

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

JEFFREY C. BALL,	:	O P I N I O N
Petitioner-Appellant.	:	CASE NO. 2008-L-053
- VS -	:	
STATE OF OHIO,	:	
Respondent-Appellee.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 MS 000011.

Judgment: Affirmed.

Richard J. Perez, Rosplock & Perez, Interstate Square Building I, 4230 State Route 306, #240, Willoughby, OH 44094-9204 (For Petitioner-Appellant).

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

MARY JANE TRAPP, P.J.

{¶1} Jeffrey C. Ball appeals from a judgment of the Lake County Court of Common Pleas, which denied his petition contesting his reclassification to a Tier II sex offender under current R.C. Chapter 2950. For the following reasons, we affirm.

{¶2} In 2002, Mr. Ball pleaded guilty to three counts of gross sexual imposition, felonies of the third degree, in violation of R.C. 2907.05(A)(4), and two counts of attempted gross sexual imposition, felonies of the fourth degree, in violation of R.C. 2923.02 and 2907.05.

{¶3} Mr. Ball was sentenced to an aggregate prison term of five years, with five years of post release control. At sentencing, the trial court adjudicated him a sexually oriented offender and classified him as such under Ohio's Megan's Law. Under this classification, he was required to register his address with the sheriff's department in the county in which he resides annually for a period of ten years.

{¶4} On November 26, 2007, Mr. Ball received a notice of new classification and registration duties from the Ohio Attorney General, based on Ohio's Adam Walsh Act. He was reclassified as a Tier II offender pursuant to the new version of R.C. Chapter 2950 with reporting requirements every 180 days for 25 years.

{¶5} On January 16, 2008, Mr. Ball filed a petition to contest the reclassification and a request for an injunction. The state filed an answer, and a hearing was held on March 10, 2008. Pursuant to its March 11, 2008 judgment entry, the trial court denied Mr. Ball's petition. The court found that he did not prove by clear and convincing evidence that the new registration requirements do not apply to him in the manner specified by the Attorney General. Thus, the trial court determined that he was properly reclassified as a Tier II offender. Mr. Ball timely appealed, presenting the following assignment of error for our review:

{¶6} "The trial court erred when it denied appellant's petition challenging reclassification and reclassified his sex offender status, pursuant to Ohio's Adam Walsh Act, Senate Bill 10, an unconstitutional body of laws."

{¶7} Mr. Ball presents six issues for our review under his assignment of error:

{¶8} "[1.] The General Assembly's reclassification of Appellant, executed by the trial court, violates the Separation of Powers Doctrine.

{¶9} “[2.] The retroactive application of Ohio’s AWA to Appellant, as executed by the trial court, violates the prohibition against *Ex Post Facto* laws in Article I, Section 10 of the United States Constitution.

{¶10} “[3.] The retroactive application of Ohio’s AWA to Appellant, as executed by the trial court, violates the prohibition against retroactive laws in Article II, Section 28 of the Ohio Constitution.

{¶11} “[4.] The trial court’s reclassification of Appellant constitutes unconstitutional, multiple punishment pursuant to the Double Jeopardy clauses of the United States and Ohio Constitutions.

{¶12} “[5.] The residency restrictions of S.B. 10, imposed upon Appellant by the trial court, violate Appellant’s right to substantive Due Process pursuant to the Fourteenth Amendment of the United States Constitution, Article I, Section[] 16 of the Ohio Constitution and the right to privacy guaranteed by Article I, Section 1 of the Ohio Constitution.

{¶13} “[6.] The reclassification of Appellant constitutes a breach of contract and violates provisions against the impairment of contracts pursuant to the United States and Ohio Constitutions.”

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

{¶15} “Prior to Senate Bill 10, when a criminal defendant was found guilty of a sexually oriented offense, he could be classified as a sexually oriented offender, a habitual sex offender, or a sexual predator. The prior statutory scheme provided that a

defendant's designation under the three categories would be predicated upon the nature of the underlying offense and findings of fact made by the trial court during a sexual classification hearing.

