IN THE SUPREME COURT OF OHIO

ORIGINAL

ROMAN CHOJNACKI, Appellant, v. RICHARD CORDRAY, Ohio Atty. General, in his Official Capacity, Appellee.	: : : :	Case Nos. 2008-0991 and 2008-0992 On Appeal from the Warren County Court of Appeals Twelfth Appellate District Court of Appeals Case No. CA200803040

SUPPLEMENTAL REPLY BRIEF OF APPELLANT ROMAN CHOJNACKI

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INTRODUCTION

In his supplemental merit brief, the State strenuously urges this Court to hold Mr. Chojnacki's case for decision in *State v. Bodyke*, Case No. 2008-2502.[1] In fact, the State erroneously describes the right-to-counsel claim as "squarely presented" in *Bodyke*. But *Bodyke* is not an appropriate vehicle to resolve the instant case for three reasons. First, Mr. Bodyke did not advance a right-to-counsel claim because he was represented by an attorney at his S.B. 10 reclassification hearing. Second, and notwithstanding the State's argument to the contrary, the right to counsel is not conditioned on whether a statute is deemed to be ex post facto. Third, Mr. Bodyke has not argued that S.B. 10 reclassification hearings are a critical stage of the proceedings—an issue addressed extensively in Mr. Chojnacki's supplemental brief, but notably absent from the State's response. For these reasons, Mr. Chojnacki asks this Court to consider his case independently as *Bodyke* is wholly insufficient to resolve the right-to-counsel issue.

As demonstrated in Mr. Chojnacki's merit brief, both the Sixth and Fourteenth Amendments to the United States Constitution command that counsel be provided at S.B. 10 reclassification hearings. The State's contrary arguments are unavailing.[2]

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[1]If this Court agrees with the State's contention that the record in this case is insufficient to resolve the substantive right to counsel issue, Mr. Chojnacki respectfully requests that this Court adopt the Proposition of Law presented in his Memorandum in Support of Jurisdiction—that denial of counsel at an S.B. 10 reclassification hearing constitutes a final, appealable order and remand this case to the court of appeals for additional proceedings.

[2]The State maintains in footnote 1, that *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, stands for the proposition that S.B. 10's new residency restrictions only apply prospectively, and therefore not to petitioners like Mr. Chojnacki. While the Appellant strongly agrees with the State, this proposition has not been universally accepted by city prosecutors, county sheriffs and trial courts throughout Ohio.

First Supplemental Issue of Law

Sex offender reclassification hearings conducted under the provisions of S.B. 10 are criminal proceedings.

A. S.B. 10 reclassification hearings are a critical stage of the criminal proceedings.

The State's brief is more remarkable for what it does *not* say than for what it does say. It is void of any reference to Mr. Chojnacki's argument that S.B. 10 hearings are a critical stage of the criminal proceedings. Although Mr. Chojnacki devoted four pages of argument and authorities to this important analysis, the State devoted not one line to it. This silence is deafening.

The State's decision to stand silent and make no attempt to rebut the authorities upon which Mr. Chojnacki relies makes sense only if the State concluded it could not mount a credible rebuttal argument. The State's brief attacks Chojnacki's other arguments in detail. The only reasonable inference is that the State decided not to rebut the critical-stage argument because it could not do so.

Given the State's failure to respond to Mr. Chojnacki's argument that S.B. 10 reclassification hearings are a critical stage of the proceedings, Mr. Chojnacki will not repeat those arguments here. See Appellant's Supplemental Merit Brief, pp. 10-13. Nonetheless, the State's failure to offer any argument on this point can only be construed as a concession that S.B. 10 reclassification proceedings are, in fact, a critical stage of the criminal proceedings. This Court should hold the same.

B. S.B. 10 imposes a criminal sanction, and reclassification hearings pursuant to the statute must comport with the Sixth Amendment.

