[Cite as *State v. Hitchcock*, 2009-Ohio-4447.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Respondent-Appellee,	:	**CASE NO. 2008-L-032**
- vs -	:	
PAUL RUSSELL HITCHCOCK,	:	
Petitioner-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 07 MS 000017.

Judgment: Reversed.

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).

Paul R. Hitchcock, pro se, 1025 Ivanhoe Road, Apt. 2, Cleveland, OH 44110 (Petitioner-Appellant).

DIANE V. GRENDELL, J.

{¶1} Appellant, Paul R. Hitchcock, appeals the judgment of the Lake County Court of Common Pleas, denying his Petition to Contest Reclassification and classifying him a Tier II sex offender. The fundamental principles of the "separation of powers" doctrine as written by our forefathers in our United States Constitution is inviolate, and, therefore, mandates reversal of the decision of the court below. However, Hitchcock

must still comply with the notification and registration requirements under his original sentence.

{¶2} On July 24, 2000, Hitchcock pleaded guilty to one count of Attempted Gross Sexual Imposition, a felony of the fourth degree, in violation of R.C. 2923.02 and R.C. 2907.05. He was found to be a sexually oriented offender.

{¶3} Hitchcock was reclassified as a Tier II offender pursuant to the new version of R.C. Chapter 2950, with reporting requirements for 25 years. He contested his reclassification, filing a Petition to Contest Reclassification on December 27, 2007.

{¶4} A hearing was held February 14, 2008. The court held that Hitchcock was unable to prove, by clear and convincing evidence, that his new registration requirements did not apply in the manner specified by the Attorney General. Hence, the court determined that Hitchcock was properly reclassified as a Tier II Offender.

{¶5} Hitchcock timely appeals and raises the following assignment of error:

{¶6} "[1.] The retroactive application of Senate Bill 10 violates the Ex Post Facto, Due Process, and Double Jeopardy Clauses of the United States Constitution and the Retroactivity Clause of Section 28, Article II of the Ohio Constitution; Fifth, Eighth, and Fourteenth Amendments to the United States Constitution; Section 10, Article I, of the United States Constitution; and Sections 10 and 28, Articles I and II, respectively, of the Ohio Constitution."

{¶7} Senate Bill 10, also known as the Adam Walsh Child Protection and Safety Act (AWA), passed in June 2007, with an effective date of January 1, 2008, amended the sexual offender classification system found in R.C. 2950.01. *In re Gant*, 3d Dist. No. 1-08-11, 2008-Ohio-5198, at ¶11. Under the prior classification system, the

trial court determined whether the offender fell into one of three categories: (1) sexually oriented offender, (2) habitual sex offender, or (3) sexual predator. Former R.C. 2950.09; *State v. Cook*, 83 Ohio St.3d 404, 407, 1998-Ohio-291. In determining whether to classify an offender as a sexual predator, former R.C. 2950.09(B)(3) provided the trial court with numerous factors to consider in its determination. *In re Smith*, 3d Dist. No. 1-07-58, 2008-Ohio-3234, at ¶28.

{¶8} Under the new classification system, adopted by the AWA, the trial court must designate the offender as either a Tier I, II, or III sex offender. R.C. 2950.01(E)(F) and (G); *Gant,* 2008-Ohio-5198, at ¶15. The new classification system places a much greater limit on the discretion of the trial court to categorize the offender, as the AWA requires the trial court to simply place the offender into one of the three tiers based on the offender's offense.

{¶9} Enactments of the Ohio General Assembly are presumed constitutional. *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, at paragraph one of the syllabus. The "presumption applies to amended R.C. Chapter 2950 ***, and remains unless [the challenger] establishes, beyond reasonable doubt, that the statute is unconstitutional." *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, at ¶12 (citation omitted).

{¶10} Hitchcock first claims that applying the AWA to crimes that occurred before January 1, 2008, violates the ex post facto clause of the United States Constitution. Section 10, Article I of the United States Constitution prohibits ex post facto laws. "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. The ex post facto clause, however, only applies to criminal statutes. *State v. Cook*, 83 Ohio St.3d 404, 415, 1998-Ohio-291. Thus, if a statute is civil, then there can be no violation of the ex post facto clause.

