[Cite as *State v. Koch*, 2009-Ohio-6998.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Respondent-Appellee,	:	**CASE NO. 2008-L-074**
- vs -	:	
MICHAEL E. KOCH,	:	
Defendant-Petitioner-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 08 MS 000044.

Judgment: Affirmed.

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

Leo J. Talikka, Leo J. Talikka Co., L.P.A. 10 West Erie Street, #106, Painesville, OH 44077 (For Defendant-Petitioner-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Michael E. Koch, appeals the judgment of the Lake County Court of Common Pleas denying his petition to contest his reclassification as a Tier III Sex Offender under Senate Bill 10, Ohio's enactment of the federal Adam Walsh Act, incorporated into Ohio law at R.C. Chapter 2950. Appellant's classification is based on his conviction of multiple counts of sexual battery and gross sexual imposition

committed against his stepdaughter during a ten-year period beginning when she was six years old. For the reasons that follow, we affirm.

{¶2} Appellant was married to the victim's mother from 1986 until 1997. Appellant's wife had two daughters from a previous relationship. Beginning in approximately 1987, when the victim was six years old, and for the following ten years, appellant repeatedly subjected her to various acts of sexual assault, including sexual intercourse. The victim attempted to resist appellant's unwanted sexual advances, but was unable to get him to stop. The victim reported appellant's crimes in 1996, following which her mother divorced him.

{¶3} On November 22, 1996, appellant was indicted on two counts of rape, in violation of R.C. 2907.02; two counts of sexual battery, in violation of R.C. 2907.03; and eight counts of gross sexual imposition ("GSI"), in violation of R.C. 2907.05. On March 27, 1997, appellant pleaded guilty to two counts of sexual battery, felonies of the third degree, and five counts of GSI, felonies of the fourth degree; the remaining counts were dismissed. Prior to sentencing, a sexual predator determination hearing was held pursuant to R.C. 2950.09. The trial court stated that appellant "started with minor touching that progressed into actual crimes of rape." Appellant was found to be a sexual predator, and was sentenced to a definite term of two years on each count of sexual battery; one and one-half years on two of the counts of GSI; and one year on each of the remaining counts of GSI, each term to run consecutively, for a total of ten years in prison.

{¶4} Appellant appealed his sentence and sexual predator determination in *State v. Koch,* 11th Dist. No. 97-L-142, 2001-Ohio-8830, 2001 Ohio App. LEXIS 5855.

This court affirmed appellant's sexual predator determination, but reversed his sentence holding the trial court had failed to state its reasons for imposing maximum and consecutive sentences pursuant to S.B. 2.

{¶5} On August 13, 2002, the trial court held a resentencing hearing, following which the trial court imposed the identical sentence. Appellant again appealed his sentence in *State v. Koch*, 11th Dist. No. 2002-L-139, 2004-Ohio-6180, in which this court held the trial court did not abuse its discretion in resentencing appellant. Id. at ¶25.

{¶6} Appellant was released from prison prior to serving his entire sentence. Subsequently, S.B. 10 was enacted on June 27, 2007 and made effective on January 1, 2008. The statute was adopted to revise Ohio's sex offender registration law to conform it to the federal Sex Offender Registration and Notification Act ("SORNA"), which is part of the Adam Walsh Child Protection and Safety Act of 2006. Consistent with the federal act, S.B. 10 provides its registration and notification provisions are retroactive. R.C. 2950.033. On November 26, 2007, pursuant to S.B.10, the Ohio Attorney General notified appellant that he had been reclassified as a Tier III Sex Offender. A Tier III classification is the highest tier and, like the former sexual predator finding, requires registration every 90 days for life, and community notification may occur every 90 days for life. See R.C. 2950.07.

{¶7} On January 30, 2008, appellant filed a petition to contest the application of S.B. 10 to him and a motion for relief from community notification.

{¶8} Following a hearing on appellant's petition and motion, on April 14, 2008, the trial court denied appellant's petition, finding he failed to prove by clear and

convincing evidence that the new registration requirements did not apply to him. R.C. 2950.031(E). The trial court also found that appellant was properly reclassified as a Tier III Sex Offender, requiring him to register every 90 days for life. In addition, the trial court found that appellant was subject to community notification under S.B. 10.

{¶9} Appellant appeals the trial court's finding regarding his reclassification and asserts the following as his sole assignment of error:

{¶10} "APPLICATION OF S.B. 10 TO CLASSIFY APPELLANT AS A TIER III OFFENDER VIOLATES THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION AND THE RETROACTIVE LAWS CLAUSE OF THE OHIO CONSTITUTION, THE SEPARATION OF POWERS DOCTRINE OF THE FEDERAL AND STATE CONSTITUTIONS AND THE APPELLANT'S RIGHTS TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS AS GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS."

{¶11} Appellant argues S.B. 10 violates (1) the constitutional prohibition against ex post facto laws; (2) the protection against retroactive legislation; (3) the separation of powers doctrine; (4) substantive due process; and (5) procedural due process.

