

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

RODNEY LEE SEARS,	:	
Petitioner-Appellant,	:	CASE NO. CA2008-07-068
	:	
- vs -	:	<u>OPINION</u>
	:	7/20/2009
	:	
STATE OF OHIO,	:	
Respondent-Appellee.	:	

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2008 CVH 00212

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BRESSLER, J.

{¶1} Petitioner-appellant, Rodney Lee Sears, appeals the decision of the Clermont County Court of Common Pleas denying his challenges to the constitutionality of his sexual offender reclassification.

{¶2} In March 2006, appellant was convicted in Greene County of importuning in violation of R.C. 2907.07(D)(2) and attempted unlawful sexual conduct with a minor in violation of R.C. 2923.02(A) and R.C. 2907.04(A). Appellant was sentenced to community control and found to be a sexually-oriented offender pursuant to prior R.C. Chapter 2950.

{¶3} On November 26, 2007, appellant received a letter from the Ohio Attorney General stating that he has been reclassified as a Tier II sexual offender as the result of the Ohio General Assembly's passage of Senate Bill 10 amendments to R.C. Chapter 2950, Ohio's Sex Offender Registration and Notification Act.¹ Appellant was advised that as a result of his reclassification, he was subject to registration as such every 180 days for 25 years.

{¶4} Appellant filed a petition contesting his reclassification and a complaint for declaratory judgment, arguing that his reclassification under Ohio's Adam Walsh Act is unconstitutional. The trial court overruled his motions, and found that Ohio's Adam Walsh Act is constitutional. Appellant appeals the trial court's decision and raises two assignments of error.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED IN FINDING THAT THE RETROACTIVE APPLICATION OF SENATE BILL 10 DOES NOT VIOLATE THE EX POST FACTO, DUE PROCESS, AND DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES CONSTITUTION AND THE RETROACTIVITY CLAUSE OF SECTION 28, ARTICLE II, OHIO CONSTITUTION; AS WELL AS THE PROHIBITION AGAINST CRUEL AND UNUSUAL

PUNISHMENTS AND REQUIREMENTS OF THE SEPARATION OF POWERS; FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION; SECTIONS 9 AND 10, ARTICLE I, OHIO CONSTITUTION."

{¶7} In his first assignment of error, appellant presents six specific constitutional challenges to Ohio's Adam Walsh Act. Appellant argues that Ohio's Adam Walsh Act violates the Ex Post Facto, Due Process, and Double Jeopardy Clauses of the United States Constitution, the Retroactivity Clause of the Ohio Constitution, the prohibition against cruel and unusual punishment, and the requirements of the separation of powers. This court has previously held that the law in Ohio's Adam Walsh Act does not violate the Ex Post Facto Clause, the Double Jeopardy Clause, and the prohibition against cruel and unusual punishment of the United States and Ohio Constitutions. See *State v. Bell*, Clermont App. No. CA2008-05-044, 2009-Ohio-2335, ¶104, citing *State v. Williams*, Warren App. No. CA2008-02-029, 2008-Ohio-6195, ¶72, 74-75, 106, 111. Likewise, this court has held that Ohio's Adam Walsh Act does not violate the Ohio Constitution's prohibition against retroactive laws. *Ritchie v. State*, Clermont App. No. CA2008-07-073, 2009-Ohio-1841, ¶16, citing *Williams* at ¶36. Further, Ohio's Adam Walsh Act does not violate appellant's due process rights. *Bell* at ¶104, citing *Williams* at ¶49, 60, 66, 72, 74. See, also, *In re S.R.P.*, Butler App. No. CA2007-11-027, 2009-Ohio-11, ¶31.

{¶8} While this court has not previously determined whether the law in Ohio's Adam Walsh Act violates the separation of powers requirement of the United States Constitution, this court has held that it does not violate the separation of powers requirement of the Ohio Constitution. *Williams*, 2008-Ohio-6195, ¶97. In *Williams* at

1. In his brief, appellant uses the phrase, "Senate Bill 10," when referring to the Sex Offender Registration and Notification Act as amended by Senate Bill 10, or Ohio's version of the Adam Walsh Act. We will use

¶198, this court quoted the Third Appellate District in *In re Smith*, Allen App. No. 1-07-58, 2008-Ohio-3234, ¶39, which held,

"the classification of sex offenders has always been a legislative mandate, not an inherent power of the courts. Without the legislature's creation of sex offender classifications, no such classification would be warranted. Therefore, * * * we cannot find that sex offender classification is anything other than a creation of the legislature, and therefore, the power to classify is properly expanded or limited by the legislature."

{¶19} Further, in *Williams* at ¶100-101, this court quoted the Clermont County Common Pleas Court in *Slagle v. State*, 145 Ohio Misc.2d 98, 2008-Ohio-593, ¶21, which stated, "[the legislature] has not abrogated final judicial decisions without amending the underlying applicable law. Instead, the [legislature] 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. Application of this new law does not order the courts to reopen a final judgment, but instead simply changes the classification scheme. This is not an encroachment on the power of the judicial branch of Ohio's government." See, also, *State v. Byers*, Columbiana App. No. 07 CO 39, 2008-Ohio-5051, ¶73-74 (adopting the reasoning of *Slagle* as its own).

{¶10} We now apply this reasoning to appellant's claim that the law in Ohio's Adam Walsh Act violates the separation of powers doctrine of the United States Constitution. Accordingly, we find that Ohio's Adam Walsh Act does not violate the separation of powers doctrine of the Ohio or the United States Constitutions. See, also, *Brooks v. State*, Lorain App. No. C.A. No. 08CA009452, 2009-Ohio-1825, ¶26.

