v. Ward* (1980), 448 U.S. 242, 248-249. To survive an ex post facto challenge, 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.

{¶21} Naples argues that the AWA is both criminal in nature and has a punitive effect. We disagree.

{¶22} When applying the intent-effects test to the former R.C. Chapter 2950, the Ohio Supreme Court held that the General Assembly did not intend for the statute to be punitive because the purpose of the scheme had been to promote public safety and increase public confidence in the state's criminal and mental health systems. *Cook*, 83 Ohio St.3d at 417. The *Cook* court found that the General Assembly's declaration of purpose was controlling in deciding what intent the Legislative body had. "[G]iven the similarities between the prior legislative intent that was specified in the version reviewed by the *Cook* Court and [the AWA'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." *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051, at ¶28.

{¶23} Naples further argues that the purpose of the statute has changed. Specifically, he maintains that under the former version of the statute, an offender's registration requirements were directly tied to his ongoing threat to the community and now the registration requirements only depend upon the offense committed. This argument also fails because "the old version of R.C. Chapter 2950's classification was also partially tied to the offense." Id. at ¶25. "Only at the classification hearing would it be determined whether [the offender] 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." Id. The AWA Tiers are also 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, 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." Id. at ¶26.

{¶24} Naples further argues the fact that R.C. 2950 is within the criminal code shows the criminal nature of the AWA. However, although R.C. Chapter 2950 is contained in the criminal section of the Revised Code, the United States Supreme Court has indicated that the location or label of a sexual offender registration act will not change a remedial provision into a criminal statute when the title of the state code has other provisions which do not relate to criminal punishment. *Smith*, 538 U.S. at 95. In addition, other Ohio appellate courts have held that the placement of the sexual offender scheme in Title 29 of our Revised Code is insufficient to negate the General Assembly's expressed intent because Title 29 has numerous provisions which pertain solely to non-criminal matters. *G.E.S.*, 2008-Ohio-4076, at ¶22.

{¶25} Based on the above discussion, the General Assembly did not intend for the statute to be punitive. We must now decide whether the AWA has such a punitive effect as to negate the Legislature's intent. While there is no test to determine whether

a statute is so punitive as to violate the constitutional prohibition against ex post facto laws, the United States Supreme Court has provided certain guideposts to be applied in resolving this issue. The guideposts include, "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned ***." *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, 168-169 (footnotes omitted).

{¶26} The *Cook* court concluded that the first version of the sexual offender laws did not impose any new affirmative disability or restraint upon a criminal defendant. *Cook*, 83 Ohio St.3d. at 418. The court emphasized that even prior to 1997, a sexual offender had been legally obligated to register with the sheriff of the county where he lived; since the act of registering only created a minor inconvenience for an offender, it was a "de minimus administrative requirement" which was similar to obtaining a driver's license; and even though the dissemination of the registration information could have a detrimental effect upon a sex offender, it was not impermissible for a remedial measure to carry a sting of punishment. Id.

{¶27} The registration requirements under the AWA are more rigorous than the ones reviewed by the *Cook* court; the offender is now required to register in more counties, and has a legal duty to provide more information. However, the Supreme Court of Ohio continues to hold that sex offender classifications are civil in nature. Most

recently in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶30, 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* was not exceedingly different from the AWA's version[1].

{¶28} Additionally, it has been noted that, even if an offender has a duty to register more often, the basic act of registering has not changed; i.e., the act is a simple procedure that can still be described as de minimus. *State v. Desbiens*, 2nd Dist. No. 22489, 2008-Ohio-3375, at ¶24. Accordingly, this factor does not weigh in favor of the AWA having a punitive effect.

{¶29} The second guidepost is the historical view of registration and notification requirements. The United States Supreme Court has held that "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. On the contrary, our criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused." *Smith*, 538 U.S. at 98-99. The *Cook* court's decision echoed this sentiment; holding that historically, the requirement of registration has been deemed a valid regulatory technique; and the dissemination of information is considered non-punitive when it supports a proper state interest. *Cook*, 83 Ohio St.3d at 418-419. Consequently, the second *Kennedy* guidepost does not weigh in favor of the conclusion that R.C. Chapter 2950 had become strictly punitive in nature.

1. The registration law in effect at the time contained a permanent sexual predator label which is similar to a Tier III designation. Offenders were required to register with the sheriff where they work, live, and go to school. Sexual predators were required to register every 90 days. Community notification information was available on the internet. Further, residency restrictions were also similar to the current version of the statute.

{¶30} "The third guidepost is the element of scienter. [The AWA's] version of R.C. 2950.04 requires registration. Like the 1997 version, [the AWA] 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." *Byers*, 2008-Ohio-5051, at ¶40.

{¶31} The fourth guidepost analyzes retribution and deterrence. In *Cook*, the court held that registration and notification were remedial because they seek to protect the public from registrants who may reoffend. *Cook*, 83 Ohio St.3d at 420. The Court explained that registration and notification do not have much of a deterrent effect on a sex offender. Further, the court found 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. Rather, these provisions have the remedial purpose of collecting and disseminating information to relevant persons to protect the public from registrants who may reoffend." Id. Thus, it found that R.C. Chapter 2950 does not promote the traditional aims of punishment: retribution and deterrence. This same reasoning applies to the AWA version of R.C. Chapter 2950.

{¶32} The fifth *Kennedy* guidepost examines whether the behavior to which it applies is already a crime. The *Cook* court explained that any punishment for failing to register is a new offense that does not arise from the past sex offense; "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." Id. at 421. Since this aspect of R.C. Chapter 2950 has not been altered under the AWA, there is no logical reason to deviate from the *Cook* holding.

{¶33} As for the sixth guidepost, other Ohio appellate courts have found that there is an alternative purpose which may be rationally assigned to R.C. Chapter 2950, namely, protection of the public. See *Byers*, 2008-Ohio-5051, at ¶47. The *Cook* court found that the alternate purpose of R.C. Chapter 2950 was to protect the public. *Cook*, 83 Ohio St.3d at 421. The court reasoned that sex offenders have a high rate of recidivism, which demands that steps be taken to protect the public against those most likely to reoffend. "Notification provisions allow dissemination of relevant information to the public for its protection." Id.