{¶12} We unanimously rejected each of these arguments in *State v. Swank,* 11th Dist. No. 2008-L-019, 2008-Ohio-6059, at ¶71-89 (no ex post facto violation); ¶90-97 (no retroactive legislation violation); ¶98-100 (no separation of powers violation); ¶101-107 (no procedural due process violation); ¶108-111 (no substantive due process violation). By operation of stare decisis, appellant's arguments are therefore overruled. However, since our holding in *Swank*, litigants, particularly those who have experienced a reclassification such as appellant, have further developed their positions. We shall

accordingly take this opportunity to revisit these arguments and amplify our previous conclusion that S.B. 10 is constitutional.

{¶13} We initially note that the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Twelfth Appellate Districts have also unanimously held the registration and notification requirements of the Adam Walsh Act are constitutional. See *Sewell v. State*, 181 Ohio App.3d 280, 2009-Ohio-872 (no retroactive law, double jeopardy, due process, or separation of powers violation); *State v. Desbiens*, 2d Dist. No. 22489, 2008-Ohio-3375 (no ex post facto or due process violation); *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234 (no ex post facto, retroactive law, or separation of powers violation); *State v. Longpre*, 4th Dist. No. 08CA3017, 2008-Ohio-3832 (no ex post facto or retroactive law violation); *State v. Hughes*, 5th Dist. No. 2008-CA-23, 2009-Ohio-2406 (no ex post facto, retroactive law, separation of powers, or double jeopardy violation); *State v. Bodyke*, 6th Dist. Nos. H-07-040, H-07-041, H-07-042, 2008-Ohio-6387 (no ex post facto, retroactive law, obligation of contract, separation of powers, substantive due process, double jeopardy, or cruel and unusual punishment violation); *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051 (no ex post facto, retroactive law, separation of powers, cruel and unusual punishment, double jeopardy, or due process violation); *State v. Holloman-Cross*, 8th Dist. No. 90351, 2008-Ohio-2189 (no ex post facto violation); *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076 (no ex post facto or separation of powers violation); *State v. Gilfillan*, 10th Dist. No. 08AP-317, 2009-Ohio-1104 (S.B. 10 is not punitive; no separation of powers or due process violation); *Ritchie v. State*, 12th Dist. No. CA2008-07-073, 2009-Ohio-1841 (no

separation of powers, retroactive law, ex post facto, double jeopardy, or right to contract violation).

{¶14} This court and each of these districts relied on the Supreme Court of Ohio's decision in *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291 as precedent. In *Cook*, the Court addressed H.B. 180, the statutory predecessor of S.B. 10. The Court held that, although H.B. 180 was retroactive, the purpose of its registration and notification requirements was to protect the public from released sex offenders. The Court in *Cook* held that because H.B. 180 was remedial and not punitive in nature, it did not present an ex post facto or retroactivity violation. Id. at 413, 423.

{¶15} Since the Ohio Supreme Court's ruling in *Cook*, the Court has reaffirmed its holding that R.C. Chapter 2950 is not an ex post facto law.

{¶16} In *State v. Williams*, 88 Ohio St.3d 513, 2000-Ohio-428, the defendant alleged that H.B. 180 violated the Double Jeopardy Clause because it inflicted a second punishment for a single offense. Relying on its reasoning in *Cook*, the Supreme Court reaffirmed that R.C. Chapter 2950 is "neither 'criminal' nor a statute that inflicts punishment," and held there was no violation of the Double Jeopardy Clause. Id. at 528.

{¶17} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, the Court held:

{¶18} "Consistent with our jurisprudence in [*Cook* and *Williams*], we find that the sex-offender-classification proceedings under R.C. Chapter 2950 are civil in nature and that a court of appeals must apply the civil manifest-weight-of-the-evidence standard in its review of the trial court's findings." Id. at 389.

{¶19} In *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, the Supreme Court of Ohio considered whether the more stringent revisions to H.B. 180, incorporated in S.B. 5, effective July 31, 2003, violated the prohibitions against ex post facto and retroactive laws.

{¶20} Ferguson had been convicted of rape and kidnapping in 1990. In 2006, the trial court classified Ferguson as a sexual predator.

{¶21} Ferguson challenged three amendments in S.B.5. First, he challenged former R.C. 2950.07(B)(1), which provided that the designation "predator" remains for life, as does the concomitant duty to register. The previous version of this section allowed for review of the predator classification by a judge and the possible removal of that classification. See former R.C. 2950.09(D).

{¶22} Second, Ferguson challenged former R.C. 2950.04(A), which provided that sex offenders are required to personally register with the sheriff in their county of residence, the county in which they attend school, and the county in which they work, and that they must do so every 90 days. R.C. 2950.06(B)(1)(a). Previously, offenders had been required to register only in their county of residence. See former R.C. 2950.06(B)(1).

