[Cite as *State v. Charette*, 2009-Ohio-2952.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-L-069**
- vs -	:	
DEREK A. CHARETTE,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 MS 000043.

Judgment: Affirmed.

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

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

MARY JANE TRAPP, P.J.

{¶1} Derek A. Charette appeals from a judgment of the Lake County Court of Common Pleas, which denied his petition to contest his reclassification as a Tier III offender under Ohio's Adam Walsh Act, codified in the current version of R.C. Chapter 2950. For the following reasons, we affirm.

{¶2} **Procedural History**

{¶3} On December 9, 2003, Mr. Charette was convicted of one count of attempted rape, a felony of the second degree, in violation of R.C. 2323.02 and R.C. 2907.02(A)(2), following his guilty plea.

{¶4} After his conviction, he was sentenced to a prison term of three years and was classified as a child victim sexually oriented offender, which subjected him to registration and verification requirements set forth in the former version of R.C. 2950.04 for a period of 10 years. On November 26, 2007, he was notified, in a letter from the Ohio Attorney General's Office, that under the new sex offender registration law, he is required to register personally with the local sheriff's office every 90 days for life and may also be subject to community notification. He filed a petition in the Lake County Court of Common Pleas to contest his reclassification, claiming the reclassification was a violation of his constitutional rights. The trial court held a hearing on his petition on April 3, 2008, and denied it.[1]

{¶5} Mr. Charette timely appealed, assigning the following error for our review:

{¶6} "Application of S.B. 10 to classify appellant as a Tier III offender violates the ex post facto clause of the United States Constitution and the retroactive laws clause of the Ohio Constitution, the separation of powers doctrine of the federal and state constitutions and the appellant's rights to substantive and procedural due process a guaranteed by the federal and state constitutions."

1. In the letter from the Attorney General's Office, Mr. Charette was advised that if he was not previously subject to community notification under R.C. 2950.11(F)(2) prior to January 1, 2008, the court may make a determination removing the requirement. After hearing, the trial court determined that he is not subject to community notification under the new law.

{¶7} Ohio's new sexual offender law was adopted by the Ohio General Assembly in Senate Bill 10. The legislation was enacted so that the state law would be consistent with the federal Adam Walsh Child Protection and Safety Act of 1996.

{¶8} Prior to Senate Bill 10, when a criminal defendant was found guilty of a sexually oriented offense, he could be classified as a sexually oriented offender, a habitual sex offender, or a sexual predator. The prior statutory scheme provided that a defendant's designation under the three categories would be predicated upon the nature of the underlying offense and findings of fact made by the trial court during a sexual classification hearing.

{¶9} Under the new legislation, those three labels are no longer applicable. Instead, a defendant who has committed a sexually oriented offense can only be designated as either a sex offender or a child victim offender. There are now three tiers of sexual offenders. The extent of the defendant's registration and notification requirements will depend on the tier. Furthermore, the placement in a tier turns solely on the crime committed.

{¶10} Another change of the sexual offender classification system implemented under the new law concerns the duration of the registration and notification requirements for the sex offenders. Prior to Senate Bill 10, if a defendant was deemed a sexually oriented offender, he was required to register once each year for a period of 10 years, but there was no notification requirement; if he was labeled as a habitual sex offender, he had to register once every six months for 20 years, and the community could be given notice of his presence at the same rate; and, if he was designated a

sexual predator, the duty to register was once every three months for life, and notification could also take place at the same rate for life.

{¶11} Under the new statutory scheme set forth in current R.C. Chapter 2950, the registration and community notification requirements are increased for sex offenders. If the defendant's sexual offense places him in the "Tier I" category, he is required to register once every year for a period of 15 years, but there is no community notification; if the defendant's offense falls under the "Tier II" category, registration must take place once every six months for 25 years, and there is still no notification requirement; and, if the sexual offense places the defendant in the "Tier III" category, the requirements are essentially the same as for a sexual predator, in that there is a duty to register once every three months for life, and community notification can occur at that same rate for life. Community notification under the new scheme requires the sheriff to give the notice of an offender's name, address, and conviction to all residents, schools, and day care centers within 1,000 feet of the offender's residence. The new law also prohibits all sex offenders from residing within 1,000 feet of a school or day care center. These registration and notification requirements under the Adam Walsh Act are retroactive and applicable to offenders whose crimes were committed before the effective date of the statute.

{¶12} Under his assignment of error, Mr. Charette raises six constitutional claims. We have addressed the majority of these claims in *State v. Swank*, 11th Dist.

