[Cite as *State v. Garner*, 2009-Ohio-4448.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Respondent-Appellee,	:	**CASE NO. 2008-L-087**
- vs -	:	
RENDELL M. GARNER,	:	
Defendant-Petitioner-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 MS 000045.

Judgment: Reversed and remanded.

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

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

COLLEEN MARY O'TOOLE, J.

{¶1} Rendell M. Garner appeals from the judgment of the Lake County Court of Common Pleas, reclassifying him from a Sexually Oriented Offender, with a ten year registration requirement pursuant to former R.C. Chapter 2950, to a Tier III Offender with Notification under Am. Sub. Senate Bill 10 ("S.B. 10"), Ohio's version of the Adam Walsh Child Protection and Safety Act, also largely encoded at present R.C. Chapter 2950. This subjects him to S.B. 10's most onerous registration requirements, for the remainder of his life. We reverse and remand.

{¶2} May 11, 1999, Mr. Garner entered a written plea of guilty to the crime of rape, a first degree felony in violation of R.C. 2907.02. June 15, 1999, he was sentenced to a term of three years imprisonment, and found to be a sexually oriented offender.

{¶3} By a letter dated November 26, 2007, the Attorney General of Ohio informed Mr. Garner that, pursuant to S.B. 10, he had been reclassified as a Tier III Offender. January 30, 2008, Mr. Garner petitioned to contest the reclassification, and moved the court to be exempted from the notification provisions of R.C. 2950.11. The state answered February 7, 2008, opposing Mr. Garner's petition. Hearing went forward May 7, 2008.

{¶4} Thereafter, the trial court reclassified Mr. Garner. The reclassification was embodied in a judgment entry filed May 9, 2008. June 3, 2008, Mr. Garner timely noticed this appeal, assigning a single error:

{¶5} "APPLICATION OF S.B. 10 TO CLASSIFY APPELLANT AS A TIER III OFFENDER VIOLATES THE EX POST FACTO CLAUSE OF THE UNTIED STATES CONSTITUTION AND THE RETROACTIVE LAWS CLAUSE OF THE OHIO CONSTITUTION, THE SEPARATION OF POWERS DOCTRINE OF THE FEDERAL AND STATE CONSTITUTIONS AND THE APPELLANT'S RIGHTS TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS AS GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS."

{¶6} Mr. Garner presents five issues for our review under his assignment of error. Prior to considering them, a brief encapsulation of S.B 10's requirements is in order.

{¶7} Under the new legislation, the basic system for sexual offender classification was altered considerably. Prior to S.B. 10, if a criminal defendant was found guilty of a sexually oriented offense which was not exempted from any registration, he could be classified as a sexually oriented offender, a habitual sex offender, or a sexual predator. The prior statutory scheme also provided that a defendant's designation under the three categories was to be predicated upon the nature of the underlying offense and findings of fact made by the trial court during a sexual classification hearing.

{¶8} Pursuant to the new law, the foregoing three "labels" for a sexual offender are no longer applicable. Instead, a defendant who has committed a sexually oriented offense can only be designated as either a sex offender or a child-victim offender. Furthermore, the extent of the defendant's registration and notification requirements will depend upon his placement in one of three "tiers" of sexual offenders. The determination of which tier is applicable to a given defendant turns solely upon the exact crime or offense he has committed.

{¶9} The second major change of the sexual offender system concerns the duration of the registration and notification requirements. Prior to S.B. 10, the governing law generally provided for the following: (1) if a defendant was deemed a sexually oriented offender, he was required to register once each year for a period of ten years, but there was no notification requirement; (2) if he was labeled as a habitual sex offender, he had to register once every six months for twenty years, and the community could be given notice of his presence at the same rate; and (3) if he was designated a sexual predator, the duty to register was once every three months for life, and

notification could also take place at the same rate for life. Under the new scheme, the registration and notification requirements are substantially different: (1) if the defendant's sexual offense places him in the "Tier I" category, he is required to register once every year for a period of fifteen years, but there is no community notification; (2) if the defendant's offense falls under the "Tier II" category, registration must take place once every six months for twenty-five years, and there is still no notification requirement; and (3) if the sexual offense places the defendant in the "Tier III" category, the requirements are essentially the same as for a sexual predator, in that there is a duty to register once every three months for life, and community notification can occur at that same rate for life.