{¶34} The AWA version of R.C. Chapter 2950 shares the same alternate purpose of protecting the public. Since there were no drastic changes to the statute, the *Cook* reasoning applies to the AWA. The one major change in the registration requirement is longer registration periods; however, this serves to protect the public for a longer duration.

{¶35} The final guidepost raises the question of the excessiveness of the statutory scheme at issue in light of its alternate purpose. In upholding the pre-AWA statutory scheme in *Cook*, the Ohio Supreme Court focused on the scheme's narrowness. 83 Ohio St.3d at 421-423. 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 421-422. 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. Thus, the Court concluded that the statutory scheme was not excessive in light of its protective purpose. Id. at 423.

{¶36} Although more information must be provided under R.C. Chapter 2950 than under the version considered in *Cook*, the registration and notification provisions of R.C. 2950 are still "nonpunitive and reasonably necessary for the intended purpose of protecting the public." *Byers*, 2008-Ohio-5051, at ¶54.

{¶37} Furthermore, other appellate districts have reviewed the AWA and have concluded that it does not violate the prohibition against ex post facto laws. *G.E.S.*, 2008-Ohio-4076, at ¶¶18-41; *State v. Longpre*, 4th Dist. No. 08CA3017, 2008-Ohio-3832, at ¶15; *Desbiens*, 2008-Ohio-3375, at ¶¶16-34; *In re Smith*, 3rd Dist. No. 1-07-58, 2008-Ohio-3234, at ¶¶24-40.

{¶38} The two prongs of the intent-effects test have been satisfied; the General Assembly intended that the current provisions of R.C. Chapter 2950 be remedial and the above analysis supports the conclusion that any punitive effect of the provisions are insufficient to negate the remedial purpose.

{¶39} Naples' first assignment of error is without merit.

{¶40} Naples next argues that the retroactive reclassification impairs vested rights and imposes new obligations and additional substantial burdens on him by requiring more frequent registration, a longer period of registration, and more disclosure at registration.

{¶41} A statutory provision can be employed retroactively under limited circumstances. In *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, the Ohio Supreme Court fashioned a two-part test to determine whether statutes may be applied retroactively. "First, the reviewing court must determine as a threshold matter whether the statute is expressly made retroactive." Id. at ¶10 (citations omitted). Next "[i]f a

statute is clearly retroactive *** the reviewing court must then determine whether it is substantive or remedial in nature." Id. (citation omitted). A purely remedial statute does not violate Section 28, Article II of the Ohio Constitution, even if applied retroactively.

{¶42} Pursuant to the AWA version of R.C. 2950.01, sex offender classifications under the new law are applicable to a sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to certain sexually oriented offenses. There are other examples of the Legislature's retroactive intent delineated in R.C. Chapter 2950. See R.C. 2950.03(A); R.C. 2950.031; and R.C. 2950.033. Therefore, the Legislature has specifically made the new version of Chapter 2950 retroactive as it applies to offenders who have been found guilty of or pleaded guilty to certain offenses prior to the enactment of the new law.

{¶43} We must now determine whether the provisions should be characterized as substantive or remedial. 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 to a past transaction, or creates a new right. *Van Fossen v. Babcock & Wilcox Co*. (1988), 36 Ohio St.3d 100, 106-107. Whereas, 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. Id. at 107.

{¶44} In *Cook*, the court found that the 1997 version of the sexual offender laws was remedial in nature. The court reasoned that "many of the requirements contained in R.C. Chapter 2950 are directed at officials rather than offenders." 83 Ohio St.3d at 411. Further, the court emphasized that the pre-1997 version as well as the version reviewed under *Cook*, had both required offenders to register, the 1997 version merely

increased both frequency and duration of the requirement. Id. The court inferred that a sex offender could have no reasonable expectation that his prior actions could not be the subject of subsequent legislation. Id. at 412 (citation omitted). Additionally, as noted in the discussion above, the court held that the registration and verification provisions were de minimus requirements which were necessary to achieve the goal of protecting society. Id. at 412-413.

{¶45} Even though the registration and verification requirements have been modified under the AWA, the foregoing points can still be made in regard to the present version of R.C. Chapter 2950. "The majority of requirements 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 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 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)." *Byers*, 2008-Ohio-5051, at ¶67.

{¶46} "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." *G.E.S.*, 2008-Ohio-4076, at ¶17. Therefore, the AWA does not violate Ohio's Retroactivity Clause.

{¶47} Naples' second assignment of error is without merit.

{¶48} In his fourth assignment of error, Naples argues that his reclassification constitutes "successive punishment, and therefore, a double jeopardy violation under the Fifth and Fourteen Amendments of the United States Constitution and Article I, Section 10, of the Ohio Constitution." He claims that he "was first punished when he was sentenced for his criminal conduct and classified under Ohio's prior sex offender law. Now, several years later, the State seeks to enhance his punishment by subjecting him to the new sex offenders' law's more onerous requirements."

{¶49} The Double Jeopardy Clause of the federal Constitution states that an individual cannot be placed "in jeopardy of life or limb" for the same offense twice. "[T]he 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." *Byers*, 2008-Ohio-5051, at ¶100 (citations omitted). "Thus, the threshold question in a double jeopardy analysis is whether the government's conduct involves

criminal punishment." Id., citing *State v. Williams*, 88 Ohio St.3d 513, 528, 2000-Ohio-428, citing *Hudson v. United States* (1997), 522 U.S. 93, 101.

{¶50} In *Williams*, the Ohio Supreme Court found no merit with the argument that former R.C. Chapter 2950 violated the Double Jeopardy Clause. 88 Ohio St.3d at 528. The Court explained that since the statute was determined in *Cook* to be remedial and not punitive, it could not violate the Double Jeopardy Clause. Id.

{¶51} Since we find that the AWA, R.C. Chapter 2950, sexual offender classification to be remedial like its predecessor, the above analysis from *Williams* is applicable and this argument fails. Thus, the AWA does not violate the Double Jeopardy Clause.

