[Cite as *State v. Curd,* 2009-Ohio-3814.]

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-048**
- vs -	:	
CHRISTOPHER R. CURD,	:	
Defendant-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 08 MS 000028.

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).

Paul A. Mancino Jr., Mancino, Mancino & Mancino, 75 Public Square, #1016, Cleveland, OH 44113 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.,

{¶1} Appellant, Christopher Curd, appeals from the judgment entry of the Lake County Court of Common Pleas reclassifying him from a sexually oriented offender to a Tier III Sex Offender as required by Am. Sub. Senate Bill 10 (a.k.a. the Adam Walsh Act). For the reasons discussed in this opinion, the trial court's judgment is affirmed.

{¶2} In 2002, appellant pleaded guilty to one count of rape, a felony of the first degree, in violation of R.C. 2907.02(A)(2). After a hearing, the trial court determined appellant was a sexually oriented offender requiring him to register upon his release

from prison for a period of 10 years. S.B. 10 was enacted in July of 2007 and made effective on January 1, 2009. The statute explicitly provided that its registration and notification provisions are retroactive. See R.C. 2950.033.

{¶3} In January of 2008, appellant was notified he had been reclassified as a Tier III Sex Offender under S.B. 10. A Tier III classification is the highest tier and, similar to the old sexual predator finding, requires registration every 90 days for life, and the community notification may occur every 90 days for life. See R.C. 2950.07.

{¶4} Appellant subsequently filed a petition to contest his reclassification asserting various violations of his constitutional rights. The state responded to appellant's petition and a hearing was held on March 13, 2008. After the hearing, the trial court concluded that appellant had not proved by clear and convincing evidence that the new registration requirements did not apply to him. See R.C. 2950.031(E). Accordingly, the trial court concluded appellant was properly reclassified as a Tier III Offender requiring life-time registration.

{¶5} Appellant filed a motion to stay the community notification pending a ruling by the Ohio Supreme Court on the constitutionality of S.B. 10. The trial court denied the motion. Appellant filed his notice of appeal and subsequently moved this court to stay the notification which was granted yet subsequently dissolved.

{¶6} Appellant now raises two assignments of error challenging the legality of his reclassification. For his first assignment of error, appellant contends:

{¶7} "A defendant has been denied due process of law when an executor [sic] overruled a prior judicial determination in violation of the constitutional separation of powers doctrine."

{¶8} Under this assigned error, appellant first argues the trial court's action of reclassifying him under the new statute violated the doctrine of res judicata.

{¶9} An issue or point of law has been formerly and finally adjudicated pursuant to res judicata where it "*** was actually and directly in issue in the former action, and was there passed upon and determined by a court of competent jurisdiction ***." *Trautwein v. Sorgenfrei* (1979), 58 Ohio St.2d 493, at syllabus. Res judicata has the effect of precluding a party, or a person in privity with him or her, from later relitigating the identical issue adjudicated in the prior judgment. Id.

{¶10} Appellant argues that because the issue of his classification was previously determined under the former statute, the matter is res judicata and cannot be revisited, regardless of the enactment of the new statute. Appellant is wrong.

{¶11} Appellant was formerly classified under a now defunct statutory scheme. The current classification scheme is both procedurally and substantively different than the scheme under which he was previously classified. Thus, because the current scheme did not exist at the time appellant was labeled a "sexually oriented offender," appellant's new classification as a "Tier III" Offender was never directly in issue. By definition, res judicata does not bar appellant's reclassification.

{¶12} Next, appellant asserts S.B. 10 violates the doctrine of separation of powers and is therefore unconstitutional.

{¶13} Before embarking on our analysis, we point out that appellant's first and second assignments of error assert various arguments relating to the constitutionality of S.B. 10. It is worth noting that each appellate district in Ohio, including this one, has concluded that S.B. 10 passes constitutional muster. See *State v. Swank,* 11th Dist.