{¶10} As to the specific requirements of registration, the original version of the "sexual offender" law stated that the defendant only had to register with the sheriff of the county where he was a resident. See *State v. Cook* (1998), 83 Ohio St.3d 404, 408. Under the latest version of the scheme, though, the places where registration is required has been expanded to now include: (1) the county where the offender lives; (2) the county where he attends any type of school; (3) the county where he is employed if he works there for a certain number of days during the year; (4) if the offender does not reside in Ohio, any county of this state where he is employed for a certain number of days; and (5) if he is a resident of Ohio, any county of another state where he is employed for a certain number of days. Similarly, the extent of the information which must be provided by an offender has increased. As part of the general registration form, the offender must indicate: his full name and any aliases, his social security number and date of birth; the address of his residence; the name and address of his

employer; the name and address of any type of school he is attending; the license plate number of any motor vehicle he owns; the license plate number of any vehicle which he operates as part of his employment; a description of where his motor vehicles are typically parked; his driver's license number; a description of any professional or occupational license which he may have; any e-mail addresses; all internet identifiers or telephone numbers which are registered to, or used by, the offender; and any other information which is required by the bureau of criminal identification and investigation.

{¶11} Under his first issue, Mr. Garner argues that S.B. 10 violates Section 10, Article I of the United States Constitution, which prohibits the enactment of ex post facto laws. Ex post facto challenges will only lie against criminal statutes. See, e.g., *State v. Swank*, 11th Dist. No. 2008-L-019, 2008-Ohio-6059, at ¶69. When considering such challenges, courts must apply the "intent-effects" test. Id. Mr. Garner argues that the intent of the Ohio General Assembly to pass a criminal statutory scheme in S.B. 10 is revealed by the fact that it is largely codified within Title 29 of the Revised Code, which deals with crime. He further argues that the effect of S.B. 10 is clearly punitive. He asserts that the effects of the notification procedures embodied in the statute are similar to the shaming and public humiliations used to punish criminals in colonial times. He notes that, unlike the classification system formerly in effect, which was based on a determination by the trial court, following hearing and the introduction of evidence, including psychological tests, of how likely an offender was likely to reoffend, the present system classes offenders *solely* on the basis of the crime for which they were convicted or pleaded guilty. He remarks on the fact that failure to comply with S.B. 10's complex system of registration, verification, and notification, subjects an individual to

criminal penalties.

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

{¶13} "'"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.)

{¶14} The United States Supreme Court recently summarized the "intent-effects" test, in a case concerning a challenge to the constitutionality of Alaska's then-sex offender registration law, *Smith v. Doe*, 534 U.S. 84. Speaking for the Court, Justice Kennedy wrote:

{¶15} "We must 'ascertain whether the legislature meant the statute to establish "civil" proceedings.' *Kansas v. Hendricks*, 521 U.S. 346, 361, *** (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is '"so punitive either in purpose or effect as to negate (the State's) intention" to deem it "civil."' *Ibid.* (quoting *United States v. Ward*, 448 U.S. 242, 248-249, *** (1980)). Because we 'ordinarily defer to the legislature's

stated intent,' *Hendricks, supra*, at 361, '"only the clearest proof" will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty,' *Hudson v. United States*, 522 U.S. 93, 100, *** (1997) (quoting *Ward, supra*, at 249); see also *Hendricks, supra,* at 361; *United States v. Ursery*, 518 U.S. 267, 290, *** (1996); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 365, *** (1984).

{¶16} "Whether a statutory scheme is civil or criminal 'is first of all a question of statutory construction.' *Hendricks, supra*, at 361 (internal quotation marks omitted); see also *Hudson, supra*, at 99. We consider the statute's text and its structure to determine the legislative objective. *Flemming v. Nestor*, 363 U.S. 603, 617, *** (1960). A conclusion that the legislature intended to punish would satisfy an *ex post facto* challenge without further inquiry into its effects, so considerable deference must be accorded to the intent as the legislature has stated it." *Smith* at 92-93. (Parallel citations omitted.)

{¶17} In this case, the Ohio General Assembly specifically denominated the remedial purposes of S.B. 10. See, e.g., *Swank*, supra, at ¶73-80. In *Smith*, the United States Supreme Court found similar declarations by the Alaskan legislature highly persuasive. Id. at 93. However, a closer reading of S.B. 10's provisions casts doubt upon the legislature's declaration.