{¶52} Naples' fourth assignment of error is without merit.

{¶53} In his fifth assignment of error, Naples argues that the residency and travel restrictions added violate the due process clause, as well as the right to privacy, guaranteed by Section I, Article I, of the Ohio Constitution.

{¶54} Naples argues that the AWA restricts how close he may live to a school or day care facility, which restricts his liberty and infringes on his fundamental right to live where he wishes.

{¶55} "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). [The AWA], 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)." *Byers*, 2008-Ohio-5051, at ¶95.

{¶56} The Ohio Supreme Court has held that "[b]ecause 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." *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, at syllabus. The *Hyle* Court found that since the language in former R.C. 2950.031 did not express a clear intention to make the residency restriction retroactive, the prospective presumption could not be overcome. Id. "[The AWA] 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." *Byers*, 2008-Ohio-5051, at ¶99.

{¶57} Therefore, if Naples 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, Naples has failed to show any actual deprivation of property rights. Thus, without an indication in the record that he purchased the residence prior to the enactment of the statement, we cannot find merit with this argument.

{¶58} Moreover, the Eighth Appellate District has held that where an offender "is currently in prison," that offender is not presently subject to the residency restrictions, resulting in no present harm being inflicted on the offender. *State v. Freer*, 8th Dist. No. 89392, 2008-Ohio-1257, ¶¶29-30. As a result, the court dismissed a due process challenge to the residency restrictions on the grounds that such issue was not ripe for review. Id. at ¶30.

{¶59} Naples' fifth assignment of error is without merit.

{¶60} In his sixth assignment of error, Naples contends that the AWA cannot be applied retroactively to him. As addressed above, R.C. Chapter 2950 is a civil, remedial statute, it therefore cannot be deemed unconstitutional on ex post facto grounds.

{¶61} Naples also argues, in the alternative, that if it does apply and he is reclassified as a Tier III sex offender, he cannot be subject to the registration or community notification requirements under R.C. 2950.11 that go beyond the registration and notification requirements previously imposed by the court order. He further asserts that he qualifies for the exception set forth in R.C. 2950.11(F)(2), which states "[t]he notification provisions of this section do not apply to a person *** if a court finds at a hearing after considering the factors described in this division that the person would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment."

{¶62} Naples would have automatically been subject to community notifications under Megan's Law, the version that existed immediately prior to the AWA version, because he was classified as a sexual predator under that law. See Former R.C. 2950.11(F)(1)(a). He cannot argue that he was not subjected to community notification requirements under the previous law. Thus, he has not met the exception requirements.

{¶63} Naples' sixth assignment of error is without merit.

{¶64} In his next assignment of error, Naples argues that he was denied procedural due process rights when he was automatically reclassified as a Tier III sex offender without a meaningful opportunity to challenge his reclassification.

{¶65} Procedural due process requires notice and an opportunity to be heard where the state seeks to infringe a protected liberty or property interest. *Williams v. Dollison* (1980), 62 Ohio St.2d 297, 299. A constitutionally protected liberty interest has been defined as freedom from bodily restraint and punishment. *Ingraham v. Wright* (1977), 430 U.S. 651, 673-674 (citation omitted).

{¶66} This court has previously found that "[n]either the Due Process Clause of the Fourteenth Amendment to the United States Constitution nor the analogous clause in Ohio's Constitution, Section 16, Article I, requires a hearing in this case." *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, at ¶104 (citation omitted). In concluding that no due process violation had occurred, this court reasoned that a defendant does not suffer "any bodily restraint as a result of the registration requirement imposed on him as a sex offender. Nor has he been punished." Id. at ¶105 (citations omitted). Thus, because Naples has not been deprived of any liberty or property interest, a hearing is not necessary. Consequently, his procedural due process has not been violated.

{¶67} Naples' seventh assignment of error is without merit.

{¶68} In his eighth assignment of error, Naples argues that he entered into a plea agreement with the State in which he agreed to plead guilty to two counts of Rape, knowing that there would be a civil ramification pursuant to R.C. 2950.01 as it existed at the time; however, now there would be new and additional obligations under the AWA and, thus, a breach of contract.

{¶69} "A plea bargain itself is contractual in nature and subject to contract-law standards." *State v. Butts* (1996), 112 Ohio App.3d 683, 685-686 (citation omitted).

Ordinarily, if one side violates a term of the plea agreement, the other party has a right to pursue certain remedies, including rescission of the agreement. *State v. Hart*, 8th Dist. No. 84531, 2005-Ohio-107, at ¶8. However, in applying the elementary rules of contract law to plea agreements, the courts of this state have held that an alleged breach of such an agreement cannot be based upon an action which occurs following the performance of the various terms. See *State v. Pointer*, 8th Dist. No. 85195, 2005-Ohio-3587, at ¶9. That is, once a criminal defendant has entered his guilty plea and has been sentenced by the trial court, a breach of contract can no longer occur because both sides have fully performed their respective obligations under the plea agreement. *Slagle v. State*, 145 Ohio Misc.2d 98, 2008-Ohio-593, at ¶59.

{¶70} The new classification system cannot be deemed a violation of the terms of Naples' plea agreement because the performance of that contract was fully completed when he entered his plea and was sentenced.

{¶71} Naples' eighth assignment of error is without merit.

{¶72} In his third assignment of error, Naples argues that his reclassification violates the separation of powers doctrine by interfering with a prior judicial adjudication regarding his sex offender status. Naples further argues that the "legislature's attempts to heap additional obligations upon the Appellant also violates the Doctrine of Res Judicata." Moreover, "such interference with previous judicial adjudications impermissibly encroaches on judicial authority and violates the separation of powers doctrine."

{¶73} "Although the Ohio Constitution does not contain explicit language establishing the doctrine of separation of powers, it is inherent in the constitutional

framework of government defining the scope of authority conferred upon the three separate branches of government." *State v. Sterling*, 113 Ohio St.3d 255, 2007-Ohio-1790, at ¶22. "The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others." *State ex rel. Bryant v. Akron Metro. Park Dist.* (1929), 120 Ohio St. 464, 473.