No. 2008-L-019, 2008-Ohio-6059, and have rejected them.[2]

{¶13} **Ex Post Facto Clause**

{¶14} Mr. Charette claims the retroactive application of Ohio's Adam Walsh Act to him constitutes an ex post facto law proscribed by Article I, Section 10 of the United State Constitution. That section provides: "[n]o State shall *** pass any *** ex post facto Law." Under this provision, "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. We addressed this constitutional claim fully in *Swank*, and held that Senate Bill 10 enacted by the General Assembly is civil in nature and not punitive in intent or effect and therefore not an ex post facto law.[3] Id. at ¶68-89.

{¶15} **Retroactivity**

{¶16} Mr. Charette argues even if the new law does not constitute an ex post facto law as applied to him, Article II, Section 28 of the Ohio Constitution prohibits its retroactive application to an offender such as him, who has already been sentenced and classified under the old law. The courts have interpreted the constitutional prohibition against retroactive laws to apply only to laws affecting substantive rights but not to

2. In *Swank*, the defendant was classified under the new law at the same time he was sentenced for his sex offense, instead of being reclassified as the defendant was in the instant case. The constitutional claims are, however, similar.

3. We note, however, the Supreme Court of Ohio has become more divided on the issue of whether the registration and notification statute has evolved from a remedial and civil statute into a punitive one. As Justice Lanzinger stated in her concurring in part and dissenting in part opinion in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, ¶46: "I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions." See, also, *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824 (Lanzinger, J., dissenting). We believe Senate Bill 10 merits review by the Supreme Court of Ohio to address the issue of whether the current version of R.C. Chapter 2950 has been transformed from remedial to punitive law. However, before that court revisits the issue, we, as an inferior court, are bound to apply its holdings in *State v. Cook* (1998), 83 Ohio St.3d 404 and *Wilson*.

procedural or remedial aspects of such laws. *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 137. Our court has addressed this constitutional claim in *Swank* and held that the registration and notification requirements of Senate Bill 10 are remedial and procedural in nature and not substantive, and therefore, Senate Bill 10 is not a retroactive law prohibited by the Ohio Constitution. Id. at ¶90-95

{¶17} **Separation of Powers**

{¶18} Mr. Charette also asserts that the new law violated the doctrine of separation of powers. Specifically, he claims it usurps the court's prior adjudication of him as a sexually oriented offender and by doing so it encroaches upon the authority reserved for the judiciary branch.

{¶19} The Seventh District evaluated a similar claim in *State v. Byers*, 7th Dist. No. 07CO39, 2008-Ohio-5051, and found no violation of the doctrine of separation of powers. The Seventh District adopted the following analysis provided in *State v. Slagle*, 145 Ohio Misc.2d 98, 2008-Ohio-593:

{¶20} "[T]he 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." *Byers* at ¶73, quoting *Slagle* at ¶21 and citing *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-

3234, ¶39, and *In re G.E.S*., 9th Dist. No. 24079, 2008-Ohio-4076, ¶42 (discussing the issue in relation to child-victim offender).

{¶21} Furthermore, as this court noted already, the registration and notification scheme of the new legislation is not punitive in nature, but rather civil and remedial. S*wank* at ¶99. The judiciary is empowered to hear a controversy between adverse parties, ascertain the facts, and apply the law to the facts to render a final judgment. Id., citing *Fairview v. Giffee* (1905), 73 Ohio St.183, 190. In the criminal context, the judiciary is empowered to determine if a crime has been committed and the penalty to be imposed on a defendant. Registration requirements such as those for motorists, corporations, or sex offenders, are always the province of the legislature and such laws do not require judicial involvement. *Swank* at ¶99. Therefore, no abrogation of final judicial decisions occurred when a petitioner such as Mr. Charette is reclassified and subjected to additional requirements. The new law as applied to a petitioner in Mr. Charette's situation does not violate the separation of powers.

{¶22} **Procedural Due Process**

{¶23} Mr. Charette maintains his procedural due process right is violated because under Senate Bill 10, the registration and notification requirements arise automatically from the conviction of an offense. He argues before his reclassification under the new law he should have been afforded an opportunity to be heard "regarding his classification or protecting his vested interest in not having to register or be subject to community notification."

{¶24} We have addressed a similar procedural due process claim in *Swank* and determined that a hearing is unnecessary because the registration or notification

requirements do not deprive an offender of a protected liberty or property interest. *Swank* at ¶103-107.