No. 2008-L-019, 2008-Ohio-6059; *Sewell v. State*, 1st Dist. No. C-080503, 2009-Ohio-872; *State v. Desbiens*, 2d Dist. No. 22489, 2008-Ohio-3375; *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234; *State v. Longpre*, 4th Dist. No. 08CA3017, 2008-Ohio-3832; *State v. Hughes*, 5th Dist. No. 2008-CA-23, 2009-Ohio-2406; *State v. Bodyke*, 6th Dist. Nos. H-07-040, H-07-041, and H-07-042, 2008-Ohio-6387; *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051; *State v. Holloman-Cross*, 8th Dist. No. 90351, 2008-Ohio-2189; *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076; *State v. Gilfillan*, 10th Dist. No. 08AP-317, 2009-Ohio-1104; *Ritchie v. State*, 12th Dist. No. CA2008-07-073, 2009-Ohio-1841.

{¶14} With this backdrop in mind, we shall proceed with an analysis of appellant's separation of powers argument. Appellant's argument asserts that S.B. 10 is unconstitutional because it violates the doctrine of separation of powers by allocating to the Ohio Attorney General the power to reclassify him as a Tier III Offender and thereby nullify a former, and otherwise valid, judgment of a court of law.

{¶15} "An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus.

{¶16} Initially, any argument related to separation of powers must relate to the Legislative branch overstepping its authority, not the Executive branch. The General Assembly was the body of government that enacted the legislation at issue and thus is the branch of government responsible for appellant's reclassification. The fact that an

officer of the Executive branch delivered the letter informing appellant of his reclassification is inconsequential. Once a law is enacted, those vested with the authority to enforce it must act accordingly. The Attorney General met his legal obligation and did not overstep his authority in serving the notification.

{¶17} Accordingly, the real constitutional question is whether the legislature's enactment stands in violation of the doctrine of separation of powers. We have previously answered this question in the negative. *Swank,* supra, at ¶98-100.

{¶18} However, for purposes of emphasis, we shall now expand upon our holding in *Swank.* We first point out that, while S.B. 10 authorizes the Ohio Attorney General to reclassify offenders previously classified under H.B. 180, see R.C. 2950.031, such reclassification does not vacate or modify a prior final judgment of the court.

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

{¶20} "[T]he classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts. *** Without the legislature's creation of sex offender classifications, no such classification would be warranted. Therefore, *** we cannot find that sex offender classification is anything other than a creation of the legislature, and therefore, the power to classify is properly expanded or limited by the legislature." *In re Smith*, supra, at ¶39.

{¶21} Put simply, S.B. 10 does not require the Attorney General (via legislative mandate) to reopen final judicial judgments. The new scheme merely changes the classification and registration requirements for sex offenders and mandates that new procedures be applied to sex offenders currently registered under the former law. In *State v. Cook,* 83 Ohio St.3d 404, 1998-Ohio-291, the Court pointed out that "where no vested right has been created, 'a later [legislative] enactment will not burden or attach a new disability to a past, transaction or consideration in the constitutional sense, unless the past transaction or consideration created at least a reasonable expectation of finality.'" Id. at 412, quoting *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281. With the exception to the constitutional protection against ex post facto laws, which, as will be discussed further infra, S.B. 10 does not violate, "'*felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation*.'" (Emphasis sic.) *Cook,* supra, quoting *Matz,* supra, at 281-282. Accordingly, because convicted sex offenders have no reasonable "settled expectations" or vested rights concerning the registration obligations imposed on them, S.B. 10 does not function to abrogate a final prior judicial adjudication. See *State v. King*, 2d Dist. No. 08-CA-02, 2008-Ohio-2594, at ¶33; *State v. Linville*, 4th Dist. No. 08CA3051, 2009-Ohio-313, at ¶16.

{¶22} Finally, in *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, the Ohio Supreme Court held that an offender's classification as a sexual predator is merely a "collateral consequence of the offender's criminal acts rather than a form of punishment per se." Id. at 14. In that case, the Court concluded the offender had "not established that he had any reasonable expectation of finality in [such] a collateral consequence

***." Id. Here, we acknowledge that appellant possesses a reasonable expectation in the finality of his conviction; however, this expectation does not extend to his former classification. His previous sexual classification is nothing more than a collateral consequence arising from his criminal conduct. Even though appellant's registration and notification obligations have changed under S.B. 10, he has failed to provide this court with any authority indicating he possessed a reasonable expectation of finality in the collateral consequence of his former classification.

{¶23} The new registration and notification scheme does not violate the doctrine of separation of powers and, as a result, we reaffirm our conclusion in *Swank.*

{¶24} Appellant's first assignment of error is without merit.

