[Cite as *State v. Grate*, 2009-Ohio-4452.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Respondent-Appellee,	:	**CASE NO. 2008-T-0058**
- vs -	:	
LLOYD ALLEN GRATE,	:	
Defendant-Petitioner-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2008 CV 195.

Judgment: Reversed.

Dennis Watkins, Trumbull County Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Respondent-Appellee).

Samuel F. Bluedorn, Bluedorn & Ohlin, L.L.C., 144 North Park Avenue, #310, Warren, OH 44481 (For Defendant-Petitioner-Appellant).

DIANE V. GRENDELL, J.

{¶1} Appellant, Lloyd Allen Grate, appeals the judgment of the Trumbull County Court of Common Pleas, denying his Petition to Contest Application of the Adam Walsh Act. The fundamental principle of the "separation of powers" doctrine as written by our forefathers in the United States Constitution is inviolate, and, therefore, mandates reversal of the decision of the court below. However, Grate must still comply with the notification and registration requirements under his original sentence.

{¶2} On February 19, 2003, Grate was convicted, in Case No. 01-CR-753 of the Trumbull County Court of Common Pleas, of three counts of Gross Sexual Imposition, a felony of the third degree in violation of R.C. 2907.05(A)(4) and (B).

{¶3} On February 24, 2003, Grate was sentenced to serve concurrent, two-year prison terms for each count, and ordered to register for a period of ten years as a sexually oriented offender.

{¶4} On November 26, 2007, the Office of the Attorney General issued a Grate Notice of New Classification and Registration Duties Tier II Sex Offender (Adult). Grate was advised "of changes to Ohio's Sex Offender Registration and Notification Act (Ohio Revised Code Chapter 2950, 'SORN') *** due to Ohio Senate Bill 10, passed to implement the federal Adam Walsh Child Protection and Safety Act of 2006." Under the new classification, Grate is a "Tier II Sex Offender" and "required to register personally with the local sheriff's office every 180 days for 25 years."

{¶5} On January 18, 2008, Grate filed a Petition to Contest Application of the Adam Walsh Act, in the Trumbull County Court of Common Pleas, the county in which he resides and currently registers. Grate filed an Amended Petition on February 12, 2008.

{¶6} The State moved for summary judgment on Grate's Petition.

{¶7} On June 23, 2008, the trial court granted the State's Motion.

{¶8} On July 1, 2008, Grate filed his Notice of Appeal and raises the following assignment of error: "The trial court erred finding Ohio Revised Code §2950 et seq. constitutional as a matter of law."

{¶9} Within this sole assignment of error, Grate challenges the constitutionality of amended Revised Code Chapter 2950 on the following grounds: "reclassification of

petitioner-appellant constitutes a violation of the separation of powers doctrine"; "the retroactive application of Ohio's AWA violates the prohibition on *ex post facto* laws in Article I, Section 10 of the United States Constitution"; "the retroactive application of Ohio's AWA violates the prohibition on retroactive laws in Article II, Section 28 of the Ohio Constitution"; "reclassification of petitioner constitutes impermissible multiple punishment under the Double Jeopardy Clauses of the United States and Ohio Constitutions"; "the residency restrictions of the AWA violate due process"; and "reclassification of petitioner constitutes a breach of contract and a violation of the right to contract under the Ohio and United States Constitutions." For the sake of clarity of presentation, these arguments will be considered out of order.

{¶10} Grate's initial contention is that the retroactive application of amended Revised Code Chapter 2950 violates the constitutional doctrine of separation of powers.

{¶11} "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.

{¶12} The doctrine of separation of powers limits the ability of the General Assembly to exercise the powers of and extert an influence over the judicial branch of

government. "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; *Gompf v. Wolfinger* (1902), 67 Ohio St. 144, at paragraph three of the syllabus ("[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").

{¶13} 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-8905, 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 advsersely 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).

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

{¶15} The State contends that the "new law does not order courts to reopen a final judgment, but *** simply changes the classification scheme based on the prior judicial adjudication." Moreover, "the classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts." *In re Smith*, 3rd Dist. No. 1-07-58, 2008-Ohio-3234, at ¶39, 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 [sic], 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.

{¶16} It does not matter that the legislature has the authority to enact or amend laws requiring sex offenders to register or that the current Sex Offender Act 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. Grate's reclassification, as a practical matter, nullifies that part of the court's February 24, 2003 Judgment ordering him to register for a period of ten years as a sexually oriented offender. To assert that the General Assembly has authority to create a new system of classification does not solve the problem that Grate'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.

