**[Cite as *State v. Vernon*, 2009-Ohio-3937.]**

**THE COURT OF APPEALS**

**ELEVENTH APPELLATE DISTRICT**

**LAKE COUNTY, OHIO**

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| STATE OF OHIO, | : | **O P I N I O N** |
| Plaintiff-Respondent-Appellee, | : | **CASE NO. 2008-L-066** |
| - vs - | : | |
| JAY R. VERNON, | : | |
| Defendant-Petitioner-Appellant. | : | |

Civil Appeal from the Lake County Court of Common Pleas, Case No. 08 MS 000014.

Judgment: Affirmed.

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

*Jay R. Vernon,* Pro Se, 200 Birch Road, Painesville, OH 44077 (Defendant-Petitioner-Appellant).

CYNTHIA WESTCOTT RICE, J.

**{¶1}** Appellant, Jay R. Vernon, appeals the judgment of the Lake County Court of Common Pleas denying his petition to contest his reclassification as a Tier III Sex Offender under Am. Sub. Senate Bill 10, Ohio's enactment of the federal Adam Walsh Act, incorporated into Ohio law at R.C. Chapter 2950, due to his conviction of rape. This case represents the eighth appeal appellant has filed following his conviction. For the reasons that follow, we affirm.

**{¶2}** On June 15, 1995, appellant stayed overnight at the home of his girlfriend Charlene Ashley and her 13-year old daughter Robin in Eastlake, Ohio. That night the victim, Robin's 12-year old girlfriend, was spending the night with Robin.

**{¶3}** During the night, appellant had an argument with Charlene. At about 4:00 a.m. on June 16, 1995, appellant woke the victim by kissing her on the mouth. Appellant was 35 years old at the time and knew the victim was 12 years old. The victim told appellant to stop, but instead he pulled her shorts down and had vaginal intercourse with her.

**{¶4}** Appellant admitted to police that he had sexual intercourse with the victim, but said she was "coming on" to him and would not let him leave.

**{¶5}** The grand jury indicted appellant on one count of rape, an aggravated felony of the first degree, in violation of R.C. 2907.02. Appellant initially pled not guilty.

**{¶6}** In October 1995, appellant withdrew his plea of not guilty and pled guilty to rape as charged in the indictment.

**{¶7}** In November 1995, a sentencing hearing was held. At this hearing, appellant admitted he had sexual intercourse with the child, but stated he did not realize it was against the law. Later in the hearing, the assistant prosecutor informed the trial court that the state's recommendation as part of the plea bargain was for a sentence of six to 25 years. Appellant had previously been convicted of receiving stolen property and trafficking in drugs, a felony of the third degree. He was on probation for the latter offense when he pled guilty to rape in the instant case.

**{¶8}** The trial court sentenced appellant to a term of six to 25 years in prison. Appellant did not file a direct appeal following his conviction.

**{¶9}** In 1997, the Ohio Department of Corrections recommended that appellant be declared a sexual predator. Appellant filed a motion to dismiss the sex offender proceedings as unconstitutional. The trial court granted appellant's motion, and the state appealed the judgment to this court. This court affirmed the judgment of the trial court in *State v. Vernon*, 11th Dist. No. 97-L-184, 1999 Ohio App. LEXIS 697. The Supreme Court of Ohio reversed this court's decision and remanded the matter to the trial court in *In re Sex Offender Registration Cases* (2000), 89 Ohio St.3d 59, 60.

**{¶10}** In August 1998, appellant filed a motion to enter judgment pursuant to Crim. R. 32(B), wherein he asserted the trial court's sentencing entry was defective because it was captioned "journal entry" rather than "judgment entry." The trial court denied appellant's motion and noted that it had issued a nunc pro tunc judgment entry correcting the error. This court affirmed the trial court's judgment entry denying appellant's motion to enter judgment in *State v. Vernon*, 11th Dist. No. 99-L-006, 2000 Ohio App. LEXIS 1399 ("*Vernon I*").