{¶25} Appellant's second assignment of error asserts:

{¶26} "A defendant has been denied his constitutional rights when the court applied Ohio's Adam Walsh Act to defendant in an unconstitutional manner."

{¶27} Under this assignment of error, appellant argues S.B. 10 violates; (1) the constitutional prohibition against ex post facto laws; (2) the protection against retroactive legislation; (3) the constitutional protection prohibiting double jeopardy; and (4) due process of law. Similar to appellant's separation of powers argument, the balance of these constitutional arguments has been considered and rejected by this court in *Swank.* Id. at ¶71-89 (ex post facto); ¶90-97 (retroactive legislation); ¶101-111 (due process of law). By operation of stare decisis, appellant's arguments are therefore overruled. However, since our holding in *Swank,* litigants, particularly those who have experienced a reclassification such as appellant, have further developed their positions. As with appellant's separation of powers challenge, we shall revisit the arguments

relating to appellant's ex post facto and retroactivity challenges to amplify our previous conclusion that S.B. 10 is constitutional. We shall first address appellant's ex post facto argument.

{¶28} All of Ohio's appellate districts, including this court, have relied on the Supreme Court of Ohio's decision in *Cook*, supra, as a foundation for upholding the constitutionality of S.B. 10. In *Cook*, the Court addressed H.B. 180, the statutory predecessor of S.B. 10. The Court held that, although H.B. 180 was retroactive, the purpose of its registration and notification requirements was to protect the public from released sex offenders. The Court in *Cook* held that because H.B. 180 was remedial and not punitive in nature, it did not present an ex post facto or retroactivity violation. Id. at 413, 423.

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

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

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

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

{¶33} In *Ferguson,* supra, the Supreme Court of Ohio considered whether the more stringent revisions to H.B. 180, incorporated in S.B. 5, effective July 31, 2003, violated the prohibitions against ex post facto and retroactive laws.

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

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

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

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

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

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

{¶40} "***

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

{¶42} "***

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

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

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

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

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

{¶48} The convicted sex offenders in *Smith* filed an action in the district court seeking a declaration that the Alaska act violated the Ex Post Facto Clause of the Federal Constitution. The district court entered summary judgment in favor of the state. The Ninth Circuit held the act violated the Ex Post Facto Clause because, although the

legislature intended the act to be a nonpunitive, civil regulatory scheme, the effects of the act were punitive.

{¶49} In reversing the decision of the Ninth Circuit, the United States Supreme Court held the intent of the act was remedial and not punitive. In arriving at this holding, the Supreme Court considered various factors. First, it considered the legislative purpose set forth in Alaska's act. The Court held: "Because we 'ordinarily defer to the legislature's stated intent,' [*Kansas v.*] *Hendricks*, [521 U.S. 346], 361, '"only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,' *Hudson v. United States*, 522 U.S. 93, 100 *** (1997) (quoting [*United States v.*] *Ward*, [448 U.S. 242,] at 249 ***." Id. at 92.

{¶50} The Supreme Court noted that the Alaska Legislature expressed its intent in the statute. It found '"sex offenders pose a high risk of reoffending,'" and stated that '"protecting the public from sex offenders'" is the '"primary governmental interest'" of the law. *Smith*, supra, at 93, quoting 1194 Alaska Sess. Laws Ch.41. The legislature found the '"release of certain information about sex offenders to public agencies and the general public will assist in protecting the public safety.'" Id. We note the legislative intention set forth in S.B.10 is virtually identical to that expressed in the Alaska **l**egislation.

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

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

{¶53} The Supreme Court also addressed the Alaska statute's requirement that the judgment of conviction for sex offenses "'set out the requirements of [the Act] and *** whether that conviction will require the offender to register for life or a lesser period.'" Id. at 95. The Court held:

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

conviction. *Invoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive*." (Emphasis added.) Id. at 95-96.

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

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

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

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

{¶59} "It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times. These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.

{¶60} "The State's Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record. An individual seeking the information must take the initial step of going to the Department of Public Safety's Web site, proceed to the sex offender registry, and then look up the desired information. The process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality. The Internet makes the document search more efficient, cost effective, and convenient for Alaska's citizenry." *Smith,* supra, at 99.