{¶11} To determine the nature of a particular statute, it is necessary to consider both the [L]egislature's intent in enacting the statute and the effect of the statute in practice. This analysis is known as the "'intent-effects' test." Id. Since the ex post facto clause only prohibits criminal statutes and punitive schemes, the court must first ask "whether the Legislature intended for the statute to be civil and non-punitive or criminal and punitive." *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076, at ¶18 (citations omitted). If "the [L]egislature intended for the statute to be civil and non-punitive, then the court must ask whether the statutory scheme is so punitive in nature that its purpose or effect negates the [L]egislature's intent." Id., quoting *United States v. Ward* (1980), 448 U.S. 242, 248-249. To survive an ex post facto challenge, a statute must be civil and non-punitive with regard to both the Legislature's intent in enacting it and its actual effect upon enactment. See *Smith v. Doe* (2003), 538 U.S. 84, 92.

{¶12} When applying the intent-effects test to the former R.C. Chapter 2950, the Ohio Supreme Court held that the General Assembly did not intend for the statute to be punitive because the purpose of the scheme had been to promote public safety and increase public confidence in the state's criminal and mental health systems. *Cook*, 83 Ohio St.3d. at 417. The *Cook* court found that the General Assembly's declaration of purpose was controlling in deciding legislative intent.

{¶13} Hitchcock argues two points that he believes indicate that, despite the similarities between the prior version of R.C. Chapter 2950 and the new version, the intent of the AWA is punitive. He first argues that the old classification and registration requirements were tied directly to the ongoing threat to the community. However, according to Hitchcock, under the new statutory scheme, an individual's registration and classification obligations depend on the convicted offense.

{¶14} Although Hitchcock is correct that under the new system the offense type determines what tier an offender is placed in, the old version of R.C. Chapter 2950's classification was also partially tied to the offense. See *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051, at ¶25. Further, "it cannot necessarily be concluded that Senate Bill 10's tiers are not directly tied to the ongoing threat to the community that sex offenders pose. The types of offenses that are placed in Tier I are less severe sex offenses, Tier II are more severe, and Tier III are the most severe offenses. Also within these tiers are some factual determinations, such as if the offense was sexually motivated, age of victim and offender, and consent. Likewise, every time an offender commits another sexually oriented offense the tier level rises. R.C. 2950.01(F)(1)(i) and (G)(1)(i). This formula detailed by the legislature illustrates that it is considering protecting the public. Consequently, this new formula does not appear to change the spelled out intent of the General Assembly in R.C. 2950.02." Id. at ¶26; *Ferguson*, 2008-Ohio-4824, at ¶35 (amendments to the Act were made "in an effort to better protect the public from the risk of recidivist offenders by maintaining the predator classification so that the public had notice of the offender's past conduct -- conduct that arguably is indicative of future risk").

{¶15} Hitchcock next argues that the General Assembly placed the AWA within Title 29, Ohio's Criminal Code, and this shows intent for it to be criminal. This argument is not persuasive. The prior version of R.C. Chapter 2950 was within the criminal code, yet the Ohio Supreme Court determined that it was civil in nature. The fact that the Act is contained in the Criminal Code and prescribes criminal penalties for failure to comply does not render it punitive. Moreover, the United States Supreme Court has held that neither of these characteristics necessarily renders a civil regulatory statute punitive. *Smith*, 538 U.S. at 94 ("[t]he location and labels of a statutory provision do not by themselves transform a civil remedy into a criminal one"), and 96 ("[i]nvoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive").

{¶16} Based on the above discussion, the General Assembly did not intend for the statute to be punitive. We must now decide whether the AWA has such a punitive effect as to negate the Legislature's intent. While there is no test to determine whether a statute is so punitive as to violate the constitutional prohibition against ex post facto laws, the United States Supreme Court has provided certain guideposts to be applied in resolving this issue. The guideposts include, "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment -- retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it

appears excessive in relation to the alternative purpose assigned ***." *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, 168-169 (footnotes omitted).

