**[Cite as *State v. Byers*, 2008-Ohio-5051.]**

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

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| STATE OF OHIO, | ) | |
| | ) | CASE NO. 07 CO 39 |
| PLAINTIFF-APPELLEE, | ) | |
| | ) | |
| - VS - | ) | O P I N I O N |
| | ) | |
| MICHAEL BYERS, | ) | |
| | ) | |
| DEFENDANT-APPELLANT. | ) | |

CHARACTER OF PROCEEDINGS: Criminal Appeal from Columbiana County Municipal Court, Case No. 07CRB450.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:

Hon. Joseph J. Vukovich
Hon. Mary DeGenaro
Hon. Cheryl L. Waite

Dated: September 30, 2008

VUKOVICH, J.

**¶{1}** Defendant-appellant Michael Byers appeals the decision of the Columbiana County Municipal Court labeling him a "Tier I Sex Offender/Child Victim Offender Registrant" in accordance with Senate Bill 10, which requires a 15 year registration period. Byers raises six constitutional issues in this appeal. He contends that Senate Bill 10's revision of R.C. Chapter 2950 violates: 1) the Ex Post Facto Clause of the United States Constitution; 2) the Retroactivity Clause of the Ohio Constitution; 3) the doctrine of separation of powers; 4) the prohibition against cruel and unusual punishment; 5) due process, and 6) the Double Jeopardy Clause of the United States and Ohio Constitutions. Byers also raises one nonconstitutional issue. Portions of Senate Bill 10 became effective July 1, 2007, while the remaining portions became effective January 1, 2008. Byers contends that the portions relevant to him were not effective on September 20, 2007, the date of his sentencing, and thus the trial court had no authority to sentence him under Senate Bill 10's sexual offender classification scheme. We find that his constitutional issues fail and that the trial court had the authority to inform him of his sexual offender classification under Senate Bill 10 at the time of his sentencing, despite the fact that portions of the bill were not effective on that date. In all, the judgment of the trial court is affirmed.

STATEMENT OF FACTS AND CASE

**¶{2}** On May 8, 2007, a complaint was filed against Byers alleging that on May 7, 2008, he had sexual contact with a 15 year old female in violation of R.C. 2907.06(A)(4), sexual imposition, a third degree misdemeanor. At the initial appearance, Byers entered a not guilty plea.

**¶{3}** Thereafter, the state and Byers entered into a plea agreement whereby the state amended the charge to attempted sexual imposition, a fourth degree misdemeanor and Byers pled no contest to the amended charge. (Tr. 3-4). The state, also in compliance with the plea agreement, recommended a 30 day jail sentence with 10 days suspended, a fine of $250 and a three year term of probation. On September 20, 2007, the trial court accepted the plea agreement, found Byers guilty and

sentenced him according to the terms set forth in the plea agreement. 09/20/07 J.E. At sentencing, the trial court informed Byers that he had been convicted of a sexually oriented offense/child victim offense as defined by Senate Bill 10's version of R.C. 2950.01 and that he would be classified as a Tier I Sex Offender/Child Victim Offender Registrant. (Tr. 6). The court explained his registration requirements and informed him that those requirements last for 15 years. (Tr. 6-7).

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

ASSIGNMENT OF ERROR

**¶{5}** "THE RETROACTIVE APPLICATION OF SENATE BILL 10 VIOLATES THE EX POST FACTO, DUE PROCESS, AND DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES CONSTITUTION AND THE RETROACTIVITY CLAUSE OF SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION. FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION; SECTION 10, ARTICLE I OF THE UNITED STATES CONSTITUTION; AND SECTIONS 10 AND 28, ARTICLE I AND II, RESPECTIVELY, OF THE OHIO CONSTITUTION. (SEPTEMBER 20, 2007 JUDGMENT ENTRY; T.PP. 11-12)."

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

**¶{7}** Senate Bill 10 modified R.C. Chapter 2950 so that it would be in conformity with the federal legislation, the Adam Walsh Act. The modification was accomplished by amending certain statutes, repealing others, renumbering a few sections, and adding new sections. The result is that a large portion of the chapter changed. Those changes, however, did not all become effective on the same date. Portions of Senate Bill 10 became effective on July 1, 2007, while other portions did not become effective until January 1, 2008.