{¶11} We recognize that the Eleventh Appellate District recently held in *Spangler v. State*, Lake App. No. 2080-L-062, 2009-Ohio-3178, ¶67, that "[t]o the extent the Adam Walsh Act attempts to modify existing final sentencing judgments, such as Spangler's sentence, it violates the doctrines of separation of powers and finality of judicial judgments, despite the good intentions of the Legislature. As such, that portion of the Act is invalid, unconstitutional, and unenforceable."

{¶12} However, we agree with the dissenting opinion in *Spangler* at ¶112, which states:

{¶13} "I do not believe Senate Bill 10 abrogates final judicial determinations in violation of the doctrine of the separation of powers. I agree with the Fourth Appellate District's view expressed in [*State v. Linville*, Ross App. No. 08CA3051, 2009-Ohio-313], that the sex offender classification is nothing more than a collateral consequence arising from the underlying criminal conduct, [*Id.*] at ¶24, citing [*State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, ¶34], and that a sex offender has no reasonable expectation that his criminal conduct would not be subject to future versions of R.C. Chapter 2950. *Id.*, citing [*State v. King*, Miami App. No. 08-CA-02, 2008-Ohio-2594, ¶33.] Reclassification does not abrogate final court judgments, because 'the classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts.' [*In re Smith*, Allen App. No. 1-07-58, 2008-Ohio-3234, ¶39]."

{¶14} Appellant's first assignment of error is overruled.

{¶15} Assignment of Error No. 2:

{¶16} "THE TRIAL COURT ERRED IN FINDING THAT THE RETROACTIVE APPLICATION OF S.B. 10 TO PERSONS WHOSE CONVICTIONS WERE OBTAINED PURSUANT TO PLEAS OF GUILTY OR NO CONTEST RATHER THAN THROUGH TRIAL VERDICTS DOES NOT IMPAIR THE OBLIGATION OF CONTRACTS

PROTECTED BY ARTICLE 1, SECTION 10, CLAUSE I OF THE UNITED STATES CONSTITUTION AND SECTION 28, ARTICLE II OF THE OHIO CONSTITUTION."

{¶17} In his second assignment of error, appellant argues that his reclassification and the associated requirements under Ohio's Adam Walsh Act constitutes a breach of contract and is a violation of the right to contract under the United States and Ohio Constitutions. However, this court has recently held that Senate Bill 10 does not interfere with any vested contractual right and, therefore, does not violate the contract clauses of the United States and Ohio Constitutions. *Ritchie*, 2009-Ohio-1841, ¶13.

{¶18} Appellant's second assignment of error is overruled.

{¶19} Judgment affirmed.

HENDRICKSON, J., concurs.

RINGLAND, J., dissents.

RINGLAND, J., dissenting.

{¶20} I respectfully dissent because I believe the retroactive modification of judicially-determined sex offender classifications by the Adam Walsh Act in this case violates the separation of powers doctrine.

{¶21} It is well-settled that a statute enacted in Ohio is presumed constitutional. *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas* (1967), 9 Ohio St.2d 159, 161; *Roosevelt Properties Co. v. Kinney* (1984), 12 Ohio St.3d 7, 13. A statute will be given a constitutional interpretation if one is reasonably available. *State v. Keenan*, 81 Ohio St.3d 133, 150, 1998-Ohio-459. This constitutional presumption remains unless it is proven beyond a reasonable doubt that the legislation is unconstitutional. *State v. Williams*, 88 Ohio St.3d 513, 521, 2000-Ohio-428.

{¶22} For further context, I provide a history of Ohio's sex offender law, which has been recited in numerous decisions addressing challenges to the Adam Walsh Act.

{¶23} Although seldom used, Ohio first enacted a sex offender registration statute in 1963. As it is now, the statute was contained within R.C. Chapter 2950. The law, however, became more complex in 1996 due in large part to New Jersey's 1994 passage of Megan's Law and the 1994 enactment of the federal Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Section 14071, Title 42, U.S.Code). See *State v. Williams*, 88 Ohio St.3d at 516-517. In 1996, against this backdrop, the Ohio Legislature repealed the original sex offender statute and reenacted its own version of Megan's Law. In enacting Megan's Law, the Ohio legislature stated its intent to "protect the safety and general welfare of the people of this state." As a result, the three sets of provisions within the reenacted R.C. Chapter 2950 (the sex offender classification, registration, and community notification provisions) became more stringent.

{¶24} Under Megan's Law, a sentencing court was given the discretion to determine whether a sexual offender fell into one of three classifications: (1) "sexually-oriented offender;" (2) "habitual sex offender;" or (3) "sexual predator." When determining which category to classify a sex offender, including offenders in prison for sex offenses committed before July 1, 1997 (the effective date of the statute), the sentencing court was required to hold a hearing and consider several factors to determine the individual's likelihood to engage in future sex offenses. The registration provisions applied to all three classifications of sex offenders, and applied to offenders sentenced on or after July 1, 1997 regardless of when the offense occurred. The registration provisions also applied to habitual sex offenders required to register immediately prior to the effective date. Finally, the community notification provisions

applied to all sexual predators and to the habitual sex offenders upon whom the sentencing court had imposed the notification requirements.