{¶23} Third, Ferguson challenged amended R.C. 2950.081, which expanded the community-notification requirements. After S.B. 5, any statements, information, photographs, and fingerprints required to be provided by the offender are public records and are included in the internet database of sex offenders maintained by the Attorney General's Office. Former R.C. 2950.081 and 2950.13.

{¶24} In *Ferguson*, the Supreme Court (Justice O'Connor writing for the majority) held:

{¶25} "As we have before, we acknowledge that R.C. Chapter 2950 may pose significant and often harsh consequences for offenders, including harassment and ostracism from the community. *** We disagree, however, with Ferguson's conclusion that the General Assembly has transmogrified the remedial statute into a punitive one by the provisions enacted through S.B. 5.

{¶26} "***

{¶27} "As an initial matter, we observe that *an offender's classification as a sexual predator is a collateral consequence of the offender's criminal acts rather than a form of punishment per se.* Ferguson has not established that he had any reasonable expectation of finality in a collateral consequence that might be removed. Absent such an expectation, there is no violation of the Ohio Constitution's retroactivity clause. ***

{¶28} "***

{¶29} "We conclude that the General Assembly's purpose for requiring the dissemination of an offender's information is the belief that education and notification will help inform the public so that it can protect itself. 'Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." (Emphasis added.) Id. at 14-16, quoting *Smith v. Doe* (2003), 538 U.S. 84, 99.

{¶30} Contrary to the contention of certain commentators, the Ohio Supreme Court's holding that a sex offender's classification is a collateral consequence of his crimes rather than a form of punishment was not based on the particular designation

imposed on Ferguson under former R.C. Chapter 2950. Whether the original classification was that of sexually-oriented offender, habitual sex offender, or sexual predator does not determine whether the designation is a collateral consequence of his crimes or additional punishment. According to *Ferguson, any* classification (or the very notion of classifying offenders itself) is merely a collateral consequence in which the offender has no reasonable expectation of finality.

{¶31} Further, the *Ferguson* Court held that the lifetime classification imposed on sexual predators as well as the more burdensome registration requirements and the collection and internet dissemination of additional information about the offender as part of the statute's notification provisions were part of a remedial, regulatory scheme designed to protect the public rather than to punish the offender. Id. at 15.

{¶32} Furthermore, in *Smith*, supra, relied on by the Ohio Supreme Court in *Ferguson,* the United States Supreme Court considered an ex post facto challenge to Alaska's sex offender registration act. In disposing of this challenge, the Court addressed many of the arguments asserted by appellant herein.

{¶33} The Alaska Act contained registration and notification requirements that were expressly made retroactive. Under the Act, the offender was required to register with local law enforcement authorities and in so doing to provide his name, aliases, identifying features, address, place of employment, date of birth, conviction information, driver's license number, information about vehicles to which he has access, and his postconviction medical treatment history. He was also required to permit authorities to photograph and fingerprint him. The nonconfidential information was made available on the internet.

{¶34} Under the Alaska statute, if the offender was convicted of a nonaggravated sex offense, he was required to provide annual registration for 15 years. In contrast, if he was convicted of an aggravated sex offense, he was required to register quarterly for life. Thus, the frequency and length of registration was based solely on the type of offense of which he was convicted, rather than any finding concerning the likelihood that the offender would reoffend. Further, if a sex offender failed to comply with the Act, he was subject to criminal prosecution.

{¶35} The convicted sex offenders in *Smith* filed an action in the district court seeking a declaration that the Alaska Act violated the Ex Post Facto Clause of the Federal Constitution. The district court entered summary judgment in favor of the state. The Ninth Circuit reversed, holding the Act violated the Ex Post Facto Clause because, although the legislature intended the Act to establish a nonpunitive, civil regulatory scheme, the effects of the Act were punitive.

{¶36} The United States Supreme Court reversed the decision of the Ninth Circuit, holding the intent of the Act was remedial and not punitive. In arriving at this holding, the Supreme Court considered various factors. First, it considered the legislative purpose set forth in Alaska's Act. The Court held: "Because we 'ordinarily defer to the legislature's stated intent, [*Kansas v.*] *Hendricks*, [521 U.S. 346], 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 [*United States v.*] *Ward*, [448 U.S. 242,] at 249 ***." Id. at 92.

{¶37} The Supreme Court noted that the Alaska Legislature expressed its intent in the statute. The legislature found "sex offenders pose a high risk of reoffending," and stated in the Act that "protecting the public from sex offenders" is the "primary governmental interest" of the law. The legislature found the "release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety." *Smith* at 93. We note the legislative intention set forth in S.B.10 is virtually identical to that expressed in the Alaska legislation.

{¶38} The Supreme Court held the imposition of restrictive measures on sex offenders is a legitimate nonpunitive governmental objective, and that nothing on the face of the statute suggests the legislature sought to create anything other than a civil scheme to protect the public from harm. Id.