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

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

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

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

Ex Post Facto Clause

**¶{12}** Byers claims that applying Senate Bill 10 to crimes that occurred before January 1, 2008, violates the Ex Post Facto Clause of the United States Constitution. Section 10, Article I of the United States Constitution prohibits ex post facto laws. "Any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, * * * is prohibited as ex post facto." *Beazell v. Ohio* (1925), 269 U.S. 167, 169-170. The Ex Post Facto Clause, however, only applies to criminal statutes. *Cook*, 83 Ohio St.3d at 415. So, if a statute is civil, then there can be no violation of the Ex Post Facto Clause. Therefore, we must determine whether Senate Bill 10 is civil or criminal legislation.

**¶{13}** As the *Cook* Court explained, the United States Supreme Court has not set out a specific test to determine whether a statute is civil or criminal. Rather, the United States Supreme Court has indicated that that determination is a matter of statutory interpretation. Id., citing *Helvering v. Mitchell* (1938), 303 U.S. 391, 399 and *Allen v. Illinois* (1986), 478 U.S. 364, 368. The *Cook* Court then used the "intent-effects" test to determine whether a statute is civil or criminal. *Cook*, 83 Ohio St.3d at 415.

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

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

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

**¶{17}** "(A) The general assembly hereby determines and declares that it recognizes and finds all of the following:

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

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

**¶{20}** "* * *

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

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

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

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

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

**¶{26}** Yet, it cannot necessarily be concluded that Senate Bill 10's tiers are not directly tied to the ongoing threat to the community that sex offenders pose. The types of offenses that are placed in Tier I are less severe sex offenses, Tier II are more severe, and Tier III are the most severe offenses. Also within these tiers are some factual determinations, such as if the offense was sexually motivated, age of victim and offender, and consent. Likewise, 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.

**¶{27}** Byers' second argument is that the General Assembly placed Senate Bill 10 within Title 29, Ohio's Criminal Code, and this shows an intent for it to be criminal. This argument is not persuasive. The prior version of R.C. Chapter 2950 was within the criminal code, yet the Ohio Supreme Court determined that it was civil in nature. While it is in the criminal code, that placement is not dispositive of the issue, especially since the legislature specifically indicated the intent to be civil.

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

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

**¶{30}** The *Cook* Court then went through the *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, guideposts for determining whether a statute is punitive in spite of its remedial label. *Cook*, 83 Ohio St.3d at 418. The guideposts are: 1) "whether the sanction involves an affirmative disability or restraint"; 2) "whether it has historically been regarded as a punishment"; 3) "whether it comes into play only on a finding of

scienter"; 4) "whether its operation will promote the traditional aims of punishment-retribution and deterrence"; 5) "whether the behavior to which it applies is already a crime"; 6) "whether an alternative purpose to which it may rationally be connected is assignable for it," and 7) "whether it appears excessive in relation to the alternative purpose assigned". Id., quoting *Kennedy,* 372 U.S. at 567-568.

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

**¶{32}** Dealing with the requirements for registration, first we must note that sex offender registration under Senate Bill 10's R.C. 2950.04 requires more than the version discussed in *Cook*. Senate Bill 10's version of R.C. 2950.04 requires that for any sexually oriented offense, the offender must register with: 1) the sheriff of the county in which the offender resides; 2) the sheriff of the county in which the offender attends school or institution of higher education regardless of whether the offender resides in that county; 3) the sheriff of the county in which the offender is employed if the offender resides in this state and has been employed in that county for more than three days or for an aggregate period of fourteen or more days in that calendar year; 4) the sheriff of the county in which the offender is employed if the offender does not reside in this state and has been employed at any location in this state more than three days or for an aggregate period of fourteen or more days in that calendar year; and 5) the sheriff of the other state immediately upon entering into that state when the offender attends a school or institution of higher education in that state or upon being