{¶17} When addressing the guideposts, this court has held that "analysis supports the conclusion that any punitive effect of the provisions is insufficient to negate the remedial purpose." *Naples v. State*, 11th Dist. No. 2008-T-0092, 2009-Ohio-3938, at ¶38.

{¶18} Finally, we note that the other appellate districts that have considered this issue have concluded that the registration and notification requirements of the AWA remain civil and nonpunitive in nature after the amendments enacted by Senate Bill 10. See *State v. Omiecinski*, 8th Dist. No. 90510, 2009-Ohio-1066, at ¶¶34-42, and the cases cited therein. Thus, this argument is without merit.

{¶19} Next, Hitchcock argues that the retroactive application of the AWA violates Article II, Section 28 of the Ohio Constitution, which provides that "[t]he general assembly shall have no power to pass retroactive laws." The Ohio Supreme Court has construed the prohibition to apply to "[e]very statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Cincinnati v. Seasongood* (1889), 46 Ohio St. 296, 303 (citation omitted).

{¶20} Hitchcock specifically argues that the AWA eliminates his preexisting right to reside where he wishes and the law imposes "new obligations and burdens which did not exist at the time that [he] committed the alleged offense."

{¶21} The Supreme Court in *Cook* explained that R.C. 1.48 dictates that statutes are presumed to apply only prospectively unless specifically made retroactive. *Cook*,

83 Ohio St.3d at 410. Thus, before we can determine whether R.C. Chapter 2950 can be constitutionally applied retrospectively, we must first determine whether the General Assembly specified that the statute would apply retroactively. Id., citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, at paragraph one of the syllabus.

{¶22} With respect to the residency restrictions, codified at R.C. 2950.034 [former R.C. 2950.031], the Ohio Supreme Court has held that these do not apply retroactively. *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, at syllabus.

{¶23} A statutory provision can be employed retroactively under limited circumstances. In *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, the Ohio Supreme Court fashioned a two part test to determine whether statutes may be applied retroactively. "First, the reviewing court must determine as a threshold matter whether the statute is expressly made retroactive." Id. at ¶10 (citations omitted). Next "[i]f a statute is clearly retroactive *** the reviewing court must then determine whether it is substantive or remedial in nature." Id. (citation omitted). A purely remedial statute does not violate Section 28, Article II of the Ohio Constitution, even if applied retroactively.

{¶24} Pursuant to the AWA version of R.C. 2950.01, sex offender classifications under the new law are applicable to a sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to certain sexually oriented offenses. There are other examples of the Legislature's retroactive intent delineated in R.C. Chapter 2950. See R.C. 2950.03(A); R.C. 2950.031; and R.C. 2950.033. Therefore, the Legislature has specifically made the new version of Chapter 2950 retroactive as it applies to offenders who have been found guilty of or pleaded guilty to certain offenses prior to the enactment of the new law.

{¶25} We must now determine whether the provisions should be characterized as substantive or remedial. A statute is substantive if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation, or liabilities to a past transaction, or creates a new right. *Van Fossen,* 36 Ohio St.3d at 106-107. Whereas, remedial laws are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right. Id. at 107.

{¶26} There are differences between the 1997 version of R.C. Chapter 2950 and AWA version. Now, there are possibly more counties an offender must register in and more information that the offender must provide when registering. Additionally, there is the internet sex offender database which anyone can access.

{¶27} However, with respect to the increased registration and notification requirements, the Ohio Supreme Court has rejected these arguments on the grounds that the more burdensome registration requirements and more extensive community notification provisions did not alter the essentially regulatory purpose of the act. *Ferguson*, 2008-Ohio-4824, at ¶39 ("Ohio retroactivity analysis does not prohibit all increased burdens; it prohibits only increased punishment").