{¶25} In *State v. Cook*, 83 Ohio St.3d 404, 1998-Ohio-291, the Ohio Supreme Court addressed whether Ohio's Megan's Law, as applied to conduct prior to the effective date of the statute, violated the Ohio Constitution's prohibition on retroactive laws and the Ex Post Facto Clause of the United States Constitution. The Supreme Court noted that Megan's Law sought to "protect the safety and general welfare of the people of this state," which was a "paramount governmental interest." *Id.* at 417. Ultimately, the court held that because the statute was remedial rather than punitive, the registration provisions of Megan's Law did not violate the Ohio Constitution's ban on retroactive laws. *Id.* at 413. The Supreme Court further held that in light of the statute's remedial nature, and because there was no clear proof that the statute was punitive in its effect, the registration and notification provisions of Megan's Law did not violate the Ex Post Facto Clause of the United States Constitution. *Id.* at 423.

{¶26} Two years later, in *Williams*, 88 Ohio St.3d 513, the Supreme Court addressed whether the registration and notification provisions of Megan's Law amounted to double jeopardy. The court held that because former R.C. Chapter 2950 was "neither 'criminal,' nor a statute that inflicts punishment," former R.C. Chapter 2950 did not violate the Double Jeopardy Clauses of the United States and Ohio Constitutions. *Id.* at 528. Subsequently, in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, the Supreme Court reiterated that "the sex-offender-classification proceedings under [former] R.C. Chapter 2950 are civil in nature[.]" *Id.* at ¶32.

{¶27} Ohio's Megan's Law was amended by Senate Bill 5, effective July 31, 2003. The amendments required that the designation "predator" and the concomitant duty to register remain for life; required sex offenders to register in three different

counties (that is, county of residence, county of employment, and county of school) every 90 days (as opposed to registering only in their county of residence); and expanded the community notification requirements. In *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, the Ohio Supreme Court addressed whether the Senate Bill 5 amendments, as applied to conduct prior to the effective date of the statute, violated the Ex Post Facto Clause of the United States Constitution and the Ohio Constitution's prohibition on retroactive laws. Once again, noting the civil, remedial nature of the statute, the court held that the amendments to Megan's Law neither violated the retroactivity clause of the Ohio Constitution nor the Ex Post Facto Clause of the United States Constitution. *Id.* at ¶36, 40, and 43.

{¶28} In 2006, the United States Congress enacted the Sexual Offender Registration and Notification Act, also referred to as Adam Walsh Child Protection and Safety Act. On June 30, 2007, the Governor of the State of Ohio signed Senate Bill 10 into effect. Ohio's Senate Bill 10 implemented the federal Adam Walsh Child Protection and Safety Act. The Adam Walsh Act amended numerous sections of the Ohio Revised Code. However, for purposes of this case, only the revisions affecting Ohio's sex offender registration statute contained within R.C. Chapter 2950 are relevant. The Adam Walsh Act went into effect on January 1, 2008.²

{¶29} The Adam Walsh Act created a new three-tiered classification system for sex offenders, abolishing the Megan's Law classifications. Designations such as "sexually-oriented offender," "habitual sex offender," and "sexual predator," no longer

2. {¶a} The guidelines proscribed by the federal government markedly encourage states to adopt the legislation. Specifically, the federal guidelines of the Adam Walsh Act provide that failure to implement the act by July 27, 2009 results in a 10 percent reduction of federal justice assistance funding for noncompliant states. Sex Offender Registration and Notification Act (SORNA) Guidelines (June 2008) at 9.

{¶b} Additionally, Federal SORNA Guidelines require the act be applied retroactively in order for a state to be compliant (and receive federal funding). Further, the guidelines summarily conclude, without

exist. Instead, under the Adam Walsh Act, sex-offender classification is determined solely by the offense committed. *State v. Clay*, 177 Ohio App.3d 78, 2008-Ohio-2980, ¶6. The offender who commits a sex offense is first found to be either a "sex offender" or a "child-victim offender." Then, depending solely upon the sex offense committed, the offender is classified as Tier I, Tier II, or Tier III without any additional assessment of risk.

{¶30} Tier I is the lowest tier and Tier III is the highest tier. Each tier has registration requirements, but they differ in terms of the duration of the duty and the frequency of the in-person address verification. The registration requirements under the Adam Walsh Act are also longer in duration than their counterparts under Megan's Law. For example, Tier I offenders are required to register for 15 years and to verify their addresses annually, but there are no community notification requirements. Tier II offenders are required to register for 25 years and to verify their addresses every 180 days, but there are no community notification requirements. Finally, Tier III offenders (similar to the former sexual predator classification) are required to register for life and to verify their addresses every 90 days; with community notification occurring up to every 90 days for life. Moreover, offenders are automatically placed into a higher tier if (1) they have a prior conviction for a sexually-oriented or child-victim-oriented offense, or (2) they have been previously classified as a sexual predator. *Id.* at ¶7.

{¶31} Further, since classification is determined solely upon the offense committed, classification hearings are unnecessary under the Adam Walsh Act and trial courts no longer have discretion in imposing classifications based upon the set of enumerated factors, such as the offender's likelihood to reoffend. Accordingly, since

regard or analysis of individual state constitutions, that the retroactive application of the Adam Walsh Act does not violate the ex post facto prohibition. *Id.* at 7.

judicial discretion in classifying sex offenders is no longer necessary, hearings were also removed under the revised statutory scheme.