{¶17} Grate's first argument under his sole assignment of error is with merit.

{¶18} Grate next argues that Ohio's current Sex Offender Registration and Notification Act violates Section 10, Article I of the United States Constitution, which provides: "No State shall *** pass any *** ex post facto Law." "Any statute which punishes as a crime an act previously committed, which was innocent when done, [or] which makes more burdensome the punishment for a crime, after its commission, *** is prohibited as *ex post facto*." *State v. Cook*, 83 Ohio St.3d 404, 414, 1998-Ohio-291, quoting *Beazell v. Ohio* (1925), 269 U.S. 167, 169-170. The prohibition against ex post facto legislation only applies to criminal statutes, i.e. statutes punitive in nature. Id. at 415 (citation omitted).

{¶19} To determine the nature of a particular statute, it is necessary to consider both the legislative intent in enacting the statute and the effect of the statute in practice. This analysis is known as the "'intent-effects' test." Id. "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."'" *Smith v. Doe* (2003), 538 U.S. 84, 92, quoting *Kansas v. Hendricks* (1997), 521 U.S. 346, 361, quoting *United States v. Ward* (1980), 448 U.S. 242, 248-249.

{¶20} Enactments of the Ohio Generally 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); *Smith*, 538 U.S. at 92, quoting *Hudson v. United States* (1997), 522 U.S. 93, 100, quoting *Ward*, 448 U.S. at 249 ("'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty").

{¶21} The legislature's intent in passing the Sex Offender Registration and Notification Act, expressed in the Act itself, is to provide "adequate notice and information about offenders *** who commit sexually oriented offenses or who commit child-victim oriented offenses," so that "members of the public and communities can develop constructive plans to prepare themselves and their children for the offender's or delinquent child's release from imprisonment, a prison term, or other confinement or detention." R.C. 2950.02(A)(1). The Act also asserts that the "protection of members of the public from sex offenders and child-victim offenders is a paramount governmental interest" and that "[t]he release of information about sex offenders and child-victim offenders to public agencies and the general public will further the governmental interests of public safety and public scrutiny of the criminal, juvenile, and mental health systems." R.C. 2950.02(A)(2) and (6). Finally, "it is the general assembly's intent to protect the safety and general welfare of the people of this state" and "the policy of this state to require the exchange *** of relevant information about sex offenders and child-victim offenders among public agencies and officials and to authorize the release *** of necessary and relevant information about sex offenders and child-victim offenders to members of the general public as a means of assuring public protection *** is not punitive." R.C. 2950.02(B).

{¶22} The Ohio Supreme Court has construed this language as a definitive statement that the legislature's intent in enacting the Sex Offender Registration and Notification Act was not punitive. *Cook*, 83 Ohio St.3d at 417; *Ferguson*, 2008-Ohio-4824, at ¶29 ("we have held consistently that R.C. Chapter 2950 is a remedial statute").

{¶23} Grate maintains that the intent and effect of the Act are, nonetheless, punitive. Grate notes that the Act's provisions are codified within Ohio's Criminal Code, Title 29; the failure to comply with the registration and notification provisions subjects the person to criminal penalties; and, under the prior law, a person's classification was tied to a determination that they posed an ongoing threat to the community, while under the current amendments, one's classification "flow[s] directly from the offense of conviction." We disagree.

{¶24} The fact that the Act is contained in the Criminal Code and prescribes criminal penalties for failure to comply does not render it punitive. Both of these provisions were part of the prior version of the Act upheld by the Ohio Supreme Court in *Cook*. 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").

{¶25} Nor does the fact that one's classification now "flow[s] directly from the offense of conviction," rather than a judicial determination as to the likelihood of recidivism, alter the legislative intent or the nature of the Act. It is well-established that "[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular

regulatory consequences." Id. at 103. The United States Supreme Court has "upheld against *ex post facto* challenges laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment." Id. at 104.

{¶26} A similar argument was previously raised, and rejected, following the 2003 amendments to the Sexual Offender and Registration and Notification Act as part of Am.Sub.S.B. No. 5. The 2003 amendments "[m]odifie[d] most of the determinations, declarations, recognitions, and findings of the General Assembly regarding the SORN Law that [formally applied] only regarding sexual predators and habitual sex offenders so that they instead apply regarding all sex offenders, offenders who commit sexually oriented offenses, child-victim offenders, and offenders who commit a child-victim offense ***." *Ferguson*, 2008-Ohio-4824, at ¶7 (citation omitted). Thus, disabilities that previously attached to persons deemed "likely to engage in the future in one or more sexually oriented offenses" were expanded to apply to all sex offenders. Cf. former R.C. 2950.01(E)(1).