{¶28} The *Cook* Court concluded that the registration and verification provisions of the 1997 version of R.C. Chapter 2950 were remedial in nature. The court stated that the registration and address verification provisions of R.C. Chapter 2950 were de minimis procedural requirements that were necessary to achieve the goals of R.C. Chapter 2950, to protect the public. *Cook*, 83 Ohio St.3d at 412-413. *Cook* is still controlling law; the Ohio Supreme Court has continued to indicate that sex offender

classification is civil, not criminal in nature. Further, "[w]hile we recognize that AWA has a significant impact upon the lives of sex offenders, that impact does not offend Ohio's prohibition on retroactive laws. Public safety is the driving force behind AWA." *G.E.S.*, 2008-Ohio-4076, at ¶17. Consequently, the Retroactivity Clause has not been violated.

{¶29} Next, Hitchcock argues that the registration period is excessive and violates the prohibition against cruel and unusual punishment. The State contends that Hitchcock waives this argument because he failed to raise this constitutional challenge in the trial court. See *State v. Awan* (1986), 22 Ohio St.3d. 120, at syllabus.

{¶30} However, even if this argument was not waived, the AWA does not violate the prohibition against cruel and unusual punishment. See *Naples,* 2009-Ohio-3938, at ¶33, ("the fact that this is a longer period of time than was under the [pre-AWA] version does not impact the analysis. As long as R.C. Chapter 2950 is viewed as civil, and not criminal - remedial and not punitive - then the period of registration cannot be viewed as punishment. Accordingly, it logically follows that it does not constitute cruel and unusual punishment since the punishment element is lacking.") (citation omitted).

{¶31} Hitchcock next argues that he could not be sentenced under the AWA because it was not effective at the time of his sentencing. He claims that portions of the AWA became effective July 1, 2007, while other portions did not become effective until January 1, 2008. He contends that R.C. 2950.09, the prior version, which is the statute for the adjudication of an offender as a sexual predator, was repealed on July 1, 2007. That section established the sexual classification hearing to determine if an offender was a sexually oriented offender, habitual sex offender, or sexual predator. He asserts that R.C. 2950.01, the AWA version, which dictates what tier an offender who commits

a sexually oriented offense should be placed in, was not effective until January 1, 2008. Therefore, according to Hitchcock, anyone who was sentenced between July 1, 2007 and December 31, 2007 cannot be subject to former R.C. Chapter 2950's requirements or to AWA's reporting requirements.

{¶32} However, as the State maintains, "[t]his is a very specific argument that applies to a narrow group of sexual offenders. This argument does not apply to Mr. Hitchcock because he was sentenced in 2000, well before [the AWA] was even contemplated." We agree; this argument is not applicable to Hitchcock. Accordingly, this argument is without merit.

{¶33} Hitchcock next maintains that the AWA categorically bars him from residing within 1000 feet of a school, preschool or child day-care center, violating his substantive due process rights.

{¶34} The State counters that Hitchcock lacks standing to challenge these restrictions, in the absence of any evidence of an injury in fact or an actual deprivation of his property rights or his right to privacy.

{¶35} "A person has no standing to attack the constitutionality of an ordinance unless he has a direct interest in the ordinance of such a nature that his rights will be adversely affected by its enforcement." *Anderson v. Brown* (1968), 13 Ohio St.2d 53, at paragraph three of the syllabus. "The 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." *Palazzi v. Estate of Gardner* (1987), 32 Ohio St.3d 169, at syllabus.

{¶36} In the present case, Hitchcock has not alleged or otherwise argued that the residency restrictions of R.C. 2950.034 have had any impact on him, i.e. that he has been forced to move from his current residence or intends to move within 1000 feet of a school, preschool, or child day-care. Cf. *Babbit v. United Farm Workers Natl. Union* (1979), 442 U.S. 289, 298 ("When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.' *** But 'persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs.'") (citation omitted).

{¶37} Accordingly, Hitchcock is without standing to challenge the AWA's residency restrictions. *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, at ¶111; *State v. Gilfillan*, 10th Dist. No. 08AP-317, 2009-Ohio-1104, at ¶117 (citations omitted).

{¶38} Hitchcock argues that the AWA violates the Double Jeopardy Clause of the United States Constitution and Section 10, Article I of the Ohio Constitution, which provides that an individual cannot be placed "in jeopardy of life or limb" for the same offense twice.

