[Cite as *Spangler v. State*, 2009-Ohio-3178.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

RAYMOND J. SPANGLER,	:	**O P I N I O N**
Plaintiff-Petitioner-Appellant,	:	**CASE NO. 2008-L-062**
- vs -	:	
STATE OF OHIO,	:	
Defendant-Respondent-Appellee.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 08 MS 000029.

Judgment: Reversed.

William P. Bobulsky, William P. Bobulsky Co., L.P.A., 1612 East Prospect Road, Ashtabula, OH 44004 (For Plaintiff-Petitioner-Appellant).

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

DIANE V. GRENDELL, J.

{¶1} Appellant, Raymond J. Spangler, appeals the judgment of the Lake County Court of Common Pleas, denying his Petition to Contest Reclassification and classifying him a Tier II Sex Offender. The fundamental principle of the "separation of powers" doctrine as written by our forefathers in the United States Constitution is inviolate, and, therefore, mandates reversal of the decision of the court below.

However, Spangler must still comply with the notification and registration requirements under his original sentence.

{¶2} On January 23, 2001, Spangler was convicted, in Case No. 2000-CR-276, of the Ashtabula County Court of Common Pleas, of Attempted Corruption of a Minor, a felony of the fifth degree in violation of R.C. 2923.02 and R.C. 2907.04(A), and Public Indecency, a misdemeanor of the fourth degree in violation of R.C. 2907.09(A). At the time of his conviction, Spangler was seventy-three years old. The charges against Spangler stemmed from allegations that he had exposed himself to and fondled neighborhood children six or seven years previously.

{¶3} On April 27, 2001, Spangler was sentenced to five years of community control, fined $350, and ordered to register for a period of ten years as a sexually oriented offender. Spangler was also required to annually verify his current residence and/or place of employment by personally appearing before the sheriff of the county, pursuant to former R.C. 2950.06(A) and (B)(2).

{¶4} On November 26, 2007, the Office of the Attorney General issued Spangler Notice of New Classification and Registration Duties Tier II Sex Offender (Adult). Spangler was advised "of changes to Ohio's Sex Offender Registration and Notification Act (Ohio Revised Code Chapter 2950, 'SORN') *** due to Ohio Senate Bill 10, passed to implement the federal Adam Walsh Child Protection and Safety Act of 2006." Under the new classification, Spangler is a "Tier II Sex Offender" and "required to register personally with the local sheriff's office every 180 days for 25 years."

{¶5} On January 23, 2008, Spangler filed a Petition to Contest Reclassification, pursuant to R.C. 2950.031(E) and R.C. 2950.032(E), in the Lake County Court of Common Pleas, the county in which he resides and currently registers.

{¶6} On March 20, 2008, a hearing was held on Spangler's Petition. At the conclusion of the hearing, the trial judge denied the Petition and reclassified Spangler a Tier II Sex Offender. On March 24, 2008, the trial court memorialized its decision in a written Judgment Entry.

{¶7} On April 22, 2008, Spangler filed his Notice of Appeal with this court. Spangler raises the following assignments of error on appeal.

{¶8} "[1.] The retroactive application of Ohio's SB 10 violates the prohibition on *ex post facto* laws in Article I, Section 10 of the United States Constitution."

{¶9} "[2.] The retroactive application of Ohio's AWA violates the prohibition on retroactive laws in Article II, Section 28 of the Ohio Constitution."

{¶10} "[3.] Reclassification of defendant-appellant constitutes a violation of the separation of powers[] doctrine."

{¶11} "[4.] Reclassification of defendant-appellant constitutes impermissible multiple punishments under the Double Jeopardy Clauses of the United States and Ohio Constitutions."

{¶12} "[5.] The residency restrictions of the AWA violate Due Process Clauses in the Fourteenth Amendment of the United States Constitution and Article I of the Ohio Constitution."

{¶13} "[6.] Defendant-appellant cannot be subjected to the community notification requirements under pre-AWA law."

{¶14} "[7.] Defendant-appellant cannot be subjected to the community notification requirements under the AWA because it would violate the contract clause of the Ohio Constitution and the plea agreement entered into with the State of Ohio in the underlying criminal proceeding."

{¶15} These assignments will be considered out of order for the sake of clarity of presentation.

{¶16} In his first assignment of error, Spangler contends that Ohio's current Sex Offender Registration and Notification Act violates Section 10, Article I of the United States Constitution, which provides: "No State shall *** pass any *** ex post facto Law." "Any statute which punishes as a crime an act previously committed, which was innocent when done, [or] which makes more burdensome the punishment for a crime, after its commission, *** is prohibited as *ex post facto*." *State v. Cook*, 83 Ohio St.3d 404, 414, 1998-Ohio-291, quoting *Beazell v. Ohio* (1925), 269 U.S. 167, 169-170. The prohibition against ex post facto legislation only applies to criminal statutes, i.e. statutes punitive in nature. Id. at 415 (citation omitted).

