[Cite as *State v. Candela*, 2009-Ohio-4096.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-A-0068**
- vs -	:	
LOUIS CANDELA,	:	
Defendant-Appellant.	:	

Civil Appeal from the Ashtabula County Court of Common Pleas, Case No. 2007 CR 266.

Judgment: Affirmed.

Thomas L. Sartini, Ashtabula County Prosecutor, and *Shelley M. Pratt*, Assistant Prosecutor, Ashtabula County Courthouse, 25 West Jefferson Street, Jefferson, OH 44047-1092 (For Plaintiff-Appellee).

Marie Lane, Ashtabula County Public Defender, Inc., 4817 State Road, #202, Ashtabula, OH 44004-6927 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Louis Candela, appeals the Judgment Entry of the Ashtabula County Court of Common Pleas, in which the trial court classified him as a Tier III offender. For the following reasons, we affirm the decision of the trial court.

{¶2} On July 16, 2007, Candela was indicated on six counts of Rape, eight counts of Gross Sexual Imposition, six counts of Sexual Battery, and one count of Attempted Rape.

{¶3} On March 21, 2008, Candela pled guilty by way of *North Carolina v. Alford* (1970), 400 U.S. 25, to three counts of Attempted Rape, felonies in the second degree, in violation of R.C. 2923.02/2907.02, and one count of Gross Sexual Imposition, a felony of the third degree, in violation of R.C. 2907.05.

{¶4} Candela filed a Motion Opposing the Retroactive Application of the Adam Walsh Act (AWA) and requested that he be classified pursuant to Megan's Law, the law in effect at the time his offenses occurred. He also requested that the court order a sexual predator evaluation, which the trial court granted. However, his motion to be classified pursuant to Megan's Law was overruled.

{¶5} Candela renewed his motion at the sentencing hearing on October 2, 2008, arguing that the risk assessment concluded he was at low-risk for re-offending, and therefore, pursuant to Megan's Law, he should be classified as a sexually oriented offender. The court overruled his motion, sentenced him to eight years for the Attempted Rape counts and five years for the Gross Sexual Imposition violations, with the sentences to be served concurrently, and classified him as a Tier III offender.

{¶6} Candela timely appeals and raises the following assignment of error:

{¶7} "[1.] The retroactive application of the AWA violates the Ex Post Facto Clause of the United States Constitution and the Retroactivity Clause of the Ohio Constitution."

{¶8} Senate Bill 10, also known as the Adam Walsh Child Protection and Safety Act, 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.

{¶9} 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.

{¶10} At the time of Candela's sentencing hearing, October 2, 2008, the AWA was already in effect. Pursuant to statute, the AWA was applicable because of Candela's sentencing date and "the trial court had no discretion not to apply the current version of the statute." *State v. Christian*, 10th Dist. No. 08AP-170, 2008-Ohio-6304, at ¶9. Other appellate districts have held that when "R.C. Chapter 2950's revisions had already been implemented at the time of appellant's sentencing, the trial court made no judicial determination with respect to appellant's classification as a Tier [III] sex offender." Id. at ¶8; *State v. Hollis*, 8th Dist. No. 91467, 2009-Ohio-2368, at ¶20 and ¶24 ("the trial court lacked any legal basis upon which to refuse to apply the AWA to [appellant], since his *** conviction *** falls under that act" and "[t]he trial court in this

case thus had no option but to apply the AWA, in spite of the date of [appellant's] offense").

{¶11} However, even if the AWA was applied retroactively in this case, for the reasons below, the retroactive application would still be constitutional in the absence of a prior final sentencing judgment or order.

{¶12} In general, statutes enjoy a strong presumption of constitutionality. "An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *State v. Cook*, 83 Ohio St.3d 404, 409, 1998-Ohio-291, quoting *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, at paragraph one of the syllabus. "A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality." Id. (citation omitted). "That presumption of validity of such legislative enactment cannot be overcome unless it appear[s] that there is a clear conflict between the legislation in question and some particular provision or provisions of the Constitution." Id. quoting *Xenia v. Schmidt* (1920), 101 Ohio St. 437, at paragraph two of the syllabus; *State ex rel. Durbin v. Smith* (1921), 102 Ohio St. 591, 600; *Dickman*, 164 Ohio St. at 147.