{¶39} In addressing Smith's argument that placement of the Act in Alaska's criminal code was probative of a punitive intent, the Court held this factor was not dispositive. The Court held: "The location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one." Id. at 94. Further, the Court held the "codification of the Act in the State's criminal *** code is not sufficient to support a conclusion that the legislative intent was punitive." Id. at 95. As a result, the General Assembly's placement of S.B. 10 in Ohio's criminal code is not dispositive of the legislature's intent.

{¶40} The United States Supreme Court in *Smith* also addressed the Alaska statute's requirement that the judgment of conviction for sex offenses "set out the requirements of [the Act] and *** whether that conviction will require the offender to

register for life or a lesser period. Smith argued this requirement indicated the Act was punitive in intent. The Supreme Court held:

{¶41} "The policy to alert convicted offenders to the civil consequences of their criminal conduct does not render the consequences themselves punitive. When a State sets up a regulatory scheme, it is logical to provide those persons subject to it with clear and unambiguous notice of the requirements and the penalties for noncompliance. The Act requires registration either before the offender's release from confinement or within a day of his conviction (if the offender is not imprisoned). Timely and adequate notice serves to apprise individuals of their responsibilities and to ensure compliance with the regulatory scheme. Notice is important, for the scheme is enforced by criminal penalties. See [Secs.] 11.56.835, 11.56.840. Although other methods of notification may be available, it is effective to make it part of the plea colloquy or the judgment of conviction. *Invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive*." (Emphasis added.) Id. at 95-96.

{¶42} As with the Alaska statute, S.B. 10 requires the judge to notify the offender of his registration duties at the time of sentencing. Based upon the United States Supreme Court's holding in *Smith*, this does not render S.B. 10's regulatory system punitive.

{¶43} After determining that Alaska's Act was not punitive in intent, the Court in *Smith* considered whether the Act was punitive in effect. In analyzing the effects of a statute for purposes of determining whether it is an ex post facto law, courts refer to the factors noted in *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, 168-169.

{¶44} First, the Supreme Court considered whether the regulatory scheme has traditionally been regarded as a punishment. The Court noted the sex offender registration statutes are of recent origin, which suggests they "did not involve a traditional means of punishing." Id. at 97. The Supreme Court further held that early punishments, such as shaming or banishment, always involved more than the dissemination of information. Id. at 98. They either held the offender up before his fellow citizens for face to face shaming or expelled him from the community. Id. The Court held: "By contrast, the stigma of Alaska's Megan's Law results *** from the dissemination of accurate information about a criminal record, most of which is already public. Our system does not treat the dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." Id.

{¶45} Moreover, the Court held the fact that Alaska posts the offender's information on the internet does not alter its decision. The Court held:

{¶46} "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.

{¶47} "The State's Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record. An individual seeking

the information must take the initial step of going to the Department of Public Safety's Web site, proceed to the sex offender registry, and then look up the desired information. The process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality. The Internet makes the document search more efficient, cost effective, and convenient for Alaska's citizenry." *Smith,* supra, at 99.

{¶48} Second, the Supreme Court held Alaska's Act imposes no disability or restraint. The Court held that because the Act does not impose a physical restraint, it does not resemble the punishment of imprisonment, which is the paradigmatic affirmative disability or restraint. Id. at 100. The Court held the statute's obligations are less harsh than the sanction of "occupational debarment," which the Court has held to be nonpunitive. Id.

{¶49} The Court also rejected the argument that the act's registration system is parallel to probation in terms of the restraint imposed. Id. at 101. The Court held:

{¶50} "Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction. *** By contrast, offenders subject to the Alaska statute are free to move where they wish *** with no supervision. Although registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so. A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense. *** [T]he registration requirements make a valid

regulatory program effective and do not impose punitive restraints in violation of the Ex Post Facto Clause." (Internal citations omitted.) Id. at 101-102.

{¶51} Third, the Court rejected the argument that the statute's deterrent quality renders it punitive since deterrence is one purpose of punishment. The Court held: "This proves too much. Any number of governmental programs might deter crime without imposing punishment. 'To hold that the mere presence of a deterrent purpose renders such sanctions "criminal" *** would severely undermine the Government's ability to engage in effective regulation.'" Id. at 102, quoting *Hudson*, supra, at 105.

{¶52} Fourth, the Court held the Act's rational connection to a nonpunitive purpose was a "most significant" factor in its determination that the Alaska statute's effects are not punitive. The Court held the Act has a legitimate, nonpunitive purpose of public safety, which is advanced by alerting the public to the risk of sex offenders in their community. Id. at 102-103.

{¶53} Fifth, the Court held the Act was not excessive even though it applies to all convicted sex offenders *without regard to the likelihood that they would reoffend in the future*. The United States Supreme Court held:

{¶54} "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. The risk of recidivism posed by sex offenders is 'frightening and high.' *McKune v. Lile*, 536 U.S. 24, 34 (2002); see also Id., at 33 ('When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault') (citing U.S.

Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997)).

{¶55} "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. *** 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.

{¶56} "In the context of the regulatory scheme the State can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants' convictions without violating the prohibitions of the Ex Post Facto Clause." *Smith* at 103-104.