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

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

{¶63} "*** Probation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in case of infraction. *** By contrast, offenders subject to the Alaska statute are free to move where they wish *** with no supervision. Although registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so. A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense. *** [T]he registration requirements make a valid regulatory program effective and do not impose punitive restraints in violation of the Ex Post Facto Clause." (Internal citations omitted.) Id. at 101-102.

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

{¶65} Fourth, the Court held the Act's rational connection to a nonpunitive purpose was the "most significant" factor in its determination that the statute's effects are not punitive. The Court held the act has a legitimate, nonpunitive purpose of public

safety, which is advanced by alerting the public to the risk of sex offenders in their community. Id. at 102-103.

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

{¶67} "Alaska could conclude that a conviction for a sex offense provides evidence of substantial risk of recidivism. The legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is 'frightening and high.' *McKune v. Lile*, 536 U.S. 24, 34 (2002); see also id., at 33 ('When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault') (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997)).

{¶68} "The Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences. *** The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the Ex Post Facto Clause.

{¶69} "*** In the context of the regulatory scheme the State can dispense with individual predictions of future dangerousness and allow the public to assess the risk on

the basis of accurate, nonprivate information about the registrants' convictions without violating the prohibitions of the Ex Post Facto Clause." Id. at 103-104.

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

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

{¶72} "[T]he notification system is a passive one: An individual must seek access to the information. The Web site warns that the use of displayed information "to commit a criminal act against another person is subject to criminal prosecution. Given the general mobility of our population, for Alaska to make its registry system available and easily accessible throughout the State was not so excessive a regulatory requirement as to become a punishment. ***" Id. at 105.

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

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

the scheme was not so punitive that it negated Congress' stated intention to deem it civil, the court held:

{¶75} "The only punishment that can arise under SORNA comes from a violation of [Sec.] 2250, which punishes convicted sex offenders who travel in interstate commerce after the enactment of SORNA and who fail to register as required by SORNA. Congress clearly intended SORNA to apply to persons convicted before the Act's passage. *** If SORNA did not apply to previously convicted sex offenders, SORNA would not serve Congress' stated purpose of establishing a 'comprehensive national system' for sex offender registration. Section 16901. *** Section 2250 punishes an individual for traveling in interstate commerce and failing to register. *The statute does not punish an individual for previously being convicted of a sex crime.* *** Thus, prosecuting May under [Sec.] 2250 is not retrospective and does not violate the ex post facto clause." (Emphasis added.) *May*, supra, at 920.

{¶76} In *United States v. Hinckley* (C.A. 10, 2008), 550 F.3d 926, the Tenth Circuit adopted the reasoning of *May*, and held that neither SORNA's registration requirements nor the criminal penalties attached to non-compliance in Sec. 2250 violate the Ex Post Facto Clause. Relying on *Smith*, supra, the court held that the legislative intent expressed in SORNA's preamble and SORNA's primary effect satisfy the requirements of the Ex Post Facto Clause. Id. at 936.

{¶77} In *Hinckley* the defendant attempted to distinguish the regulatory scheme in *Smith* from the federal SORNA. The defendant argued the *Smith* scheme was primarily civil in nature, and, unlike SORNA, did not require internet dissemination of offenders' information, did not establish a community notification program, did not

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

{¶78} Moreover, the court in *Hinckley* pointed out that SORNA, just as Alaska's regulatory scheme in *Smith*, merely provides for the "dissemination of accurate information about a criminal record, most of which is already public.'" *Hinckley*, quoting *Smith*, supra, at 98. The *Hinckley,* supra, court held that while the public display of information may result in humiliation for the registrant, it is not an '"integral part of the objective of the regulatory scheme.'" *Hinckley*, supra, quoting *Smith*, supra, at 99. To the contrary, the court in *Hinckley* held that SORNA aims to "inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation." *Hinkley*, supra, at 938. The court held the primary effect of the act supports Congress' intent that the statute operate as a civil, regulatory scheme.

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

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

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

{¶82} Even though many of the cases outlined above do not directly address S.B. 10, the qualitative components of the schemes these cases addressed are

substantially the same as S.B. 10. We therefore reaffirm our holding in *Swank* that Ohio's Adam Walsh Act does not violate constitutional protections against ex post facto legislation.