{¶13} Candela first argues that the AWA violates Section 10, Article I of the United States Constitution. Section 10, Article 1 of the United States Constitution provides that no State may enact an ex post facto law. Candela claims that the "AWA imposes burdens on defendants that have historically been regarded as punishment and operate as affirmative disabilities and restraints."

{¶14} An ex post facto law "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." *Cook*, 83 Ohio St.3d at 414 (citation omitted).

{¶15} "To determine whether a statute constitutes an unconstitutional ex post facto law, a reviewing court must conduct a two-tiered analysis." *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076, at ¶18, citing *Smith v. Doe* (2003), 538 U.S. 84, 92. 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." Id. (citations omitted). If "the legislature 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 legislature'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 *Doe*, 538 U.S. at 92.

{¶16} Candela argues that the AWA is both criminal in nature and has a punitive effect. We disagree.

{¶17} 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 what intent the legislative body had. "[G]iven the

similarities between the prior legislative intent that was specified in the version reviewed by the *Cook* Court and [the AWA's] legislative intent spelled out in R.C. 2950.02, we find that the intent of Senate Bill 10 as it pertains to R.C. Chapter 2950 is remedial, not punitive." *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051, at ¶28.

{¶18} Candela further argues that the purpose of the statute has also changed. Specifically, he maintains that under the former version of the statute, an offender's registration requirements were directly tied to his ongoing threat to the community and now the registration requirements only depend upon the offense committed. This argument also fails because "the old version of R.C. Chapter 2950's classification was also partially tied to the offense." Id. at ¶25. "Only at the classification hearing would it be determined whether [the offender] should be a habitual sex offender due to a prior conviction of a sexually oriented offense or a sexual predator because of his possible likelihood to engage in a sexually oriented offense in the future. Thus, the habitual sex offender and sexual predator determinations were tied more to the ongoing threat to the community." Id. The AWA Tiers are also 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.

{¶19} Candela further argues the fact that R.C. 2950 is within the criminal code shows the criminal nature of the AWA. However, although R.C. Chapter 2950 is contained in the criminal section of the Revised Code, the United States Supreme Court has indicated that the location or label of a sexual offender registration act will not change a remedial provision into a criminal statute when the title of the state code has other provisions which do not relate to criminal punishment. *Smith*, 538 U.S. at 95. In addition, other Ohio appellate courts have held that the placement of the sexual offender scheme in Title 29 of our Revised Code is insufficient to negate the General Assembly's expressed intent because Title 29 has numerous provisions which pertain solely to non-criminal matters. *G.E.S.*, 2008-Ohio-4076, at ¶22.

{¶20} 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).

{¶21} The *Cook* court concluded that the first version of the sexual offender laws did not impose any new affirmative disability or restraint upon a criminal defendant. *Cook*, 83 Ohio St.3d. at 418. The court emphasized that even prior to 1997, a sexual offender had been legally obligated to register with the sheriff of the county where he lived; since the act of registering only created a minor inconvenience for an offender, it was a "de minimus administrative requirement" which was similar to obtaining a driver's license; and even though the dissemination of the registration information could have a detrimental effect upon a sex offender, it was not impermissible for a remedial measure to carry a sting of punishment. Id.

{¶22} The registration requirements under the AWA are more rigorous then the ones reviewed by the *Cook* court; the offender is now required to register in more counties, and has a legal duty to provide more information. However, the Supreme Court of Ohio continues to hold that sex offender classifications are civil in nature. Most recently in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶30, the court restated the decision in *Cook* that the sex offender classification laws are remedial, not punitive. The registration statute that was in effect in *Wilson* was not exceedingly different from the AWA version[1].

{¶23} Additionally, it has been noted that, even if an offender has a duty to register more often, the basic act of registering has not changed; i.e., the act is a simple procedure that can still be described as de minimus. *State v. Desbiens*, 2nd Dist. No.

1. The registration law in effect at the time contained a permanent sexual predator label which is similar to a Tier III designation. Offenders were required to register with the sheriff where they work, live, and go to school. Sexual predators were required to register every 90 days. Community notification information was available on the internet. Further, residency restrictions were also similar to the current version of the statute.

22489, 2008-Ohio-3375, at ¶24. Accordingly, this factor does not weigh in favor of the AWA having a punitive effect.