The State asserts that Mr. Chojnacki's argument that the S.B. 10 reclassification hearing is a criminal proceeding is based on Appellant's "incorrect premise." Appellee's Supplemental Brief, p. 8. The State cites to this Court's decisions in *State v. Cook* (1998), 83 Ohio St.3d 404,

700 N.E.2d 570, and *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, 896 N.E.2d 110, as support for the argument that under the *Kennedy v. Mendoza-Martinez* factors, this Court rejected the argument that Ohio's predecessor sex offender laws were criminal. The State is correct that this Court analyzed H.B. 180, the first major change to Ohio's sex offenders laws, in *Cook* and found H.B. 180 to be civil. However, in *Ferguson,* the majority opinion of this Court never analyzed S.B. 5 under the *Kennedy* factors. *Ferguson* at ¶1-43. In fact, it was the dissent in *Ferguson* who analyzed S.B. 5 under the *Kennedy* factors and determined S.B. 5 was a *punitive* statute. Id. at ¶56-60 (Lanzinger, J., dissenting). The dissent stated, "[t]hrough classification and registration, an affirmative disability is imposed." Id. at ¶57; see also, *State v. Ettenger*, 11th Dist. No. 2008-L-054, 2009-Ohio-3525 (Grendell, J., concurring in judgment only) (Trapp, P.J. dissenting) (noting the changes to the original 1997 law analyzed in *Cook* have transformed the sex offender law to a punitive statute). Ohio's sex offender laws have undergone a fundamental transformation resulting in the necessary conclusion that under the *Kennedy* factors, S.B. 10 is a punitive statute.

1. S.B. 10's obligations impose an affirmative restraint or restraint.

The State maintains that, "although S.B. 10 unquestionably changed the manner in which sex offenders are classified, the law promotes the same remedial objective (protecting the public) and imposes the same type of obligations (periodic verification of residency and employment addresses) as its predecessors." Appellee's Supplemental Brief, p. 8. Appellant agrees that one of the goals of S.B. 10 is the same as previous sex offender laws: to promote public safety. See also, Appellant Supplemental Merit Brief, p.8. However, Appellee's characterization of the obligations as the "same" is wrong, misleading, and trivializes the significant changes that have occurred to Ohio's sex offender laws over the past decade. Under Appellee's logic, the

legislature could require daily in-person reporting for life for someone convicted of misdemeanor sexual imposition. The point is that there is a limit.

S.B. 10 did more than just impose the "same" type of obligations. The following chart tracks the changes that have occurred since the original implementation of Megan's Law in H.B. 180 that this Court analyzed under the *Kennedy* factors, to S.B. 5 in 2003, and finally in S.B. 10 at issue today:

	H.B. 180 (effective 1998)	S.B. 5 (effective 2003)	S.B. 10 (effective 2008)
Periodic Verification (lowest level: sexually oriented/Tier I)	Annually for 10 years	Annually for 10 years	Annually for *15 years*
Periodic Verification (mid-level: habitual offender/Tier II)	Annually for 20 years	Annually for 20 years	*Twice a year for 25 years*
Periodic Verification (highest level: sexual predator/ Tier III)	Every 90 days for life	Every 90 days for life	Every 90 days for life
Personal Offender Information provided to public	Name, residential address, offense of conviction	Name, offense, residential address, *employment address*	Name, offense, residential address, employment address, *license plate, all motor vehicles registered, where offender parks; any aliases used by the offender; the name of the registrant's school, institution of higher education, and place of employment; the license plate number of any vehicle owned by or registered to the offender; the license plate number of any vehicle the offender operates as part of employment and any vehicle that is regularly available to or operated by the registrant; and the number of any driver's license, commercial driver's license, or state identification card*
Where the offender must register	County of residence	County of residence, *county of employment, county of school*	County of residence, county of employment, county of school
Residency Restriction	None	*All sex offenders are prohibited from residing within 1000 feet of a school*	All sex offenders are prohibited from residing within 1000 feet of school, *pre-school or day care*

When *Cook* was decided, the new sex offender law effected only a few people, and only substantially effected even fewer. Thus, it was easy to characterize the changes as regulatory. Now, however, not only have the burdens dramatically increased, but the number of people this seriously effects has exponentially increased. See Appellant's Supplemental Merit Brief, pp. 5-10.