{¶83} We also reaffirm our previous conclusion that S.B. 10 does not violate Ohio's constitutional protection against retroactive legislation. R.C. 1.48 provides: "A statute is presumed to be prospective in its operation unless expressly made retrospective." Here, S.B. 10 expressly states it shall apply retroactively. Further, while it is clear that S.B. 10 imposes different obligations upon appellant, such an imposition does not imply the law is substantive in nature. To the contrary, because appellant had no reasonable expectation of finality in the collateral consequence of his former classification, the new obligations do not affect or take away a vested, substantive right. As a result, S.B. 10 is procedural in nature and is valid under Article II, Section 28 of the Ohio Constitution. See *Ferguson,* supra, at 14-16.

{¶84} Finally, our opinion in *Swank* did not specifically address the Double Jeopardy argument; however, one can easily deduce from the substantive conclusions this court drew in *Swank,* as well as additional analysis of this opinion, S.B. 10 does not violate constitutional protections against Double Jeopardy.

{¶85} "The Double Jeopardy Clause states that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'" *State v. Williams*, 88 Ohio St.3d 513, 527-528, 2000-Ohio-428, citing the Fifth Amendment to the United States Constitution; see, also, Section 10, Article I, Ohio Constitution. The double jeopardy clauses in both the United States and Ohio Constitutions prevent states "from punishing twice, or from attempting a second time to criminally punish for the same offense." Id.,

at 528, citing *Kansas v. Hendricks*, 521 U.S. 346. Consequently, the preliminary question in a double jeopardy analysis is whether the government's actions entail criminal punishment. *Hudson v. United States* (1997), 522 U.S. 93.

{¶86} As discussed at length in *Swank* as well as in this opinion, S.B. 10 is non-punitive and therefore does not violate constitutional protections against double jeopardy.[1]

{¶87} Appellant's second assignment of error is without merit.

{¶88} For the reasons discussed in this opinion, appellant's two assignments of error are without merit. The judgment entry of the Lake County Court of Common Pleas is therefore affirmed.

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

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

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

{¶89} The appellant's ex post facto and retroactive claims are rejected based on the Supreme Court of Ohio's prior determination that the registration and notification statute is civil and remedial in nature, and not punitive. I write separately to note as we did in *State v. Charette*, 11th Dist. No. 2008-L-069, 2009-Ohio-2952, that the Supreme Court of Ohio has become more divided on the issue of whether the registration and

1. *Swank* sufficiently addressed due process challenges to S.B. 10 and therefore, we believe those conclusions need no further expansion or amplification.

{¶90} notification statute has evolved from a remedial and civil statute into a punitive one.

{¶91} As Justice Lanzinger stated in her concurring in part and dissenting in part opinion in *Wilson*: "I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions." See, also, *Ferguson* (Lanzinger, J., dissenting). I believe Senate Bill 10 merits review by the Supreme Court of Ohio to address the issue of whether the current version of R.C. Chapter 2950 has been transformed from remedial to punitive law. Before that court revisits the issue, however, we, as an inferior court, are bound to apply its holdings in *Cook* and *Wilson*, as we did in *Swank*.

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

{¶92} I respectfully dissent.

{¶93} 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.

{¶94} 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.

{¶95} 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.

{¶96} As to the specific requirements of registration, the original version of the "sexual offender" law stated that the defendant only had to register with the sheriff of the county where he was a resident. See *Cook*, supra, at 408. Under the latest version of the scheme, though, the places where registration is required has been expanded to now include: (1) the county where the offender lives; (2) the county where he attends any type of school; (3) the county where he is employed if he works there for a certain number of days during the year; (4) if the offender does not reside in Ohio, any county of this state where he is employed for a certain number of days; and (5) if he is a resident of Ohio, any county of another state where he is employed for a certain number of days. Similarly, the extent of the information which must be provided by an offender has increased. As part of the general registration form, the offender must indicate: his full name and any aliases, his social security number and date of birth; the address of his residence; the name and address of his employer; the name and address of any type of school he is attending; the license plate number of any motor vehicle he owns; the license plate number of any vehicle which he operates as part of his employment; a description of where his motor vehicles are typically parked; his driver's license number; a description of any professional or occupational license which he may have; any e-mail addresses; all internet identifiers or telephone numbers which are registered to, or used by, the offender; and any other information which is required by the bureau of criminal identification and investigation.