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

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

{¶18} "Under the new statutory scheme set forth in current R.C. Chapter 2950, the registration and community notification requirements are increased for sex offenders. If the defendant's sexual offense places him in the 'Tier I' category, he is required to register once every year for a period of 15 years, but there is no community notification; if the defendant's offense falls under the 'Tier II' category, registration must

take place once every six months for 25 years, and there is still no notification requirement; and, if the sexual offense places the defendant in the ‘Tier III’ category, the requirements are essentially the same as for a sexual predator, in that there is a duty to register once every three months for life, and community notification can occur at that same rate for life. Community notification under the new scheme requires the sheriff to give the notice of an offender’s name, address, and conviction to all residents, schools, and day care centers within 1,000 feet of the offender’s residence. The new law also prohibits all sex offenders from residing within 1,000 feet of a school or day care center. These registration and notification requirements under the Adam Walsh Act are retroactive and applicable to offenders whose crimes were committed before the effective date of the statute.” *State v. Charette*, 11th Dist. No. 2008-L-069, 2008-Ohio-2952, ¶7-11.

{¶19} Under his assignment of error, Mr. Ball raises six constitutional claims. This court has addressed and rejected the majority of these claims in a unanimously decided case in *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, and in *Charette* (O’Toole, J. dissenting).¹

{¶20} Separation of Powers

{¶21} Mr. Ball asserts that the new law violates the doctrine of separation of powers. Specifically, he claims it usurps the court’s prior adjudication of him as a

1. We also note that all of the other districts have reached the same conclusion. See *Sewell v. State*, 181 Ohio App.3d 280, 2009-Ohio-872; *State v. Desbiens*, 2d No. 22490, 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.

sexually oriented offender and in doing so it encroaches upon the authority reserved for the judiciary. Regarding this claim, we provided the following analysis in *Charette* at ¶19-21

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

{¶23} “[T]he Assembly has enacted a new law, which changes the different sexual offender classifications and time spans for registration requirements, among other things, and is requiring that the new procedures be applied to offenders currently registering under the old law or offenders currently incarcerated for committing a sexually oriented offense. Application of this new law does not order the courts to reopen a final judgment, but instead simply changes the classification scheme. This is not an encroachment on the power of the judicial branch of Ohio’s government.’ *Byers* at ¶73, quoting *Slagle* at ¶21 and citing *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234, ¶39, and *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076, ¶42 (discussing the issue in relation to child-victim offender).

{¶24} “Furthermore, as this court noted already, the registration and notification scheme of the new legislation is not punitive in nature, but rather civil and remedial. *Swank* at ¶99. The judiciary is empowered to hear a controversy between adverse parties, ascertain the facts, and apply the law to the facts to render a final judgment. *Id.*, citing *Fairview v. Giffee* (1905), 73 Ohio St.183, 190. In the criminal context, the judiciary is empowered to determine if a crime has been committed and the penalty to

be imposed on a defendant. Registration requirements such as those for motorists, corporations, or sex offenders, are always the province of the legislature and such laws do not require judicial involvement. *Swank* at ¶99. Therefore, no abrogation of final judicial decisions occurred when a petitioner such as Mr. Charette is reclassified and subjected to additional requirements. The new law as applied to a petitioner in Mr. Charette's situation does not violate the separation of powers." *Charette* at ¶20-21.

{¶25} Ex Post Facto Clause

{¶26} Mr. Ball claims the retroactive application of Ohio's Adam Walsh Act to him constitutes an ex post facto law proscribed by Article I, Section 10 of the United State Constitution. That section provides: "[n]o State shall *** pass any *** ex post facto Law." Under this provision, "any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, *** is prohibited as ex post facto." *Beazell v. Ohio* (1925), 269 U.S. 167, 169-170. We have addressed this constitutional claim fully in *Swank*, and held that Senate Bill 10 enacted by the General Assembly is civil in nature and not punitive in intent or effect and therefore not an ex post facto law.² Id. at ¶68-89.

{¶27} Retroactivity

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

{¶28} Mr. Ball argues even if the new law does not constitute an ex post facto law as applied to him, Article II, Section 28 of the Ohio Constitution prohibits its retroactive application to an offender such as him, who has already been sentenced and classified under the old law. The courts have interpreted the constitutional prohibition against retroactive laws to apply only to laws affecting substantive rights but not to procedural or remedial aspects of such laws. *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 137. Our court has addressed this constitutional claim in *Swank* and held that the registration and notification requirements of Senate Bill 10 are remedial and procedural in nature and not substantive, and therefore, Senate Bill 10 is not a retroactive law prohibited by the Ohio Constitution. *Swank* at ¶90-95.

{¶29} Double Jeopardy

{¶30} Mr. Ball next claims his reclassification constitutes successive punishment and is therefore a double jeopardy violation pursuant to the Fifth and Fourteenth Amendments of the United States Constitution, and Article I, Section 10 of the Ohio Constitution, all of which forbid the imposition of multiple criminal punishments for the same offense in successive proceedings.