{¶32} The Adam Walsh Act also provides for the reclassification of all offenders who were previously classified under Megan's Law. *In re Smith*, Allen App. No. 1-07-58, 2008-Ohio-3234, ¶32. The reclassification affords no deference to the prior classification given by the trial court and, like the prospective application of the Adam Walsh Act, offenders are reclassified based solely upon the offense for which they were convicted. *Id.*

{¶33} In its prospective application, the Adam Walsh Act is a commendable effort to clarify problems of vagueness with much of the criteria under former versions of Ohio's sex offender law. Specifically, it corrects the problematic judicial disparity that results from discretionary classification of offenders by various judges in Ohio. Case law clearly reflects the discrepancies that often occur among the various trial courts of Ohio. For instance, one court may classify an offender as a sexual predator while another court, given the same facts and criteria, would classify the offender as a sexually-oriented offender. Much of the judicial decisions concerning classification were subject to appellate review.

{¶34} It is, however, this same limitation of judicial discretion which, when applied retroactively, is troublesome. The retroactive application of the Adam Walsh Act completely extinguishes the judicially determined classifications. Individuals who were previously assessed as low-risk by a court may now be automatically and retroactively conferred a more serious status by the legislature based upon the nature of the offense. No consideration appears to be given to the offender's risk of reoffending or his current level of dangerousness, which a court was required to consider under the previous sex offender statute.

{¶35} As described above, the Ohio Supreme Court has addressed constitutional and retroactivity concerns with previous versions of Ohio's sexual offender legislation. In those instances, the Supreme Court concluded that sex offender classifications under Megan's Law were civil penalties and, due to the remedial nature of the amendments, the retroactive application did not violate the Ohio or United States Constitutions.

{¶36} However, additional constitutional concerns emerge under the enactment of the Adam Walsh Act. Concerns do not arise merely because the Adam Walsh Act applies retroactively. Rather, it is the retroactive abolishment of discretionary judicial decisions by the legislature that is troublesome. Accordingly, a simple retroactivity analysis is no longer controlling. Instead, the legislative abrogation of previous judicial determinations, implicates the separation of powers doctrine.

{¶37} A fundamental principle of the American constitutional system is that the governmental and sovereign powers are divided among three branches of government: legislative, executive and judicial; and each branch is separate from the other. *State ex rel. Finley v. Pfeiffer* (1955), 163 Ohio St. 149, 155. Pursuant to the doctrine of separation of powers, each of the three divisions of government must be protected from encroachments of the others, so that the integrity and independence of each is preserved. *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 464. While the separation of powers doctrine is not specifically embodied in the Ohio Constitution or the Constitution of the United States, the separation of powers doctrine implicitly arises from our tripartite democratic form of government and recognizes that the executive, legislative, and judicial branches of our government have their own unique powers and duties that are separate and apart from the others. *Zanesville v. Zanesville Tel. & Telegraph Co.* (1900), 63 Ohio St. 442, paragraph one of the syllabus.

{¶38} "The principle of separation of powers is embedded in the constitutional

framework of our state government. The Ohio Constitution applies the principle in defining the nature and scope of powers designated to the three branches of the government. *State v. Warner* (1990), 55 Ohio St.3d 31, 43-44. See *State v. Harmon* (1877), 31 Ohio St. 250, 258. It is inherent in our theory of government 'that each of the three grand divisions of the government, must be protected from the encroachments of the others, so far that its integrity and independence may be preserved. * * *' *S. Euclid v. Jemison* (1986), 28 Ohio St.3d 157, 159, quoting *Fairview v. Giffie* (1905), 73 Ohio St. 183, 187." *Hochhausler* at 463.

{¶39} "A statute that violates the doctrine of separation of powers is unconstitutional." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 1999-Ohio-123. The line separating the power to make laws from the power to interpret and apply them is not exactly defined. *Fassig v. State* (1917), 95 Ohio St. 232, paragraph two of the syllabus, overruled on other grounds by *Griffin v. Hydra-Matic Div., General Motors Corp.* (1988), 39 Ohio St.3d 79.

{¶40} "[T]o declare what the law is, or has been, is a judicial power; to declare what the law shall be, is legislative." *Weaver v. State* (1929), 120 Ohio St. 44, 46. The legislative power has been characterized as "the vital function which animates, directs, and controls the whole operation of civil authority." *Milan & Richland Plank-Road Co. v. Husted* (1854), 3 Ohio St. 578, 580. The legislative branch is empowered to make laws. *State ex rel. Bryant v. Akron Metropolitan Park Dist. For Summit County* (1929), 120 Ohio St. 464, 485.

{¶41} It is the function of the judiciary to interpret and apply the law as enacted. *State v. Cunningham*, 113 Ohio St.3d 108, 2007-Ohio-1245, ¶27. The primary design of judicial power is to administer justice according to the law of the land and to declare what the law is, determining the rights of parties comfortably thereto. 16 Ohio

Jurisprudence 3d (2001) 390, Constitutional Law, Section 274, citing *Cincinnati, W. & Z.R. Co. v. Clinton Cty. Commrs.* (1852), 1 Ohio St. 77, 81; and *Stanton v. State Tax Comm.* (1926), 114 Ohio St. 658, 672.

{¶42} The administration of justice by the judicial branch of 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, 421. It is well-settled that the legislature has no right or power to invade the province of the judiciary, by annulling, setting aside, modifying, or impairing a final judgment previously rendered by a court of competent jurisdiction. *Cowen v. State* (1920), 101 Ohio St. 387, 394. Such action would constitute the impermissible exercise of judicial power; an "exercise in the most objectionable and offensive form, since the legislature would in effect sit as a court of review." *Id.*

{¶43} In the criminal context, the legislature has authority to define criminal conduct and determine appropriate punishments. *State v. Bonello* (1981), 3 Ohio St.3d 365, 670. Yet, once the law has been enacted, it becomes the province of the judiciary to determine culpability and apply the punishments as applicable to each individual case.