{¶39} "[T]he United States Supreme Court has also applied the clause to prevent a state from punishing twice, or from attempting a second time to criminally punish for the same offense." *Byers*, 2008-Ohio-5051, at ¶100 (citations omitted). "Thus, the threshold question in a double jeopardy analysis is whether the government's

conduct involves criminal punishment." Id., citing *State v. Williams*, 88 Ohio St.3d 513, 528, 2000-Ohio-428, citing *Hudson v. United States* (1997), 522 U.S. 93, 101.

{¶40} In *Williams*, the Ohio Supreme Court found no merit with the argument that former R.C. Chapter 2950 violated the Double Jeopardy Clause. 88 Ohio St.3d at 528. The Court explained that since that chapter was deemed in *Cook* to be remedial and not punitive, it could not violate the Double Jeopardy Clause. Id.

{¶41} Since we find that the AWA, R.C. Chapter 2950, sexual offender classification system to be remedial like its predecessor, the above analysis from *Williams* is applicable and this argument fails. Thus, the AWA does not violate the Double Jeopardy Clause.

{¶42} Hitchcock further maintains that "Senate Bill 10 violates the separation-of-powers principle that is inherent in Ohio's constitutional framework by unconstitutionally limiting the power of the judicial branch of government." He contends that Senate Bill 10 divests the judiciary branch of its power to sentence a defendant.

{¶43} "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.

{¶44} The reclassification of offenders pursuant to R.C. 2950.031(E) and R.C. 2950.032(E) does not grant appellate review to the Attorney General; the amendments to the Sex Offender Registration and Notification Act constitute a new law, with a new system of classification and attendant registration and notification requirements.

{¶45} Unlike the review vested in courts of appeal, "the classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts." *State v. Smith*, 2008-Ohio-3234, at ¶39 (citation omitted). Similarly, this court has observed "[t]he enactment of laws establishing registration requirements for, e.g., motorists, corporations, or sex offenders, is traditionally the province of the legislature and such laws do not require judicial involvement." *Swank*, 2008-Ohio-6059, at ¶99.

{¶46} However, "[t]he 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 "command[ing] the federal courts to reopen final judgments") (citation omitted). "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.

{¶47} A determination of an offender's classification under former R.C. Chapter 2950 constitutes a final order. *State v. Washington*, 11th Dist. No. 99-L-015, 2001-Ohio-8905, 2001 Ohio App. LEXIS 4980, at *9 ("a defendant's status *** 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") (citation omitted).

{¶48} Hitchcock's classification as a sexually oriented offender, with definite registration requirements, constituted a final order of the lower court. Therefore, no court can now be statutorily directed or required to modify the prior judgment provisions concerning Hitchcock's notification and registration requirements without violating separation of powers and res judicata principles.

{¶49} Other appellate districts have held that the amendments to the Act 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*, 2008-Ohio-593, at ¶21. According to these cases and the arguments of the State, "the Assembly has enacted a new law, which changes the different sexual offender classifications and time spans for registration: (sic) 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." *State v. Slagle*, 145 Ohio Misc.2d 98, 2008-Ohio-593, at ¶21. We disagree. The imposition of the new enhanced notification and registration requirements of the Act to previously adjudicated offenders changes the terms of prior final sentencing judgments.

{¶50} 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. Hitchcock's reclassification, as a practical matter, nullifies that part of the court's August 30, 2000 Judgment determining Hitchcock to be a sexually oriented offender and ordering him to register for a period of

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

{¶51} 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*, 2008-Ohio-4824, at ¶34 (citations omitted); *Linville*, 2009-Ohio-313, at ¶24 (citation omitted).

{¶52} This argument also is 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 final 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. In the present case, Hitchcock had every reasonable expectation of finality in the trial court's prior Judgment Entry.