2. S.B. 10 serves traditional aims of punishment and is excessive in relation to its purpose.

Appellee asserts that Mr. Chojnacki's argument that sex offender laws do little to protect public safety is undermined by Chojnacki's own studies. Appellee's Supplemental Brief, p. 13. The studies, however, must be read in full, not piecemeal as Appellee attempts. Appellee cites to the following statement in the Vasquez study: "[t]he rape incidence in . . . Ohio . . . significantly decreased after the introduction of the sex offender notification laws." Id. at 14. Initially, Mr. Chojnacki cited to the Vasquez study for the broad proposition that empirical research has found that sex offender laws, in general, do very little to advance public safety. Appellant's Supplemental Brief, p. 10; see also, *Ferguson* at ¶59, fn. 7 (Lanzinger, J., dissenting) ("Although the majority discounts the research done regarding the recidivism rate of sexual offender, it is relevant for determining whether the scope of the legislation exceeds its civil purpose.").

Appellee reads the study out of context. The study examined ten states that implemented sex offender registries under Megan's Law. Bob Vasquez, *The Influence of Sex Offender Registration and Notification Laws in the United States*, 54 Crime & Delinquency 185 (2008). The study looked at the incidence of rape 3 to 5 years before the intervention of the registry, and 3 to 5 years after. Id. at 185-86. The study looked at the results from each state and found that 6 states saw no statistically significant increase of the incidences of rape after the implementation of a registry, three states (including Ohio), saw a decrease of the incidences of rape, and one state

saw a statistically significant increase in the incidences of rape. Id. The study's conclusion was that there was nothing to differentiate the states that saw a decrease in incidences of crime from those that did not. Id. at 188. The evidence did *not* support a conclusion that sex offender laws reduce rape. Id. at 187. Presumably the State is not arguing that Ohio's rapists are more responsive to deterrence than Connecticut's, or that Ohio's citizens are smarter than Arkansas' and, therefore, can naturally protect themselves better when equipped with community notification. Because the flip side of that is that the states that saw an increase of the incidences of rape, e.g., California, somehow *encouraged* offenders to commit rape. Id. at 187. This is true because under the study, the states all had similar sex offender statutes in place. Id. at 182. The authors point out that using any one example independently, was not the purpose of the study. Id. at 186. The value of this study is to show that there is no conclusive empirical to suggest that a statue like S.B. 10 will have a deterrent effect

The State next cites to the Prescott study as stating that there was "evidence that sex offender registration and notification laws decreased the total frequency of sex offenses in the states . . . examine[d]" and "the registration of released sex offenders alone is associated with a significant decrease in the frequency of crime." Appellee's Supplemental Brief, p. 14. However, the next paragraph of the article states, "Importantly, we find no evidence that notification laws (as opposed to registration laws) reduced crime by lowering recidivism." JJ Prescott, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior*? at 4 (emphasis in original). The study notes that the implementation of notification dampens any positive effect of a registry. Id. Furthermore, the study notes that notification laws can only be effective if the size of the registry is relatively small. Id at 25.

This Court recognized the same premise in *State v. Eppinger* (2001), 91 Ohio St.3d 158, 185, 743 N.E.2d 881, "if we were to adjudicate all sexual offenders as sexual predators, we run

the risk of 'being flooded with a number of persons who may or may not deserve to be classified as high-risk individuals, with the consequence of diluting both the purpose behind and the credibility of the law. This result could be tragic for many.'" (internal citations omitted)). See also, Amici Curiae Brief of Victim's Rights Groups[3] at 7, *State v. Bodyke*, Ohio Supreme Court Case No. 2008-2502 (July 13, 2009). Thus, read in context, the empirical data is a functional tool to use to appreciate the effects and intricacies (such as the value of a small registry versus a large registry) of sex offender laws. The study must be read in full, not piecemeal as the State attempts. S.B. 10's intended goal of protecting the public is excessive and ineffective.