{¶27} The Ohio Supreme Court recognized that these "changes were driven by the General Assembly's finding that all sex offenders pose a risk of engaging in further sexually abusive behavior after being released from prison and that the protection of the public from those offenders is a paramount governmental interest." Id. Similarly, the current changes to the Act reflect the understanding that all sex offenders, by virtue of having committed "sexually oriented offenses," pose a risk of committing further sexually oriented offenses. This understanding is consistent with stated aim of protecting the public from the danger of recidivism by convicted sex offenders through the public dissemination of information about the offenders. R.C. 2950.02(A) and (B); *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 arguable is indicative of future risk").

{¶28} Finally, we note that the other appellate districts that have considered this issue have concluded that the registration and notification requirements of the Act 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.

{¶29} Accordingly, the amended version of R.C. Chapter 2950 does not violate the ex post facto clause.

{¶30} Grate next maintains the retroactive application of Ohio's current Sex Offender Registration and Notification Act 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).

{¶31} Specifically, Grate claims the current law "eliminates the pre-existing right of citizens to reside where they wish and imposes new obligations and burdens which did not exist at the time [he] committed his offense."

{¶32} 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.

{¶33} 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"); *Cook*, 83 Ohio St.3d at 412 ("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*"), citing *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281-282 (emphasis added).

{¶34} For these reasons, amended version of R.C. Chapter 2950 does not violate the Article II, Section 28 of the Ohio Constitution.

{¶35} Grate's fourth argument is that his reclassification as a Tier II Sex Offender constitutes multiple punishment under the double jeopardy clauses of the United States and Ohio Constitutions.

{¶36} Since the Sex Offender Act's notification and registration requirements do not constitute punishment, they do not implicate the double jeopardy provisions of either the United States or Ohio Constitutions. *Williams*, 88 Ohio St.3d at 528, citing *Cook*, 83 Ohio St.3d at 420.

{¶37} In his fifth argument, Grate asserts that the residency restrictions contained in the Sex Offender Act, whereby he is barred from residing within 1000 feet of a school, pre-school, or child day-care center, see R.C. 2950.034, violate the substantive component of the due process clause contained in the Fourteenth Amendment of the United States Constitution and in Section 16, Article I of the Ohio

Constitution, as well as the right to privacy guaranteed by Section 1, Article I of the Ohio Constitution.

{¶38} The State counters that Grate 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.

{¶39} "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.

{¶40} In the present case, Grate 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 statute, and there exists a credible threat of persecution 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).

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

{¶42} Grate's final argument is that that his reclassification constitutes a breach of his plea agreement with the State of Ohio. According to the Finding on the Guilty Plea to Amended Indictment, journalized in the underlying case on Febraury 20, 2003, the "agreement upon which [Grate's] plea is based is as follows: Defendant to waive PSI. State recommends two (2) years incarceration on each count, to be served concurrently to each other. State to Nolle Count 1 of the Indictment. Defendant will be required to register as a sexually oriented offender. State will oppose judicial release."

{¶43} "A plea bargain itself is contractual in nature and subject to contract-law standards." *State v. Butts* (1996), 112 Ohio App.3d 683, 686. Ordinarily, if one side violates a term of the plea agreement, the other party has a right to pursue certain remedies, including rescission of the agreement. *State v. Heart*, 8th Dist. No. 84531, 2005-Ohio-107, at ¶8. However, in applying the elementary rules of contract law to plea agreements, the courts of this State have held that an alleged breach of such an agreement cannot be based upon an action which occurs following the performance of the various terms. See *State v. Pointer*, 8th Dist. No. 85195, 2005-Ohio-3587, at ¶9. That is, once a criminal defendant has entered his guilty plea and has been sentenced by the trial court, a breach of contract can no longer occur because both sides have fully performed their respective obligations under the plea agreement. *State*, 145 Ohio Misc.2d 98, at ¶59.

{¶44} The new classification system cannot be deemed a violation of the terms of Grate's plea agreement because the performance of that contract was fully completed when he entered his plea and was sentenced.

{¶45} Grate's sole assignment of error has merit with respect to his argument that his reclassification under the amended Sex Offender Act violates the doctrine of separation of powers.