{¶17} To determine the nature of a particular statute, it is necessary to consider both the legislative intent in enacting the statute and the effect of the statute in practice. This analysis is known as the "'intent-effects' test." Id. "If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is '"so punitive either in purpose or effect as to negate [the State's] intention" to deem it "civil."'" *Smith v. Doe* (2003), 538 U.S. 84, 92, quoting *Kansas v. Hendricks* (1997), 521 U.S. 346, 361, quoting *United States v. Ward* (1980), 448 U.S. 242, 248-249.

{¶18} Enactments of the Ohio Generally Assembly are presumed constitutional. *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, at paragraph one of the syllabus. The "presumption applies to amended R.C. Chapter 2950 ***, and remains unless [the challenger] establishes, beyond reasonable doubt, that the statute is

unconstitutional." *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, at ¶12 (citation omitted); *Smith*, 538 U.S. at 92, quoting *Hudson v. United States* (1997), 522 U.S. 93, 100, quoting *Ward*, 448 U.S. at 249 ("'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty").

{¶19} The Legislature's intent in passing the Sex Offender Registration and Notification Act, expressed in the Act itself, is to provide "adequate notice and information about offenders *** who commit sexually oriented offenses or who commit child-victim oriented offenses," so that "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." R.C. 2950.02(A)(1). The Act also asserts that the "protection of members of the public from sex offenders and child-victim offenders is a paramount governmental interest" and that "[t]he 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." R.C. 2950.02(A)(2) and (6). Finally, "it is the general assembly's intent to protect the safety and general welfare of the people of this state" and "the policy of this state to require the exchange *** of relevant information about sex offenders and child-victim offenders among public agencies and officials and to authorize the release *** of necessary and relevant information about sex offenders and child-victim offenders to members of the general public as a means of assuring public protection *** is not punitive." R.C. 2950.02(B). The Legislature's effort to further protect the public is well within its authority and the prospective application of the Adam Walsh Act is

constitutional. However, to the extent the application of the Adam Walsh Act requires final sentencing orders to be vacated, modified or rewritten, such application to previously journalized orders, no matter how well-intended, violates the separation of powers doctrine and res judicata.

{¶20} The Ohio Supreme Court has construed this language as a definitive statement that the Legislature's intent in enacting the Sex Offender Registration and Notification Act was not punitive. *Cook*, 83 Ohio St.3d at 417; *Ferguson*, 2008-Ohio-4824, at ¶29 ("we have held consistently that R.C. Chapter 2950 is a remedial statute").[1]

{¶21} Spangler maintains that the intent and effect of the Act are, nonetheless, punitive. Spangler notes that the Act's provisions are codified within Ohio's Criminal Code, Title 29; the failure to comply with the registration and notification provisions subjects the person to criminal penalties; and, under the prior law, a person's classification was tied to a determination that they posed an ongoing threat to the community, while under the current amendments one's classification "flow[s] directly from the offense of conviction." We disagree.

{¶22} The fact that the Act is contained in the Criminal Code and prescribes criminal penalties for failure to comply does not render it punitive. Both of these provisions were part of the prior version of the Act upheld by the Ohio Supreme Court in *Cook*. Moreover, the United States Supreme Court has held that neither of these characteristics necessarily renders a civil regulatory statute punitive. *Smith*, 538 U.S. at 94 ("[t]he location and labels of a statutory provision do not by themselves transform a

1. It is unnecessary political commentary and inappropriate to speculate whether the motivation for passing the Adam Walsh Act was driven by "public opinion and political security." If such underlying alleged motivation was relevant, one might consider that Ohio was required by federal law to pass the Adam Walsh Act or risk losing "10 percent of the funds that would otherwise be allocated *** to the jurisdiction under *** the Omnibus Crime Control and Safe Streets Act of 1968." Section 16925(a), Title 24, U.S.Code.

civil remedy into a criminal one"), and 96 ("[i]nvoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive").

{¶23} Nor does the fact that one's classification now "flow[s] directly from the offense of conviction," rather than a judicial determination as to the likelihood of recidivism, alter the legislative intent or the nature of the Act. Initially, "[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." Id. at 103. The United States Supreme Court has "upheld against *ex post facto* challenges laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment." Id. at 104.

{¶24} A similar argument was previously raised, and rejected, following the 2003 amendments to the Sexual Offender and Registration and Notification Act as part of Am.Sub.S.B. No. 5. The 2003 amendments "[m]odifie[d] most of the determinations, declarations, recognitions, and findings of the General Assembly regarding the SORN Law that [formally applied] only regarding sexual predators and habitual sex offenders so that they instead apply regarding all sex offenders, offenders who commit sexually oriented offenses, child-victim offenders, and offenders who commit a child-victim offense ***." *Ferguson*, 2008-Ohio-4824, at ¶7. Thus, disabilities that previously attached to persons deemed "likely to engage in the future in one or more sexually oriented offenses" were expanded to apply to all sex offenders. Cf. former R.C. 2950.01(E)(1).