employed in that state for more than three days or for an aggregate period of fourteen or more days in that calendar year regardless of whether the offender resides in that state or a different state. R.C. 2950.04(A)(2)(a)-(e). It further requires that the offender give to the sheriff a completed and signed registration form, a photograph of the offender, and copies of travel and immigration documents. R.C. 2950.04(B). The registration form must contain: the offender's name and any aliases; the offender's social security number and date of birth; address of residence; name and address of employment; name and addresses of any school or institution of higher education that the offender is attending; license plate number of the vehicle the offender owns; the license plate number of the vehicle the offender operates as part of employment; description of where each vehicle is habitually parked or otherwise kept; driver's license number; a description of each professional and occupational license; e-mail addresses, internet identifiers or telephone numbers registered to or used by the offender; and any other information required by the bureau of criminal identification and investigation (BCI). R.C. 2950.04(C)(1)-(11).

**¶{33}** As can be seen, these requirements are more involved than the registration requirements in the version discussed in *Cook*. However, the Ohio Supreme Court has continually stated that sex offender classifications are civil in nature. Most recently in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶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*, is not too different from Senate Bill 10's version.

**¶{34}** However, in *Wilson,* Justice Lanzinger, in a concurring in part and dissenting in part opinion (joined by Justice O'Connor and Judge Donovan) stated that the simple registration and notification process that was discussed in *Cook* does not exist anymore; the current laws are more complicated and restrictive. She opined that the registration and notification requirements can no longer be considered civil.

**¶{35}** "R.C. Chapter 2950 has been amended since *Cook* and *Williams,* however, and the simple registration process and notification procedures considered in those two cases are now different. The following comparisons show that the current laws are more complicated and restrictive than those at issue in *Williams* and *Cook.*

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

**¶{36}** "While protection of the public is the avowed goal of R.C. Chapter 2950, we cannot deny that severe obligations are imposed upon those classified as sex

offenders. All sexual predators and most habitual sex offenders are expected, for the remainder of their lives, to register their residences and their employment with local sheriffs. Moreover, this information will be accessible to all. The stigma attached to sex offenders is significant, and the potential exists for ostracism and harassment, as the *Cook* Court recognized. Id., 83 Ohio St.3d at 418, 700 N.E.2d 570. Therefore, I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions." *Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶45-46.

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

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

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

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

**¶{41}** The fourth guidepost is retribution and deterrence. In *Cook,* it was argued that the effect of R.C. Chapter 2950 embraced the traditional notions of

punishment, including retribution and deterrence. The *Cook* Court disagreed with that argument. *Cook*, 83 Ohio St.3d at 420. It explained that the registration and notification provisions of R.C. Chapter 2950 do not seek vengeance for vengeance's sake, nor does it seek retribution. Id. at 420. Rather, registration and notification were remedial because they seek to protect the public from registrants who may reoffend. Id. Similarly, it found that registration and notification are not a deterrent. The Court explained that registration and notification do not have much of a deterrent effect on a sex offender. Thus, it found that R.C. Chapter 2950 does not promote the traditional aims of punishments, retribution and deterrence. This same reasoning applies to Senate Bill 10's version of R.C. Chapter 2950.

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

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

**¶{44}** "Accordingly, the behavior to which R.C. Chapter 2950 applies is already a crime." Id. at 420-421.

**¶{45}** Like above, that same reasoning applies to Senate Bill 10's version of R.C. Chapter 2950.

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

**¶{47}** Senate Bill 10's version of R.C. Chapter 2950, like its predecessor, has the alternate purposes to protect the public. Given that there were no drastic changes

to the statute, the *Cook* reasoning applies to Senate Bill 10. The one major change in the registration requirement is longer registration periods. However, this serves to protect the public for a longer duration than its predecessor.

**¶{48}** The last guidepost is excessiveness in relation to the alternate purpose. The Supreme Court in *Cook* found that the verification requirements of R.C. Chapter 2950 were narrowly tailored to comport with the respective danger and recidivism levels of the different sex offender classifications.