{¶46} Under this holding, Grate will have to complete his original sentence and continue registering as a sexually oriented offender pursuant to the trial court's February 24, 2003 Judgment Entry.

{¶47} We note that 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. Section 5, S.B. No. 10. Grate'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 v. Spendthrift Farm, Inc.* (1995), 514 U.S. 211, 228 (emphasis sic). To the extent the Adam Walsh Act attempts to modify existing final sentencing judgments, such as Grate's sentence, it

1. Moreover, as a final judgment, Grate'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).

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.

{¶48} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas, reclassifying Grate as Tier II Sex Offender, is reversed; however, Grate shall continue registering as a sexually oriented offender pursuant to the trial court's February 24, 2003 Judgment Entry. Costs to be taxed against appellee.

TIMOTHY P. CANNON, J., concurs in judgment only with 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.

{¶49} I would follow this court's opinion in *State v. Ettenger*, 11th Dist. No. 2008-L-054, 2009-Ohio-3525. Thus, I disagree with the majority's opinion regarding Grate's breach of contract argument. Id. at ¶60-67. See, also, *State v. Spangler*, 11th Dist. No. 2008-L-062, 2009-Ohio-3178, at ¶65.

{¶50} Grate had an expectation of finality that his prior adjudication as a sexually-oriented offender would result in a finite, ten-year reporting period. This expectation of finality was the result of an agreement between Grate and the state of Ohio.

{¶51} As stated in the finding on guilty pleas to amended indictment:

{¶52} "[A]greement upon which [Grate's] plea is based is as follows: [Grate] to waive PSI. State recommends two (2) years incarceration on each count, to be served concurrently to each other. State to Nolle Count 1 of the Indictment. *[Grate] will be required to register as a sexually oriented offender*. State will oppose judicial release." (Emphasis added.)

{¶53} "Reclassification by the state legislature clearly may have impacted [Grate's] decision to enter a plea and forego his right to trial." *State v. Ettenger*, 2009-Ohio-3525, at ¶66.

{¶54} Furthermore, I do not believe that the application of the Adam Walsh Act to Grate violates the doctrine of separation of powers. See *State v. Ettenger*, 2009-Ohio-3525, at ¶75-79. Instead, I would hold that application of the Adam Walsh Act to Grate 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.

{¶55} 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.

{¶56} I concur thoroughly with the majority's well-reasoned analysis of the separation of powers issue presented by this appeal. I also concur that, on the facts of this case, the issue of AWA's residency restrictions is one we should not reach, though I premise this on ripeness, rather than standing. However, as I do believe that AWA, as

applied to Mr. Grate, constitutes an ex post facto law, as well as an impermissible retroactive law, and that it places him in double jeopardy, I would also reverse and remand on these bases.

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

{¶58} "'"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.)

{¶59} 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.

{¶60} 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.

{¶61} 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 2007), Case No. 5:06-CV-96, 2007 U.S. Dist. LEXIS 65076, at 15-16.

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

{¶63} 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:

{¶64} "*** the General Assembly expressed a remedial intent in the legislation.

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

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 [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.)

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

{¶66} Moreover, an exploration of the effects of AWA reveals that it is a punitive, criminal statute, rather than remedial and civil. In exploring the effects of a statute for ex post facto purposes, we are required to apply the seven part test enunciated by the United States Supreme Court in *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, 168-169. *Smith v. Doe*, supra, at 97.

{¶67} 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.

{¶68} 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?

{¶69} 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.)

{¶70} 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.

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

{¶72} 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.

{¶73} 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.

{¶74} 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.

{¶75} 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.

{¶76} 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.

{¶77} Thus, AWA's requirements fulfill the traditionally punitive roles of retribution and deterrence.

{¶78} 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:

{¶79} "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.)

{¶80} 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.

{¶81} 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.

{¶82} 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. Grate.

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

{¶84} "'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.)

{¶85} 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*, supra, at 281. "*Except* with regard to constitutional protections against ex post facto laws, ***, felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation." (Emphasis added.) Id. at 281-282.

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

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

{¶88} 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.

{¶89} "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.

{¶90} Clearly, Mr. Grate'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.

{¶91} Thus, I believe that Mr. Grate'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.

{¶92} It appears that the second part of the test – whether a change in the law has impaired the contract established between Mr. Grate 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. Grate 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.

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

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

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

{¶96} Here, in 2003, Mr. Grate was convicted of three counts of gross sexual imposition. He was sentenced for these offenses and adjudicated a sexually oriented

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.

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.

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