{¶25} The Ohio Supreme Court recognized that these "changes were driven by the General Assembly's finding that all sex offenders pose a risk of engaging in further sexually abusive behavior after being released from prison and that the protection of the

public from those offenders is a paramount governmental interest." Id. Similarly, the current changes to the Act reflect the understanding that all sex offenders, by virtue of having committed "sexually oriented offenses," pose a risk of committing further sexually oriented offenses. This understanding is consistent with stated aim of protecting the public from the danger of recidivism by convicted sex offenders through the public dissemination of information about the offenders. R.C. 2950.02(A) and (B); *Ferguson*, 2008-Ohio-4824, at ¶35 (amendments to the Act were made "in an effort to better protect the public from the risk of recidivist offenders by maintaining the predator classification so that the public had notice of the offender's past conduct -- conduct that arguably is indicative of future risk").

{¶26} Finally, we note that the other appellate districts that have considered this issue have concluded that the registration and notification requirements of the Act remain civil and nonpunitive in nature after the amendments enacted by Senate Bill 10. See *State v. Omiecinski*, 8th Dist. No. 90510, 2009-Ohio-1066, at ¶¶34-42, and the cases cited therein.

{¶27} The first assignment of error is without merit.

{¶28} Under the second assignment of error, Spangler maintains that the retroactive application of Ohio's current Sex Offender Registration and Notification Act violates Article II, Section 28 of the Ohio Constitution, which provides that "[t]he general assembly shall have no power to pass retroactive laws." The Ohio Supreme Court has construed the prohibition to apply to "[e]very statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Cincinnati v. Seasongood* (1889), 46 Ohio St. 296, 303 (citation omitted).

{¶29} Specifically, Spangler claims the current law "eliminates the pre-existing right of citizens to reside where they wish and imposes new obligations and burdens which did not exist at the time [he] committed his offense."

{¶30} With respect to the residency restrictions, codified at R.C. 2950.034 [former R.C. 2950.031], the Ohio Supreme Court has held that these do not apply retroactively. *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, at syllabus.

{¶31} With respect to the increased registration and notification requirements, the Ohio Supreme Court has rejected these arguments on the grounds that the more burdensome registration requirements and more extensive community notification provisions did not alter the essentially regulatory purpose of the act. *Ferguson*, 2008-Ohio-4824, at ¶39 ("Ohio retroactivity analysis does not prohibit all increased burdens; it prohibits only increased punishment"); *Cook*, 83 Ohio St.3d at 412 ("except with regard to constitutional protections against *ex post facto* laws *** *felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation*"), citing *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281-282 (emphasis added).

{¶32} The second assignment of error is without merit.

{¶33} In his fourth assignment of error, Spangler argues the Act violates the constitutional prohibitions against double jeopardy since his reclassification constitutes a successive punishment for the same crime.

{¶34} Since the Act's notification and registration requirements do not constitute punishment, they do not implicate the double jeopardy provisions of either the United States or Ohio Constitutions. *Williams*, 88 Ohio St.3d 513, 528, 2000-Ohio-428, citing *Cook*, 83 Ohio St.3d at 420.

{¶35} The fourth assignment of error is without merit.

{¶36} In his fifth assignment of error, Spangler asserts that the residence restrictions contained in the Sex Offender Act, whereby he is barred from residing within 1000 feet of a school, pre-school, or child day-care center, see R.C. 2950.034, violate the substantive component of the due process clause contained in the Fourteenth Amendment of the United States Constitution and in Section 16, Article I of the Ohio Constitution as well as the right to privacy guaranteed by Section 1, Article I of the Ohio Constitution.

{¶37} The State counters that Spangler lacks standing to challenge these restrictions, in the absence of any evidence of an injury in fact or an actual deprivation of his property rights or his right to privacy.

{¶38} "A person has no standing to attack the constitutionality of an ordinance unless he has a direct interest in the ordinance of such a nature that his rights will be adversely affected by its enforcement." *Anderson v. Brown* (1968), 13 Ohio St.2d 53, at paragraph three of the syllabus. "The constitutionality of a state statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied and who has not been injured by its alleged unconstitutional provision." *Palazzi v. Estate of Gardner* (1987), 32 Ohio St.3d 169, at syllabus.

{¶39} In the present case, Spangler has not alleged or otherwise argued that the residency restrictions of R.C. 2950.034 have had any impact on him, i.e. that he has been forced to move from his current residence or intends to move within 1000 feet of a school, preschool, or child day-care. Cf. *Babbit v. United Farm Workers Natl. Union* (1979), 442 U.S. 289, 298 ("When the plaintiff has alleged an intention to engage in a

course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of persecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.' *** But 'persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs.'") (citations omitted).

{¶40} Accordingly, Spangler is without standing to challenge the Act's residency restrictions. *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, at ¶111; *State v. Gilfillan*, 10th Dist. No. 08AP-317, 2009-Ohio-1104, at ¶117 (citations omitted).

{¶41} The fifth assignment of error is without merit.

{¶42} In the sixth assignment of error, Spangler argues that the community notification provisions for Tier II Sex Offenders cannot be applied to him, pursuant to R.C. 2950.11(F)(2), which provides "[t]he notification provisions of this section do not apply to a person *** if a court finds at a hearing *** that the person would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment."