{¶44} "Legislative action cannot be made to retroact upon past controversies, and to reverse decisions which the courts, in the exercise of their undoubted authority, have made." *Cowen* at 394. (Emphasis added.) Regardless of whether sex offender classification and the resulting duties are civil or criminal, punitive or remedial, this principle applies equally. Specifically, the Ohio Supreme Court has found in both criminal and civil matters that modifications of previous judicial determinations violate separation of powers. See *Cowen*; *City of South Euclid v. Jemison* (1986), 28 Ohio St.3d 157.

{¶45} Under the previous sex offender statute, the legislature empowered the judiciary to classify convicted sex offenders. Specifically, under Megan's Law, the legislature imposed a duty upon the judiciary that, once a defendant was found guilty of a sex-related offense, the judge was required to conduct a hearing and determine the correct sexual offender classification. Former R.C. 2950.09(A). Judges in Ohio were given discretion to determine the proper classification based upon a series of enumerated criteria for the court to consider in evaluating each offender. See former R.C. 2950.09(B)(2). However, the Adam Walsh Act abolished all judicially-determined sex offender classifications, unconstitutionally vacating previous judicial orders.

{¶46} Courts in Ohio have provided little analysis in addressing separation of powers challenges to the Adam Walsh Act. Most appellate districts, including the majority in this case, have taken a lock-step approach, primarily reciting the reasoning first espoused in *Slagle v. Slate*, 145 Ohio Misc.2d 98, 2008-Ohio-593. In overruling the separation of powers argument, the *Slagle* court held, "the General Assembly has not abrogated final judicial decisions without amending the underlying applicable law. See, e.g., *United States v. Gardner* (N.D.Cal.2007), 523 F.Supp.2d 1025. Instead, 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. Application of this new law does not order the courts to reopen a final judgment, but instead simply changes the classification scheme. This is not an encroachment on the power of the judicial branch of Ohio's government." *Id.* at ¶21. See *Sewell v. State*, Hamilton App. No. C-080503, 2009-Ohio-872, ¶31; *State v. Byers*, Columbiana App. No. 07 CO 09, 2008-Ohio-5051, ¶73; *State v. Netherland*, Ross App. No. 08CA3043, 2008-

Ohio-7007, ¶25; *Gildersleeve v. State*, Cuyahoga App. No. 91515, 2009-Ohio-2031, ¶37; *State v. Williams*, Warren App. No. CA2008-02-029, 2008-Ohio-6195, ¶101.

{¶47} The reasoning of *Slagle* makes two improper assumptions: 1) a sex offender classification is not a judgment or order; and 2) that the legislature "simply" changed the classification scheme. Neither conclusion can be justified.

{¶48} Clearly, the judicially-determined sexual offender classifications constituted judicial findings or orders. Specifically, in *State v. Thompson*, 92 Ohio St.3d 584, 2001-Ohio-1288, the Ohio Supreme Court engaged in a thorough analysis of the nature of discretionary classification. Further, in *State v. Wilson*, 2007-Ohio-2202, and *State v. Cook* the Ohio Supreme Court addressed the appealability and correct standard of review for judicial classification of sex offenders under Megan's Law. *Wilson* at ¶23; *Cook*, 83 Ohio St.3d at 426.

{¶49} Further, with the enactment of the Adam Walsh Act, the legislature did not "simply" change the classification scheme as characterized in *Slagle*. Rather, the very nature and procedure of classifying sex offenders was changed. Procedurally, under the previous law, judges determined sex offender classification. Under the Adam Walsh Act, sex offender classification is no longer judicially determined. Completely altering which branch of government is responsible for classifying sex offenders is not a "simple" change.

{¶50} Under Megan's Law, the legislature gave the judiciary discretion to classify individual sex offenders based upon an enumerated set of factors. Unlike previous modifications to the sex offender statute, which merely changed the regulations for each classifications, the Adam Walsh Act also completely abolished all previously-determined judicial classifications with no deference to earlier judicial determinations. The legislature cannot give the judiciary discretion and then retroactively it take away after it

has been exercised by judges, thereby nullifying judicial determinations.

{¶51} With the passage of the Adam Walsh Act, all judicial sex offender classifications were vacated and abolished, as if no such decision was ever made by a court. Further, the legislature gave no deference to the previous judicial determination in re-classifying the offenders. Under Megan's Law, the sex offender classifications were discretionary civil judicial findings. An act which modifies or vacates such orders is clearly an unconstitutional encroachment upon the judiciary. *Jemison* at 162.

{¶52} Moreover, in support of its separation of power's analysis, the *Slagle* court cited *United States v. Gardner*. The defendant in *Gardner* was indicted for conspiracy to engage in sex trafficking of a minor. 523 F.Supp.2d at 1026. Following a detention hearing, the District Court granted the defendant pretrial release subject to the federal guidelines. *Id.* After the enactment of the federal Adam Walsh Act, the government moved to amend Gardner's pretrial release conditions to include the act's requirement that release also be conditioned upon electronic monitoring. *Id.* Gardner challenged the additional release condition, arguing that the change was an improper legislative interference with a final judgment of the judiciary in violation of separation of powers. *Id.* at 1035.