{¶74} The reclassification of offenders pursuant to R.C. 2950.031(E) and R.C. 2950.032(E) does not grant appellate review to the Attorney General; the amendments to the Sex Offender Registration and Notification Act constitute a new law, with a new system of classification and attendant registration and notification requirements.

{¶75} Unlike the review vested in courts of appeal, "the classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts." *Smith*, 2008-Ohio-3234, at ¶39 (citation omitted). Similarly, this court has observed "[t]he enactment of laws establishing registration requirements for, e.g., motorists, corporations, or sex offenders, is traditionally the province of the legislature and such laws do not require judicial involvement." *Swank*, 2008-Ohio-6059, at ¶99.

{¶76} However, "[t]he administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers." *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, at paragraph one of the syllabus. "[I]t is well settled that the legislature cannot annul, reverse or modify a judgment of a court already rendered." *Bartlett v.*

Ohio (1905), 73 Ohio St. 54, 58; *Plaut v. Spendthrift Farm, Inc.* (1995), 514 U.S. 211, 219 (Congress may not interfere with the power of the federal judiciary "to render dispositive judgments" by "command[ing] the federal courts to reopen final judgments") (citation omitted). "A judgment which is final by the laws existing when it is rendered cannot constitutionally be made subject to review by a statute subsequently enacted." *Gompf v. Wolfinger* (1902), 67 Ohio St. 144, at paragraph three of the syllabus. "That the conclusions are uniform upon the proposition that a judgment which is final by the statutes existing when it is rendered is an end to the controversy, will occasion no surprise to those who have reflected upon the distribution of powers in such governments as ours, and have observed the uniform requirement that legislation to affect remedies by which rights are enforced must precede their final adjudication." Id. at 152-153.

{¶77} A determination of an offender's classification under former R.C. Chapter 2950 constituted a final order. *State v. Washington*, 11th Dist. No. 99-L-015, 2001-Ohio-8905, 2001 Ohio App. LEXIS 4980, at *9 ("a defendant's status *** arises from a finding rendered by the trial court, which in turn adversely affects a defendant's rights by the imposition of registration requirements"); *State v. Dobrski*, 9th Dist. No. 06CA008925, 2007-Ohio-3121, at ¶6 ("[i]nasmuch as a sexual predator classification is an order that affects a substantial right in a special proceeding, it is final and appealable"). Accordingly, if either party failed to appeal such a determination within thirty days, as provided for in App.R. 4(A), the judgment became settled. Subsequent attempts to overturn such judgments have been barred under the principles of res judicata. See *State v. Lucerno*, 8th Dist. No. 89039, 2007-Ohio-5537, at ¶9 (applying

res judicata where the State failed to appeal the lower court's determination that House Bill 180/Megan's Law was unconstitutional: "the courts have barred sexual predator classifications when an initial classification request had been dismissed on the grounds that the court believed R.C. Chapter 2950 to be unconstitutional") (citation omitted).

{¶78} Naples' classification as a sexual predator, with definite registration requirements, constituted a final order of the lower court. Therefore, no court can now be statutorily directed or required to modify the prior judgment provisions concerning Naples' notification and registration requirements without violating separation of powers and res judicata principles.

{¶79} Other appellate districts have held that the amendments to the Act do not vacate "final judicial decisions without amending the underlying applicable law" or "order the courts to reopen a final judgment." *State v. Linville*, 4th Dist. No. 08CA3051, 2009-Ohio-313, at ¶23, citing *Slagle*, 2008-Ohio-593, at ¶21. According to these cases and the arguments of the State, "the Assembly has enacted a new law, which changes the different sexual offender classifications and time spans for registration: (sic) 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." *Slagle*, 2008-Ohio-593, at ¶21. We disagree. The imposition of the new enhanced notification and registration requirements of the Act changes the terms of prior final sentencing judgments.

{¶80} It does not matter that the current Sex Offender Act formally amends the underlying law and does not order the courts to reopen final judgments. The fact remains that the General Assembly "cannot annul, reverse or modify a judgment of a

court already rendered." *Bartlett*, 73 Ohio St. at 58. Naples' reclassification, as a practical matter, nullifies that part of the court's September 8, 2000 Judgment determining Naples to be a sexual predator and ordering him to register as a sexual predator for life. To assert that the General Assembly has created a new system of classification does not solve the problem that Naples' original classification constituted a final judgment. There is no exception to the rule that final judgments may not be legislatively annulled or modified in situations where the Legislature has enacted new legislation.

{¶81} It is also argued that the Ohio Supreme Court has characterized the registration and notification requirements of the Sex Offender Act as "a collateral consequence of the offender's criminal acts," in which the offender does not possess a reasonable expectation of finality. *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, at ¶34 (citations omitted); *Linville*, 2009-Ohio-313, at ¶24 (citation omitted).

{¶82} This argument also is unavailing. In *Ferguson*, as in *Cook*, the Supreme Court did not consider the argument that the enactment of House Bill 180/Megan's Law overturned a valid, final judgment. Rather, the Court was asked to determine whether the retroactive application of the Sex Offender Act violated the ex post facto clause or the prohibition against retroactive legislation. The court did not consider the arguments based on separation of powers and res judicata raised herein. In *Cook*, the Sex Offender Act was applied retroactively to persons who had not been previously classified as sexual offenders. There were no prior final judicial determinations regarding the offenders' status as sexual offenders. Thus, the Supreme Court could properly state that the new burdens imposed by the law did not "impinge on any

reasonable expectation of finality" the offenders had with respect to their convictions. 83 Ohio St.3d at 414. In the present case, Naples had every reasonable expectation of finality in the trial court's prior Judgment Entry.

{¶83} Reliance upon the Supreme Court's reasoning in *Cook* and *Ferguson* is further misplaced since the separation of powers and res judicata doctrines apply equally in civil (remedial) contexts as they do in criminal (punitive) contexts. *Akron v. Smith*, 9th Dist. Nos. 16436 and 16438, 1994 Ohio App. LEXIS 1859, at *4 ("[t]he doctrine of *res judicata* *** applies equally to criminal and to civil litigation") (citation omitted).