{¶31} The double jeopardy provision has been interpreted to apply in two basic situations: (1) when the state tries to pursue a second prosecution based upon the same facts; and (2) when the state attempts to impose a second punishment for the same offense. *Byers* at ¶100. However, the double jeopardy prohibition can only be invoked when the conduct of the government involves criminal punishment. *State v. Williams* (2000), 88 Ohio St.3d 513, 528.

{¶32} In *Williams*, the Supreme Court of Ohio considered the question of whether the provisions of the 1997 version of R.C. Chapter 2950 imposed a second criminal penalty for purposes of the Double Jeopardy Clause. The court emphasized that, as part of its prior discussion in *Cook*, it had expressly held that the registration and notification requirements provided in that version of R.C. Chapter 2950 were not criminal in nature and did not inflict any punishment. The *Williams* court then determined that the holding in *Cook* dictated a conclusion that the enforcement of the registration and notification requirements did not result in a double jeopardy violation. *Id.* at 528.

{¶33} Because we have determined that the new registration and notification requirements are still to be characterized as civil and non-punitive, the *Williams* holding would still be controlling as to the present version of R.C. Chapter 2950. Its application to a defendant in Mr. Ball's position does not constitute a second punishment prohibited by the double jeopardy provision. See, also, *Smith* at ¶38 (the court stated it is not persuaded that the Supreme Court of Ohio would view the issues of criminality and punishment regarding the provisions of Senate Bill 10 any differently than the manner it had interpreted the former R.C. 2950 et. seq. in the *Cook* and *Williams* decisions).

{¶34} Substantive Due Process Rights and Privacy

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

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

{¶37} “[C]ourts routinely decline such challenges unless evidence is presented that the defendant was actually injured by the residency restriction on the ground of waiver. *State v. Bruce*, 8th Dist. No. 89641, 2008-Ohio-926, ¶10-11. Appellant has failed to show or even argue that he owns property or resides within 1,000 feet of any of the above-listed facilities or that he was forced to move outside this limit. As a result, appellant's argument that S.B. 10 has interfered with his liberty or privacy interest fails because he has not shown that he has been actually injured by S.B. 10.

{¶38} “Moreover, a defendant lacks standing to challenge the constitutionality of a residency restriction unless the record shows the defendant suffered an actual deprivation of his property rights as a result of the application of such restriction to him. *State v. Pierce*, 8th Dist. No. 88470, 2007-Ohio-3665, ¶33. Because appellant has failed to show an actual deprivation of his property rights, he does not have standing to challenge the residency restriction of S.B. 10.” *Swank* at ¶110-111. See, also, *State v. Amos*, 8th Dist. No. 89855, 2008-Ohio-1834, ¶43, citing the syllabus of *Palazzi v. Estate of Gardner* (1987), 32 Ohio St.3d 169 (“[t]he constitutionality of a state statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied and who has not been injured by its alleged unconstitutional provision”).

{¶39} Similarly here, the record does not show Mr. Ball has suffered an actual injury from any residency restrictions imposed by Senate Bill 10, and therefore, we find his claim to be without merit.

{¶40} Impairment of Contracts

{¶41} Finally, Mr. Ball asserts that the application of the provisions of Senate Bill 10 to him would violate the terms of his plea agreement and therefore would result in a breach of his contract with the state, in violation of the constitutional provisions against the impairment of contracts.

{¶42} A plea agreement is considered a contract between the state and a criminal defendant. As a result, such an agreement is subject to the general laws of contracts. *State v. Butts* (1996), 112 Ohio App.3d 683, 686. Therefore, if one side violates a term of a plea agreement, the other party has a right to pursue certain remedies, including the rescission of the agreement. *State v. Walker*, 6th Dist. No. L-05-1207, 2006-Ohio-2929, ¶13.

{¶43} However, in applying the elementary rules of contract law to plea agreements, the courts of Ohio have held that an alleged breach of such an agreement cannot be based upon an action which occurs following the performance of the various terms. See, e.g., *State v. Pointer*, 8th Dist. No. 85195, 2005-Ohio-3587, ¶9. That is, once a criminal defendant has entered his guilty plea and punishment has been imposed by the trial court, a breach of contract can no longer occur because both sides have fully performed their respective obligations under the plea agreement. Because the registration and notification requirements of the new law, just as in former R.C. Chapter 2950, are merely remedial conditions imposed upon offenders after their

release from prison and not additional punishment, they do not affect any plea agreement previously entered into between the offender and the state. Therefore, the enactment of the new sexual offender scheme under Senate Bill 10 does not constitute a breach of a prior plea agreement. See, also, *Slagle*.