**{¶11}** In March 2001, more than five years after he entered his guilty plea, appellant filed a motion to withdraw his guilty plea pursuant to Crim. R. 32.1. The state filed an objection to this motion. The trial court denied appellant's motion prior to appellant filing his reply brief. Appellant appealed the trial court's judgment to this court. This court reversed the trial court's judgment due to the trial court's failure to consider appellant's reply brief in *State v. Vernon*, 11th Dist. No. 2001-L-102, 2002-Ohio-5153 ("*Vernon II*"). The matter was remanded to the trial court to reconsider appellant's motion to withdraw his guilty plea. Id.

**{¶12}** On remand, appellant argued his attorney had misrepresented his recommended sentence. The trial court denied appellant's motion to withdraw his guilty plea. In its judgment entry, the court indicated that it had considered appellant's motion, the state's response, and appellant's reply brief. Appellant again appealed the trial court's judgment denying his motion to withdraw his guilty plea. This court affirmed the trial court's judgment in *State v. Vernon*, 11th Dist. No. 2002-L-182, 2003-Ohio-6408 ("*Vernon III*").

**{¶13}** In December 2003, appellant filed a second motion to withdraw his guilty plea. In this motion, he argued that he should be eligible for parole after six years, rather than the range of 150 to 210 months, as determined by the Ohio Adult Parole Authority. The trial court denied this motion. Following an appeal by appellant, this court affirmed the judgment of the trial court in *State v. Vernon*, 11th Dist. No. 2004-L-055, 2005-Ohio-3894 ("*Vernon IV*"), holding that appellant had not demonstrated a manifest injustice necessary to withdraw his guilty plea, as required by Crim.R. 32.1.

**{¶14}** In November 2005, appellant filed a motion to dismiss the sex offender proceedings pending against him. The trial court denied appellant's motion. Appellant appealed the trial court's judgment to this court. This court dismissed the appeal for lack of a final, appealable order in *State v. Vernon*, 11th Dist. No. 2006-L-007, 2006-Ohio-2151 ("*Vernon V*").

**{¶15}** In May 2006, appellant filed a third motion to withdraw his guilty plea. The basis of this motion was that the state breached the plea agreement by initiating sex offender proceedings against him. The trial court denied this motion. Appellant appealed the trial court's judgment to this court in *State v. Vernon*, 11th Dist. No. 2006-

L-146, 2007-Ohio-3376 ("*Vernon VI*"). In October 2006, this court remanded the matter to the trial court for 30 days to allow the trial court to conduct a sexual predator hearing. Following this hearing, the trial court found appellant to be a sexually oriented offender and thus subject to registration verification annually for a period of ten years. In *Vernon VI*, appellant argued that his guilty plea was not entered knowingly, intelligently, and voluntarily because he was not aware that he would be subject to sex offender proceedings under R.C. 2950.09. This court affirmed, holding that because defendant did not raise his claims regarding sex offender proceedings in his two prior motions under Crim. R. 32.1 to withdraw his guilty plea, those claims were barred by res judicata. This court also held that the plea agreement was not breached by the initiation of sex offender proceedings because the registration requirements in R.C. § 2950.09 did not violate the Ex Post Facto Clause in the United States Constitution or the prohibition against retroactive laws in the Ohio Constitution.

**{¶16}** In October 2006, Vernon filed a motion for relief from judgment. In this motion, Vernon sought relief from the trial court's judgment entry denying his third motion to withdraw his guilty plea. The state filed its response to this motion on October 18, 2006. The trial court denied Vernon's motion for relief from judgment on October 19, 2006, prior to Vernon's reply brief being filed. Vernon appealed the trial court's judgment entry denying his motion for relief from judgment in *State v. Vernon*, 11th Dist. No. 2006-L-240, 2007-Ohio-3378 ("*Vernon VII*"), arguing the court erred in not considering his reply brief before entering judgment. After the trial court dismissed his motion for relief from judgment, appellant filed a reply brief, wherein he argued that "Jay R. Vernon (C) is the copyrighted trade mark/trade name of Jay R. Vernon (C) a sentient

human being." In addition, he threatened the trial court and the state with "unauthorized user fees" in the amount of $500,000 for using his name without permission. This court affirmed the trial court's judgment, holding that any error was harmless since appellant's reply brief did not respond to any issues raised in the state's brief, which is the function of a reply brief.