{¶84} The General Assembly's purpose in enacting the Adam Walsh Act, "to provide increased protection and security for the state's residents from persons who have been convicted of, or found to be delinquent children for committing, a sexually oriented offense or a child-victim oriented offense," is properly realized in its application to cases pending when enacted and those subsequently filed. Am.Sub.S.B. No. 10, Section 5. Naples' sentence, however, had become final several years prior to the Adam Walsh Act. As such, it is beyond the power of the Legislature to vacate or modify.[2] The United States Supreme Court has stated that the principle of separation of powers is violated by legislation which "depriv[es] judicial judgments of the conclusive effect that they had when they were announced" and "when an individual final judgment is legislatively rescinded for even the *very best* of reasons." *Plaut*, 514 U.S. at 228 (emphasis sic). To the extent the Adam Walsh Act attempts to modify existing final sentencing judgments, such as Naples' sentence, it violates the doctrines of separation

2. Moreover, as a final judgment, Naples' sentence also is beyond the authority of the courts to vacate or modify. *State v. Smith* (1989), 42 Ohio St.3d 60, at paragraph one of the syllabus; *Jurasek v. Gould Elecs., Inc.*, 11th Dist. No. 2001-L-007, 2002-Ohio-6260, at ¶15 (citations omitted).

of powers and finality of judicial judgments, despite the good intentions of the Legislature. As such, that portion of the Act is invalid, unconstitutional, and unenforceable as applied to Naples.

{¶85} Under this holding, Naples will still have to complete his original sentence and continue registering as a sexual predator for life pursuant to the trial court's September 8, 2000 Judgment Entry.

{¶86} Naples' third assignment of error has merit.

{¶87} For the foregoing reasons, the Judgment Entry of the Trumbull County Court of Common Pleas, granting Summary Judgment, is reversed. However, Naples shall continue registering as a sexual predator pursuant to the trial court's September 8, 2000 Judgment Entry. Costs to be taxed against appellee.

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

TIMOTHY P. CANNON, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

{¶88} I concur with the majority's disposition that the application of the AWA to appellant violates the doctrine of separation of powers, thus requiring us to reverse. However, I disagree and write separately with respect to the following issues.

{¶89} Initially, this writer notes that under the new legislation, the basic system for sexual offender classification was altered considerably. Prior to S.B. 10, if a criminal

defendant was found guilty of a sexually oriented offense which was not exempted from any registration, he could be classified as a sexually oriented offender, a habitual sex offender, or a sexual predator. The prior statutory scheme also provided that a defendant's designation under the three categories was to be predicated upon the nature of the underlying offense and findings of fact made by the trial court during a sexual classification hearing.

{¶90} Pursuant to the new law, the foregoing three "labels" for a sexual offender are no longer applicable. Instead, a defendant who has committed a sexually oriented offense can only be designated as either a sex offender or a child-victim offender. Furthermore, the extent of the defendant's registration and notification requirements will depend upon his placement in one of three "tiers" of sexual offenders. The determination of which tier is applicable to a given defendant turns solely upon the exact crime or offense he has committed.

{¶91} The second major change of the sexual offender system concerns the duration of the registration and notification requirements. Prior to S.B. 10, the governing law generally provided for the following: (1) if a defendant was deemed a sexually oriented offender, he was required to register once each year for a period of ten years, but there was no notification requirement; (2) if he was labeled as a habitual sex offender, he had to register once every six months for twenty years, and the community could be given notice of his presence at the same rate; and (3) if he was designated a sexual predator, the duty to register was once every three months for life, and notification could also take place at the same rate for life. Under the new scheme, the registration and notification requirements are substantially different: (1) if the

defendant's sexual offense places him in the "Tier I" category, he is required to register once every year for a period of fifteen years, but there is no community notification; (2) if the defendant's offense falls under the "Tier II" category, registration must take place once every six months for twenty-five years, and there is still no notification requirement; and (3) if the sexual offense places the defendant in the "Tier III" category, the requirements are essentially the same as for a sexual predator, in that there is a duty to register once every three months for life, and community notification can occur at that same rate for life.

{¶92} Although the Tier III requirements are essentially the same as for a sexual predator, this writer notes that the new tier structure classifies sex offenders based on their convictions rather than on factors as with the previous law. Also, the registration requirements for sex offenders, including sexual predators, have now become more stringent due to the new law.

{¶93} As to the specific requirements of registration, the original version of the "sexual offender" law stated that the defendant only had to register with the sheriff of the county where he was a resident. See *Cook*, supra, at 408. Under the latest version of the scheme, though, the places where registration is required has been expanded to now include: (1) the county where the offender lives; (2) the county where he attends any type of school; (3) the county where he is employed if he works there for a certain number of days during the year; (4) if the offender does not reside in Ohio, any county of this state where he is employed for a certain number of days; and (5) if he is a resident of Ohio, any county of another state where he is employed for a certain number of days. Similarly, the extent of the information which must be provided by an offender

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

{¶94} **Ex Post Facto**

{¶95} Ex post facto challenges will only lie against criminal statutes. See, e.g., *Swank*, supra, at ¶69. When considering such challenges, courts must apply the "intent-effects" test. Id.

{¶96} "The ex post facto clause extends to four types of laws:

{¶97} "'"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*. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender.'" (Emphasis added.) *Rogers v. Tennessee*, (2001), 532 U.S. 451, 456, ***, quoting *Calder v. Bull* (1798), 3

U.S. 386, 390, *** (seriatum opinion of Chase, J.)" *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011, at ¶17-18. (Parallel citations omitted.)

{¶98} In *Smith v. Doe*, supra, the United States Supreme Court summarized the "intent-effects" test, in a case concerning a challenge to the constitutionality of Alaska's then-sex offender registration law. Speaking for the Court, Justice Kennedy wrote:

{¶99} "We must 'ascertain whether the legislature meant the statute to establish "civil" proceedings.' *Kansas v. Hendricks*, 521 U.S. 346, 361, *** (1997). 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."' *Ibid.* (quoting *United States v. Ward*, 448 U.S. 242, 248-249, *** (1980)). Because we 'ordinarily defer to the legislature's stated intent,' *Hendricks, supra*, at 361, '"only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,' *Hudson v. United States*, 522 U.S. 93, 100, *** (1997) (quoting *Ward, supra*, at 249); see also *Hendricks, supra,* at 361; *United States v. Ursery*, 518 U.S. 267, 290, *** (1996); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365, *** (1984).