{¶25} Furthermore, we note that following his reclassification, Mr. Charette *was* afforded a hearing, conducted by the trial court on April 3, 2008, regarding the application of the new statute to him. Therefore, Mr. Charette's claim of a violation of procedural due process is without merit.

{¶26} **Substantive Due Process Rights and Privacy**

{¶27} Mr. Charette also argues that the residency restrictions added by Senate Bill 5 in 2003 and enhanced by Senate Bill 10 violate the substantive component of the Due Process Clause in the Fourteenth Amendment to the United States Constitution and in Section 16, Article 1 of the Ohio Constitution, as well as the right to privacy guaranteed by Section 1, Article 1 of the Ohio Constitution.

{¶28} Pursuant to his reclassification, Mr. Charette is barred from residing within 1,000 feet of a school, pre-school, or child care center. He argues the restrictions violate his substantive due process rights as it interferes with his liberty interest to live where he wishes, as well as his right to privacy.

{¶29} We have considered and rejected this constitutional claim in *Swank*. There, the appellant also claimed the residency restrictions "violate his substantive due process rights because it interferes with a liberty interest tantamount to being on parole or his right of privacy," id. at ¶108, and we stated:

{¶30} "[C]ourts routinely decline such challenges unless evidence is presented that the defendant was actually injured by the residency restriction on the ground of waiver. *State v. Bruce,* 8th Dist. No. 89641, 2008-Ohio-926, ¶10-11. Appellant has

failed to show or even argue that he owns property or resides within 1,000 feet of any of the above-listed facilities or that he was forced to move outside this limit. As a result, appellant's argument that S.B. 10 has interfered with his liberty or privacy interest fails because he has not shown that he has been actually injured by S.B. 10.

{¶31} "Moreover, defendant lacks standing to challenge the constitutionality of a residency restriction unless the record shows the defendant suffered an actual deprivation of his property rights as a result of the application of such restriction to him. *State v. Pierce*, 8th Dist. No. 88470, 2007-Ohio-3665, ¶33. Because appellant has failed to show an actual deprivation of his property rights, he does not have standing to challenge the residency restriction of S.B. 10." *Swank* at ¶110-111. See, also, *State v. Amos*, 8th Dist. No. 89855, 2008-Ohio-1834, ¶43, citing the syllabus of *Palazzi v. Estate of Gardner* (1987), 32 Ohio St.3d 169, which states "[t]he 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."

{¶32} Similarly here, Mr. Charette does not show or even allege an actual injury he suffers from the residency restrictions imposed by Senate Bill 10, and therefore, we find his claim to be without merit. His assignment of error is overruled.

{¶33} The judgment of the Lake County Common Pleas Court is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶34} I respectfully dissent.

{¶35} Initially, this writer notes that under the new legislation, the basic system for sexual offender classification was altered considerably. Prior to S.B. 10, if a criminal defendant was found guilty of a sexually oriented offense which was not exempted from any registration, he could be classified as a sexually oriented offender, a habitual sex offender, or a sexual predator. The prior statutory scheme also provided that a defendant's designation under the three categories was to be predicated upon the nature of the underlying offense and findings of fact made by the trial court during a sexual classification hearing.

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

{¶37} The second major change of the sexual offender system concerns the duration of the registration and notification requirements. Prior to S.B. 10, the governing law generally provided for the following: (1) if a defendant was deemed a sexually oriented offender, he was required to register once each year for a period of ten years, but there was no notification requirement; (2) if he was labeled as a habitual sex offender, he had to register once every six months for twenty years, and the community

could be given notice of his presence at the same rate; and (3) if he was designated a sexual predator, the duty to register was once every three months for life, and notification could also take place at the same rate for life. Under the new scheme, the registration and notification requirements are substantially different: (1) if the defendant's sexual offense places him in the "Tier I" category, he is required to register once every year for a period of fifteen years, but there is no community notification; (2) if the defendant's offense falls under the "Tier II" category, registration must take place once every six months for twenty-five years, and there is still no notification requirement; and (3) if the sexual offense places the defendant in the "Tier III" category, the requirements are essentially the same as for a sexual predator, in that there is a duty to register once every three months for life, and community notification can occur at that same rate for life.

