[Cite as *State v. Lasko*, 2009-Ohio-4100.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Respondent- Appellee,	:	**CASE NO. 2008-L-075**
- vs -	:	
THOMAS LASKO,	:	
Defendant-Petitioner-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 MS 000042.

Judgment: Affirmed.

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

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

MARY JANE TRAPP, P.J.

{¶1} Mr. Thomas Lasko appeals from the Lake County Court of Common Pleas judgment finding that he was properly reclassified as a Tier III offender under the new Sexual Offender Registration and Notification Act (SORN) (also known as Senate Bill 10, Ohio's version of the Adam Walsh Act or AWA), now newly enacted R.C. Chapter 2950. The trial court further dismissed Mr. Lasko's constitutional challenges to the Act.

{¶2} We affirm, determining Mr. Lasko was properly reclassified as his classification and duty to register arose by operation of law solely by the virtue of his

convictions for sexual battery and corruption of a minor. Further, we find the new sexual offender registration provisions, when viewed through the prism of prior precedent set by the Supreme Court of Ohio, are constitutional. Thus, Mr. Lasko's constitutional challenge is without merit.

{¶3} **Substantive and Procedural History**

{¶4} Mr. Lasko was convicted of one count of sexual battery, a third degree felony in violation of R.C. 2907.03; and two counts of corruption of a minor, third degree felonies in violation of R.C 2907.04. He was classified as a sexually oriented offender shortly before his release from incarceration in the spring of 1999.

{¶5} After receiving his new classification and registration duties in late November of 2007, Mr. Lasko timely filed a petition to contest his reclassification and a motion for immediate relief from community notification. After holding a hearing, the trial court denied his petition for reclassification, finding: Mr. Lasko was properly reclassified from a sexually oriented offender to a Tier III offender under the new Act, his new classification arose automatically by operation of law, his constitutional challenges were without merit, and he was not subject to the community notification provisions because he was not subject to community notification under the former classification and registration scheme.

{¶6} Mr. Lasko now timely appeals, raising the following assignment of error:

{¶7} "Application of S.B. to classify appellant as a tier III offender violates the ex post facto clause of the United States Constitution and the retroactive laws clause of the Ohio Constitution, the separation of powers doctrine of the federal and state

constitutions and the appellant's rights to substantive and procedural due process as guaranteed by the federal and state constitutions."

{¶8} **Senate Bill 10 and the New SORN Act Provisions**

{¶9} "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.

{¶10} "Prior to Senate Bill 10, when a defendant was found guilty of a sexually oriented offense, he could be classified as a sexually oriented offender, a habitual 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.

{¶11} "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.

{¶12} "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.

{¶13} "Under the new statutory scheme set forth in the 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, 2009-Ohio-2952, ¶7-11.

{¶14} Mr. Lasko's reclassification as a Tier III offender arises solely as an operation of law due to his conviction of sexual battery and corruption of a minor. See R.C. 2950.01(G)(1)(a).

{¶15} **Constitutional Claims**

{¶16} In his sole assignment of error, Mr. Lasko raises five specific constitutional arguments, arguing that the new Act is in contravention of his rights against ex post facto laws, retroactivity, separation of powers, as well as procedural and substantive due process.

{¶17} We have already addressed these arguments and found them to be without merit in *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059 and *State Charette*.[1]

{¶18} In addition, we 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*

1. We note, however, as we did in *Charette*, 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 *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202: "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." Id. at ¶46. 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. Before that court revisits the issue, however, we, as an inferior court, are bound

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.

{¶19} Thus, finding Mr. Lasko's assignment without merit, we affirm the judgment of the Lake County Court of Common Pleas.

CYNTHIA WESTCOTT RICE, J., concurs,

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

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

{¶20} Finding merit in Mr. Lasko's contention that application to him of S.B. 10 violates the bans on ex post facto and retroactive laws, as well as the doctrine of separation of powers, I would reverse, and require him to complete his registration and notification obligations, if any, under his original classification.

{¶21} In addition to the changes made by S.B. 10 in our sexual offender laws mentioned by the majority, I would note that the registration requirements have been heightened. 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

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to apply its holdings in *State v. Cook* (1998), 83 Ohio St.3d 404; *State v. Williams* (2000), 88 Ohio St.3d 513, 521; and *Wilson*.

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.

{¶22} Under his first issue, Mr. Lasko argues that S.B. 10 violates Section 10, Article I of the United States Constitution, which prohibits the enactment of ex post facto laws. 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. Mr. Lasko argues that the intent of the Ohio General Assembly to pass a criminal statutory scheme in S.B. 10 is revealed by the fact that it is largely codified within Title 29 of the Revised Code, which deals with crime. He further argues that the effect of S.B. 10 is clearly punitive. He asserts that the effects of the notification procedures embodied in the statute are similar to the shaming and public humiliations

used to punish criminals in colonial times. He notes that, unlike the classification system formerly in effect, which was based on a determination by the trial court, following hearing and the introduction of evidence, including psychological tests, of how likely an offender was likely to reoffend, the present system classes offenders *solely* on the basis of the crime for which they were convicted or pleaded guilty. He remarks on the fact that failure to comply with S.B. 10's complex system of registration, verification, and notification, subjects an individual to criminal penalties.

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

{¶24} "'"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.)

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

{¶26} "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).

{¶27} "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.)

{¶28} 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.