{¶100} "Whether a statutory scheme is civil or criminal 'is first of all a question of statutory construction.' *Hendricks, supra*, at 361 (internal quotation marks omitted); see also *Hudson, supra*, at 99. We consider the statute's text and its structure to determine the legislative objective. *Flemming v. Nestor*, 363 U.S. 603, 617, *** (1960). A conclusion that the legislature intended to punish would satisfy an *ex post facto*

challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as the legislature has stated it." *Smith* at 92-93. (Parallel citations omitted.)

{¶101} In this case, the Ohio General Assembly specifically denominated the remedial purposes of S.B. 10. See, e.g., *Swank*, supra, at ¶73-80. In *Smith*, the United States Supreme Court found similar declarations by the Alaskan legislature highly persuasive. Id. at 93. However, a closer reading of S.B. 10's provisions casts doubt upon the legislature's declaration.

{¶102} First, there is the simple fact that S.B. 10 is part of Title 29 of the Revised Code. The United States Supreme Court rejected the notion that a statute's placement within a criminal code is solely determinative of whether the statute is civil or criminal in *Smith*. Id. at 94-95. However, it is clearly indicative of the statute's purpose. See, e.g., *Mikaloff v. Walsh* (N.D. Ohio Sept. 4, 2007), Case No. 5:06-CV-96, 2007 U.S. Dist. LEXIS 65076 at 15-16.

{¶103} Second, those portions of S.B. 10 controlling the sentencing of sex offenders indicate that the classification is part of the sentence imposed – and thus, part of the offender's punishment. See, e.g., R.C. 2929.01(D)(D) and (E)(E).

{¶104} Both the placement of S.B. 10 within the Revised Code, and the language of the statute, indicates a punitive, rather than remedial, purpose.[3] Further, as Judge James J. Sweeney of the Eighth Appellate District recently noted regarding the intent of S.B. 10:

{¶105} "*** the General Assembly expressed a remedial intent in the legislation. However, the stated purpose of protecting the public from those likely to reoffend is

3. I am indebted to my colleague, Judge Timothy P. Cannon, for these insights into the intent of S.B. 10.

substantially undermined by the total removal of any discretion or consideration in applying the tier labels to a particular offender. The fact of conviction alone controls the labeling process, but simply is not in and of itself indicative of a realistic likelihood of a person to recidivate. In addition, the severity of the potential penalty for violating [the registration and notification] provisions of [S.B. 10] depends upon the underlying offense that serves as the basis for the offender's registration or notification conditions." *State v. Omiecinski*, 8th Dist. No. 90510, 2009-Ohio-1066, at ¶91. (Sweeney, J., dissenting in part.)

{¶106} Consequently, I believe that the intent of S.B. 10 is punitive, rather than remedial.

{¶107} Moreover, an exploration of the effects of S.B. 10 reveals that it is a punitive, criminal statute, rather than remedial and civil. When considering whether a statute's effects are punitive under the ban of ex post facto laws, courts are required to consider the factors set forth by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*, supra. *Cook*, supra, at 418. These include: (1) whether the law imposes an affirmative disability or restraint; (2) whether it imposes what has historically been viewed as punishment; (3) whether it involves a finding of scienter; (4) whether it promotes the traditional aims of punishment – retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether it promotes some rational purpose other than punishment; and (7) whether it is excessive in relation to this other rational purpose.

{¶108} Regarding the first factor, S.B. 10 clearly imposes significant affirmative disabilities upon offenders. They must register personally with the sheriffs of any county

in which they live, work, or attend school, as often as quarterly. Failure to do so may result in felony prosecution – even if the offender is, for instance, hospitalized, and unable to go to the sheriff's office.

{¶109} Vast amounts of personal information must be turned over by offenders to the sheriffs' departments with which they register. Some of this information bears no relationship to any conceivable matter of public safety, such as where the offender parks his or her automobile. Some of the information is so vaguely described as to render compliance impossible. What, for instance, is included amongst automobiles regularly "available" to an offender, or telephones "used" by an offender? Is an offender required to report to the sheriff when he or she has a loaner from the auto body shop? Is an offender required to report if he or she stopped in a mall and used a public phone? Must an offender register the cell phone number of a spouse or child, which the offender only uses on rare occasions?

{¶110} S.B. 10 significantly limits where an offender may live. The right to live where one wishes is a fundamental attribute of personal liberty, protected by the United States Constitution. *Omiecinski*, supra, at ¶82. (Sweeney, J., dissenting in part.)

{¶111} S.B. 10 requires offenders to surrender *any* information required by the bureau of criminal identification and investigation – or face criminal prosecution. Consequently, it grossly invades offenders' rights to be free of illegal searches and to counsel, at the very least.

{¶112} Thus, S.B. 10 imposes significant disabilities and restraints upon offenders, which indicates it is an unconstitutional ex post facto law under the first *Kennedy* factor.

{¶113} The second *Kennedy* factor requires us to consider whether S.B. 10 imposes conditions upon offenders traditionally regarded as punishment. Clearly it does. The affirmative duties to register constantly with law enforcement, and turn over to them vast amounts of private information, the limitations upon where an offender may live, and the duty to answer any question posed by the BCI renders the registration requirements of S.B. 10 the functional equivalent of community control sanctions.

{¶114} Under the third *Kennedy* factor, we must consider whether the registration and notification requirements of S.B. 10 only come into play upon a finding of scienter. Clearly they do not. There are strict liability sex offenses, such as statutory rape. Nevertheless, as the Supreme Court of Alaska remarked in considering this factor in a challenge to Alaska's version of Megan's Law, the vast majority of sex offenses do require a finding of scienter. *Doe v. Alaska* (2008), 189 P.3d 999, 1012-1013. I believe, as did the Alaska court, that this factor provides some support for the punitive effect of S.B. 10. Cf. id. at 1013.