**{¶17}** Appellant was released from prison in 2007, after serving 12 years of his sentence. S.B. 10 was enacted in July of 2007 and made effective on January 1, 2008. The statute expressly provides that its registration and notification provisions are retroactive. R.C. 2950.033. On November 26, 2007, pursuant to S.B.10, the Ohio Attorney General notified appellant that he had been reclassified as a Tier III Sex Offender. A Tier III classification is the highest tier. This classification requires registration every 90 days for life, and community notification may occur every 90 days for life. See R.C. 2950.07.

**{¶18}** On January 17, 2008, appellant filed a petition to contest the application of the Adam Walsh Act to him and a motion for relief from community notification.

**{¶19}** Following a hearing on appellant's petition and motion, on March 31, 2008, the trial court denied appellant's petition, finding appellant had failed to prove by clear and convincing evidence that the new registration requirements did not apply to him. R.C. 2950.031(E). The trial court also found that appellant was properly reclassified as a Tier III Sex Offender, requiring him to register every 90 days for life. However, the trial court found that appellant was not subject to community notification, and granted his motion for relief from community notification.

**{¶20}** Appellant appeals the trial court's judgment regarding his reclassification as a Tier III Sex Offender and asserts the following as his sole assignment of error:

**{¶21}** "WHETHER THE SENTENCING COURT ABUSED ITS DISCRETION AND OR ERRED IN RELYING UPON STATE V. COOK, (1998), [83 OHIO ST.3D 404.] [SIC] TO SUPPORT THE PROPOSITION THAT RETROACTIVE APPLICATION OF OHIO'S ADAM WALSH ACT DOES NOT VIOLATE EX POST FACTO AND RETROACTIVITY PROHIBITIONS GUARANTEED BY THE STATE AND FEDERAL CONSTITUTIONS."

**{¶22}** Appellant argues S.B. 10 violates the constitutional prohibitions against ex post facto laws and retroactive legislation.

**{¶23}** We unanimously rejected these arguments in *State v. Swank,* 11th Dist. No. 2008-L-019, 2008-Ohio-6059, at ¶71-89 (no ex post facto violation); ¶90-97 (no retroactive legislation violation). We also held S.B. 10 does not violate other constitutional protections. Id. at ¶98-100 (no separation of powers violation); ¶101-107 (no procedural due process violation); ¶108-111 (no substantive due process violation). By operation of stare decisis, appellant's arguments are therefore overruled. However, since our holding in *Swank,* litigants, particularly those who have experienced a reclassification such as appellant, have further developed their positions. We shall accordingly take this opportunity to revisit these arguments and amplify our previous conclusion that S.B. 10 is constitutional.

**{¶24}** We initially note that the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Twelfth Appellate Districts have also unanimously held the registration and notification requirements of the Adam Walsh Act are constitutional. See