{¶53} The district court provided three justifications for overruling Gardner's argument. First, the court noted that the bail process is not part of an adjudication of the merits of a case. *Id.* Rather, it is an ancillary proceeding and the change in bail conditions merely alters an interim condition of release pending trial. *Id.* Second, Congress also amended the underlying law to promulgate the additional conditions. *Id.* Most importantly though, the court held that with the enactment, Congress did not deprive the court of its fundamental role of determining whether an arrestee is to be detained or released on conditions. *Id.* at 1036.

{¶54} The *Slagle* decision claims that since the legislature amended the underlying applicable law, it could abrogate previous judicial decisions. *Gardner* does not justify that conclusion. The *Slagle* court omitted two important criteria listed in *Gardner*. An examination of those factors favors the position that the Adam Walsh Act as applied in this case violates separation of powers.

{¶55} In *Gardner* the revised statute only affected an ancillary pretrial determination, bail conditions. In contrast, the reclassification by the Adam Walsh Act affected final post-trial judicial determinations, terms of a sexual offense conviction. *Gardner* at 1035. Further, the Adam Walsh Act completely changed the nature and role of the judiciary. As described above, under Megan's Law, the legislature vested sex offender classification determinations with the judiciary. Yet, the Adam Walsh Act completely removed the discretion retroactively, altering the judicial role and abolishing all previously-determined judicial classifications. *Id.*

{¶56} I agree that classification of sex offenders is a legislative mandate and that, without the creation of sex offender classification, it would not be warranted. *Williams* at ¶98. Similarly, it is the legislative prerogative to define criminal conduct and determine appropriate punishments. *Bonello*, 3 Ohio St.3d at 670. However, once a specific defendant has been charged with a crime, criminality and punishment is no longer a creature of the legislature. Rather, it is the role of the judiciary to apply the law, determine culpability, and sentence the offender appropriately. *Id.* Similarly, once the sex offender law was enacted, granting judges discretion to classify sex offenders, and the judge has classified a specific defendant, the judicially-determined classification is not a legislative function. The discretionary classifications are judicial determinations; any legislative change retroactively affecting the findings is an unconstitutional invasion upon the judiciary and an improper modification of a judicial order.

{¶57} In the instant appeal, the majority attempts to provide further justification for its previous decisions, as other courts have done, by citing the reasoning of *State v. Linville*, Ross App. No. 08CA3051, 2009-Ohio-313; and *State v. King*, Miami App. No. 08-CA-02, 2008-Ohio-2594.³ The majority excuses the retroactive reclassification scheme by characterizing sex offender classification merely as a "collateral consequence" of the underlying criminal conduct. *Linville* at ¶24. The majority further concludes that reclassification is permissible since a "sex offender [has] no reasonable expectation that [his] criminal conduct would not be subject to future versions of R.C. Chapter 2950." *King* at ¶33.

{¶58} These justifications cited by the majority from *Linville* and *King* originate from the Ohio Supreme Court's decision in *Ferguson*. As noted, *Ferguson* addressed the Senate Bill 5 amendments to Megan's Law, concluding that the amendments did not violate ex post facto or the retroactivity clause of the Ohio Constitution. The court found that sex offender classification is merely a "collateral consequence"⁴ and that the offender had no "reasonable expectation" that the classification would be removed. 2008-Ohio-4824 at ¶34. Separation of powers was never addressed in *Ferguson*. Rather, these conclusions were applicable to the *Ferguson* majority's retroactivity clause

3. As noted by the majority, the Eleventh Appellate District in *Spangler v. State*, Lake App. No. 2008-L-062, 2009-Ohio-3178, held that the retroactive application of the Adam Walsh Act violates separation of powers. *Id.* at ¶67. Although my analysis somewhat differs, I agree with the conclusion of the *Spangler* plurality.

4. {¶a} In her dissent in *Ferguson*, Justice Lanzinger, joined by Justice Pfeifer and Justice Lundberg Stratton, criticized the majority's conclusion that sexual offender classifications are merely "collateral consequences" of the underlying convictions. Rather, she urged that "an offender's classification as a sexual predator is a direct consequence of the offender's criminal acts * * * [since] they result only as a direct result of this type of conviction." 2008-Ohio-4824, ¶53. I agree with the dissenting justices that a sex offender's classification is not merely a collateral consequence of conviction. This is clearly evidenced by the procedure to determine the offender status. Former R.C. 2950.09 directed the court to conduct a hearing, allowing the introduction of witnesses and cross-examination, when classifying an offender.

{¶b} However, these distinctions are immaterial to the separation of powers analysis. Neither the United States Supreme Court, nor the Ohio Supreme Court, has allowed a final judicial order, direct or collateral, to be retroactively reviewed, annulled, reversed or modified by legislative enactment.

analysis. *Id.* In this case, the majority wishes to substitute this retroactivity clause analysis as a veiled attempt to justify a separation of powers violation. Yet, the Ohio Supreme Court has never recognized an exception that allows a separate branch of government to disturb a judicial finding retroactively regardless of the "reasonable expectations" of a party or whether the nullification affects a collateral or direct consequence. *Spangler v. State*, Lake App. No. 2008-L-062, 2009-Ohio-3178, ¶60. See, also, *State v. Bartlett* (1905), 73 Ohio St. 54, 58 ("it is well-settled that the Legislature cannot annul, reverse, or modify a judgment of a court already rendered").