{¶53} Reliance upon the Supreme Court's reasoning in *Cook* and *Ferguson* is further misplaced since the separation of powers and res judicata doctrines apply equally in civil (remedial) contexts as they do in criminal (punitive) contexts. *Akron v. Smith*, 9th Dist. Nos. 16436 and 16438, 1994 Ohio App. LEXIS 1859, at *4 ("[t]he doctrine of *res judicata* *** applies equally to criminal and to civil litigation") (citation omitted).

{¶54} The General Assembly's purpose in enacting the Adam Walsh Act, "to provide increased protection and security for the state's residents from persons who have been convicted of, or found to be delinquent children for committing, a sexually oriented offense or a child-victim oriented offense," is properly realized in its application to cases pending when enacted and those subsequently filed. Am.Sub.S.B. No. 10, Section 5. Hitchcock's sentence, however, had become final several years prior to the Adam Walsh Act. As such, it is beyond the power of the Legislature to vacate or modify.[1] The United States Supreme Court has stated that the principle of separation of powers is violated by legislation which "depriv[es] judicial judgments of the conclusive effect that they had when they were announced" and "when an individual final judgment is legislatively rescinded for even the *very best* of reasons." *Plaut*, 514 U.S. at 228 (emphasis sic). To the extent the Adam Walsh Act attempts to modify existing final sentencing judgments, such as Hitchcock's sentence, it violates the doctrines of separation of powers and finality of judicial judgments, despite the good intentions of the Legislature. As such, that portion of the Act is invalid, unconstitutional, and unenforceable.

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

{¶55} Under this holding, Hitchcock will still have to complete his original sentence and continue registering as a sexually oriented offender until his ten year requirement is completed, pursuant to the trial court's August 30, 2000 Judgment Entry.

{¶56} Hitchcock's sole assignment of error is with merit to the extent indicated above.

{¶57} For the foregoing reasons, the Judgment Entry of the Lake County Court of Common Pleas, denying his Petition to Contest Reclassification and classifying him a Tier II sex offender, is reversed; however, Hitchcock shall continue registering as a sexually oriented offender pursuant to the trial court's August 30, 2000 Judgment Entry. Costs to be taxed against appellee.

TIMOTHY P. CANNON, J., concurs in judgment only with a Concurring Opinion.

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

TIMOTHY P. CANNON, J., concurring in judgment only.

{¶58} I concur with the majority's disposition of Hitchcock's claim regarding cruel and unusual punishment, as well as his challenge to the residency restriction.

{¶59} I would follow this court's opinion in *State v. Ettenger*, 11th Dist. No. 2008-L-054, 2009-Ohio-3525. I do not believe that the application of the Adam Walsh Act to Hitchcock violates the doctrine of separation of powers. See *State v. Ettenger*, 2009-Ohio-3525, at ¶75-79.

{¶60} Instead, I would hold that the application of the Adam Walsh Act to Hitchcock violates the Ex Post Facto Clause of the United States Constitution, the Retroactivity Clause of the Ohio Constitution, and the Double Jeopardy Clauses of the Ohio and United States Constitutions. Id. at ¶10-59, 68-74.

{¶61} Hitchcock had an expectation of finality that his prior adjudication as a sexually oriented offender would result in a finite, ten-year reporting period. However, Hitchcock has been reclassified as a Tier II offender subject to enhanced reporting requirements for 25 years.

{¶62} The judgment of the trial court should be reversed.

COLLEEN MARY O'TOOLE, J., concurs in part, dissents in part, with a Concurring/Dissenting Opinion.

{¶63} I concur with the majority's disposition of Mr. Hitchcock's third issue – that application of AWA to him violates the doctrine of separation of powers, thus requiring us to reverse and remand. I further concur with the majority's disposition of his fifth issue, relating to the effective dates of AWA. I agree with the majority that there is no merit in his argument that application of AWA to him constitutes cruel and unusual punishment, though on a different analysis. And I would hold that, on the facts of this case, Mr. Hitchcock's challenge to the residency restrictions of AWA is not ripe for review. However, I do find that application of AWA to Mr. Hitchcock violates the federal ban against ex post facto laws, as well as the Ohio ban on retroactive laws. I also believe its application to him constitutes double jeopardy. Consequently, I would reverse and remand on these issues, as well.