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

**¶{50}** Similarly, while under prior versions of R.C Chapter 2950 the registration information was not available to any member of the general public, now it is more accessible to the general public. Admittedly, R.C. 2950.08(A) strictly prohibits public inspection of the registration data by the public. Only law enforcement officers, authorized employees of BCI for purposes of providing information to a board, administrator or person pursuant to R.C. 109.57(F) and (G), and the registrar or employee of the registrar of motor vehicles for the purpose of verifying and updating any information upon the request from BCI are permitted to inspect the registration data. R.C. 2050.08(A)(1)(2) and (3). However, R.C. 2950.08(B) states that subsection (A) does not apply to any information that is contained in the internet sex offender database established by the Attorney General under R.C. 2950.13(A)(11).

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

**¶{52}** As all the above shows, more information now has to be provided for registration than it had to be under the 1997 version of R.C. Chapter 2950 that was in effect at the time of *Cook*. Likewise, at that time, there was no internet sex offender database. An internet database puts sex offender information more readily at the hands of the general public than it did before, thereby making the information more public. Now anyone can get on the Ohio Attorney General's web page and can search for sex offenders by name, school district, county, or zip code. www.esorn.ag.state.oh.us.

**¶{53}** The *Cook* decision stated that "[d]issemination of the information required by R.C. 2950.11 is restricted to those most likely to have contact with the offender, e.g., neighbors, the director of children's services, school superintendents and administrators of preschool and day care centers." *Cook*, 83 Ohio St.3d at 422. That statement, however, is not accurate anymore. The information that is contained in the notification to the neighbors, school and others listed in R.C. 2950.11(A) is easily available to anyone with a computer because all of that information is on the internet database. As Justice Lanzinger pointed out in her concurring in part and dissenting in part opinion in *Wilson*, "community notification has expanded to the extent that any statements, information, photographs, or fingerprints that an offender is required to provide are public record and much of that material is now included in the sex-offender database maintained on the Internet by the attorney general." *Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶45.

**¶{54}** Having stated that, we still find that the registration and notification provisions of R.C. Chapter 2950 are nonpunitive and reasonably necessary for the

intended purpose of protecting the public. While the information is available on the internet, a person must take an affirmative step to look at it; law enforcement is not sending out this information to everyone.

**¶{55}** In conclusion, Senate Bill 10's R.C. Chapter 2950 may not be the narrowly tailored dissemination of information that was contemplated by *Cook*. However, as stated above, *Cook* is still controlling law and as of *Wilson*, the Supreme Court was still of the opinion that sex offender classification was still remedial and not punitive. Furthermore, four other appellate districts have reviewed Senate Bill 10 and have concluded that it does not violate the prohibition against ex post facto laws. *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076, ¶18-41; *State v. Longpre*, 4th Dist. No. 08CA3017, 2008-Ohio-3832, ¶15; *State v. Desbiens*, 2d Dist. No. 22489, 2008-Ohio-3375, ¶16-34; *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234, ¶24-40. See, also, *Slagle v. State*, 145 Ohio Misc.2d 98, 2008-Ohio-593, ¶40-50 (Clermont County Common Pleas Court). Admittedly, Senate Bill 10 does make some changes to the classification procedure. It changes the classification types from sexually oriented offender, habitual sex offender, and sexual predator to Tier I, Tier II and Tier III. It also provides a more systematic determination of what offenses fall into what classification. Lastly, it increases the registration period. Tier I is 15 years, while a sexually oriented offender would only have been 10 years. Tier II is 25 years, while a habitual sex offender was 20 years. Tier III is a lifetime registration requirement, which sexual predator has always been. But those changes do not clearly indicate that *Wilson* and *Cook* are no longer controlling and that the sexual offender classification system is now punitive rather than remedial. Thus, we find no merit with the ex post facto argument.

Retroactivity Clause of the Ohio Constitution

**¶{56}** Next, Byers argues that Senate Bill 10 violates the Retroactivity Clause of the Ohio Constitution. The Retroactivity Clause argument was made in *Cook* and the Supreme Court found that R.C. Chapter 2950 did not violate it. Likewise, the Retroactivity Clause argument was also made in *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076, ¶6-17 and *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234, ¶24-

40. Those appellate courts found on the basis of *Cook* that Senate Bill 10 did not violate it. See, also, *Slagle*, 165 Ohio Misc.2d 98, 2008-Ohio-593.