{¶43} As the State correctly points out, Tier II Sex Offenders are not subject to the community notification provisions. R.C. 2950.11(F)(1); *Omiecinski*, 2009-Ohio-1066, at ¶29.

{¶44} The sixth assignment of error is without merit.

{¶45} In the third assignment of error, Spangler maintains that the amended provisions of the Sex Offender Registration and Notification Act violate the constitutional doctrine of separation of powers.

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

{¶47} Specifically, Spangler argues the amendments violate the doctrine "by requiring the Attorney General, an executive branch official, to impose criminal punishment"; "by requiring the Attorney General, an executive branch official, to effectively overrule final court judgments and administrative orders adjudicating individuals like [Spangler] low-risk offenders and limiting their registration terms to ten years"; and "by legislatively overturning final court and administrative adjudications."

{¶48} Spangler's argument that the Act authorizes the Attorney General to impose criminal punishment, is refuted by our prior determinations that the nature of the Act remains remedial, rather than punitive, and that the registration and notification requirements are merely collateral consequences of a criminal conviction.

{¶49} Similarly, we reject Spangler's argument that the new law violates the separation of powers doctrine by requiring an official of the executive branch of government, i.e. the Attorney General, to exercise appellate review of a court judgment,

in that his reclassification as a Tier II Sex Offender increases the burden of the registration and notification requirements.

{¶50} Spangler relies on the Ohio Supreme Court's decision in *S. Euclid v. Jemison* (1986), 28 Ohio St.3d 157. In *Jemison*, the court struck down a statute authorizing the Registrar of the Motor Vehicles to review and reverse a trial court's order to suspend a driver's license, certificate of registration, or registration plates for failing to provide proof of financial responsibility.

{¶51} At issue in *Jemison* was R.C. 4509.101, which authorized a court to impose civil penalties for operating a vehicle without proof of financial responsibility "as part of the sentencing procedures." Former R.C. 4509.101(B)(1). The statute further provided, however, that a defendant could submit a statement to the Registrar of Motor Vehicles contesting the court's finding and the Registrar could, if he determines that a "reasonable basis" exists for believing the defendant has not violated the statute, conduct a hearing to determine the truth of the matter. Former R.C. 4509.101(B)(3)(a). Similarly, the Registrar could terminate the penalties imposed "if [he] determines upon a showing of proof of financial responsibility that the operator or owner of the motor vehicle was in compliance with [former R.C. 4509.101(A)(1)] at the time of the traffic offense or accident which resulted in the order against the person." Former R.C. 4509.101(D).

{¶52} The Ohio Supreme Court concluded that these provisions could not "withstand constitutional scrutiny under the separation of powers doctrine, because they clearly grant appellate review to an executive administrator, in a manner that conflicts with the constitutional powers of the courts of appeals." 28 Ohio St.3d at 161.

{¶53} *Jemison* is distinguishable inasmuch as the reclassification of offenders pursuant to R.C. 2950.031(E) and R.C. 2950.032(E) does not grant appellate review to the Attorney General. As noted above, the amendments to the Sex Offender Registration and Notification Act constitute a new law, with a new system of classification and attendant registration and notification requirements. A court's prior determination that an offender is a sexually oriented offender, habitual sex offender, or sexual predator has no relevance to their classification under the new system.

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

{¶55} In his final argument under this assignment of error, Spangler maintains that his original classification as a sexually oriented offender constitutes a final judgment and, as such, is beyond the Legislature's power to vacate, nullify, or otherwise modify. "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. "[I]t is well settled that the legislature cannot annul, reverse or modify a judgment of a court already rendered." *Bartlett v. Ohio* (1905), 73 Ohio St. 54, 58; *Plaut v. Spendthrift Farm, Inc.* (1995), 514 U.S. 211, 219 (Congress may not interfere with the power of the federal judiciary "to render dispositive judgments" by "commanding the federal courts to reopen final judgments") (citation omitted).

{¶56} Spangler raises a similar argument under his seventh assignment of error. "A judgment which is final by the laws existing when it is rendered cannot constitutionally be made subject to review by a statute subsequently enacted." *Gompf v. Wolfinger* (1902), 67 Ohio St. 144, at paragraph three of the syllabus. "That the conclusions are uniform upon the proposition that a judgment which is final by the statutes existing when it is rendered is an end to the controversy, will occasion no surprise to those who have reflected upon the distribution of powers in such governments as ours, and have observed the uniform requirement that legislation to affect remedies by which rights are enforced must precede their final adjudication." Id. at 152-153.