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

{¶65} ""'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.)

{¶66} As the majority notes, Ohio courts apply the "intent-effects" test in analyzing whether a statute violates the ban on ex post facto laws. My own application of the test indicates both the intent, and the effect, of AWA are punitive, rendering it unconstitutional when applied to crimes committed prior to the statute's enactment, as in this case.

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

{¶68} First, there is the simple fact that AWA 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.

{¶69} Second, those portions of AWA 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."

{¶70} Both the placement of AWA 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 AWA:

{¶71} "*** 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

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

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 [AWA] depends upon the underlying offense that serves as the basis for the offender's registration or notification conditions." *Omiecinski*, supra, at ¶91. (Sweeney, J., dissenting in part.)

{¶72} For all these reasons, I would find that the intent of AWA is punitive, rather than remedial.

{¶73} Moreover, an exploration of the effects of AWA, under the seven factors of the *Kennedy* test, reveals that it is a punitive, criminal statute, rather than remedial and civil. Regarding the first factor, AWA 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.

{¶74} 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?

{¶75} AWA 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.)

{¶76} AWA 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.

{¶77} Thus, AWA imposes significant disabilities and restraints upon offenders, which indicates it is an unconstitutional ex post facto law under the first *Kennedy* factor.

{¶78} The second *Kennedy* factor requires us to consider whether AWA 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 AWA the functional equivalent of community control sanctions.

{¶79} Under the third *Kennedy* factor, we must consider whether the registration and notification requirements of AWA 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 AWA. Cf. id. at 1013.

{¶80} The fourth *Kennedy* factor requires us to determine whether the registration and notification requirements of AWA 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.

{¶81} 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.

{¶82} 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 and their families.

{¶83} Thus, AWA's requirements fulfill the traditionally punitive roles of

retribution and deterrence.

{¶84} The fifth *Kennedy* factor questions whether the conduct to which a law applies is already a crime. I again 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:

{¶85} "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." Id. at 1015. (Footnote omitted.)

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

{¶87} Under the sixth *Kennedy* factor, we are required to consider whether the law has some rational purpose other than punishment. Clearly AWA 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. AWA 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.

{¶88} Consequently, I would find that both AWA's intent, and effect are punitive, and that it is an unconstitutional ex post facto law regarding Mr. Hitchcock.

{¶89} I further believe that AWA violates the Ohio Constitution's ban on retroactive laws.

{¶90} "'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.)

{¶91} 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.

{¶92} The foregoing establishes that AWA is an unconstitutional retroactive law, as applied to Mr. Hitchcock. 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.

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

{¶94} 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.

{¶95} "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, *State v. Pointer*, 8th Dist. No. 85195, 2005-Ohio-3587, 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.

{¶96} Clearly, Mr. Hitchcock'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.

{¶97} Thus, I believe that Mr. Hitchcock'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.

{¶98} It appears that the second part of the test – whether a change in the law has impaired the contract established between Mr. Hitchcock 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 II" offender, the state has unilaterally imposed new affirmative duties upon Mr. Hitchcock 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 II offenders are greater in number and duration than those which were imposed upon sexually oriented offenders.

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

{¶100} I also believe that application of AWA to Mr. Hitchcock constitutes double jeopardy. The Supreme Court of Ohio has held:

{¶101} "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

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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 in an AWA case 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 maintain 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 would not hold that former R.C. Chapter 2950 created any contractual rights at all on the part of persons classified thereunder. Rather, I believe that a valid plea agreement entered by the state with a defendant is a contract incorporating the terms of the classification made.

twice put in jeopardy for the same offense.'" *State v. Zima*, 102 Ohio St.3d 61, 2004-Ohio-1807, at ¶16.

{¶102} Here, in 2000, Mr. Hitchcock pleaded guilty to one count of attempted gross sexual imposition. He was sentenced for this offense and adjudicated a sexually oriented offender. Additional punitive measures have now been placed on him, as he is required to comply with the new, more stringent registration requirements. Essentially, he is being punished a second time for the same offense. The application of the current version of R.C. Chapter 2950 to appellant violates the double jeopardy clauses of the Ohio and United States Constitutions.