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

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

**¶{59}** Portions of Senate Bill 10 were intended to apply retroactively. R.C. 2950.03(A) indicates that "[e]ach person who has been convicted of, is convicted of, has pleaded guilty to or pleads guilty to a sexually oriented offense" and has a duty under R.C. 2950.04 to register must be given notice of that duty. Subsection (1) states, "[r]egardless of when the person committed the sexually oriented offense * * * if the person is an offender who is sentenced to a prison term * * * and if on or after January 1, 2008, the offender is serving that term or is under that confinement * * * the official in charge of the jail, workhouse, state correctional institution * * * shall provide the notice to the offender before the offender is released." Subsection 2 also states "[r]egardless of when the person committed the sexually oriented offense * * * if the person is an offender who is sentenced on or after January 1, 2008 for any offense, * * * the judge shall provide the notice to the offender at the time of sentencing." Subsection (5)(a) indicates that the tier classification system applies to offenders who prior to December 1, 2007 had registered under the old law.

**¶{60}** R.C. 2950.031 also indicates that it is retrospective. It states that any time on or after July 1, 2007 and not later than December 1, 2007, the Attorney General shall determine for each offender who prior to December 1, 2007 had registered a residence, school or place of employment under the old law, their classification under the new law. R.C. 2950.03(A). The Attorney General must send a

letter indicating the changes in R.C. Chapter 2950 and what the offender's new classification will be and what their requirements are under that new classification. R.C. 2950.031(B).

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

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

**¶{63}** All of the above shows the General Assembly's express intention for those sections to be applicable to acts committed or facts in existence prior to the effective date of the statutes. *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, ¶17. Thus, Senate Bill 10's tier classification system was intended to apply retroactively to all offenders. That however, is not a determination that all of Senate Bill 10 applies retroactively, rather, it is only an opinion that the tier classification system is intended to apply retroactively. (Later under the due process argument it is determined that Senate Bill 10's R.C. 2950.034 residency restriction is not retroactive).

**¶{64}** As the tier system applies retroactively, our analysis now turns to whether it violates Ohio's Retroactivity Clause. The *Cook* Court succinctly explained

that the test for this determination is whether R.C. Chapter 2950 is substantive or remedial. *Cook*, 83 Ohio St.3d at 410, citing *Van Fossen,* 36 Ohio St.3d 100, paragraph three of the syllabus. It then explained the difference between substantive and remedial statutes:

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

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

**¶{67}** The same can be said for Senate Bill 10's retroactive sections. 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 BCI and sheriff regarding internet sex offender database); R.C. 2950.132 (additional duties of the Attorney General); R.C. 2950.14 (duty of department of rehabilitation and correction); R.C. 2950.16 (department of rehabilitation requirement to adopt rules to treatment programs). Only the registration and verification provisions require the

offender to act. R.C. 2950.04 (requiring offender to register); R.C. 2950.041 (requiring child-victim oriented offense duty to register); R.C. 2950.42 (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).

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

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

Separation of Powers

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

**¶{71}** The Constitution distributes the legislative power to the General Assembly, the executive power to the Governor, and the judicial power to the courts. Each branch acts as a check and balance for the other branches. The power and duty of the judiciary to determine the constitutionality and, therefore, the validity of the acts of the other branches of government have been firmly established as an essential feature of the Ohio system of separation of powers. *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 462, citing *Beagle v. Walden*

(1997), 78 Ohio St.3d 59, 62. A statute that violates the doctrine of separation of powers is unconstitutional. *Sheward*, 86 Ohio St.3d at 475.