*Sewell v. State*, 1st Dist. No. C-080503, 2009-Ohio-872 (no retroactive law, double jeopardy, due process, or separation of powers violation); *State v. Desbiens*, 2d Dist. No. 22489, 2008-Ohio-3375 (no ex post facto or due process violation); *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234 (no ex post facto, retroactive law, or separation of powers violation); *State v. Longpre*, 4th Dist. No. 08CA3017, 2008-Ohio-3832 (no ex post facto or retroactive law violation); *State v. Hughes*, 5th Dist. No. 2008-CA-23, 2009-Ohio-2406 (no ex post facto, retroactive law, separation of powers, or double jeopardy violation); *State v. Bodyke*, 6th Dist. Nos. H-07-040, H-07-041, H-07-042, 2008-Ohio-6387 (no ex post facto, retroactive law, obligation of contract, separation of powers, substantive due process, double jeopardy, or cruel and unusual punishment violation); *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051 (no ex post facto, retroactive law, separation of powers, cruel and unusual punishment, double jeopardy, or due process violation); *State v. Holloman-Cross*, 8th Dist. No. 90351, 2008-Ohio-2189 (no ex post facto violation); *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076 (no ex post facto or separation of powers violation); *State v. Gilfillan*, 10th Dist. No. 08AP-317, 2009-Ohio-1104 (S.B. 10 is not punitive; no separation of powers or due process violation); *Ritchie v. State*, 12th Dist. No. CA2008-07-073, 2009-Ohio-1841 (no separation of powers, retroactive law, ex post facto, double jeopardy, or right to contract violation).

**{¶25}** This court and each of these districts relied on the Supreme Court of Ohio's decision in *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291 as precedent. In *Cook*, the Court addressed H.B. 180, the statutory predecessor of S.B. 10. The Court held that, although H.B. 180 was retroactive, the purpose of its registration and

notification requirements was to protect the public from released sex offenders. The Court in *Cook* held that because H.B. 180 was remedial and not punitive in nature, it did not present an ex post facto or retroactivity violation. Id. at 413, 423.

**{¶26}** 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.

**{¶27}** 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.

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

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

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

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

**{¶32}** 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).

**{¶33}** 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).

**{¶34}** 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.

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

**{¶36}** "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.

**{¶37}** "***

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

**{¶39}** "***

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

**{¶41}** Contrary to the contention of certain commentators, the Ohio Supreme Court's holding that a sex offender's classification is a collateral consequence of his crimes rather than a form of punishment was not based on the particular designation imposed on Ferguson. Whether the original classification was that of sexually-oriented offender, habitual sex offender, or sexual predator does not determine whether the designation is a collateral consequence of his crimes or additional punishment. According to *Ferguson,* that designation is merely a collateral consequence in which the offender has no reasonable expectation of finality.

**{¶42}** Further, the *Ferguson* Court held that the lifetime classification imposed on sexual predators as well as the more burdensome registration requirements and the

collection and internet dissemination of additional information about the offender as part of the statute's notification provisions were part of a remedial, regulatory scheme designed to protect the public rather than to punish the offender. Id. at 15.

**{¶43}** 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.

**{¶44}** 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.

**{¶45}** 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.

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

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

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

**{¶49}** The United States 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.

**{¶50}** In addressing the 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.

**{¶51}** The United States Supreme Court in *Smith* also addressed the Alaska statute's requirement that the judgment of conviction for sex offenses "'set out the requirements of [the Act] and *** whether that conviction will require the offender to register for life or a lesser period.'" Id. at 95. Smith argued this requirement indicated the act was punitive in intent. The Supreme Court held:

**{¶52}** "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.

**{¶53}** 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.

**{¶54}** 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.

**{¶55}** 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 they "did not involve a traditional means of punishing." Id. at 97. The Supreme Court further held that early punishments, such as shaming or banishment, always involved more than the dissemination of information. Id. at 98. They either held the offender up before his fellow citizens for face to face shaming or expelled him from the community. Id. The Court held: "By contrast, the stigma of Alaska's Megan's Law results *** from the dissemination of accurate information about a criminal record, most of which is already

public. Our system does not treat the dissemination of truthful information in furtherance of a legitimate governmental objective as punishment." Id.