{¶59} In 1984, the Ohio legislature enacted the "financial responsibility" law under R.C. 4509.101, requiring motorists to verify proof of financial responsibility when found guilty of a traffic violation. *Jemison*, 28 Ohio St.3d at 159. The law also provided a provision that the defendant who failed to provide proof of financial responsibility for the vehicle was required to present the Registrar of Motor Vehicles with proof of financial responsibility, surrender his registration, or submit a statement that "he did not operate or permit the operation of a motor vehicle at the time of the offense." *Id.* at 160-161. If the defendant submits a statement, the Registrar was required to investigate whether the defendant actually operated a motor vehicle without financial coverage. *Id.* at 161. Following the investigation, the code section allowed the Registrar to terminate "any order or suspension * * * upon a showing of proof of financial responsibility that the operator or owner of the motor vehicle was in compliance with R.C. 4509.101." *Id.*

{¶60} In *Jemison*, the Ohio Supreme Court found that these provisions violated separation of powers due to the proscribed interference with a judicial order allowed under the statute. Specifically, the court found constitutional violations because the Registrar of Motor Vehicles was empowered to accept a statement from a defendant which may expressly contradict the findings and decision of the court. *Id.* at 162. "A

court might conclude that a defendant operated or permitted the operation of a motor vehicle without appropriate financial responsibility at the time of the traffic offense. Nevertheless, the defendant may elect to file with the registrar a statement contesting the court's finding, and the registrar is empowered to determine 'whether there is a reasonable basis for believing' the truth of the offense which was previously determined by the trial court." *Id.* In addition, the court found further violation of separation of powers because the statute permitted the registrar to review and possibly reverse or vacate a prior court order. *Id.* See, also, *State v. Stambaugh* (1987), 34 Ohio St.3d 34, 35.

{¶61} Like the financial responsibility law described in *Jemison*, the Adam Walsh Act similarly authorizes a separate branch of government to interfere with previous judicial determinations. In the case at bar, the trial court found appellant to be a sexually-oriented offender following convictions of importuning and attempted unlawful sexual conduct with a minor. Following passage of the Adam Walsh Act by the Ohio General Assembly, appellant received notification that he was being automatically reclassified as a Tier II sexual offender based upon his convictions. Like *Jemison*, appellant's reclassification as a result of the legislative enactment improperly modified or vacated the earlier judicial determination.

{¶62} In *State v. Thompson*, 2001-Ohio-1288, the Ohio Supreme Court examined the judicial fact-finding authority under the previous sex offender law. The court recognized that the Ohio Constitution prevents the General Assembly from exercising "any judicial power, not herein expressly conferred." *Id.* at 586, citing Section 32, Article II, Ohio Constitution. Courts "possess all powers necessary to secure and safeguard the free and untrammelled exercise of their judicial functions and cannot be directed, controlled or impeded therein by other branches of the government." *Id.*, citing

State ex rel. Johnston v. Taulbee, 66 Ohio St.2d at 421.

{¶63} The court listed the factors under former R.C. 2950.09(B)(2) that must be considered by a court when making a classification. *Id.* at 586-587. The court also noted that the guidelines were not "an exclusive list of factors to consider when determining whether an offender is a sexual predator" and that "a judge may consider evidence other than those factors listed." *Id.* at 588. Although, former R.C. 2950.09 required a judge to consider the guidelines set out in division (B)(2), the guidelines do not control a judge's discretion. *Id.* at 587. The court ultimately concluded the Megan's Law guidelines did not create a separation of powers violation because they "[do] not divest a court of its fact-finding powers in assessing the relevancy of each factor." *Id.* at 588. "[T]he judge has discretion to determine what weight, if any, he or she will assign to each guideline." *Id.*

{¶64} Until sexual offender classification law, most cases addressing civil retroactivity involved the effective timing of the newly-enacted law. Such was the case with Ohio's transition from contributory to comparative negligence. Specifically, the legal community faced the issue of retroactive application of law when the legislature in 1980 amended the negligence law by enacting the comparative negligence statute, abrogating contributory negligence as a complete bar to recovery. See Former R.C. 2315.19. This engendered much discussion from courts and legal scholars alike as to whether the statute should be applied retroactively. See *Balcerzak v. Page* (July 30, 1981), Cuyahoga App. No. 42864, 1981 WL 5081; *Musgrove v. Phill's Inn* (May 15, 1981), Ottawa App. No. OT-80-22, 1981 WL 5583; and *Wirth v. S. Central Power* (Mar. 24, 1981), Franklin App. No. 80AP-713, 1981 WL 3072. See, also, Case Note, *Viers v. Dunlap: Prospective Application of Comparative Negligence* (1983), 10 Ohio Northern U.L.Rev. 213; Wise, *The Retroactive Application of Ohio's Comparative Negligence*

Statute: A Golden Opportunity (1982), 9 Ohio Northern U.L.Rev. 63.

{¶165} *Viers v. Dunlap* (1982), 1 Ohio St.3d 173, the Ohio Supreme Court held that retroactive application of the comparative negligence statute was constitutionally inappropriate. *Id.* at syllabus. This decision was not without dissent. *Id.* at 179-181. The issue of retroactivity was examined to determine whether an accident occurring before the enactment of the statute required application of comparative or contributory negligence. *Id.* at 174. The court concluded that the statute could only be applied prospectively. *Id.* Nowhere did the legislature or the courts fathom considering retroactive application to vitiate a jury or court verdict which had already been rendered prior to the enactment of the comparative negligence statute. Further, no court could have justified the vitiating of a prior judgment under the premise that the parties have no reasonable expectation that their conduct would be subject to future revisions of Ohio's negligence law.