{¶115} The fourth *Kennedy* factor requires us to determine whether the registration and notification requirements of S.B. 10 fulfill two of the traditional aims of punishment: retribution and deterrence. "'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 (***) [.]'" *Doe*, supra, at 1013, fn. 107, quoting *Artway v. Attorney Gen. of N.J.* (C.A.3, 1996), 81 F.3d 1235, 1255.

{¶116} There are certain retributive factors in the registration requirements: i.e.,

the necessity of registering personally and the mandate that all personal information of any type be turned over, upon request, to the BCI. These do not affect future conduct or solve any problem. They simply impose burdens upon offenders. Similarly, the prohibition upon offenders living within a certain proximity of schools, pre-schools, and day care facilities is a form of retribution, since it applies across the board, and not simply to violent offenders or child-victim offenders.

{¶117} Further, offenders' personal information is available online, from the Attorney General, to the entire world. This creates a deterrent effect, both in the embarrassment and shame, which encourages people so tempted not to commit sex offenses, and by allowing the public to identify potential dangers to themselves and their families.

{¶118} Thus, S.B. 10's requirements fulfill the traditionally punitive roles of retribution and deterrence.

{¶119} The fifth *Kennedy* factor questions whether the conduct to which a law applies is already a crime. I find the reasoning of the court in *Doe*, supra, at 1014-1015, persuasive. That court noted the law in question applied only to those convicted of, or pleading guilty to, a sex offense: not to those, for instance, who managed to plead out to simple assault, or found not guilty due to an illegal search and seizure. Ultimately, the court held:

{¶120} "In other words, [the law] fundamentally and invariably requires a judgment of guilt based on either a plea or proof under the criminal standard. It is therefore the determination of guilt of a sex offense beyond a reasonable doubt (or per a knowing plea), not merely the fact of the conduct and potential for recidivism, that

triggers the registration requirement. Because it is the criminal conviction, and only the criminal conviction, that triggers obligations under [the law], we conclude that this factor supports the conclusion that [the law] is punitive in effect." *Doe*, supra, at 1015. (Footnote omitted.)

{¶121} Similarly, only conviction for, or a guilty plea to, a sex offense (and kidnapping of a minor) triggers the provisions of S.B. 10. Consequently, the fifth *Kennedy* factor supports the conclusion that S.B. 10 is punitive in effect.

{¶122} Under the sixth *Kennedy* factor, we consider whether the law has some rational purpose other than punishment. Clearly S.B. 10 has an important remedial purpose, by keeping law enforcement and the public aware of potential recidivists amongst sex offenders. But the seventh *Kennedy* factor requires analysis of whether the law in question is excessive in relation to that alternate purpose. S.B. 10 is excessive. It punishes offenders by requiring personal registration, in a day of instant communications. It punishes by requiring offenders to turn over personal information bearing no rational relationship to the remedial purpose of the law. It punishes offenders by restricting them from living near schools and day care facilities, even if their crime had no relationship to children. It punishes offenders by requiring them to submit to *any* questioning, on any subject, by the BCI.

{¶123} S.B. 10's intent is punitive. Its effect is punitive. S.B. 10 violates the federal constitutional ban on ex post facto laws.

{¶124} **Retroactivity**

{¶125} Article II, Section 28 of the Ohio Constitution provides, in pertinent part: "[t]he general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts ***[.]"

{¶126} "'The analysis of claims of unconstitutional retroactivity is guided by a binary test. We first determine whether the General Assembly expressly made the statute retrospective. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, ¶10 ***. If we find that the legislature intended the statute to be applied retroactively, we proceed with the second inquiry: whether the statute restricts a substantive right or is remedial. Id. If a statute affects a substantive right, then it offends the constitution. *Van Fossen* (*v. Babcock & Wilcox Co*. (1988)), 36 Ohio St.3d (100,) at 106 ***.' [*State v.*] *Ferguson*, supra, at ¶13." *Swank*, supra, at ¶91. (Parallel citations omitted.)

{¶127} A statute is "substantive" if it: (1) impairs or takes away vested rights; (2) affects an accrued substantive right; (3) imposes new burdens, duties, obligations or liabilities regarding a past transaction; (4) creates a new right from an act formerly giving no right and imposing no obligation; (5) creates a new right; or (6) gives rise to or takes away a right to sue or defend a legal action. *Van Fossen*, supra, at 107. A later enactment does not attach a new disability to a past transaction in the constitutional sense unless the past transaction "created at least a reasonable expectation of finality." *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281. "*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." (Emphasis added.) Id. at 281-282.

{¶128} The foregoing establishes that S.B. 10 is an unconstitutional retroactive law, as applied to appellant. By its terms, it applies retroactively. Second, it attaches new burdens and disabilities to a past transaction, since it violates the constitutional protections against ex post facto laws.

{¶129} **Double Jeopardy**

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

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

{¶132} Here, in 2000, appellant pleaded guilty to two counts of rape. He was sentenced for these offenses and adjudicated a sexual predator. Additional punitive measures have now been placed on appellant, as he is required to comply with the new, more stringent registration requirements. Essentially, appellant is being punished a second time for the same offense. The application of the current version of R.C. 2950 to appellant violates the Double Jeopardy Clauses of the Ohio and United States Constitutions.

{¶133} **Substantive Due Process**

{¶134} I believe this issue lacks ripeness.

{¶135} "'The basic principle of ripeness may be derived from the conclusion that "judicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote."

(***) The prerequisite of ripeness is a limitation on jurisdiction that is nevertheless basically optimistic as regards the prospects of a day in court: the time for judicial relief is simply not yet arrived, even though the alleged action of the defendant foretells legal injury to the plaintiff.' Comment, Mootness and Ripeness: The Postman Always Rings Twice (1965), 65 Colum.L.Rev. 867, 876." *State ex rel. Elyria Foundry Co. v. Indus. Comm.* (1998), 82 Ohio St.3d 88, 89.