{¶44} For all the forgoing reasons, we overrule Mr. Ball's assignment of error and affirm the judgment of the Lake County Common Pleas Court.

CYNTHIA WESTCOTT RICE, J., concurs,

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

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

{¶45} I respectfully dissent.

{¶46} Initially, I note 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.

{¶47} 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.

{¶48} 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.

{¶49} 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.

{¶50} Separation of Powers

{¶51} As this court stated in *Spangler v. State*, 11th Dist. No. 2008-L-062, 2009-Ohio-3178, at ¶45-46:

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

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

{¶54} In *Spangler*, this court further held, at ¶55-63:

{¶55} “The administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers.” *State ex rel. Johnston v. Taulbee* (1981), 66 Ohio St.2d 417, ***, at paragraph one of the syllabus. “(I)t is well settled that the legislature cannot annul, reverse or modify a judgment of a court already rendered.” *Bartlett v. Ohio* (1905), 73 Ohio St. 54, 58, ***; *Plaut v. Spendthrift Farm, Inc.* (1995), 514 U.S. 211, 219, *** (Congress may not interfere with the power of the federal judiciary ‘to render dispositive judgments’ by ‘commanding the federal courts to reopen final judgments’) (citation omitted).

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

{¶57} “A determination of an offender’s classification under former R.C. chapter 2950 constituted a final order. *State v. Washington* [Nov. 2, 2001], 11th Dist. No 99-L-015, ***, 2001 Ohio App. LEXIS 4980 at *9 (‘a defendant’s status as a sexually Oriented offender (***)) arises from a finding rendered by the trial court, which in turn adversely affects a defendant’s rights by the imposition of registration requirements’); *State v. Dobrski*, 9th Dist. No. 06CA008925, 2007-Ohio-3121, at ¶6 (“[i]nasmuch as a sexual predator classification is an order that affects a substantial right in a special proceeding, it is final and appealable’). Accordingly, if either party failed to appeal such a determination within thirty days, as provided for in App.R. 4(A), the judgment became settled. Subsequent attempts to overturn such judgments have been barred under the principles of res judicata. See *State v. Lucerno*, 8th Dist. No. 89039, 2007-Ohio-5537, at ¶9 (applying res judicata where the State failed to appeal the lower court’s determination that House Bill 180/Megan’s Law was unconstitutional: ‘the courts have

barred sexual predator classifications when an initial classification request had been dismissed on the grounds that the court believed R.C. Chapter 2950 to be unconstitutional') (citations omitted).

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

{¶59} "The State relies upon the decisions of other appellate districts which have held the amendments do not vacate 'final judicial decisions without amending the underlying applicable law' or 'order the courts to reopen a final judgment.' *State v. Linville*, 4th Dist. No. 08CA3051, 2009-Ohio-313, at ¶23, citing *Slagle v. State*, 145 Ohio Misc.2d 98, 2008-Ohio-593, at ¶21, ***. According to these cases, 'the Assembly has enacted a new law, which changes the different sexual offender classifications and time spans for registration: requirements, among other things, and is requiring that the new procedures be applied to offenders currently registering under the old law or offenders currently incarcerated for committing a sexually oriented offense.' *Slagle*, 2008-Ohio-593, at ¶21, ***.

{¶60} "It does not matter that the current Sex Offender Act formally amends the underlying law and does not order the courts to reopen final judgments. The fact remains that the General Assembly 'cannot annul, reverse or modify a judgment of a court already rendered.' *Bartlett*, 73 Ohio St. at 58. Spangler's reclassification, as a practical matter, nullifies that part of the court's April 27, 2001 Judgment ordering him to register for a period of ten years as a sexually oriented offender. To assert that the

General Assembly has created a new system of classification does not solve the problem that Spangler's original classification constituted a final judgment. There is no exception to the rule that final judgments may not be legislatively annulled in situations where the Legislature has enacted new legislation.

{¶61} "It is also argued that the Ohio Supreme Court has characterized the registration and notification requirements of the Sex Offender Act as 'a collateral consequence of the offender's criminal acts,' in which the offender does not possess a reasonable expectation of finality. [State v.] *Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, at ¶34, ***; *Linville*, 2009-Ohio-313, at ¶24 (citation omitted).