{¶18} First, there is the simple fact that S.B. 10 is part of Title 29 of the Revised Code. The United States Supreme Court rejected the notion that a statute's placement within a criminal code is solely determinative of whether the statute is civil or criminal in *Smith*. Id. at 94-95. However, it is clearly indicative of the statute's purpose. See, e.g.,

Mikaloff v. Walsh (N.D. Ohio 2007), Case No. 5:06-CV-96, 2007 Dist. LEXIS 65076, at 15-16.

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

{¶20} Both the placement of S.B. 10 within the Revised Code, and the language of the statute, indicates a punitive, rather than remedial, purpose.[1] Further, as Judge James J. Sweeney of the Eighth Appellate District recently noted regarding the intent of S.B. 10:

{¶21} "*** 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

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

applying the tier labels to a particular offender. The fact of conviction alone controls the labeling process, but simply is not in and of itself indicative of a realistic likelihood of a person to recidivate. In addition, the severity of the potential penalty for violating [the registration and notification] provisions of [S.B. 10] depends upon the underlying offense that serves as the basis for the offender's registration or notification conditions." *State v. Omiecinski*, 8th Dist. No. 90510, 2009-Ohio-1066, at ¶91. (Sweeney, J., dissenting in part.)

{¶22} Consequently, we find that the intent of S.B. 10 is punitive, rather than remedial.

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

{¶24} Regarding the first factor, S.B. 10 clearly imposes significant affirmative disabilities upon offenders. They must register personally with the sheriffs of any county in which they live, work, or attend school, as often as quarterly. Failure to do so may

result in felony prosecution – even if the offender is, for instance, hospitalized, and unable to go to the sheriff's office.

{¶25} 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?

{¶26} S.B. 10 significantly limits where an offender may live. The right to live where one wishes is a fundamental attribute of personal liberty, protected by the United States Constitution. *Omiecinski*, supra, at ¶82. (Sweeney, J., dissenting in part.)

{¶27} S.B. 10 requires offenders to surrender *any* information required by the bureau of criminal identification and investigation – or face criminal prosecution. Consequently, it grossly invades offenders' rights to be free of illegal searches and to counsel, at the very least.

{¶28} Thus, S.B. 10 imposes significant disabilities and restraints upon offenders, which indicates it is an unconstitutional ex post facto law under the first *Kennedy* factor.

{¶29} The second *Kennedy* factor requires us to consider whether S.B. 10

imposes conditions upon offenders traditionally regarded as punishment. Clearly it does. The affirmative duties to register constantly with law enforcement, and turn over to them vast amounts of private information, the limitations upon where an offender may live, and the duty to answer any question posed by the BCI renders the registration requirements of S.B. 10 the functional equivalent of community control sanctions.

{¶30} Under the third *Kennedy* factor, we must consider whether the registration and notification requirements of S.B. 10 only come into play upon a finding of scienter. Clearly they do not. There are strict liability sex offenses, such as statutory rape. Nevertheless, as the Supreme Court of Alaska remarked in considering this factor in a challenge to Alaska's version of Megan's Law, the vast majority of sex offenses do require a finding of scienter. *Doe v. Alaska* (2008), 189 P.3d 999, 1012-1013. We conclude, as did the Alaska court, that this factor provides some support for the punitive effect of S.B. 10. Cf. id. at 1013.

{¶31} The fourth *Kennedy* factor requires us to determine whether the registration and notification requirements of S.B. 10 fulfill two of the traditional aims of punishment: retribution and deterrence. "Retribution is vengeance for its own sake. It does not seek to affect future conduct or solve any problem except realizing 'justice.' Deterrent measures serve as a threat of negative repercussions to discourage people from engaging in certain behavior. Remedial measures, on the other hand, seek to solve a problem *** [.]" *Doe v. Alaska*, supra, at 1013, fn. 107, citing *Artway v. Attorney Gen. of N.J.* (C.A.3, 1996), 81 F.3d 1235, 1255.

{¶32} We find 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.

{¶33} 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.

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

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

{¶36} "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.)

{¶37} Similarly, only conviction for, or a guilty plea to, a sex offense (and kidnapping of a minor) triggers the provisions of S.B. 10. Consequently, the fifth *Kennedy* factor supports the conclusion that S.B. 10 is punitive in effect.