{¶24} The second guidepost is the historical view of registration and notification requirements. The United States Supreme Court has held that "[o]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment. On the contrary, our criminal law tradition insists on public indictment, public trial, and public imposition of sentence. Transparency is essential to maintaining public respect for the criminal justice system, ensuring its integrity, and protecting the rights of the accused." *Smith*, 538 U.S. at 98-99. The *Cook* court's decision echoed this sentiment; holding that historically, the requirement of registration has been deemed a valid regulatory technique; and the dissemination of information is considered non-punitive when it supports a proper state interest. *Cook*, 83 Ohio St.3d at 418-419. Consequently, the second *Kennedy* guidepost does not weigh in favor of the conclusion that R.C. Chapter 2950 had become strictly punitive in nature.

{¶25} "The third guidepost is the element of scienter. [The AWA's] version of R.C. 2950.04 requires registration. Like the 1997 version, [the AWA] version does not have a scienter element. The act of failing to register alone is sufficient to trigger criminal punishment under R.C. 2950.99." *Byers*, 2008-Ohio-5051, at ¶40.

{¶26} The fourth guidepost analyzes retribution and deterrence. In *Cook*, the court held that registration and notification were remedial because they seek to protect the public from registrants who may reoffend. *Cook*, 83 Ohio St.3d at 420. The Court explained that registration and notification do not have much of a deterrent effect on a sex offender. Further, the court found that "[t]he registration and notification provisions

of R.C. Chapter 2950 do not seek vengeance for vengeance's sake, nor do they seek retribution. Rather, these provisions have the remedial purpose of collecting and disseminating information to relevant persons to protect the public from registrants who may reoffend." Id. Thus, it found that R.C. Chapter 2950 does not promote the traditional aims of punishment: retribution and deterrence. This same reasoning applies to the AWA version of R.C. Chapter 2950.

{¶27} The fifth *Kennedy* guidepost examines whether the behavior to which it applies is already a crime. The *Cook* court explained that any punishment for failing to register is a new offense that does not arise from the past sex offense; "the punishment is not applied retroactively for an act that was committed previously, but for a violation of law committed subsequent to the enactment of the law." Id. at 421. Since this aspect of R.C. Chapter 2950 has not been altered under the AWA, there is no logical reason to deviate from the *Cook* holding.

{¶28} As for the sixth guidepost, other Ohio appellate courts have found that there is an alternative purpose which may be rationally assigned to R.C. Chapter 2950, namely, protection of the public. *Byers*, 2008-Ohio-5051, at ¶47. The *Cook* court found that the alternate purpose of R.C. Chapter 2950 was to protect the public. *Cook*, 83 Ohio St.3d at 421. The court reasoned that sex offenders have a high rate of recidivism, which demands that steps be taken to protect the public against those most likely to reoffend. "Notification provisions allow dissemination of relevant information to the public for its protection." Id.

{¶29} The AWA version of R.C. Chapter 2950 has the same alternate purpose of protecting the public. Since there were no drastic changes to the statute, the *Cook*

reasoning applies to the AWA. The one major change in the registration requirement is longer registration periods; however, this serves to protect the public for a longer duration.

{¶30} The final guidepost raises the question of the excessiveness of the statutory scheme at issue in light of its alternate purpose. In upholding the pre-AWA statutory scheme in *Cook*, the Ohio Supreme Court focused on the scheme's narrowness. 83 Ohio St.3d at 421-423. The Court reasoned that the scheme imposed the harshest registration and notification requirements upon the most probable recidivists and placed the vast majority of information solely in the hands of law enforcement officials. Id. at 421-422. Further, the Court noted that the scheme provided a mechanism for offenders to submit evidence and petition to have their classification label and its obligations removed. Id. Thus, the Court concluded that the statutory scheme was not excessive in light of its protective purpose. Id. at 423.

{¶31} Although more information must be provided under R.C. Chapter 2950 than under the version considered in *Cook*, the registration and notification provisions of R.C. 2950 are still "nonpunitive and reasonably necessary for the intended purpose of protecting the public." *Byers*, 2008-Ohio-5051, at ¶54.