{¶57} The Supreme Court's analysis of this factor therefore defeats appellant's argument that S.B. 10 is unconstitutional because its classification system is based solely on the type of crime committed by the offender.

{¶58} The Supreme Court also rejected the argument that the Act was excessive in that it places no limit on the number of persons who have access to the offender's information. The Court held:

{¶59} "[T]he notification system is a passive one: An individual must seek access to the information. *** Given the general mobility of our population, for Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment. ***" Id. at 105.

{¶60} Post-*Smith*, federal appellate courts have repeatedly held that SORNA does not violate the Ex Post Facto Clause of the United States Constitution. Since S.B. 10 conforms Ohio law to the federal SORNA, decisions of federal appellate courts considering the federal act are strongly persuasive in considering challenges to S.B. 10.

{¶61} In *United States v. May* (C.A. 8, 2008), 535 F.3d 912, the Eighth Circuit applied *Smith* in holding the federal SORNA does not violate the Ex Post Facto Clause. The court held that Congress' stated intent was to protect the public from sex offenders by enacting a regulatory scheme that is "civil and nonpunitive." Id. at 920. In concluding the scheme was not so punitive that it negated Congress' stated intention to deem it civil, the court held:

{¶62} "The only punishment that can arise under SORNA comes from a violation of [Sec.] 2250, which punishes convicted sex offenders who travel in interstate commerce after the enactment of SORNA and who fail to register as required by SORNA. Congress clearly intended SORNA to apply to persons convicted before the Act's passage. *** If SORNA did not apply to previously convicted sex offenders, SORNA would not serve Congress' stated purpose of establishing a "comprehensive national system" for sex offender registration. Section 16901. *** Section 2250 punishes an individual for traveling in interstate commerce and failing to register. *The statute does not punish an individual for previously being convicted of a sex crime.* *** Thus, prosecuting May under [Sec.] 2250 is not retrospective and does not violate the ex post facto clause." (Emphasis added.) Id.

{¶63} In *United States v. Hinckley* (C.A. 10, 2008), 550 F.3d 926, the Tenth Circuit adopted the reasoning of *May*, and held that neither SORNA's registration

requirements nor the criminal penalties attached to non-compliance in Sec. 2250 violate the Ex Post Facto Clause. Relying on *Smith*, supra, the court held that the legislative intent expressed in SORNA's preamble and SORNA's primary effect satisfy the requirements of the Ex Post Facto Clause. Id. at 936.

{¶64} In *Hinckley* the defendant attempted to distinguish the regulatory scheme in *Smith* from the regime established by the federal SORNA. The defendant argued the *Smith* scheme was primarily civil in nature, and, unlike SORNA, did not require internet dissemination of offenders' information, did not establish a community notification program, did not require in-person reporting, and did not include felony criminal penalties for failing to register. Id. at 937. The court reasoned that SORNA's declaration of intent "shapes the statute as one involving public safety concerns, making clear that the law is designed 'to protect the public from sex offenders and offenders against children,' and comes as a 'response to the vicious attacks by violent predators.'" Id., quoting 42 U.S.C. Sec. 16901. The court then independently assessed whether the so-called civil statute is "so punitive either in purpose or effect as to negate Congress' express intention." Id. Toward this end, the court observed that while SORNA uses criminal penalties to further its public safety ends, "'[i]nvoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive.'" *Hinckley*, supra, quoting *Smith*, supra, at 96.

{¶65} Moreover, the court in *Hinckley* pointed out that SORNA, just as Alaska's regulatory scheme in *Smith*, merely provides for the "'dissemination of accurate information about a criminal record, most of which is already public.'" *Hinckley*, supra, quoting *Smith*, supra, at 98. The *Hinckley* court held that while the public display of

information may result in humiliation for the registrant, it is not an "'integral part of the objective of the regulatory scheme.'" *Hinckley*, supra, at 938, quoting *Smith*, supra, at 99. To the contrary, the court in *Hinckley* held that SORNA aims 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.'" *Hinckley*, supra, quoting *Smith*, supra. The court held the primary effect of the Act supports Congress' intent that the statute operate as a civil, regulatory scheme. *Hinckley*, supra.

{¶66} Next, in *United States v. Dixon* (C.A. 7, 2008), 551 F.3d 578, the Seventh Circuit observed, based on the United States Supreme Court's holding in *Smith*, SORNA's registration requirement (which, if an offender fails to follow, he or she can be prosecuted) is regulatory rather than punitive. The *Dixon* court unequivocally held that, in light of *Smith,* an offender "could not successfully *** challenge the registration requirement itself as an ex post facto law." Id. at 584.

{¶67} In *United States v. Ambert* (C.A. 11, 2009), 561 F.3d 1202, the Eleventh Circuit also held that SORNA did not violate protections against ex post facto laws. The court held that SORNA does not "impose a retroactive duty to register for prior convicted sex offenders or punish a defendant for actions that occurred prior to February 28, 2007 [, the date the Attorney General determined the act was retroactive]." Id. at 1207. The court held that SORNA imposed a duty to register beginning on the date of the Attorney General's retroactivity determination. Id. The court further held a violation of the Act only occurs thereafter when a defendant fails to register after the date the statute became applicable. Id.