{¶38} Under the sixth *Kennedy* factor, we consider whether the law has some rational purpose other than punishment. Clearly S.B. 10 has an important remedial purpose, by keeping law enforcement and the public aware of potential recidivists amongst sex offenders. But the seventh *Kennedy* factor requires analysis of whether the law in question is excessive in relation to that alternate purpose. S.B. 10 is excessive. It punishes offenders by requiring personal registration, in a day of instant communications. It punishes by requiring offenders to turn over personal information bearing no rational relationship to the remedial purpose of the law. It punishes offenders by restricting them from living near schools and day care facilities, even if their crime had no relationship to children. It punishes offenders by requiring them to submit to *any* questioning, on any subject, by the BCI.

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

{¶40} The first issue has merit.

{¶41} Under his second issue, Mr. Garner alleges that the retroactive application of S.B. 10 violates the prohibition against retroactive laws in Article II, Section 28 of the

Ohio Constitution, which provides, in pertinent part: "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts ***[.]"

{¶42} "'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 ***.' [*State v.*] *Ferguson*, [120 Ohio St.3d 7, 2008-Ohio-4824,] at ¶13." *Swank*, supra, at ¶91. (Parallel citations omitted.)

{¶43} 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.

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

{¶45} However, our analysis under Section 28, Article II, is incomplete, without enquiring whether S.B. 10, as applied to Mr. Garner, violates the ban against laws impairing the obligation of contract. We find it does.

{¶46} 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.

{¶47} "It is well established that a plea agreement is viewed as a contract between the State and a criminal defendant. *Santobello v. New York* (1971), 404 U.S. 257, ***. Accordingly, if one side breaches the agreement, the other side is entitled to either rescission or specific performance of the plea agreement. Id., at 262." *State v. Walker*, 6th Dist. No. L-05-1207, 2006-Ohio-2929, at ¶13. (Parallel citations omitted.) Ohio courts have noted that, in the main, the contract is completely executed once the defendant has pleaded guilty, and the trial court has sentenced him or her. See, e.g., *State v. McMinn* (June 16, 1999), 9th Dist. No. 2927-M, 1999 Ohio App. LEXIS 2745, at 11; accord, *State v. Pointer*, 8th Dist. No. 85195, 2005-Ohio-3587, at ¶9. However, to the extent the plea agreement contains further promises, the contract remains

executory, and may be enforced by either party. See, e.g., *Parsons v. Wilkinson* (S.D. Ohio 2006), Case No. C2-05-527, 2006 U.S. Dist. LEXIS 54979 (allegation by inmate that plea agreement superseded parole board's authority regarding timing of parole hearing sufficient to withstand state attorney general's motion to dismiss in Section 1983 action), citing *Layne v. Ohio Adult Parole Auth.*, 97 Ohio St.3d 456, 2002-Ohio-6719, at ¶28; see, also, *McMinn*, supra, at 11, fn. 6.

{¶48} Clearly, Mr. Garner'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.

{¶49} Thus, we find that Mr. Garner'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.

{¶50} It appears that the second part of the test – whether a change in the law has impaired the contract established between Mr. Garner and the state, *Trumbull Cty. Bd. of Commrs.* at 602-603 – is also met by S.B. 10. By changing his classification from "sexually oriented offender" to "Tier III" offender, the state has unilaterally imposed new affirmative duties upon Mr. Garner in relation to the contract. Further, the third part of the test for determining if a law unconstitutionally impairs a contract – i.e., whether the

impairment is substantial, *Trumbull Cty. Bd. of Commrs.* at 603 – is obviously fulfilled, since the duties imposed upon Tier III offenders are greater in number and duration than those which were imposed upon sexually oriented offenders.

{¶51} Consequently, we find that the application of S.B. 10 to Mr. Garner violates the prohibition in Section 28, Article II of the Ohio Constitution against laws impairing the obligation of contracts.[2]

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

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

{¶54} "'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

2. We recognize that other appellate courts have reached contrary conclusions. Thus, in *Sigler v. State*, 5th Dist. No. 08-CA-79, 2009-Ohio-2010, the Fifth District rejected a breach of contract argument on the basis that members of one branch of government (i.e., prosecutors, representing the executive) cannot bind future actions by the legislature. This seems beside the point: of course the legislature can change the law. We merely hold 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. We are not holding that former R.C. Chapter 2950 created any contractual rights at all on the part of persons classified thereunder. Rather, we are holding that a valid plea agreement entered by the state with a defendant is a contract incorporating the terms of the classification made.

departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others.' *State ex rel. Bryant v. Akron Metro. Park Dist*. (1929), 120 Ohio St. 464, 473, ***." (Parallel citations omitted.)