{¶32} Furthermore, other appellate districts have reviewed the AWA and have concluded that it does not violate the prohibition against ex post facto laws. *G.E.S.*, 2008-Ohio-4076, at ¶¶18-41; *State v. Longpre*, 4th Dist. No. 08CA3017, 2008-Ohio-3832, at ¶15; *Desbiens*, 2008-Ohio-3375, at ¶¶16-34; *In re Smith*, 3rd Dist. No. 1-07-58, 2008-Ohio-3234, at ¶¶24-40.

{¶33} The two prongs of the intent-effects test have been satisfied. The General Assembly intended that the current provisions of R.C. Chapter 2950 be remedial and the above analysis supports the conclusion that any punitive affect of the provisions are insufficient to negate the remedial purpose.

{¶34} Candela's argument that the AWA violated the constitutional prohibition against ex post facto laws is without merit.

{¶35} Candela next asserts that the Adam Walsh Act violates Section 28, Article II of the Ohio Constitution, which forbids the enactment of retroactive laws. Candela claims that "the fact that under AWA Mr. Candela must register as a sex offender for life, as opposed to only once a year for ten years, the law imposed new obligations and burdens which did not exist at the time that Mr. Candela committed the alleged offenses." Further, he claims that the "AWA eliminates [his] preexisting right to reside where he wishes."

{¶36} 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.

{¶37} 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.

{¶38} 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 v. Babcock & Wilcox Co*. (1988), 36 Ohio St.3d 100, 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.

{¶39} In *Cook*, the court found that the 1997 version of the sexual offender laws was remedial in nature. The court reasoned that "many of the requirements contained in R.C. Chapter 2950 are directed at officials rather than offenders." 83 Ohio St.3d at 411. Further, the court emphasized that the pre-1997 version as well as the version reviewed under *Cook*, had both required offenders to register, the 1997 version merely increased both frequency and duration of the requirement. Id. The court inferred that a sex offender could have no reasonable expectation that his prior actions could not be the subject of subsequent legislation. Id. at 412 (citation omitted). Additionally, as noted in the discussion above, the court held that the registration and verification

provisions were de minimus requirements which were necessary to achieve the goal of protecting society. Id. at 412-413.

{¶40} Even though the registration and verification requirements have been modified under the AWA, the foregoing points can still be made in regard to the present version of R.C. Chapter 2950. "The majority of requirements are directed at officials, department of corrections, judges, and the Attorney General. R.C. 2950.03 (directing official in charge of jail or state correctional institution, judge, Attorney General, or sheriff to provide notice depending on the situation); R.C. 2950.031 (requires Attorney General to act); R.C. 2950.032 (requires Attorney General to act); R.C. 2950.033 (Attorney General to send letter of non-termination of registration requirements); R.C. 2950.043 (sheriff provide notice to Attorney General of registration); R.C. 2950.10 (sheriff notify victim); R.C. 2950.11 (sheriff to provide community notification); R.C. 2950.11 (sheriff confirm reported address of offender); R.C. 2950.13 (duties of Attorney General); R.C. 2950.131 (duties of *** sheriff regarding internet sex offender database); R.C. 2950.132 (additional duties of the Attorney General); R.C. 2950.14 (duty of department of rehabilitation and correction); R.C. 2950.16 (department of rehabilitation requirement to adopt rules to treatment programs). Only the registration and verification provisions require the offender to act. R.C. 2950.04 (requiring offender to register); R.C. 2950.041 (requiring child-victim oriented offense duty to register); R.C. 2950.042 (verification by offender); R.C. 2950.05 (offender register notice of change of address of residence, school, or place of employment); R.C. 2950.06 (verification of current resident, school or place of employment); R.C. 2950.15 (Tier I offender after 10 years may request termination of registration duties)." *Byers*, 2008-Ohio-5051, at ¶67.

{¶41} "While 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. Therefore, the AWA does not violate Ohio's Retroactivity Clause.

{¶42} Candela next claims that the new system for classification of sex offenders violates the separation of powers doctrine by "unconstitutionally limiting the powers of the judicial branch of government." Further, he asserts that the "AWA divests the judiciary branch of its power to sentence a defendant."

{¶43} The application of the AWA to persons previously classified as sexual offenders, with judgments that have become final, results in those prior final judicial decisions being re-opened and ultimately annulled, reversed or modified, which is contrary to the principles of res judicata and separation of powers. When a judgment of the court is not annulled, reversed or modified, as in the instant case, the principles of res judicata and the separation of powers doctrine have not been violated.