{¶103} As I would find that AWA is a criminal, punitive statutory scheme, I feel obliged to analyze Mr. Hitchcock's contention that application of it to him is cruel and unusual punishment, banned under the Eighth Amendment to the United States Constitution, and Section 9, Article I, Ohio Constitution. The Supreme Court of Ohio set forth the standards to be applied in deciding whether punishment is "cruel and unusual" in *State v. Weitbrecht* (1999), 86 Ohio St.3d 368, 370-372:

{¶104} "Historically, the Eighth Amendment has been invoked in extremely rare cases, where it has been necessary to protect individuals from inhumane punishment such as torture or other barbarous acts. *Robinson v. California* (1962), 370 U.S. 660, 676, ***. Over the years, it has also been used to prohibit punishments that were found to be disproportionate to the crimes committed. In *McDougle v. Maxwell* (1964), 1 Ohio St.2d 68, ***, this court stressed that Eighth Amendment violations are rare. We stated that 'cases in which cruel and unusual punishments have been found are limited to those involving sanctions which under the circumstances would be considered shocking

to any reasonable person.' Id. at 70, ***. Furthermore, 'the penalty must be so greatly disproportionate to the offense as to shock the sense of justice of the community.' Id. See, also, *State v. Chaffin* (1972), 30 Ohio St.2d 13, ***, paragraph three of the syllabus.

{¶105} "The United States Supreme Court has also discussed the concept of whether the Eighth Amendment requires that sentences be proportionate to the offenses committed. An Eighth Amendment challenge on these grounds was initially applied only in cases involving the death penalty or unusual forms of imprisonment. *Enmund v. Florida* (1982), 458 U.S. 782, ***; *Weems v. United States* (1910), 217 U.S. 349, ***. Then, in *Solem v. Helm* (1983), 463 U.S. 277, 290, ***, the court applied the Eighth Amendment to reverse a felony sentence on proportionality grounds, finding that 'a criminal sentence must be proportionate to the crime for which the defendant has been convicted.' In so holding, the *Solem* court set forth the following tripartite test to review sentences under the Eighth Amendment:

{¶106} "'First, we look to the gravity of the offense and the harshness of the penalty. (***) Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. (***) Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.' Id. at 290-291, ***.

{¶107} "More recently, in *Harmelin v. Michigan* (1991), 501 U.S. 957, ***, the United States Supreme Court revisited the issue of proportionality as it relates to the Eighth Amendment. In *Harmelin*, the court was asked to decide whether a mandatory

term of life imprisonment without possibility of parole for possession of six hundred seventy-two grams of cocaine violated the prohibition against cruel and unusual punishments. In finding no constitutional violation, the lead opinion rejected earlier statements made in *Solem v. Helm* and stated that the Eighth Amendment contains no proportionality guarantee. However, this statement failed to garner a majority. The three Justices who concurred in part would refine the *Solem* decision to an analysis of 'gross disproportionality' between sentence and crime. As stated by Justice Kennedy in his opinion concurring in part, 'The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.' Id. at 1001, ***." (Parallel citations omitted.)

{¶108} Application of the *Solem* test to Mr. Hitchcock's predicament makes clear that AWA does not constitute "cruel and unusual" punishment in violation of the Eighth Amendment. Upon a Tier II offender, AWA places time-consuming and difficult reporting burdens, for an extraordinarily long time. It is like spending twenty-five years on probation. But if the penalty in *Harmelin*, supra – life imprisonment, without parole, for cocaine possession – passes Eighth Amendment scrutiny, the penalties inflicted by AWA upon a Tier II offender must, as well. Consequently, pursuant to *Solem* and *Harmelin*, I cannot find that there is a gross disproportion between the crime and the penalty. And, since Mr. Hitchcock cannot pass the first prong of the *Solem* test, analysis of the second and third prongs is not required. *Weitbrecht*, supra, at 373, fn. 4.

{¶109} For all the reasons foregoing, I respectfully concur in part and dissent in part.