{¶57} A determination of an offender's classification under former R.C. Chapter 2950 constituted a final order. *State v. Washington*, 11th Dist. No. 99-L-015, 2001-Ohio-8905, 2001 Ohio App. LEXIS 8905, at *9 ("a defendant's status as a sexually Oriented offender *** arises from a finding rendered by the trial court, which in turn advsersely affects a defendant's rights by the imposition of registration requirements"); *State v. Dobrski*, 9th Dist. No. 06CA008925, 2007-Ohio-3121, at ¶6 ("[i]nasmuch as a sexual predator classification is an order that affects a substantial right in a special proceeding, it is final and appealable"). Accordingly, if either party failed to appeal such a determination within thirty days, as provided for in App.R. 4(A), the judgment became settled. Subsequent attempts to overturn such judgments have been barred under the principles of res judicata. See *State v. Lucerno*, 8th Dist. No. 89039, 2007-Ohio-5537, at ¶9 (applying res judicata where the State failed to appeal the lower court's determination that House Bill 180/Megan's Law was unconstitutional: "the courts have barred sexual predator classifications when an initial classification request had been

dismissed on the grounds that the court believed R.C. Chapter 2950 to be unconstitutional") (citations omitted).

{¶58} Since Spangler's classification as a sexually oriented offender with definite registration requirements constituted a final order of the lower court, Spangler cannot, under separation of powers and res judicata principles, now be reclassified under the provisions of the amended Act with differing registration requirements.

{¶59} The State relies upon the decisions of other appellate districts which have held that the amendments do not vacate "final judicial decisions without amending the underlying applicable law" or "order the courts to reopen a final judgment." *State v. Linville*, 4th Dist. No. 08CA3051, 2009-Ohio-313, at ¶23, citing *Slagle v. State*, 145 Ohio Misc.2d 98, 2008-Ohio-593, at ¶21. According to these cases, "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." *Slagle*, 2008-Ohio-593, at ¶21.

{¶60} It does not matter that the current Sex Offender Act formally amends the underlying law and does not order the courts to reopen final judgments. The fact remains that the General Assembly "cannot annul, reverse or modify a judgment of a court already rendered." *Bartlett*, 73 Ohio St. at 58. Spangler's reclassification, as a practical matter, nullifies that part of the court's April 27, 2001 Judgment ordering him to register for a period of ten years as a sexually oriented offender. To assert that the General Assembly has created a new system of classification does not solve the problem that Spangler's original classification constituted a final judgment. There is no

exception to the rule that final judgments may not be legislatively annuled in situations where the Legislature has enacted new legislation.

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

{¶62} These arguments are similarly unavailing. In *Ferguson*, as in *Cook*, the Supreme Court did not consider the argument that the enactment of House Bill 180/Megan's Law overturned a valid, final judgment. Rather, the Court was asked to determine whether the retroactive application of the Sex Offender Act violated the ex post facto clause or the prohibition against retroactive legislation. The Court did not consider the arguments based on separation of powers and res judicata raised herein. In *Cook*, the Sex Offender Act was applied retroactively to persons who had not been previously classified as sexual offenders. There were no prior judicial determinations regarding the offenders' status as sexual offenders. Thus, the Supreme Court could properly state that the new burdens imposed by the law did not "impinge on any reasonable expectation of finality" the offenders had with respect to their convictions. 83 Ohio St.3d at 414.

{¶63} In the present case, Spangler had every reasonable expectation of finality in the trial court's April 27, 2001 Judgment Entry, i.e. that he would have to comply with five years of community control sanctions, pay the fine of $350, and register for a period of ten years as a sexually oriented offender.

{¶64} Reliance upon the Supreme Court's reasoning in *Cook* and *Ferguson* is further misplaced since the ex post facto and retroactive legislation provisions only apply to punitive enactments. The holdings of *Cook* and *Ferguson* rested on the determination that the sex offender registration and notification requirements were remedial, non-punitive measures. See e.g. *Ferguson*, 2008-Ohio-4824, at ¶39 ("Ohio retroactivity analysis does not prohibit all increased burdens; it prohibits only increased punishment") and ¶43 (since "R.C. Chapter 2950 is a civil, remedial statute ***, it *** cannot be deemed unconstitutional on ex post facto grounds"). The separation of powers and res judicata doctrines, in contrast, apply equally in civil (remedial) contexts as they do in criminal (punitive) contexts. *Akron v. Smith*, 9th Dist. Nos. 16436 and 16438, 1994 Ohio App. LEXIS 1859, at *4 ("[t]he doctrine of *res judicata* *** applies equally to criminal and to civil litigation") (citation omitted).

{¶65} Spangler's third and seventh assignments of error have merit to the exent indicated above.

{¶66} Under this holding, Spangler will have to complete his original sentence and continue registering as a sexually oriented offender pursuant to the trial court's April 27, 2001 Judgment Entry.

{¶67} The General Assembly's purpose in enacting the Adam Walsh Act, "to provide increased protection and security for the state's residents from persons who have been convicted of, or found to be delinquent children for committing, a sexually oriented offense or a child-victim oriented offense," is properly realized in its application to cases pending when enacted and those subsequently filed. Section 5, S.B. No. 10. Spangler's sentence, however, had become final several years prior to the Adam Walsh

Act. As such, it is beyond the power of the Legislature to vacate or modify.[2] The United States Supreme Court has stated that the principle of separation of powers is violated by legislation which "depriv[es] judicial judgments of the conclusive effect that they had when they were announced" and "when an individual final judgment is legislatively rescinded for even the *very best* of reasons." *Plaut*, 514 U.S. at 228 (emphasis sic). To the extent the Adam Walsh Act attempts to modify existing final sentencing judgments, such as Spangler'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.