{¶44} This court has recognized that "[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." *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, at ¶99. However, "it is well settled that the legislature cannot annul, reverse or modify a judgment of a court already rendered." *Bartlett v. Ohio* (1905), 73 Ohio St. 54, 58; *Plaut v. Spendthrift Farm, Inc.* (1995), 514 U.S. 211, 219 (Congress may not interfere with the power of the federal judiciary "to render dispositive judgments" by "commanding the federal courts to reopen final judgments") (citation omitted). "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.

{¶45} Had Candela been previously classified under the old law in a journalized final sentencing judgment, the Legislature would have no authority to order his reclassification. Since Candela was never classified as a sexual offender because his original classification was under the AWA, the judgment of the trial court was never annulled, reversed or modified. Thus, a final order of the lower court did not have to be vacated in order to classify him under the AWA.

{¶46} Candela next argues that the AWA violates the United States Constitution's prohibition against excessive and cruel and unusual punishment. Admittedly, the AWA lengthens the registration period. However, "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." *Byers*, 2008-Ohio-5051, at ¶77.

{¶47} As a result, this argument is without merit.

{¶48} Candela next argues that the AWA residency restrictions violate the Due Process Clause of the United States Constitution and Section 16, Article I of the Ohio Constitution. Candela contends that the AWA categorically bars him from residing within 1000 feet of a school, preschool or child day-care center. This requirement is contained in R.C. 2950.034 in the AWA. He asserts that there is a possibility of being

repeatedly uprooted and forced to abandon his home if a school, preschool, or a day-care center opens near his residence.

{¶49} "The difference between pre-Senate Bill 10 R.C. 2950.031 and Senate Bill 10 R.C. 2950.034 is minimal. The prior version indicated that a person convicted of a sexually oriented offense could not 'establish a residence * * * within one thousand feet of any school premises.' R.C. 2950.031(A). [The AWA], in addition to restricting residency within one thousand feet of any school premises, also restricts residency within one thousand feet of a 'preschool or child day-care center premises.' R.C. 2950.034(A)." *Byers*, 2008-Ohio-5051, at ¶95.

{¶50} The Ohio Supreme Court has held that "[b]ecause R.C. 2950.031 was not expressly made retrospective, it does not apply to an offender who bought his home and committed his offense before the effective date of the statute." *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, at syllabus. The *Hyle* Court found that since the language in former R.C. 2950.031 did not express a clear intention to make the residency restriction retroactive, the prospective presumption could not be overcome. Id. "[The AWA] only made a slight change to the residency restriction by adding day-cares and preschools to the residency prohibition; no other drastic change in that statute was made. As such, *Hyle* is controlling." *Byers*, 2008-Ohio-5051, at ¶99.

{¶51} Therefore, if Candela bought his home and committed his offense before the effective date of the statute, R.C. 2950.034 cannot be applied to his residency at that home. As the state points out, Candela has failed to show any actual deprivation of property rights. Thus, without an indication in the record that he purchased the residence prior to the enactment of the statute, we cannot find merit with this argument.

{¶52} Finally, Candela argues that the AWA violates the Double Jeopardy Clause of the United States Constitution and Section 10, Article I of the Ohio Constitution "by unconstitutionally inflicting a second punishment upon a sex offender for a singular offense."

{¶53} The Double Jeopardy Clause of the federal Constitution states that an individual cannot be placed "in jeopardy of life or limb" for the same offense twice. "[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.

{¶54} 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 the statute was determined in *Cook* to be remedial and not punitive, it could not violate the Double Jeopardy Clause. Id.

{¶55} Since we find that the AWA, R.C. Chapter 2950, sexual offender classification 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.

{¶56} Candela's sole assignment of error is without merit.

{¶57} For the foregoing reasons, the Judgment Entry of the Ashtabula County Court of Common Pleas, classifying Candela as a Tier III offender, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, J., concurs 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.

{¶58} I concur with the majority's opinion.

{¶59} This court has previously rejected challenges to Senate Bill 10 on the grounds it violates the Ex Post Facto Clause and the prohibition against retroactive laws. *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, at ¶63-95. I note that *Swank* is factually similar to the case sub judice, in that the offender committed the crime prior to the enactment of Senate Bill 10 but was originally classified under Senate Bill 10 at the sentencing hearing. Id. at ¶17.