{¶62} "These arguments are similarly unavailing. In *Ferguson*, as in [State v.] *Cook* [(1998), 83 Ohio St.3d 404], the Supreme Court did not consider the argument that the enactment of House Bill 180/Megan's Law overturned a valid, final judgment. Rather, the Court was asked to determine whether retroactive application of the Sex Offender Act violated the ex post facto clause or the prohibition against retroactive legislation. The Court did not consider the arguments based on separation of powers and res judicata raised herein. In *Cook*, the Sex Offender Act was applied retroactively to persons who had not been previously classified as sexual offenders. There were no prior judicial determinations regarding the offenders' status as sexual offenders. Thus, the Supreme Court could properly state that the new burdens imposed by the law did not 'impinge on any reasonable expectation of finality' the offenders had with respect to their convictions. 83 Ohio St.3d at 414.

{¶63} "In the present case, Spangler had every reasonable expectation of finality in the trial court's April 27, 2001 Judgment Entry, i.e., that he would have to comply with

five years of community control sanctions, pay the fine of \$350, and register for a period of ten years as a sexually oriented offender.” (Parallel citations omitted.)

{¶64} Like Spangler, appellant, in the present case, also had every reasonable expectation of finality in the trial court’s 2002 judgment entry in which he was sentenced to an aggregate prison term of five years, with five years post release control; and adjudicated and classified as a sexually oriented offender, requiring him to register annually for a period of ten years.

{¶65} Ex Post Facto

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

{¶67} “The ex post facto clause extends to four types of laws:

{¶68} ““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.)

{¶69} In *Smith v. Doe* (2003), 538 U.S. 84, 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:

{¶70} “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).

{¶71} “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.)

{¶72} 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.

{¶73} 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.

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

{¶75} Both the placement of S.B. 10 within the Revised Code, and the language of the statute, indicates a punitive, rather than remedial, purpose.³ Further, as Judge James J. Sweeney of the Eighth Appellate District recently noted regarding the intent of S.B. 10:

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

{¶76} “*** 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.)

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

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

{¶79} 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.

{¶80} 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?

{¶81} 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.)

{¶82} 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.

{¶83} 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.

{¶84} 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.

{¶85} 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.

{¶86} 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.

{¶87} 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.

{¶88} 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.

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

{¶90} 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:

{¶91} "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.)

{¶92} 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.

{¶93} 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.

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

{¶95} Retroactivity

{¶96} 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 ***[.]”

{¶97} “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.)

{¶98} 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 v. Brown* (1988), 37 Ohio St.3d 279, 281. “Except with regard to constitutional protections against ex post facto laws, ***, felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation.” (Emphasis added.) *Id.* at 281-282.

{¶99} 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.

{¶100} Double Jeopardy

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

{¶102} “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.

{¶103} Here, in 2002, appellant pleaded guilty to three counts of gross sexual imposition and two counts of attempted gross sexual imposition. He was sentenced for these offenses 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 180 days for 25 years. 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.

{¶104} Substantive Due Process and Right to Privacy

{¶105} I believe this issue lacks ripeness.

{¶106} “The basic principle of ripeness may be derived from the conclusion that

"judicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote."

(***) (T)he prerequisite of ripeness is a limitation on jurisdiction that is nevertheless basically optimistic as regards the prospects of a day in court: the time for judicial relief is simply not yet arrived, even though the alleged action of the defendant foretells legal injury to the plaintiff.' Comment, Mootness and Ripeness: The Postman Always Rings Twice (1965), 65 Colum.L.Rev. 867, 876." *State ex rel. Elyria Foundry Co. v. Indus. Comm.* (1998), 82 Ohio St.3d 88, 89.

{¶107} Here, the majority refers to the issue of standing. This writer, however, believes that this may not be an issue of standing but the issue of residency is non-justiciable at this time pursuant to these facts due to a lack of a pending case and controversy, i.e., ripe for adjudication.

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

{¶109} Justiciability is defined as: "[t]he quality or state of being appropriate or suitable for adjudication by a court." Black's Law Dictionary (8 Ed.2004) 882.

{¶110} Appellant has not alleged an actual deprivation of his property rights, i.e., that he is forced to live in a certain part of town, on a certain street, or was forced to move. The fact that by dictating where he cannot live is essentially the same as dictating where he can live indicates that appellant has standing to appeal this issue. However, as he has not presented evidence that he has been prejudiced by his status and/or that his ability to domicile has been actually restrained, in that he cannot live where he chooses or he has been denied housing because the place where he wants to

live is prohibited, he has not presented us with a justiciable issue. Appellant has standing to appeal as he is classified under the new more restrictive statute. However, our lack of ability to adjudicate this issue is lack of harm to the person with standing and goes to the facts at hand or ripeness of a pending case and controversy, not the person's ability and standing to raise it.