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

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

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

affect remedies by which rights are enforced must precede their final adjudication.' Id. at 152-153.

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

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

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

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

{¶62} "It is also argued that the Ohio Supreme Court has characterized the registration and notification requirements of the Sex Offender Act as 'a collateral consequence of the offender's criminal acts,' in which the offender does not possess a

reasonable expectation of finality. *Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, at ¶34, ***(citations omitted); *Linville*, 2009-Ohio-313, at ¶24 (citation omitted).

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

{¶64} "In the present case, Spangler had every reasonable expectation of finality in the trial court's April 27, 2001 Judgment Entry, i.e., that he would have to comply with five years of community control sanctions, pay the fine of $350, and register for a period of ten years as a sexually oriented offender." (Parallel citations omitted.)

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

{¶66} The third issue has merit.

{¶67} By his fourth issue, Mr. Garner asserts that he has been deprived of

procedural due process in being reclassified without a hearing. We note that he was able, under the statute, to petition the trial court to find that the new classification requirements were inapplicable to him, and did so petition, with a hearing consequent to that. Apparently, Mr. Garner is actually challenging whether he may constitutionally be reclassified without a prior, evidentiary hearing, as occurred for certain offenders under the former sex offender laws.

{¶68} Given our disposition of Mr. Garner's first two issues, we find his fourth issue moot.

{¶69} By his fifth and last issue, Mr. Garner asserts that his reclassification as a Tier III offender deprives him of substantive due process, due to the restriction set forth at R.C. 2950.034, which prevents those so classified from living within one thousand feet of any school, preschool, or daycare facility. We find this issue lacks ripeness.

{¶70} "'The basic principle of ripeness may be derived from the conclusion that "judicial machinery should be conserved for problems which are real or present and imminent, not squandered on problems which are abstract or hypothetical or remote." (***) The prerequisite of ripeness is a limitation on jurisdiction that is nevertheless basically optimistic as regards the prospects of a day in court: the time for judicial relief is simply not yet arrived, even though the alleged action of the defendant foretells legal injury to the plaintiff.' Comment, Mootness and Ripeness: The Postman Always Rings Twice (1965), 65 Colum.L.Rev. 867, 876." *State ex rel. Elyria Foundry Co. v. Indus. Comm. of Ohio* (1998), 82 Ohio St.3d 88, 89.

{¶71} As the record in this case does not disclose that Mr. Garner has actually been deprived of his right to live where he pleases, we find his fifth issue lacks ripeness.

{¶72} The assignment of error has merit.

{¶73} The judgment of the Lake County Court of Common Pleas is reversed, and this matter is remanded. Mr. Garner shall have to fulfill his registration requirements, and all other duties, under his original classification.

{¶74} It is the further order of this court that appellee is assessed costs herein taxed.

{¶75} The court finds there were reasonable grounds for this appeal.

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

DIANE V. GRENDELL, J., concurs in part, dissents in part, with a Concurring/ Dissenting Opinion.

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

{¶76} I would follow this court's opinion in *State v. Ettenger*, 11th Dist. No. 2008-L-054, 2009-Ohio-3525.

{¶77} In June 1999, Garner was classified a sexually oriented offender and, under the former sex offender registration law, he was required to register for a finite, ten-year period. As Garner's ten-year period ended in June 2009, he is no longer subject to the reporting requirements under former R.C. Chapter 2950.

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

DIANE V. GRENDELL, J., concurs in part, dissents in part, with a Concurring/ Dissenting Opinion.

{¶79} I concur with the judgment ultimately reached by the majority, that Garner may not be constitutionally reclassified under the provisions of the Adam Walsh Act. I further concur in the majority's holding that Garner's reclassification under the Adam Walsh Act violates the separation of powers doctrine. Garner's duty to register as a sex offender and provide appropriate notification as required by his original sentencing order remains in full force and effect.

{¶80} I dissent, however, from the majority's conclusion that the retroactive application of the Adam Walsh Act violates the ex post facto clause of the United States Constitution and the retroactivity and contract clauses of the Ohio Constitution for the reasons set forth in *McCostlin v. State*, 11th Dist. No. 2008-L-117, 2009-Ohio-4097, *Naples v. State*, 11th Dist. No. 2008-T-0092, 2009-Ohio-3938, and *Spangler v. State*, 11th Dist. No. 2008-L-062, 2009-Ohio-3178.