{¶68} For the foregoing reasons, the judgment of the Lake County Court of Common Pleas, reclassifying Spangler as a Tier II Sex Offender, is reversed; however, Spangler shall continue registering as a sexually oriented offender pursuant to the trial court's April 27, 2001 Judgment Entry. Costs to be taxed against appellee.

TIMOTHY P. CANNON, J., concurs in part and concurs in judgment only in part with Concurring Opinion.

MARY JANE TRAPP, P.J., dissents with Dissenting Opinion.

TIMOTHY P. CANNON, J., concurring in part and concurring in judgment only in part.

{¶69} I concur with the analysis in the majority opinion with regard to the disposition of assignment of error number 7. I do not agree with the analysis with regard to the separation of powers argument. I write separately to address the

2. Moreover, as a final judgment, Spangler'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).

arguments with regard to the ex post facto law assignment of error, and the assignment of error addressing the prohibition in the Ohio Constitution on retroactive laws.

{¶70} The Ohio legislature passed its version of the Adam Walsh Act effective January 1, 2008. S.B. 10 was incorporated into Ohio law at R.C. Chapter 2950. The legislative directive to apply this law retroactively to criminal defendants whose cases had long been concluded spurned hundreds of filings across the state of Ohio. In this appellate district, a stay was issued for a brief period of time to allow for the orderly review and consistent disposition of the appeals. This stay was lifted in August 2008.

{¶71} As a result of lifting the stay, approximately 31 cases on appeal became ripe for review within a short span of time. One of the unintended benefits of this timeline is the opportunity to examine the vast disparity in the underlying facts of each case.

{¶72} With the abundant number of cases comes the temptation to simply look at the statute in a vacuum and then apply it uniformly. This, I believe, would be a tremendous disservice to our Ohio and United States Constitutional protections. Certainly, to examine each case independently would require time and effort, but defense of the constitution against legislators who may be driven by public opinion and political security is the oath of every judge in this state.

{¶73} In Ohio, as elected judges, we are forced to be a part of the political process. However, our oath directs that we protect, preserve, and defend the constitution. It does not allow us to wink at it when the political winds suggest it may be the popular thing to do.

{¶74} It is important to note that numerous appellate briefs have opined that we are bound by the precedent of the Supreme Court of Ohio as set forth in, inter alia:

State v. Cook (1998), 83 Ohio St.3d 404; *State v. Williams*, 114 Ohio St.3d 103, 2007-Ohio-3268; *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202; and *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, as well as the United States Supreme Court in *Smith v. Doe* (2003), 538 U.S. 84. However, these cases are distinguishable from the instant situation, for it is important to realize that while the Courts engaged in a weighing and balancing of interests as they related to the ex post facto clause, the Supreme Court of Ohio has yet to conduct an analysis weighing the impact of the additional burdens imposed by S.B. 10, R.C. Chapter 2950.

{¶75} As applied to most defendants, the laws contained in R.C. Chapter 2950 are more comprehensive and restrictive than those previously analyzed by the Supreme Court of Ohio. Under S.B. 10, the registration and verification requirements have been modified substantially. For example, the classification system has changed, the duration and frequency of the requirements for registration have increased, the information to be provided when reporting has increased, and the access of the public to this information has greatly increased through the use of an internet database that was previously established by the Ohio Attorney General. Also, significant criminal penalties are imposed for failure to comply with the mandated reporting requirements.

{¶76} Ex Post Facto Analysis

{¶77} Section 10, Article I of the United States Constitution succinctly provides that no state may enact an ex post facto law. Under well-established precedent, this provision is intended to apply (1) when a new law seeks to punish a prior action which did not constitute a crime at the time of its commission, or (2) when a new law seeks to increase the punishment for a crime following its actual commission. *State v. Wilson*, 2007-Ohio-2202, at ¶30.

{¶78} The provisions of S.B. 10 demonstrate that the General Assembly intended for the new statutory scheme to be punitive. Similar to the 1997 version of R.C. Chapter 2950, S.B. 10 contains language stating the exchange or release of certain information is not intended to be punitive. However, also probative of legislative intent is the manner of the legislative enactment's "codification or the enforcement procedures it establishes ***." *Smith v. Doe*, 538 U.S. at 94. I recognize that placement of a statute "is not sufficient to support a conclusion that the legislative intent was punitive." Id. at 95; See, also, *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076, at ¶22. While it is not dispositive, "[w]here a legislature chooses to codify a statute suggests its intent." *Mikaloff v. Walsh* (N.D.Ohio 2007), 2007 U.S. Dist. LEXIS 65076, at *15. (Citation omitted.) The placement of S.B. 10, along with the text, demonstrates the General Assembly's intent to transform classification and registration into a punitive scheme.