[3]The Victim's Rights Groups Amicus consists of the following parties: Association for the Treatment of Sexual Abusers, California Coalition Against Sexual Assault, Iowa Coalition Against Sexual Assault, National Alliance to End Sexual Violence, Detective Robert Shilling, Texas Association Against Sexual Assault, and The Jacob Wetterling Resource Center.

Second Supplemental Issue of Law

Petitioners in S.B. 10 reclassification proceedings are entitled to court-appointed counsel under the Fourteenth Amendment's Due Process Clause regardless of the civil or criminal nature of those proceedings.

The State argues that Mr. Chojnacki is not facing a potential loss of liberty or a fundamental right, nor does he need an attorney to be guarded from the risk of an erroneous S.B. 10 classification. The State's argument is disingenuous and wrong.

A. The risk of erroneous classification is likely based on the AG's "simple" classification procedures.

The State claims that there is no need for the petitioner to have counsel at reclassification hearings because "the risk of erroneous classification is minimal." Appellee's Supplemental Brief, p. 19. The State asserts, "[e]ven if S.B. 10 is a complex law, its classification method is simple. The tier levels for adult sex offenders *turn* on one factor only-the offense of conviction. And the Attorney General's reclassification duties were entirely ministerial-he identified the offense of conviction, matched it to the proper tier, and then informed the offender." Id., p. 20. Despite the State's characterization of the classification method as "simple", in practice, it has turned out to more complicated and subject to erroneous classification. See Supplemental Reply Brief of Amici Public Defenders[4], pp. 5-10. Despite the State's contrived attempt to assure this Court today that the method of classification is simple and relatively error-free, the truth, as usual, is much less "simple".

B. The risk of erroneous classification is a reality for many.

The reclassification process is not as foolproof as the Appellee argues. Neither is the risk of error minimal. The Attorney General has misclassified hundreds of offenders. See e.g., *State v. Perkins*, 5th Dist. No. 08-CA-0020, 2009-Ohio-2404 (the Attorney General classified

[4] The Public Defenders' Amici consists of the following parties: Cuyahoga County Public Defender, Franklin County Public Defender, Lake County Public Defender, Montgomery County Public Defender, Stark County Public Defender, and American Civil Liberties Union.

petitioner as Tier III, but the court had to correct it to Tier II); *Gildersleeve v. State*, 8th Dist. Nos. 91515, 91516, 91517, 91518, 91519 and 91521, 91522, 91523, 91524, 91525, 91526, 91527, 91528, 91529, 91530, 91531, 91532, 2009-Ohio-2031, ¶89 at fn. 13 (the Attorney General classified petitioner incorrectly as a Tier III offender though he should have been classified as a Tier I offender); *State v. Cook*, 2nd Dist. No. 2008-CA-19, 2008-Ohio-6543 (the Attorney General classified petitioner as a Tier II offender, but the trial court and court of appeals determined he should never have been classified at all); see also, Supplemental Reply Brief of Amici Public Defenders, pp. 5-10 (citing numerous specific examples of significant errors that have occurred in the "simple" reclassification method and the chaos that has ensued in the trial courts as a result).

Furthermore, as thoroughly described in Amici Public Defender's Reply, the classification process becomes increasingly complex as the tier system requires fact-finding in order to fit certain offenses into the tier. See Supplemental Reply Brief of Amici Public Defenders, pp. 5-10. For example, Unlawful Sexual Conduct with a Minor, is a Tier I offense "when the offender is less than four years older than the other person with whom the offender engaged in sexual conduct, the other person did not consent to the sexual conduct." R.C. 2950.01(E)(1)(b). However, the same offense is a Tier II offense "when the offender is at least four years older than the other person with whom the offender engaged in sexual conduct." R.C. 2950.01(F)(1)(b). In order for an offender to be classified as a Tier II, the Attorney General often must go beyond the sentencing entry to determine the facts that were not determined by a judge or jury. The risk that the Attorney General will misclassify an offender, subjecting him or

her to irreparable prejudice,[5] is a reality and an offender at deserves an attorney to help protect against the State's errors.