{¶60} Further, in regard to the retroactivity analysis, the Supreme Court of Ohio has held:

{¶61} "[W]e observe that an offender's classification as a sexual predator is a collateral consequence of the offender's criminal acts rather than a form of punishment per se. Ferguson has not established that he had any reasonable expectation of finality in a collateral consequence that *might* be removed. *** Absent such an expectation,

there is no violation of the Ohio Constitution's retroactivity clause." *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, at ¶34. (Emphasis sic.)

{¶62} Candela was indicted in July 2007 for crimes that allegedly occurred between 2002 and 2006. During that time period, as a result of convictions of the offenses charged, precedent clearly established he could have been classified as a sexually oriented offender (registration required for 10 years), a habitual sex offender (registration required for 20 years), or a sexual predator (potential lifetime registration). See former R.C. 2950.07(B). See, also, e.g., *State v. Cook* (1998), 83 Ohio St.3d 404, 407-408. As a Tier III sex offender, Candela is required to register for the remainder of his life. Had he been classified under the former version of R.C. 2950 et seq., he could have been adjudicated a sexual predator, which also had a potential lifetime registration requirement. Accordingly, he did not have any expectation of finality in a shorter registration term. As a result, the concerns and infirmities noted in this court's opinion in *State v. Ettenger* do not exist, and the precedent of the Supreme Court of Ohio as set out in *State v. Cook* and *State v. Ferguson*, supra, controls. See *State v. Ettenger*, 11th Dist. No. 2008-L-054, 2009-Ohio-3525, at ¶54-59. See, also, *State v. Swank*, 2008-Ohio-6059, at ¶63-95.

{¶63} The judgment of the trial court should be affirmed.

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

{¶64} I concur with the majority's disposition of Mr. Candela's third issue – that application of AWA to him violates the doctrine of separation of powers – due to the fact

that it was applied to him on his initial sentencing. I believe that neither his fourth issue – that application of AWA constitutes cruel and unusual punishment – nor his fifth – that application of AWA's residency restrictions to him violates substantive due process – nor his sixth – that application of AWA constitutes double jeopardy – are ripe for review on the facts presented. However, as I find that application of AWA to Mr. Candela violates the federal ban against ex post facto laws, as well as the Ohio ban on retroactive laws, I would reverse and remand.

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

{¶66} "'"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.)

{¶67} 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.

{¶68} In this case, the Ohio General Assembly specifically denominated the remedial purposes of AWA. See, e.g., *Swank*, supra, at ¶73-80. In *Smith*, 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.

{¶69} 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.

{¶70} 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 ***[.]" 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 R.C. 2950.04, 2950.041 ***, 2950.05, and 2950.06 of the Revised Code and the duration of the duties."

{¶71} 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:

{¶72} "*** the General Assembly expressed a remedial intent in the legislation. However, the stated purpose of protecting the public from those likely to reoffend is substantially undermined by the total removal of any discretion or consideration in applying the tier labels to a particular offender. The fact of conviction alone controls the labeling process, but simply is not in and of itself indicative of a realistic likelihood of a person to recidivate. In addition, the severity of the potential penalty for violating [the registration and notification] provisions of [AWA] depends upon the underlying offense that serves as the basis for the offender's registration or notification conditions." *State v. Omiecinski*, 8th Dist. No. 90510, 2009-Ohio-1066, at ¶91. (Sweeney, J., dissenting in part.)

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

{¶74} 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.

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

{¶75} 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?

{¶76} 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.)

{¶77} 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.

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

{¶79} 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.

{¶80} 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.

{¶81} 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.* (3d Cir., 1996), 81 F.3d 1235, 1255.

{¶82} 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.

{¶83} 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.

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

{¶85} 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:

{¶86} "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*, supra, at 1015. (Footnote omitted.)

{¶87} 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.

{¶88} 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.

{¶89} 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. Candela.

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

{¶91} "'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.)

{¶92} 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.

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

{¶94} As I find AWA to violate both the ban on ex post facto laws, and that on retroactive laws, I would reverse the judgment of the trial court.

{¶95} I respectfully concur in part, and dissent in part.