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

{¶80} The following mandates by the legislature are also indicative of its intent for the new classification to be a portion of the offender's sentence. First, R.C. 2929.19(B)(4)(a), which is codified within the Penalties and Sentencing Chapter, states: "[t]he court *shall include in the offender's sentence* a statement that the offender is a tier III sex offender ***." (Emphasis added.) In addition, R.C. 2929.23(A), titled "Sentencing

for sexually oriented offense or child-victim misdemeanor offense ***," codified under the miscellaneous provision, states, "the judge *shall include in the offender's sentence* a statement that the offender is a tier III sex offender/child victim offender [and] shall comply with the requirements of section 2950.03 of the Revised Code ***." (Emphasis added.) R.C. 2929.23(B) states, "[i]f an offender is being sentenced for a sexually oriented offense or a child-victim oriented offense that is a misdemeanor ***, the judge *shall include in the sentence* a summary of the offender's duties imposed under R.C. 2950.04, 2950.041, 2950.05, and 2950.06 of the Revised Code and the duration of the duties." (Emphasis added.)

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

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

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

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

{¶85} The *Cook* Court also determined that former R.C. Chapter 2950, on its face, "is not punitive because it seeks to 'protect the safety and general welfare of the people of this state ***.'" *State v. Cook*, 83 Ohio St.3d at 417, citing former R.C. 2950.02(B) and (A)(2). Recognizing this, the Supreme Court of Ohio, in *State v. Eppinger* (2001), 91 Ohio St.3d 158, 165, stressed the importance of a sexual offender classification hearing and the significance of classifying offenders appropriately stating:

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

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

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

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

independent determination as to the likelihood that a given offender would commit another crime.

{¶90} While the legislature may be entitled to adopt this questionable approach to apply to offenders from the date of passing the legislation, I believe that neither the Ohio Constitution nor the United States Constitution permit the retroactive application of S.B. 10 in its current form to individuals such as appellant herein.

{¶91} Moreover, to date, the majority of the current justices on the Supreme Court of Ohio have objected to the characterization of Ohio's sex offender classification system as a "civil" proceeding. In *State v. Wilson*, Justice Lanzinger, whose dissenting opinion was joined by Justice O'Conner, stated the "restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions." *State v. Wilson*, 2007-Ohio-2202, at ¶46. (Lanzinger, J., concurring in part and dissenting in part.) More recently, Justice Lanzinger again voiced her concern in a dissenting opinion in *State v. Ferguson*, where she stated "R.C. 2950.09 has been transformed from remedial to punitive." *State v. Ferguson*, 2008-Ohio-4824, at ¶45. (Lanzinger, J., dissenting.) Her dissenting opinion in *Ferguson* was joined by Justices Pfeifer and Stratton. Thus, at one time or another, Justices Pfeifer, O'Connor, Stratton, and Lanzinger have all expressed their belief that the former version of Ohio's sex offender classification system was punitive rather than remedial.

{¶92} Furthermore, even if it were construed that the General Assembly's intent was civil in nature, I believe that S.B. 10 is unconstitutional due to its punitive effect as applied to this appellant.

{¶93} While the *Cook* Court concluded that: (1) historically, the requirement of

registration has been deemed a valid regulatory technique; and (2) the dissemination of information is considered non-punitive when it supports a proper state interest, it analyzed the 1997 version of R.C. Chapter 2950. *State v. Cook*, 83 Ohio St.3d at 418-419.

{¶94} Since *Cook*, the sexual offender laws have been significantly modified. For example, the original version of the "sexual offender" law stated that the defendant only had to register with the sheriff of the county where he was a resident. See, *State v. Cook*, 83 Ohio St.3d at 408. Under the latest version of the scheme, though, the places where registration is required has been expanded to now include: (1) the county where the offender lives; (2) the county where he attends any type of school; (3) the county where he is employed if he works there for a certain number of days during the year; (4) if the offender does not reside in Ohio, any county of this state where he is employed for a certain number of days; and (5) if he is a resident of Ohio, any county of another state where he is employed for a certain number of days. R.C. 2950.04. Not only is the offender now obligated to register in more counties, but he also has a legal duty to provide more information, as previously stated. The new law as applied to this case resulted in an offender, with a clear expectation that his reporting was going to end in 2011, to be legislatively resentenced to 25 years of reporting. Certainly, the enhanced requirements imposed on an offender such as appellant herein cannot be described as de minimis administrative requirements, as stated in *Cook*, supra, at 418.

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

{¶96} The *Cook* Court stated that registration and notification requirements are not intended to deter the behavior of the offender, but are instead intended to help the public protect itself from the harmful behavior. *Cook*, 83 Ohio St.3d at 420. Furthermore, with the enactment of S.B. 10, the legislature contends that the dissemination of an offender's personal information is intended to protect public safety. R.C. 2950.02. The general assembly makes the assertion that "[s]ex offenders and offenders who commit child-victim oriented offenses pose a risk of engaging in further sexually abusive behavior even after being released from imprisonment, a prison term, or other confinement or detention ***." R.C. 2950.02(A)(2). However, if the statistics and public opinion are as viable as those perceived by the legislature, the appropriate avenue for the legislature would have been to amend the constitution to allow for the retroactive, ex post facto application of S.B. 10. However, the constitutional amendment should not be circumvented with a clever legislative preamble based on questionable statistical data. If that were the case, virtually every constitutional protection is subject to selective legislative amendment.