{¶136} Here, appellant has not alleged an actual deprivation of his property rights, i.e., that he is forced to live in a certain part of town, on a certain street, or was forced to move. The fact that by dictating where he cannot live is essentially the same as dictating where he can live indicates that appellant has standing to appeal this issue. However, as he has not presented evidence that he has been prejudiced by his status and/or that his ability to domicile has been actually restrained, in that he cannot live where he chooses or he has been denied housing because the place where he wants to live is prohibited, he has not presented us with a justiciable issue. Appellant has standing to appeal as he is classified under the new more restrictive statute. However, our lack of ability to adjudicate this issue is lack of harm to the person with standing, and goes to the facts at hand or ripeness of a pending case and controversy, not the person's ability and standing to raise it.

{¶137} **Breach of Contract**

{¶138} Again, Article II, Section 28 of the Ohio Constitution provides in pertinent part: "[t]he general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts ***[.]"

{¶139} Analysis under Section 28, Article II, is incomplete, without enquiring whether S.B. 10, as applied to appellant, violates the ban against laws impairing the obligation of contract. I find it does.

{¶140} When analyzing whether a law violates the ban against the impairment of contracts, this court applies a tripartite test. *Trumbull Cty. Bd. of Commrs. v. Warren* (2001), 142 Ohio App.3d 599, 602-603. First, there must be a determination if a contractual relation exists. Id. at 602. If it does, we must ascertain whether a change in the law impairs that relationship. Id. at 602-603. Finally, we must determine if that impairment is substantial. Id. at 603.

{¶141} "It is well established that a plea agreement is viewed as a contract between the State and a criminal defendant. *Santobello v. New York* (1971), 404 U.S. 257, ***. Accordingly, if one side breaches the agreement, the other side is entitled to either rescission or specific performance of the plea agreement. Id., at 262." *State v. Walker*, 6th Dist. No. L-05-1207, 2006-Ohio-2929, at ¶13. (Parallel citations omitted.) Ohio courts have noted that, in the main, the contract is completely executed once the defendant has pleaded guilty, and the trial court has sentenced him or her. See, e.g., *State v. McMinn* (June 16, 1999), 9th Dist. No. 2927-M, 1999 Ohio App. LEXIS 2745, at 11; accord, *Pointer*, supra, at ¶9. However, to the extent the plea agreement contains further promises, the contract remains executory, and may be enforced by either party. See, e.g., *Parsons v. Wilkinson* (S.D. Ohio 2006), Case No. C2-05-527, 2006 U.S. Dist. LEXIS 54979 (allegation by inmate that plea agreement superseded parole board's authority regarding timing of parole hearing sufficient to withstand state attorney general's motion to dismiss in Section 1983 action), citing *Layne v. Ohio Adult Parole*

Auth., 97 Ohio St.3d 456, 2002-Ohio-6719, at ¶28; see, also, *McMinn*, supra, at 11, fn. 6.

{¶142} Clearly, appellant's plea agreement contained further terms, beyond his agreement to plead guilty to a certain charge, followed by sentencing by the trial court. The state implied those terms into the agreement as a matter of law, pursuant to former R.C. Chapter 2950. As a consequence of the particular charge to which he pleaded guilty, he was eventually found to be a sexual predator. Thus, his plea, as a matter of law, contained the terms that he comply with the registration requirements attendant upon that classification.

{¶143} Thus, I believe that appellant's plea agreement with the state remained an executory contract at the time of his reclassification under S.B. 10, meeting the first requirement for determining if a law breaches the ban on impairment of contracts. *Trumbull Cty. Bd. of Commrs.*, supra, at 602.

{¶144} It appears that the second part of the test – whether a change in the law has impaired the contract established between appellant and the state, *Trumbull Cty. Bd. of Commrs.* at 602-603, is also met by S.B. 10. Further, the third part of the test for determining if a law unconstitutionally impairs a contract is whether the impairment is substantial, *Trumbull Cty. Bd. of Commrs.* at 603. Although the Tier III requirements are essentially the same as for a sexual predator, this writer notes that the new tier structure classifies sex offenders based on their convictions rather than on factors as with the previous law. Also, the registration requirements for sex offenders, including sexual predators, have now become more stringent due to the new law.

{¶145} Consequently, I believe that the application of S.B. 10 to appellant violates the prohibition in Article II, Section 28 of the Ohio Constitution against laws impairing the obligation of contracts.[4]

{¶146} For the foregoing reasons, I would reverse the judgment of the trial court, and remand the matter for further proceedings.

{¶147} I respectfully concur in part and dissent in part.

TIMOTHY P. CANNON, J., dissenting.

{¶148} I respectfully dissent from the majority's opinion. For the reasons stated in this court's opinion in *State v. Ettenger*, 11th Dist. No. 2008-L-054, 2009-Ohio-3525, at ¶56-59 & 84, the application of Ohio's Adam Walsh Act to Naples is not unconstitutional. Naples did not have an expectation of finality in his prior adjudication as a sexual predator. As stated in *Ettenger*, "a lifetime of reporting is a lifetime of reporting." Id. at ¶84.

{¶149} The judgment of the trial court should be affirmed.

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4. I recognize that other appellate courts have reached contrary conclusions. Thus, in *Sigler v. State*, 5th Dist. No. 08-CA-79, 2009-Ohio-2010, the Fifth District rejected a breach of contract argument on the basis that members of one branch of government (i.e., prosecutors, representing the executive) cannot bind future actions by the legislature. This seems beside the point: of course the legislature can change the law. I merely believe it cannot change substantially the terms of a civil contract previously entered by the state without consideration. The *Sigler* court further relied upon the doctrine of "unmistakability" in reaching its conclusion. That doctrine holds that a statute will not be held to create contractual rights binding on future legislatures, absent a clearly stated intention to do so. Again, this argument seems not to deal with the question presented. I am not holding that former R.C. Chapter 2950 created any contractual rights at all on the part of persons classified thereunder. Rather, I believe that the valid plea agreements entered by the state with defendants are contracts incorporating the terms of the classification made.