{¶29} 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 2007), Case No. 5:06-CV-96, 2007 U.S. Dist. LEXIS 65076, at 15-16.

{¶30} Second, those portions of S.B. 10 controlling the sentencing of sex offenders indicate that the classification is part of the sentence imposed – and thus, part of the offender's punishment. See, e.g., R.C. 2929.01(D)(D) and (E)(E). Thus, R.C. 2929.19(B)(4)(a) provides: "[t]he court shall include in the offender's sentence a statement that the offender is a tier III sex offender/child-victim offender ***[.]" Similarly, R.C. 2929.23(A) provides: "the judge shall include in the offender's sentence a statement that the offender is a tier III sex offender/child-victim offender [and] shall comply with the requirements of section 2950.03 of the Revised Code ***[.]" R.C. 2929.23(B) provides: "[i]f an offender is being sentenced for a sexually oriented offense or a child-victim oriented offense that is a misdemeanor ***, the judge shall include in the sentence a summary of the offender's duties imposed under sections 2950.04, 2950.041 ***, 2950.05, and 2950.06 of the Revised Code and the duration of the duties."

{¶31} Both the placement of S.B. 10 within the Revised Code, and the language

of the statute, indicates a punitive, rather than remedial, purpose.[2] Further, as Judge James J. Sweeney of the Eighth Appellate District recently noted regarding the intent of S.B. 10:

{¶32} "*** 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.)

{¶33} Consequently, I would find that the intent of S.B. 10 is punitive, rather than remedial.

{¶34} 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

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

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.

{¶35} 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.

{¶36} 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 "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?

{¶37} 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.)

{¶38} 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.

{¶39} 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.

{¶40} 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.

{¶41} 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 conclude, as did the Alaska court, that this factor provides some support for the punitive effect of S.B. 10. Cf. id. at 1013.

{¶42} 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 v. Alaska*, supra, at 1013, fn. 107, citing *Artway v. Attorney Gen. of N.J.* (C.A.3, 1996), 81 F.3d 1235, 1255.

{¶43} I believe 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.

{¶44} 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 members of the public to identify potential dangers to themselves or their families.

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

{¶46} 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 v. Alaska*, 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:

{¶47} "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 v. Alaska* at 1015. (Footnote omitted.)

{¶48} 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.

{¶49} 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.

{¶50} S.B. 10's intent is punitive. Its effect is punitive. As regard to Mr. Lasko, S.B. 10 violates the federal constitutional ban on ex post facto laws.

{¶51} I believe the first issue has merit.

{¶52} Under his second issue, Mr. Lasko alleges that the application of S.B. 10 to him violates the prohibition against retroactive laws in Article II, Section 28 of the Ohio Constitution, which provides, in pertinent part: "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts *** [.]" I agree.

{¶53} "'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.)

{¶54} 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.

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

{¶56} However, an analysis under Section 28, Article II, is incomplete, without enquiring whether S.B. 10, as applied to Mr. Lasko, violates the ban against laws impairing the obligation of contract. I think it does.

{¶57} 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, this court must ascertain whether a change in the law impairs that relationship. Id. at 602-603. Finally, a determination must be made whether that impairment is substantial. Id. at 603.

{¶58} "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." *State v. Walker*, 6th Dist. No. L-05-1207, 2006-Ohio-2929, 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.

{¶59} Clearly, Mr. Lasko'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 eventually 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.

{¶60} Thus, I would find that Mr. Lasko'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. *Trumbull Cty. Bd. of Commrs.*, supra, at 602.

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

Bd. of Commrs. at 602-603 – is also met by S.B. 10. By changing his classification from "sexually oriented offender" to "Tier III" offender, the state has unilaterally imposed new affirmative duties upon Mr. Lasko in relation to the contract. Further, the third part of the test for determining if a law unconstitutionally impairs a contract – i.e., whether the impairment is substantial, *Trumbull Cty. Bd. of Commrs.* at 603 – is obviously fulfilled, since the duties imposed upon Tier III offenders are greater in number and duration than those which were imposed upon sexually oriented offenders.

{¶62} Consequently, I would find that the application of S.B. 10 to Mr. Lasko violates the prohibition in Section 28, Article II of the Ohio Constitution against laws impairing the obligation of contracts.[3]

{¶63} By his third issue, Mr. Lasko asserts that S.B. 10 violates the doctrine of separation of powers. I agree. As this court stated in *Spangler v. State*, 11th Dist. No. 2008-L-062, 2009-Ohio-3178, at ¶45-46:

{¶64} "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.

{¶65} "'Although the Ohio Constitution does not contain explicit language establishing the doctrine of separation of powers, it is inherent in the constitutional

3. 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. However, 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 do not believe that former R.C. Chapter 2950 created any contractual rights at all on the part of persons classified thereunder. Rather, I would hold that a valid plea

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.)

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

{¶67} "'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).

{¶68} "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

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agreement entered by the state with a defendant is a contract incorporating the terms of the classification made.

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.

{¶69} "A determination of an offender's classification under former R.C. Chapter 2950 constituted a final order. *State v. Washington*, 11th Dist. No 99-L-015, ***, 2001 Ohio 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 ('inasmuch 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).

{¶70} "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.

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

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

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

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

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

{¶75} "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.)

{¶76} Similarly, in this case, Mr. Lasko had every reasonable expectation that he would be required to fulfill his obligations as a sexually oriented offender, then be done with his registration requirements.

{¶77} For the foregoing reasons, I respectfully dissent.