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

**{¶57}** "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.

**{¶58}** "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.

**{¶59}** 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.

**{¶60}** 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:

**{¶61}** "*** 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.

**{¶62}** 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.

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

**{¶64}** 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:

**{¶65}** "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)).

**{¶66}** "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.

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

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

**{¶69}** 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:

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

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

**{¶72}** In *United States v. May* (C.A. 8, 2008), 535 F.3d 912, the Eighth Circuit applied *Smith* in holding the federal SORNA does not violate the Ex Post Facto Clause. The court held that Congress' stated intent was to protect the public from sex offenders

by enacting a regulatory scheme that is "civil and nonpunitive." Id. at 920. In concluding the scheme was not so punitive that it negated Congress' stated intention to deem it civil, the court held:

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

**{¶74}** 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.

**{¶75}** In *Hinckley* the defendant attempted to distinguish the regulatory scheme in *Smith* from the regime established by the federal SORNA. The defendant argued the *Smith* scheme was primarily civil in nature, and, unlike SORNA, did not require internet

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

**{¶76}** Moreover, the court in *Hinckley* pointed out that SORNA, just as Alaska's regulatory scheme in *Smith*, merely provides for the "'dissemination of accurate information about a criminal record, most of which is already public.'" *Hinckley*, supra, quoting *Smith*, supra, at 98. The *Hinckley* court held that while the public display of information may result in humiliation for the registrant, it is not an "'integral part of the objective of the regulatory scheme.'" *Hinckley*, supra, at 938, quoting *Smith* 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.'" Id., quoting *Smith*, supra. The court held the

primary effect of the act supports Congress' intent that the statute operate as a civil, regulatory scheme. *Hinckley*, supra.

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

**{¶78}** 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.

**{¶79}** 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).

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

**{¶81}** In the context of appellant's argument that he had a reasonable expectation of finality in his original classification, we note 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.

**{¶82}** 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.

**{¶83}** "[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*, 3d Dist. No. 1-07-58, 2008-Ohio-3234 at ¶39.

**{¶84}** 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 *Cook,* the Court pointed out that "where no vested right has been created, 'a later [legislative] enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, unless the past transaction or consideration *** created at least a reasonable expectation of finality." Id. at 412, quoting *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281. With the exception to the constitutional protection against ex post facto laws, which, as discussed above, S.B. 10 does not violate, "'*felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation*.'" (Emphasis sic.) *Cook,* supra, quoting *Matz,* supra, at 281-282. Accordingly, because convicted sex offenders have no reasonable "settled expectation" or vested rights concerning the registration obligations imposed on them, S.B. 10 does not function to abrogate a final prior judicial adjudication. *State v. King*, 2d Dist. No. 08-CA-02, 2008-Ohio-2594, at ¶33; *State v. Linville*, 4th Dist. No. 08CA3051, 2009-Ohio-313; *Ritchie*, supra. As the Twelfth District recently held in *Ritchie*, "application of Ohio's Adam Walsh Act does not order the courts to reopen a final judgment, but instead simply changes the classification scheme, which is not an encroachment on the power of Ohio's judicial branch. Id. at ¶15.

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

provide this court with any authority indicating he possessed a reasonable expectation of finality in his original classification.

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

**{¶87}** Consistent with the foregoing precedent, appellant's expectation of finality is limited to his conviction and does not include his former classification. His previous classification is nothing more than a collateral consequence arising from his criminal conduct. As a result, in amending Ohio's classification scheme and making it retroactive to apply to all sex offenders, including appellant, the General Assembly did not abrogate a final judgment in favor of appellant.

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

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

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

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

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

**{¶90}** The appellant's ex post facto and retroactive claims are rejected based on the Supreme Court of Ohio's prior determination that the registration and notification statute is civil and remedial in nature, and not punitive. I write separately to note as we did in *State v. Charette*, 11th Dist. No. 2008-L-069, 2009-Ohio-2952, that the Supreme Court of Ohio has become more divided on the issue of whether the registration and notification statute has evolved from a remedial and civil statute into a punitive one. As Justice Lanzinger stated in her concurring in part and dissenting in part opinion in *Wilson*: "I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions." See, also, *Ferguson* (Lanzinger, J., dissenting). I believe Senate Bill 10 merits review by the Supreme Court of Ohio to address the issue of whether the current version of R.C. Chapter 2950 has been transformed from remedial to punitive

law. Before that court revisits the issue, however, we, as an inferior court, are bound to apply its holdings in *Cook* and *Wilson*, as we did in *Swank*.