{¶38} As to the specific requirements of registration, the original version of the "sexual offender" law stated that the defendant only had to register with the sheriff of the county where he was a resident. See *State v. Cook* (1998), 83 Ohio St.3d 404, 408. Under the latest version of the scheme, though, the places where registration is required has been expanded to now include: (1) the county where the offender lives; (2) the county where he attends any type of school; (3) the county where he is employed if he works there for a certain number of days during the year; (4) if the offender does not reside in Ohio, any county of this state where he is employed for a certain number of days; and (5) if he is a resident of Ohio, any county of another state where he is employed for a certain number of days. Similarly, the extent of the information which must be provided by an offender has increased. As part of the general registration

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

{¶39} In the instant matter, the majority holds that Mr. Charette's issues concerning the ex post facto clause, retroactivity, and substantive due process and right to privacy are without merit. I disagree.

{¶40} **Ex Post Facto Clause**

{¶41} Ex post facto challenges will only lie against criminal statutes. See, e.g., *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, at ¶69. When considering such challenges, courts must apply the "intent-effects" test. Id.

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

{¶43} ""1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. *Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed*. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of

the commission of the offense, in order to convict the offender.'" (Emphasis added.) *Rogers v. Tennessee*, (2001), 532 U.S. 451, 456, ***, quoting *Calder v. Bull* (1798), 3 U.S. 386, 390, *** (seriatum opinion of Chase, J.)" *State v. Elswick*, 11th Dist. No. 2006-L-075, 2006-Ohio-7011, at ¶17-18. (Parallel citations omitted.)

{¶44} In *Smith v. Doe* (2003), 538 U.S. 84, the United States Supreme Court recently summarized the "intent-effects" test, in a case concerning a challenge to the constitutionality of Alaska's then-sex offender registration law. Speaking for the Court, Justice Kennedy wrote:

{¶45} "We must 'ascertain whether the legislature meant the statute to establish "civil" proceedings.' *Kansas v. Hendricks*, 521 U.S. 346, 361, ***. If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is '"so punitive either in purpose or effect as to negate (the State's) intention" to deem it "civil."' *Ibid.* (quoting *United States v. Ward*, 448 U.S. 242, 248-249, *** (1980)). Because we 'ordinarily defer to the legislature's stated intent,' *Hendricks, supra*, at 361, '"only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,' *Hudson v. United States*, 522 U.S. 93, 100, *** (1997) (quoting *Ward, supra*, at 249); see also *Hendricks, supra,* at 361; *United States v. Ursery*, 518 U.S. 267, 290, *** (1996); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365, *** (1984).

{¶46} "Whether a statutory scheme is civil or criminal 'is first of all a question of statutory construction.' *Hendricks, supra*, at 361 (internal quotation marks omitted); see

also *Hudson, supra*, at 99. We consider the statute's text and its structure to determine the legislative objective. *Fleming v. Nestor*, 363 U.S. 603, 617, *** (1960). A conclusion that the legislature intended to punish would satisfy an *ex post facto* challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as the legislature has stated it." *Smith* at 92-93. (Parallel citations omitted.)

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

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

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

{¶50} Both the placement of S.B. 10 within the Revised Code, and the language of the statute, indicates a punitive, rather than remedial, purpose.[4] Further, as Judge James J. Sweeney of the Eighth Appellate District recently noted regarding the intent of S.B. 10:

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

{¶52} Consequently, this writer believes that the intent of S.B. 10 is punitive, rather than remedial.

{¶53} Moreover, an exploration of the effects of S.B. 10 reveals that it is a punitive, criminal statute, rather than remedial and civil. When considering whether a statute's effects are punitive under the ban of ex post facto laws, courts are required to consider the factors set forth by the United States Supreme Court in *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, 168-169. *Cook*, supra, at 418. These include: (1) whether the law imposes an affirmative disability or restraint; (2) whether it imposes what has historically been viewed as punishment; (3) whether it involves a finding of scienter; (4) whether it promotes the traditional aims of punishment – retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether it promotes some rational purpose other than punishment; and (7) whether it is excessive in relation to this other rational purpose.

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

{¶54} Regarding the first factor, S.B. 10 clearly imposes significant affirmative disabilities upon offenders. They must register personally with the sheriffs of any county in which they live, work, or attend school, as often as quarterly. Failure to do so may result in felony prosecution – even if the offender is, for instance, hospitalized, and unable to go to the sheriff's office.

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

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

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

{¶58} Thus, S.B. 10 imposes significant disabilities and restraints upon

offenders, which indicates it is an unconstitutional ex post facto law under the first *Kennedy* factor.