{¶68} Finally, in *United States v. Samuels* (Apr. 2, 2009), 6th Cir. No. 08-5537, 2009 U.S. App. LEXIS 7084, the Sixth Circuit, relying on *Smith* and *May*, held SORNA presented no ex post facto violation. The court observed the intent and effects of SORNA are non-punitive and, moreover, SORNA only criminalizes behavior occurring after the enactment of the statute itself. *Samuels,* supra, at *11-*13; see, also, *United States v. Gould* (C.A. 4, 2009), 568 F.3d 459 (released June 18, 2009).

{¶69} Even though some of the cases outlined above do not directly address S.B. 10, the qualitative components of the schemes these cases addressed are substantially the same as S.B. 10. We therefore reaffirm our holding in *Swank* that Ohio's Adam Walsh Act does not violate the constitutional prohibition against ex post facto legislation.

{¶70} In the context of appellant's separation-of-powers challenge and his argument that he had a vested interest in his original classification, we note that, although S.B. 10 authorizes the Ohio Attorney General to reclassify offenders previously classified under H.B. 180, such reclassification does not vacate a prior final judgment of the court.

{¶71} While there is no doubt that a judicial determination of a sex offender's classification under H.B. 180 is a final judgment for purposes of appeal, *State v. Washington*, 11th Dist. No. 99-L-015, 2001-Ohio-8905, 2001 Ohio App. LEXIS 4980, *9, such a judgment does not deprive the legislature of its constitutional authority to classify sex offenders.

{¶72} "[T]he classification of sex offenders into categories 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." *In re Smith*, supra, at ¶39.

{¶73} S.B. 10 does not require the Attorney General (via legislative mandate) to reopen or nullify final judicial judgments. The new scheme merely changes the classification and registration requirements for sex offenders, and mandates that new procedures be applied to sex offenders currently registered under the former law. In *Cook,* the Court pointed out that "where no vested right has been created, 'a later [legislative] 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." Id. at 412, quoting *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281. With the exception to the constitutional protection against ex post facto laws, which, as discussed above, S.B. 10 does not violate, "'*felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation*.'" (Emphasis sic.) *Cook,* supra, quoting *Matz,* supra, at 281-282.

{¶74} Accordingly, because convicted sex offenders have no reasonable "settled expectations" or vested rights concerning the registration obligations imposed on them, S.B. 10 does not function to abrogate a final prior judicial adjudication. *State v. King*, 2d Dist. No. 08-CA-02, 2008-Ohio-2594, at ¶33 (While a sex offender has a reasonable expectation of finality in his conviction, he has "no reasonable expectation that his *** criminal conduct will not be subject to future legislation"). Accord *State v. Linville*, 4th

Dist. No. 08CA3051, 2009-Ohio-313, at ¶22 (S.B. 10 does not abrogate final court judgments because a sex offender classification is a mere collateral consequence of the offender's criminal acts, and he has no reasonable expectation that his crimes would not be subject to future revisions of R.C. Chapter 2950); *Ritchie*, supra. As the Twelfth District recently held in *Ritchie*, "application of Ohio's Adam Walsh Act does not order the courts to reopen a final judgment, but instead simply changes the classification scheme, which is not an encroachment on the power of Ohio's judicial branch." Id. at ¶15.

{¶75} Further, as noted supra, the Ohio Supreme Court in *Ferguson* held that an offender's classification as a sexual predator is merely a "collateral consequence of the offender's criminal acts rather than a form of punishment per se. Ferguson has not established that he had any reasonable expectation of finality in [such] a collateral consequence ***." Id. at 14. Likewise, here, appellant has failed to establish that he had a vested interest in his original classification.

{¶76} Finally, because the qualitative nature of the duties imposed under H.B. 180 and S.B. 5 have not substantially changed under S.B. 10 and an offender has neither a vested right nor a reasonable expectation of finality in his or her classification, S.B. 10 is remedial and procedural in nature and does not affect an offender's substantive rights. See *Ferguson,* supra, at 14-16. We therefore reaffirm our conclusion in *Swank* that S.B. 10 does not violate Ohio's prohibition against retroactive legislation.

{¶77} Consistent with the foregoing precedent, appellant's expectation of finality is limited to his conviction and does not include his former sexual predator

determination. His previous classification is nothing more than a collateral consequence arising from his criminal conduct. As a result, in amending Ohio's classification scheme and making it retroactive to apply to all sex offenders, including appellant, the General Assembly did not abrogate a final judgment in favor of appellant.