{¶166} Predictability in the law has been a time-honored concept since Hammurabi first decreed his laws to be inscribed and the Mosaic laws were inculcated by the 12 tribes. *Highland Tank & Mfg. Co. v. PS Intern, Inc.* (W.D.Penn 2005), 393 F.Supp.2d 348, fn. 3. Further, as the famed Lord Edward Coke prescribed, "knowing for certaine, that the law is unknowne to him that knoweth not the reason thereof, and that the known certaintie of the law is the safetie of all." *Institutes of the Laws of England* (1628), Section 395(a). It is this principle of predictability that spawned the additional constitutional prohibition against retroactivity in Ohio and further strengthened the doctrine of separation of powers.

{¶167} Although, Ohio's Constitution of 1802 prohibited the legislature from passing ex post facto laws, it did not directly prohibit the passage of retrospective laws relating to the civil rights of individuals. Woodbridge, *A History of Separation of Powers*

In Ohio: A Study In Administrative Law (1939), 13 U.Cin.L.Rev. 191, 264. Soon after statehood, Ohio passed a law concerning the acknowledgement of deeds by a married woman when she was joining a conveyance with her husband. *Id.* It required the attesting officer to examine the wife separate and apart from the husband and make known to her the contents of the deed and to show this in the acknowledgment. *Id.* A case in 1834 held that, where this was not shown in the certificate of acknowledgment, such deed was void and did not divest the wife of her interest in the land. *Id.* at 264-265, citing *Connell v. Connell* (1834), 6 Ohio St. 353. This caused much alarm since most title deeds of this type were acknowledged in this manner. *Id.* at 265. Shortly thereafter, in March 1835, the legislature passed an act making admissible in evidence any deed executed by a grantee wife "although the magistrate taking the acknowledgment of such deed, shall not have certified that he read or made known the contents of such deed, mortgage or instrument of writing to such wife, before or at the time she acknowledged the execution thereof." *Id.*

{¶68} Soon, another case was before the court. In *Lessee of Good v. Zercher* (1843), 12 Ohio St. 365, the wife had joined with her husband in making a conveyance on April 9, 1829. *Id.* The plaintiff claimed title under the grantee of the husband and wife, although the wife remained in possession. *Id.* Suit of ejectment was brought in 1843 for the land. *Id.* The wife objected to the introduction of the deed in evidence, claiming that the 1835 act was invalid. *Id.* The court held the statute unconstitutional, reasoning that the deed was a nullity, and if the legislature could, by a statute make it valid and convey property, it could divest property from any person in most any way it saw fit. *Id.*

{¶69} Many suits were brought after this decision to recover dower, or the actual property itself on the basis of the illegality of married women's deeds. *Id.* Following a

change of personnel on the court, on a similar factual situation to *Zercher*, the court reversed its former holding and held such deeds valid. *Id.* The rationale of that decision was that the statute was merely curative and did not divest vested rights, but only helps convert an equity, which was conveyed by the deed into a legal interest. *Id.*, citing *Chestnut v. Shane's Lessee* (1847) 16 Ohio St. 599. The dissenting judge held that nothing was conveyed and that the statute could not operate upon a nullity. *Id.* at 266. The judge further warned that if the decision stood, the legislature would be merely a court of appeals and would attempt to reverse judgments rendered by the courts. *Id.* This concern was raised at the Constitutional Convention of 1850-1851. *Id.* In response, the Constitution of 1851 contained the provision preventing retroactive laws. *Id.*

{¶70} Although the retroactivity clause of Ohio's Constitution is not the controlling issue of this dissent, it demonstrates the importance of predictability of the law and finality of judgments to our form of government. Closely related to the problem of retroactive laws is the issue of whether a legislature may pass laws which change the effect of judgments already rendered. *Id.* at 268. It is well-settled that if the legislature disagrees with a decision of a court, the legislature may change the outcome for future cases. *Id.* However, the legislature has no power to review court decisions. *Id.* When a judgment has been rendered by a court of competent jurisdiction, and there is no appeal to a higher court, that judgment is final. *Id.* See, also, *United States v. Shreveport Grain & Elevator Co.* (1932), 287 U.S. 77, 53 S.Ct. 42, 45; *Teague v. Lane* (1989), 489 U.S. 288, 332, 109 S.Ct. 1060 (recognizing the importance of predictability in the law).

{¶71} With the passage of the Adam Walsh Act, the legislature has disturbed the discretionary judicial decisions made under the earlier law and interfered with the

independence of the judiciary. Risk-assessment of sexual offenders and the likelihood to reoffend were integral objectives under the earlier sex offender law. Former R.C. 2950.09(B)(2). Judges were given the ability to classify individuals in consideration of these objectives. *Id.* Risk of the sexual offender to reoffend was a justiciable question under the previous law and, while the legislature certainly may make different criteria for the prospective application, it has no authority to retroactively change the findings of a court. *Cowen* at 394. The factual findings and judicial determinations based upon those findings can not be completely set aside retroactively by a ministerial or legislative act.

{¶72} While some may argue that sex offenders make poor exemplars for procedural safeguards to guarantee the rights of the accused, nevertheless, to allow the legislature to retroactively modify a judicial determination, whether it be by criminal or civil methods, erodes the independence of the judiciary. For these reasons, I dissent to the retroactive application of the Adam Walsh Act.