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

**{¶91}** Appellant, Jay R. Vernon's, reclassification as a Tier III Sex Offender pursuant to the Adam Walsh Act, unconstitutionally nullifies his prior classification in a final order of a court of competent jurisdiction as a sexually oriented offender, in violation of the doctrine of separation of powers. Accordingly, I respectfully dissent. Vernon's obligations to register as a sexual offender should continue as set forth in the November 6, 2006 Judgment Entry of the Lake County Court of Common Pleas.

**{¶92}** "It is well settled that the legislature has no right or power to invade the province of the judiciary, by annulling, setting aside, modifying, or impairing a final judgment previously rendered by a court of competent jurisdiction." *Cowen v. State ex rel. Donovan* (1920), 101 Ohio St. 387, 394; *Bartlett v. Ohio* (1905), 73 Ohio St. 54, 58 ("it is well settled that the legislature cannot annul, reverse or modify a judgment of a court already rendered"). This limit on the legislature's power is part of the separation of powers doctrine. "The administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers." *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, at paragraph one of the syllabus.

**{¶93}** In effect, the separation of powers doctrine applies the principle of res judicata, typically used as a bar to further litigation by parties, to legislative action. Cf.

*Grava v. Parkman Twp.*, 73 Ohio St.3d 379, 1995-Ohio-331, at paragraph one of the syllabus ("[a] valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction or occurrence that was the subject matter of the previous action").

**{¶94}** In the present case, the trial court's November 6, 2006 Judgment Entry, finding that Vernon was not a sexual predator and notifying him of his duty to register as a "sexually oriented offender," constituted such a final judgment. Once the period for appeal had passed, Vernon's classification became a settled judgment, which neither Vernon nor the State could challenge. *Armstrong v. Marathon Oil Co.* (1990), 64 Ohio App.3d 753, 757 ("when a reviewable final determination has also become final in the sense that the time for review has expired, its effect cannot be challenged in a later appeal on another matter"). As such, Vernon had every reasonable expectation that his duty to register was fixed by that judgment entry.

**{¶95}** The majority states that "[p]ut simply, S.B. 10 does not require the Attorney General *** to reopen final judicial judgments." I disagree. "When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than 'reverse a determination once made, in a particular case.'" *Plaut v. Spendthrift Farm, Inc.* (1995), 514 U.S. 211, 225, quoting The Federalist No. 81 (J. Cooke ed. 1961), at 545.

**{¶96}** The majority relies on prior appellate decisions holding that "the classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts. *** Therefore, *** the power to classify is properly

expanded or limited by the legislature." *In re Smith*, 3rd Dist. No. 1-07-58, 2008-Ohio-3234, at ¶39.

**{¶97}** This response does not address the problem raised by Vernon's classification as a sexually oriented offender being the settled judgment of the trial court, a judgment in which Vernon had a reasonable expectation of finality. It is not disputed that the General Assembly has full authority to enact new laws and alter the classification of sexual offenders. The application of any new law to persons already classified as sexual offenders, whose judgments have become final, however, necessarily results in those prior final judicial decisions being re-opened, contrary to the principles of separation of powers and res judicata. Vernon's reclassification as a Tier III offender involves more than merely altering the denomination of his status; the obligations imposed by Tier III status are substantively greater than those entailed by his classification as a sexually oriented offender pursuant to the final sentencing judgment journalized by the trial court on November 6, 2006.

**{¶98}** The majority also emphasizes that the new registration scheme is merely a "collateral consequence of the offender's criminal acts rather than a form of punishment per se." *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, at ¶34; also *State v. Cook*, 83 Ohio St.3d 404, 423, 1998-Ohio-291 ("[w]e do not deny that the notification requirements may be a detriment to registrants, but the sting of public censure does not convert a remedial statute into a punitive one") (citation omitted).