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

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

{¶61} The fourth *Kennedy* factor requires us to determine whether the registration and notification requirements of S.B. 10 fulfill two of the traditional aims of punishment: retribution and deterrence. "'Retribution is vengeance for its own sake. It does not seek to affect future conduct or solve any problem except realizing "justice." Deterrent measures serve as a threat of negative repercussions to discourage people from engaging in certain behavior. Remedial measures, on the other hand, seek to solve a problem (***) [.]'" *Doe*, supra, at 1013, fn. 107, quoting *Artway v. Attorney Gen.*

of N.J. (3d Cir., 1996), 81 F.3d 1235, 1255.

{¶62} This writer believes there are certain retributive factors in the registration requirements: i.e., the necessity of registering personally and the mandate that all personal information of any type be turned over, upon request, to the BCI. These do not affect future conduct or solve any problem. They simply impose burdens upon offenders. Similarly, the prohibition upon offenders living within a certain proximity of schools, pre-schools, and day care facilities is a form of retribution, since it applies across the board, and not simply to violent offenders or child-victim offenders.

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

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

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

{¶66} "In other words, [the law] fundamentally and invariably requires a judgment of guilt based on either a plea or proof under the criminal standard. It is

therefore the determination of guilt of a sex offense beyond a reasonable doubt (or per a knowing plea), not merely the fact of the conduct and potential for recidivism, that triggers the registration requirement. Because it is a criminal conviction, and only the criminal conviction, that triggers obligations under [the law], we conclude that this factor supports the conclusion that [the law] is punitive in effect." *Doe*, supra, at 1015. (Footnote omitted.)

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

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

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

{¶70} **Retroactivity**

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

{¶72} "'The analysis of claims of unconstitutional retroactivity is guided by a binary test. We first determine whether the General Assembly expressly made the statute retrospective. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, ¶10 ***. If we find that the legislature intended the statute to be applied retroactively, we proceed with the second inquiry: whether the statute restricts a substantive right or is remedial. Id. If a statute affects a substantive right, then it offends the constitution. *Van Fossen* (*v. Babcock & Wilcox Co*. (1988)), 36 Ohio St.3d (100,) at 106 ***.' [*State v.*] *Ferguson*, [120 Ohio St.3d 7, 2008-Ohio-4824,] at ¶13." *Swank*, supra, at ¶91. (Parallel citations omitted.)

{¶73} A statute is "substantive" if it: (1) impairs or takes away vested rights; (2) affects an accrued substantive right; (3) imposes new burdens, duties, obligations or liabilities regarding a past transaction; (4) creates a new right from an act formerly giving no right and imposing no obligation; (5) creates a new right; or (6) gives rise to or takes away a right to sue or defend a legal action. *Van Fossen*, supra, at 107. A later enactment does not attach a new disability to a past transaction in the constitutional sense unless the past transaction "created at least a reasonable expectation of finality." *State ex rel. Maltz v. Brown* (1988), 37 Ohio St.3d 279, 281. "*Except* with regard to constitutional protections against ex post facto laws, ***, felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation." (Emphasis added.) Id. at 281-282.

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

{¶75} **Substantive Due Process and Right to Privacy**

{¶76} I believe this issue lacks ripeness.

{¶77} "'The basic principle of ripeness may be derived from the conclusion that "judicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote." (***) The prerequisite of ripeness is a limitation on jurisdiction that is nevertheless basically optimistic as regards the prospects of a day in court: the time for judicial relief is simply not yet arrived, even though the alleged action of the defendant foretells legal injury to the plaintiff.' Comment, Mootness and Ripeness: The Postman Always Rings Twice (1965), 65 Colum.L.Rev. 867, 876." *State ex rel. Elyria Foundry Co. v. Indus. Comm.* (1998), 82 Ohio St.3d 88, 89.

{¶78} Here, the majority contends that Mr. Charette does not have standing to challenge the residency restriction of S.B. 10 unless he is forced to move. This writer, however, believes that this may not be an issue of standing but the issue of residency is non-justiciable at this time pursuant to these facts due to a lack of a pending case and controversy, i.e., ripe for adjudication.

{¶79} Standing is defined as: "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right." Black's Law Dictionary (8 Ed.2004) 1442.

{¶80} Justiciability is defined as: "[t]he quality or state of being appropriate or

suitable for adjudication by a court." Black's Law Dictionary (8 Ed.2004) 882.

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

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

{¶83} I respectfully dissent.