C. An attorney is needed for the relief-from-community-notification hearing.

The private interests at stake in reclassification hearings are substantial for petitioners. S.B. 10 provides a hearing for those individuals not previously subject to community notification, who, under the new law, are now subject to community notification. R.C. 2950.11(F)(2). This applies to over 7,000 people, almost half of all people reclassified under S.B. 10. Supplemental Reply Brief of Amici Public Defenders, p. 11.

While not clear in the statute, a hearing under Revised Code 2950.11(F)(2) should not be required for individuals that a trial court previously held that they were not likely to reoffend. These individuals have legally satisfied the requirement to be relieved from community notification. R.C. 2950.11(F)(2). As the Eighth District held, "it would be nonsensical for a court to hold a hearing to determine whether they would have been subject to community notification under the former statute, when it was already determined that they were not subject to community notification under the former statute." *Gildersleeve* at ¶75. However, not all courts have taken this reasoned approach. See e.g., *State v. Messer*, 4th Dist. No. 08CA3050, 2009-Ohio-312 (petitioner had been found by a trial court to be a sexually oriented offender unlikely to reoffend, however later in a R.C. 29050.11(F)(2) hearing, was denied relief from community notification by a different trial court). In the instances where lower courts ignore decades of res judicata principles, and require petitioners to resubmit evidence on their likely to reoffend, the need for an attorney is even greater. Petitioners need attorneys trained in the law to present evidence to the court.

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[5]Once the postcards alerting an offender's neighbors that the offender is the most dangerous type of offender are sent and received, it is beyond question that the damage is done to the misclassified offender for as long as he or she remains in their home.

This Court previously determined that in sexual predator hearings under H.B. 180, a defendant was entitled to the appointment of an expert to testify on his behalf on the issue of the facts determining likelihood to reoffend. *Eppinger*, 91 Ohio St.3d at 163, 743 N.E.2d 881.

> Because "the State must, **as a matter of equal protection**, provide indigent prisoners with the basic tools of an adequate defense . . . when those tools are available for a price to other prisoners," *Britt v. North Carolina* (1971), 404 U.S. 226, 227, **it follows that the defendant would also be entitled to an expert provided at state expense in order to avail himself or herself of the statutory right to present witnesses on his or her own behalf.**

Id. (emphasis added.) Further, this Court noted that "only an expert" can predict future behaviors in the absence of a history of similar offenses. Id. Petitioners seeking to prove the R.C. 2950.11 factors (the same factors at issue in H.B. 180 used to predict future behavior) are, at a minimum, entitled to counsel to assist the presentation of this type of evidence.

CONCLUSION

For the foregoing reasons, Mr. Chojnacki asks this Court to determine that S.B. 10 reclassification hearings are criminal in nature. In the alternative, Mr. Chojnacki asks this Court to find that he is entitled to court-appointed counsel under the Due Process Clauses of the United States and Ohio Constitutions, regardless of whether those hearings are deemed criminal in nature.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **Supplemental Reply Brief of Appellant Roman Chojnacki** was forwarded by regular U.S. Mail, postage prepaid to Benjamin Mizer, Solicitor General, 30 E. Broad Street, 17th Floor, Columbus, Ohio 43215 this 3rd day of August, 2009.

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#302895

IN THE SUPREME COURT OF OHIO

ROMAN CHOJNACKI,	:	
		Case Nos. 2008-0991 and 2008-0992
Appellant,	:	
		On Appeal from the Warren
v.	:	County Court of Appeals
		Twelfth Appellate District
RICHARD CORDRAY, Ohio Atty. General, in his Official Capacity,	:	Court of Appeals Case No. CA200803040
	:	
Appellee.		