{¶97} **Retroactivity Clause**

{¶98} Section 28, Article II of the Ohio Constitution states that "[t]he general assembly shall have no power to pass retroactive laws." A review of various provisions in the present version of R.C. Chapter 2950 confirms that the General Assembly has clearly indicated that offenders who were classified under the prior version of the scheme are obligated to comply with the new requirements. See, e.g., R.C. 2950.03, 2950.03(A)(5)(a), 2950.031, 2950.032(A), 2950.033(A). Therefore, since the first prong of the test for retroactive application of a statute has been met, the analysis must focus on whether the provisions should be characterized as substantive or remedial. As such,

I conclude that such an application is not permitted in cases such as appellant's, since it has an adverse effect upon this offender's substantive rights.

{¶99} The *Cook* Court determined that applying Megan's Law to those convicted under prior law did not offend the retroactivity clause. *State v. Cook*, 83 Ohio St.3d at 414. In *Cook*, the Supreme Court of Ohio stated: "[t]o hold otherwise would be 'to find that society is unable to protect itself from sexual predators by adopting the single remedy of informing the public of their presence.'" Id. (Citation omitted.)

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

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

{¶102} "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. *** These restraints on liberty are the consequences of specific

criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions." Id. at ¶46. (Internal citations omitted.)

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

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

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

{¶106} While I recognize the prohibition against ex post facto laws applies only to criminal cases, the retroactivity provisions of the Ohio Constitution apply in criminal and

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

{¶107} In this regard, I do not believe the same conclusion would be reached for offenders in the following scenarios: Offender #1 committed a rape and was declared a sexual predator with potential reporting and residency restrictions for the rest of his life, such as the offender in *State v. Ferguson*, 2008-Ohio-4824; Offender #2, like appellant, enters a plea to, and is subsequently sentenced on one count of attempted corruption of a minor, a felony of the fifth degree, and one count of public indecency, a misdemeanor of the fourth degree. He is sentenced to serve five years of community control, and classified as a sexually oriented offender, requiring ten years of reporting. Offender #2 serves seven years of a ten-year reporting period but under S.B. 10 has been legislatively re-classified as a Tier II offender, subject to residency restrictions and reporting for 25 years.

{¶108} In the instant case, appellant certainly had a reasonable expectation that his classification and attendant requirements were to last a finite period of ten years. Yet, through the enactment of S.B. 10, he is subject to *25 years* of reporting.

{¶109} Based on the foregoing, I would reverse the judgment of the Lake County Court of Common Pleas by holding that when applied retroactively to offenders such as appellant in this case, S.B. 10 violates the ex post facto clause of the United States Constitution and Section 28, Article II of the Ohio Constitution when an offender had a reasonable expectation of finality. The same result would not necessarily be true where an offender had been adjudicated a sexual predator, or if the offender, at the time of his conviction, had not yet been classified, but could have been classified as a sexual predator. This is primarily due to the fact, as observed by Justice O'Connor, that these individuals never had any expectation that their registration requirements would end prior to the passage of S.B. 10. However, those individuals who had been classified with resulting specific, terminable reporting requirements should be given the protections afforded by the United States and Ohio Constitutions.

MARY JANE TRAPP, P.J., dissenting.

{¶110} The majority rejected most of the constitutional challenges to Senate Bill 10, as this court had done in *Swank*, but it reversed the trial court's judgment based on Mr. Spangler's contention that his original classification as a sexually oriented offender constituted a final judgment and, as such, could not be vacated or modified by the legislature without a violation of the separation of powers doctrine.

{¶111} The majority cited *State v. Washington* and *State v. Dobrski* for the proposition that a court's determination of a sex offender's classification constitutes a final order or judgment, and therefore the separation of powers doctrine precludes a reclassification. The majority's reliance on these cases is misplaced, because these cases only concluded such determinations are final orders *for the purposes of appealability*. *Washington* at *8-9 (this court held that the classification of a defendant as a sexually oriented offender was a final appealable order and therefore properly appealable); *Dobrski* at ¶6 ("[i]nasmuch as a sexual predator classification is an order that affects a substantial right in a special proceeding, it is final and appealable").

{¶112} I do not believe Senate Bill 10 abrogates final judicial determinations in violation of the doctrine of the separation of powers. I agree with the Fourth Appellate District's view expressed in *State v. Linville*, 4th Dist. No. 08CA3051, 2009-Ohio-313, that the sex offender classification is nothing more than a collateral consequence arising from the underlying criminal conduct, id. at ¶24, citing *Ferguson* at ¶34, and that a sex offender has no reasonable expectation that his criminal conduct would not be subject to future versions of R.C. Chapter 2950. Id., *citing State v. King*, 2d Dist. No. 08-CA-02, 2008-Ohio-2594, ¶33. Reclassification does not abrogate final court judgments, because "the classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts." *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234, ¶39.

{¶113} For these reasons, I respectfully dissent.