{¶111} Breach of Contract

{¶112} Again, 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 ***[.]”

{¶113} Analysis under Section 28, Article II, is incomplete, without enquiring whether S.B. 10, as applied to appellant, violates the ban against laws impairing the obligation of contract. I find it does.

{¶114} When analyzing whether a law violates the ban against the impairment of contracts, this court applies a tripartite test. *Trumbull Cty. Bd. of Commrs. v. Warren* (2001), 142 Ohio App.3d 599, 602-603. First, there must be a determination if a contractual relation exists. *Id.* at 602. If it does, we must ascertain whether a change in the law impairs that relationship. *Id.* at 602-603. Finally, we must determine if that impairment is substantial. *Id.* at 603.

{¶115} “It is well established that a plea agreement is viewed as a contract between the State and a criminal defendant. *Santobello v. New York* (1971), 404 U.S. 257, ***. Accordingly, if one side breaches the agreement, the other side is entitled to either rescission or specific performance of the plea agreement. *Id.*, at 262.” *Walker*, supra, at ¶13. (Parallel citations omitted.) Ohio courts have noted that, in the main, the

contract is completely executed once the defendant has pleaded guilty, and the trial court has sentenced him or her. See, e.g., *State v. McMinn* (June 16, 1999), 9th Dist. No. 2927-M, 1999 Ohio App. LEXIS 2745, at 11; accord, *Pointer*, supra, at ¶9. However, to the extent the plea agreement contains further promises, the contract remains executory, and may be enforced by either party. See, e.g., *Parsons v. Wilkinson* (S.D. Ohio 2006), Case No. C2-05-527, 2006 U.S. Dist. LEXIS 54979 (allegation by inmate that plea agreement superseded parole board's authority regarding timing of parole hearing sufficient to withstand state attorney general's motion to dismiss in Section 1983 action), citing *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St.3d 456, 2002-Ohio-6719, at ¶28; see, also, *McMinn*, supra, at 11, fn. 6.

{¶116} Clearly, appellant's plea agreement contained further terms, beyond his agreement to plead guilty to certain charges, followed by sentencing by the trial court. The state implied those terms into the agreement as a matter of law, pursuant to former R.C. Chapter 2950. As a consequence of the particular charges to which he pleaded guilty, he was found to be a sexually oriented offender. Thus, his plea, as a matter of law, contained the terms that he comply with the registration requirements attendant upon that classification.

{¶117} Thus, I believe that appellant's plea agreement with the state remained an executory contract at the time of his reclassification under S.B. 10, meeting the first requirement for determining if a law breaches the ban on impairment of contracts. *Bd. of Trumbull Cty. Commrs.*, supra, at 602.

{¶118} It appears that the second part of the test – whether a change in the law has impaired the contract established between appellant and the state, *Bd. of Trumbull*

Cty. Commrs. at 602-603, is also met by S.B. 10. Further, the third part of the test for determining if a law unconstitutionally impairs a contract is whether the impairment is substantial, *Bd. of Trumbull Cty. Commrs.* at 603. The new tier structure classifies sex offenders based on their convictions rather than on factors as with the previous law. Also, the registration requirements for sex offenders have now become more stringent due to the new law.

{¶119} Consequently, I believe that the application of S.B. 10 to appellant violates the prohibition in Article II, Section 28 of the Ohio Constitution against laws impairing the obligation of contracts.⁴

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

{¶121} I respectfully dissent.

4. I recognize that other appellate courts have reached contrary conclusions. Thus, in *Sigler v. State*, 5th Dist. No. 08-CA-79, 2009-Ohio-2010, the Fifth District rejected a breach of contract argument on the basis that members of one branch of government (i.e., prosecutors, representing the executive) cannot bind future actions by the legislature. This seems beside the point: of course the legislature can change the law. I merely believe it cannot change substantially the terms of a civil contract previously entered by the state without consideration. The *Sigler* court further relied upon the doctrine of "unmistakability" in reaching its conclusion. That doctrine holds that a statute will not be held to create contractual rights binding on future legislatures, absent a clearly stated intention to do so. Again, this argument seems not to deal with the question presented. I am not holding that former R.C. Chapter 2950 created any contractual rights at all on the part of persons classified thereunder. Rather, I believe that the valid plea agreements entered by the state with defendants are contracts incorporating the terms of the classification made.