**¶{72}** Senate Bill 10, however, does not violate the doctrine of separation of powers. The common pleas court in *Slagle* adequately explained:

**¶{73}** "In the case at bar, the General Assembly has not abrogated final judicial decisions without amending the underlying applicable law. See, e.g., *United States v. Gardner* (N.D.Cal.2007), 523 F.Supp.2d 1025. Instead, the Assembly has enacted a new law, which changes the different sexual offender classifications and time spans for registration requirements, among other things, and is requiring that the new procedures be applied to offenders currently registering under the old law or offenders currently incarcerated for committing a sexually oriented offense. Application of this new law does not order the courts to reopen a final judgment, but instead simply changes the classification scheme. This is not an encroachment on the power of the judicial branch of Ohio's government." *Slagle*, 145 Ohio Misc.2d 98, 2008-Ohio-593, at ¶21. See, also, *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234, ¶39. See, *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076, ¶42 (discussing in relation to child-victim offender).

**¶{74}** We agree with the above reasoning and adopt it as our own; Senate Bill 10 does not violate the separation of powers.

Cruel and Unusual Punishment

**¶{75}** Next, Byers argues that the 15 year registration period is excessive and violates the prohibition against cruel and unusual punishment. That argument has been rejected by our sister district. *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234, ¶37 (finding that Senate Bill 10 does not violate the prohibition against cruel and unusual punishment). Moreover, the *Cook* Court held that R.C. Chapter 2950 and its registration requirements were remedial, not punitive. The Ohio Supreme Court in *State v. Williams* (2000), 88 Ohio St.3d 513, 528, when addressing whether R.C. Chapter 2950 violated the Double Jeopardy Clause, stated that R.C. Chapter 2950 did not constitute punishment. Since the statutes in R.C. Chapter 2950 were not criminal statutes and did not constitute punishment, there was no violation of the prohibition

against cruel and unusual punishments. *State v. Bell*, 3d Dist. No. 9-01-60, 2002-Ohio-2182, ¶10; *State v. Bagnall* (Dec. 7, 2001), 11th Dist. No. 99-L-062.

**¶{76}** Admittedly, Senate Bill 10 lengthens the registration period. For instance, Byers, if classified under the old law, would probably have been labeled a sexually oriented offender and would have to register for 10 years. Now, he is labeled a Tier I offender and has to register for 15 years. Tier I is the lowest offender classification, just like sexually oriented offender was the lowest classification. So in that instance, he remains the same in that he is in the lowest level. However, as can be seen, the reporting period is extended by five years under the new law.

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

Effective Date of Senate Bill 10

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

**¶{79}** Byers claims that portions of Senate Bill 10 became effective July 1, 2007, while other portions did not become effective until January 1, 2008. He contends that R.C. 2950.09, the prior version, which is the statute for the adjudication of an offender as a sexual predator, was repealed on July 1, 2007. That section established the sexual classification hearing to determine if an offender was a sexually oriented offender, habitual sex offender or sexual predator. He then asserts that R.C. 2950.01, Senate Bill 10 version, which dictates what tier an offender who commits a

sexually oriented offense should be placed in, was not effective until January 1, 2008. Therefore, according to Byers, anyone like him who was sentenced between July 1, 2007 and December 31, 2007 cannot be subject to former R.C. Chapter 2950's requirements nor to Senate Bill 10's reporting requirements.

**¶{80}** His argument is factually incorrect; he is incorrect in his statement that R.C. 2950.09 was repealed on July 1, 2007. Senate Bill 10, the act, has six sections. The General Assembly in Section 1 of the act listed all of the sections of the Revised Code that were amended and renumbered. It also listed all the new sections that were added to the Revised Code. For our purposes, it is important to acknowledge that Section 1 indicates that R.C. 2950.01 was amended.

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

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

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

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

**¶{85}** R.C. 2950.032 is a new section that was added to R.C. Chapter 2950 and became effective July 1, 2007. Section 1 and 3 of the Act. The statute is titled

"Determination of sex offender classification tier for those serving prison term; juvenile offender; hearing; notice". Subsection (C) is the portion relevant for our review. It states:

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

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

**¶{88}** "(2) Provide the offender * * * with a written notice that contains the information specified in divisions (A)(2)(a) and (b) of this section;

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

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

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

written notice indicating that until January 1, 2008, the offender is to comply with the old version of R.C. 2950.03 and then on that date will be required to comply with the new law. R.C. 2950.032(C)(3).