{¶97} **Ex Post Facto**

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

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

{¶100} ""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.)

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

{¶102} "We must 'ascertain whether the legislature meant the statute to establish "civil" proceedings.' *Kansas v. Hendricks*, 521 U.S. 346, 361, *** (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is '"so punitive either in purpose or effect as to negate (the State's) intention" to deem it "civil."' *Ibid.* (quoting *United States v. Ward*,

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

{¶103} "Whether a statutory scheme is civil or criminal 'is first of all a question of statutory construction.' *Hendricks, supra*, at 361 (internal quotation marks omitted); see also *Hudson, supra*, at 99. We consider the statute's text and its structure to determine the legislative objective. *Flemming v. Nestor*, 363 U.S. 603, 617, *** (1960). A conclusion that the legislature intended to punish would satisfy an *ex post facto* challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as the legislature has stated it." *Smith* at 92-93. (Parallel citations omitted.)

{¶104} 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.

{¶105} First, there is the simple fact that S.B. 10 is part of Title 29 of the Revised Code. The United States Supreme Court rejected the notion that a statute's placement within a criminal code is solely determinative of whether the statute is civil or criminal in

Smith. Id. at 94-95. However, it is clearly indicative of the statute's purpose. See, e.g., *Mikaloff v. Walsh* (N.D. Ohio Sept. 4, 2007), Case No. 5:06-CV-96, 2007 U.S. Dist. LEXIS 65076 at 15-16.

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

{¶107} Both the placement of S.B. 10 within the Revised Code, and the language of the statute, indicates a punitive, rather than remedial, purpose.[2] Further, as Judge James J. Sweeney of the Eighth Appellate District recently noted regarding the intent of S.B. 10:

{¶108} "*** 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.)

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

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

{¶110} 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*, 372 U.S. at 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.

{¶111} 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.

{¶112} 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?

{¶113} 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.)

{¶114} 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.

{¶115} 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.

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

{¶117} 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.

{¶118} The fourth *Kennedy* factor requires us to determine whether the registration and notification requirements of S.B. 10 fulfill two of the traditional aims of punishment: retribution and deterrence. "'Retribution is vengeance for its own sake. It does not seek to affect future conduct or solve any problem except realizing "justice." Deterrent measures serve as a threat of negative repercussions to discourage people from engaging in certain behavior. Remedial measures, on the other hand, seek to solve a problem (***) [.]'" *Doe*, supra, at 1013, fn. 107, quoting *Artway v. Attorney Gen. of N.J.* (C.A.3, 1996), 81 F.3d 1235, 1255.

{¶119} 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.

{¶120} 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.

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

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

{¶123} "In other words, [the law] fundamentally and invariably requires a judgment of guilt based on either a plea or proof under the criminal standard. It is therefore the determination of guilt of a sex offense beyond a reasonable doubt (or per a knowing plea), not merely the fact of the conduct and potential for recidivism, that triggers the registration requirement. Because it is the criminal conviction, and only the criminal conviction, that triggers obligations under [the law], we conclude that this factor supports the conclusion that [the law] is punitive in effect." *Doe*, supra, at 1015. (Footnote omitted.)

{¶124} 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.

{¶125} 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.

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

{¶127} **Retroactivity**

{¶128} 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 ***[.]"

{¶129} "'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 ***.' *Ferguson*, supra, at ¶13." *Swank*, supra, at ¶91. (Parallel citations omitted.)

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

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

{¶132} **Double Jeopardy**

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

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

{¶135} Here, in 2002, appellant pleaded guilty to one count of rape. He was sentenced for this offense and adjudicated a sexually oriented offender. Appellant had an expectation of finality in that his reporting requirements would end in 2012. However, additional punitive measures have now been placed on appellant, as he is required to comply with the new registration requirements every 90 days for life. Essentially, appellant is being punished a second time for the same offense. The application of the current version of R.C. 2950 to appellant violates the Double Jeopardy Clauses of the Ohio and United States Constitutions.

{¶136} Based upon the foregoing, I do not find it necessary to expound upon the other constitutional issues raised.

{¶137} For the foregoing reasons, I dissent.