{¶78} We are not insensitive to the serious nature of the restrictions imposed by S.B. 10. Moreover, we recognize the Ohio Supreme Court has become increasingly divided on the issue of whether SORNA is constitutional and that the issue is currently before the Supreme Court. However, as an appellate court, it is not our role to prognosticate how the various Justices will rule on the issue. In fact, to do so would be to abdicate our obligation to follow precedent set by the Ohio Supreme Court as well as the United States Supreme Court.

{¶79} For the reasons stated in the Opinion of this court, the assignment of error is not well taken. It is the order and judgment of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J., concurs with Concurring Opinion,

DIANE V. GRENDELL, J., dissents with Dissenting Opinion.

MARY JANE TRAPP, P.J., concurs with Concurring Opinion.

{¶80} The appellant's ex post facto and retroactive claims are rejected based on the Supreme Court of Ohio's prior determination that the registration and notification statute is civil and remedial in nature, and not punitive. I write separately to note as we

did in *State v. Charette*, 11th Dist. No. 2008-L-069, 2009-Ohio-2952, that the Supreme Court of Ohio has become more divided on the issue of whether the registration and notification statute has evolved from a remedial and civil statute into a punitive one. As Justice Lanzinger stated in her concurring in part and dissenting in part opinion in *Wilson*: "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." See, also, *Ferguson* (Lanzinger, J., dissenting). I believe Senate Bill 10 merits review by the Supreme Court of Ohio to address the issue of whether the current version of R.C. Chapter 2950 has been transformed from remedial to punitive law. Before that court revisits the issue, however, we, as an inferior court, are bound to apply its holdings in *Cook* and *Wilson*, as we did in *Swank*.

DIANE V. GRENDELL, J., dissents with Dissenting Opinion.

{¶81} Appellant, Michael E. Koch's, reclassification as a Tier III Sex Offender pursuant to the Adam Walsh Act, unconstitutionally nullifies his prior classification in a final order of a court of competent jurisdiction as a sexually oriented offender, in violation of the doctrine of separation of powers. Accordingly, I respectfully dissent. Koch's obligations to register as a sexual offender should continue as set forth in the June 17, 1997 Judgment Entry of the Lake County Court of Common Pleas.[1]

1. Contrary the majority's assertion, this court did not consider the separation of powers doctrine in *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, with respect to the legislature's authority to annul, reverse, or modify final judgments. Rather, the sex offender in *Swank* argued "that in enacting a system

{¶82} "It is well settled that the legislature has no right or power to invade the province of the judiciary, by annulling, setting aside, modifying, or impairing a final judgment previously rendered by a court of competent jurisdiction." *Cowen v. State ex rel. Donovan* (1922), 101 Ohio St. 387, 394; *Bartlett v. Ohio* (1905), 73 Ohio St. 54, 58 ("it is well settled that the legislature cannot annul, reverse or modify a judgment of a court already rendered"). This limit on the legislature's power is part of the separation of powers doctrine. "The administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers." *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, at paragraph one of the syllabus.

{¶83} In effect, the separation of powers doctrine applies the principle of res judicata, typically used as a bar to further litigation by parties, to legislative action. Cf. *Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, at paragraph one of the syllabus ("a valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action").

{¶84} In the present case, the trial court's June 17, 1997 Judgment Entry, finding that Koch is a sexual predator with the attendant duty of registering as such for the remainder of his life, constituted such a final judgment. This judgment was duly appealed and affirmed by this court in *State v. Koch*, 11th Dist. No. 97-L-142, 2001-Ohio-8830. Further review of the matter denied by the Ohio Supreme Court. *State v. Koch*, 95 Ohio St.3d 1437, 2002-Ohio-2084. Upon completion of the appellate process,

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of registration and notification based solely on the offense committed by the sex offender, S.B. 10 divested Ohio courts of the power to sentence a defendant." 2008-Ohio-6059, at ¶99.

Koch had every reasonable expectation that his duty to register as a sexual predator as set forth in the June 17, 1997 Judgment Entry was conclusively settled.

{¶85} The majority states that "S.B. 10 does not require the Attorney General *** to reopen or nullify final judicial judgments," but "merely changes the classification and registration requirements for sex offenders." I disagree. Koch's reclassification as a Tier III Sex Offender nullifies that part of the trial court's June 17, 1997 Judgment Entry classifying him as a sexual predator. As the United States Supreme Court has observed, "[w]hen retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than 'reverse a determination once made, in a particular case.'" *Plaut v. Spendthrift Farm, Inc.* (1995), 514 U.S. 211, 225, quoting The Federalist No. 81 (J. Cooke ed. 1961), at 545.

{¶86} The majority relies on prior appellate decisions holding that "application of Ohio's Adam Walsh Act does not order the courts to reopen a final judgment, but instead simply changes the classification scheme, which is not an encroachment on the power of Ohio's judicial branch." *Ritchie v. State*, 12th Dist. No. CA2008-07-073, 2009-Ohio-1841, at ¶15. This position seriously mischaracterizes the nature of the Adam Walsh Act, which does not "simply" alter the classification scheme, but mandates that all prior classifications be altered to conform to the new legislation. The General Assembly's authority to alter the classification scheme is unquestioned. Its ability to alter prior classifications by the courts is constitutionally impermissible. "Having achieved finality *** a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by

retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was." *Plaut*, 514 U.S. at 227 (emphasis sic).