**{¶99}** Reliance upon the remedial nature of the legislation is misplaced. "The doctrine of *res judicata* *** applies equally to criminal and to civil litigation." *Akron v.*

*Smith*, 9th Dist. Nos. 16436 and 16438, 1994 Ohio App. LEXIS 1859, at *4 (citation omitted).

**{¶100}** Moreover, the majority's citation to *Ferguson* is misleading. The Supreme Court did not hold, as the majority opinion implies, that offenders have no reasonable expectation of finality in collateral consequences. Rather, it held that "Ferguson has not established that he had any reasonable expectation of finality in a collateral consequence **that *might* be removed**." *Ferguson*, 2008-Ohio-4824, at ¶34 (italics in original; bold-face added). Ferguson, as a sexual predator, was required to register for the rest of his life, although he could petition the court to remove his sexual predator classification. Subsequent amendments to the Sex Offender Act rendered the sexual predator designation permanent, without the possibility of subsequent judicial review. Since there was never any guarantee that Ferguson could alter his status as a sexual predator, the Supreme Court properly acknowledged that he had no reasonable expectation in its eventual removal.

**{¶101}** This is a far different situation than the present one. According to the November 6, 2006 Judgment Entry, Vernon's duty to register was to end after ten years as a matter of law. It was not a future contingency, such as the possibility of Ferguson petitioning the court to remove his sexual predator designation. Whereas Ferguson was unable to present any "argument" or "evidence that would support a reasonable conclusion that [he] was likely to have his classification removed," Vernon had every right to expect the removal of his classification after ten years based upon the November 6, 2006 Judgment Entry and former R.C. 2950.07(B)(3).

**{¶102}** Finally, it is important to note that in *Ferguson*, the Supreme Court did not consider any argument based on the finality of the original judgment or principles of res judicata. *Ferguson* stands in a line of cases beginning with *State v. Cook*, 83 Ohio St.3d 404. The *Cook*/*Ferguson* line of cases is distinguishable from the present situation in that, when Cook was classified as a sexually oriented offender, there was no classification system operative in Ohio for sex offenders. Cook's classification was an initial classification that did not upset some prior determination. Thus, the Supreme Court could properly declare that sex offenders had "no reasonable right to expect that their conduct will never thereafter be made the subject of legislation." *Cook*, 83 Ohio St.3d at 412 (citation omitted). Such a declaration does not carry the same import where the offender's conduct is already the subject of legislation and the court's final judgment.

**{¶103}** The General Assembly's stated purpose in enacting the Adam Walsh Act, "to provide increased protection and security for the state's residents from persons who have been convicted of, or found to be delinquent children for committing, a sexually oriented offense or a child-victim oriented offense," is properly realized in its application to cases pending when enacted and those subsequently filed. Section 5, S.B. No. 10. Vernon's sentence, however, had become final prior to the Adam Walsh Act. As such, it is beyond the power of the Legislature to vacate or modify.[1]

1. Moreover, as a final judgment, Vernon's sentence also is beyond the authority of the courts to vacate or modify. *State v. Smith* (1989), 42 Ohio St.3d 60, at paragraph one of the syllabus; *Jurasek v. Gould Elecs., Inc.*, 11th Dist. No. 2001-L-007, 2002-Ohio-6260, at ¶15 (citations omitted).

**{¶104}** The United States Supreme Court has stated that the principle of separation of powers is violated by legislation which "depriv[es] judicial judgments of the conclusive effect that they had when they were announced" and "when an individual final judgment is legislatively rescinded for even the *very best* of reasons." *Plaut*, 514 U.S. at 228 (emphasis sic). To the extent the Adam Walsh Act attempts to modify existing final sentencing judgments, such as Vernon's sentence, it violates the doctrines of separation of powers and finality of judicial judgments, despite the good intentions of the Legislature. As such, that portion of the Act is invalid, unconstitutional, and unenforceable.

**{¶105}** For the foregoing reasons, I would reverse the decision of the court below and reinstate the trial court's November 6, 2006 Judgment Entry, requiring Vernon to register as a sexually oriented offender.