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

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

Due Process

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

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

**¶{96}** Recently, the Ohio Supreme Court has reviewed pre-Senate Bill 10's residency restrictions (R.C. 2950.031) on classified sex offenders. *Hyle*, 117 Ohio St.3d 165, 2008-Ohio-542. In the syllabus the Court stated:

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

**¶{98}** The *Hyle* Court found that the language in former R.C. 2950.031 did not express a clear intention to make the residency restriction retroactive. Id. at ¶19. Thus, the prospective presumption could not be overcome.

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

Double Jeopardy Clause

**¶{100}** The Double Jeopardy Clause commonly is understood to prevent a second prosecution for the same offense. *Williams*, 88 Ohio St.3d at 528. Yet, the United States Supreme Court has also applied the clause to prevent a state from punishing twice, or from attempting a second time to criminally punish for the same offense. Id. citing *Kansas v. Hendricks* (1997), 521 U.S. 346, 369; *Witte v. United States* (1995), 515 U.S. 389, 396. Thus, the threshold question in a double jeopardy analysis is whether the government's conduct involves criminal punishment. *Williams*, 88 Ohio St.3d at 528, citing *Hudson v. United States* (1997), 522 U.S. 93, 101.

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

**¶{102}** "This court, in *Cook,* addressed whether R.C. Chapter 2950 is a 'criminal' statute, and whether the registration and notification provisions involved 'punishment.' Because *Cook* held that R.C. Chapter 2950 is neither 'criminal,' nor a statute that inflicts punishment, R.C. Chapter 2950 does not violate the Double Jeopardy Clauses of the United States and Ohio Constitutions. We dispose of the defendant's argument here with the holding and rationale stated in *Cook*." *Williams,* 88 Ohio St.3d at 528. See, also, *Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶31.

**¶{103}** Since we find that Senate Bill 10's R.C. Chapter 2950 sexual offender classification to be remedial like its predecessor, the above analysis from *Williams* is applicable and this argument fails. *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234, ¶36; *Slagle*, 145 Ohio Misc.2d 98, 2008-Ohio-593, ¶51-54. Thus, Senate Bill 10 does not violate the Double Jeopardy Clause. This assignment of error in its entirety is meritless.

MISCELLANEOUS ISSUE

**¶{104}** As an aside, we must note that Byers may have waived the above claims. He did not file a motion with the trial court claiming that Senate Bill 10 was unconstitutional. At sentencing, however, counsel stated that he was going to file an appeal and a stay motion so that Byers' name would not get into the system "in the event that it does – it is found to be unconstitutional." (Tr. 12).

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

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

CONCLUSION

**¶{107}** For the reason expressed above, despite the changes to Ohio's sex offender classification scheme, we find that we are bound by the Supreme Court's

holding in *Cook* and *Wilson*, as they are controlling law. Thus, Senate Bill 10 does not violate the Ex Post Facto Clause of the United States Constitution, it does not violate the Retroactivity Clause of the Ohio Constitution, it does not violate the doctrine of separation of powers, it does not violate the prohibition against cruel and unusual punishment, it does not violate due process and it does not violate the Double Jeopardy Clauses of the United States and Ohio Constitutions. Also, portions of R.C. Chapter 2950 were in effect at the time of sentencing that permitted the trial court to inform Byers that he would be a Tier I offender and would have to comply with the registration requirements under Senate Bill 10.

**¶{108}** For the foregoing reasons, the judgment of the trial court is hereby affirmed.

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

DeGenaro, J., concurs with separate concurring opinion.

**¶{109}** I concur with my colleagues, because, as alluded to in ¶37, as an inferior court, we are bound by the rationale in *Cook* and *Wilson*, as the Ninth, Fourth, Third and Second Appellate Districts have likewise held. However, I write separately because I find Justice Lanzinger's dissent in *Wilson* persuasive.

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

**¶{111}** However, when comparing R.C. Chapter 2950 as it is today to the version enacted in 1996, let alone the original version enacted in 1963, the requirements and restrictions are vastly different. This is why I find persuasive Justice Lanzinger's conclusion that we can no longer "continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal

convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions." *Wilson*, at ¶46, (Lanzinger, J., concurring in part and dissenting in part).

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