{¶87} The majority then asserts that a final prior judicial adjudication is not abrogated when a party has "no reasonable 'settled expectations' or vested rights" in the prior adjudication. In support of this position, the majority emphasizes that the new registration scheme is merely a "collateral consequence of the offender's criminal acts rather than a form of punishment per se." *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, at ¶34; *State v. Linville*, 4th Dist. No. 08CA3051, 2009-Ohio-313, at ¶24 ("sex offender classification is nothing more than a collateral consequence arising from his criminal conduct").

{¶88} Initially, there is no exception to the separation of powers doctrine or res judicata for "collateral consequences." It would be a peculiar and dangerous precedent in constitutional law if substantive matter contained in a final judicial judgment could be winnowed into direct and "collateral consequences"; the former accorded the attributes of finality while the latter remained vulnerable to legislative revision.[2]

{¶89} Moreover, the majority's citation to *Ferguson* is misleading. The Supreme Court did not hold, as the majority opinion implies, that offenders have no reasonable expectation of finality in collateral consequences. Rather, it held that "Ferguson has not established that he had any reasonable expectation of finality in a collateral

2. One might suppose that court costs are a similar "collateral consequence" of conviction. The Ohio Supreme Court, however, has ruled otherwise. *State v. Clevenger*, 114 Ohio St.3d 258, at ¶5 ("a motion by an indigent criminal defendant to waive payment of costs must be made at the time of sentencing *** [o]therwise, the issue is waived and costs are res judicata") (citation omitted). In the analogous situation where a defendant has been resentenced to impose a term of postrelease control, the Ohio Supreme Court allowed the resentencing to occur because the original was "void." Thus, there was no constitutional violation and the doctrine of res judicata did not apply. *State v. Simpkins*, 117 Ohio St.3d 420, 2008-Ohio-1197, at ¶36 ("[w]here *** the sentence imposed was unlawful and void, there can be no

consequence **that *might* be removed**." *Ferguson*, 2008-Ohio-4824, at ¶34 (italics in original; bold-face added). Ferguson, as a sexual predator, was required to register for the rest of his life, although he could petition the court to remove his sexual predator classification. Subsequent amendments to the Sex Offender Act rendered the sexual predator designation permanent, without the possibility of subsequent judicial review. Since there was never any guarantee that Ferguson could alter his status as a sexual predator, the Supreme Court properly acknowledged that he had no reasonable expectation in its eventual removal.

{¶90} Unlike Ferguson, Koch is not arguing that the General Assembly lacks authority to remove a future contingency or alter particular conditions of his classification. Rather, Koch's is that the General Assembly is without authority to essentially erase his prior classification and then reclassify him under a wholly different classification scheme.

{¶91} It is worth emphasizing that in *Ferguson*, the Supreme Court did not consider any argument based on the finality of the original judgment or principles of res judicata. Thus, it cannot be claimed that that these issues have been definitively ruled upon or even considered by the Ohio Supreme Court.

{¶92} *Ferguson* stands in a line of cases beginning with *State v. Cook*, 83 Ohio St.3d 404. The *Cook*/*Ferguson* line of cases is distinguishable from the present situation in that, when Cook was classified as a sexual predator, there was no classification system operative in Ohio for sex offenders. Cook's classification was an initial classification that did not upset some prior determination. Thus, the Supreme

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reasonable, legitimate expectation of finality in it"). Conversely, where, as in the present case, the original sentence was lawful and valid, there is a reasonable, legitimate expectation of finality.

Court could properly declare that sex offenders had "no reasonable right to expect that their conduct will never thereafter be made the subject of legislation." *Cook*, 83 Ohio St.3d at 412 (citation omitted). Such a declaration does not carry the same import where the offender's conduct is already the subject of legislation and the court's final judgment.

{¶93} Finally, the majority asserts that a "final judgment for purposes of appeal" is not the same as a final judgment for purposes of the separation of powers doctrine/res judicata. I fail to see any meaningful distinction between a final judgment for purposes of appeal and a final judgment on the merits for the purposes of applying the separation of powers and/or res judicata doctrine. Cf. Civ.R. 54(A) ("'Judgment' as used in these rules includes a decree and any order from which an appeal lies as provided in section 2505.02 of the Revised Code").

{¶94} The General Assembly's stated 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. Section 5, S.B. No. 10. Koch's sentence, however, had become final prior to the Adam Walsh Act. As such, it is beyond the power of the Legislature to vacate or modify.[3] 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 Koch's sentence, it violates the doctrines of separation 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.

{¶95} For the foregoing reasons, I would reverse the decision of the court below and reinstate the trial court's June 17, 1997 Judgment Entry, requiring Koch to register as a sexual predator.

3. Moreover, as a final judgment, Koch's 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).