APPENDIX TO

SUPPLEMENTAL REPLY BRIEF OF APPELLANT ROMAN CHOJNACKI

LexisNexis

LEXSEE 2008 OHIO 6543

STATE OF OHIO, Plaintiff-Appellant v. BRIAN N. COOK, Defendant-Appellee

C.A. CASE NO. 2008 CA 19

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, MIAMI COUNTY

2008 Ohio 6543*; *2008 Ohio App. LEXIS 5452

December 12, 2008, Rendered

PRIOR HISTORY: [**1]

(Civil appeal from Common Pleas Court). T.C. NO. 08-91.

COUNSEL: JAMES R. DICKS, JR., Assistant Prosecuting Attorney, Troy, Ohio, Attorney for Plaintiff-Appellant.

BRIAN N. COOK, Tipp City, Ohio, Defendant-Appellee.

JUDGES: WOLFF, P.J. GRADY, J. and DONOVAN, J., concur.

OPINION BY: WOLFF

OPINION

WOLFF, P.J.

[*P1] The State of Ohio appeals from a judgment of the Miami County Court of Common Pleas, which held that Brian Cook was not subject to the sex offender registration and notification requirements set forth in *R.C. Chapter 2950*, as amended by Amended Substitute Senate Bill 10 ("S.B. 10"), effective January 1, 2008. For the following reasons, the trial court's judgment will be affirmed.

I

[*P2] In June 2001, Cook was convicted in the Montgomery County Court of Common Pleas of 20 counts of possessing or viewing material showing a minor in a state of nudity, in violation of *R.C. 2907.323(A)(3)*. Cook was designated a sexual predator, which subjected him to community notification requirements under Ohio's Sex Offender Registration and Notification Act, *R.C. Chapter 2950* ("SORN").

[*P3] In 2007, the General Assembly enacted S.B. 10 to implement the federal Adam Walsh Child Protection and Safety Act of 2006. Among other changes, S.B. 10 modified [**2] the classification scheme for offenders who are subject to the Act's registration and notification requirements. S.B. 10 created a three-tiered system, in which a sex offender's classification is determined based on the offense of which the offender was convicted.

[*P4] On November 29, 2007, Cook received a notice from the Ohio Attorney General, informing him of recent changes to SORN and that he had been reclassified as a Tier III sex offender. On January 27, 2008, Cook filed a petition to contest his reclassification. Cook raised several constitutional challenges to S.B. 10 and, alternatively, he argued that his offense is statutorily defined as a Tier I, not Tier III, offense under the amended statute.

[*P5] The trial court stayed the constitutional challenges pending a ruling by the Supreme Court of Ohio on those issues, and it held a hearing on whether Cook had been properly reclassified. Upon consideration of stipulated facts and oral argument, the trial court held that Cook was not subject to community notification

under S.B. 10. It reasoned as follows:

[*P6] "The nature of the Defendant's conviction (*2907.323(A)(3)*) would now put him in a Tier I classification (Jan. 1, 2008). However, he was [**3] found to be a sexual predator by his original trial court.

[*P7] "Pursuant to *O.R.C. 2950.01(G)(5)* a Tier III sex offender includes any sex offender who is not in any category of Tier III sex offenders, who, prior to January 1, 2008, was convicted of a sexually oriented offense * * * and who prior to that date was adjudicated a sexual predator, unless the sex offender is reclassified as a Tier I or Tier II offender, relative to the offense (*2950.01(G)(5)(a)*).

[*P8] "The applicable section to determining if the Defendant should be reclassified as a Tier I offender, is *O.R.C. 2950.031(E)*. This section directs the Court to consider all relevant information and testimony presented relative to the application of the Defendant. If the Court finds by clear and convincing evidence that the new registration requirement does not apply to the Defendant, the Court shall issue an order that specifies that the new registration requirements do not apply to the offender[.]

[*P9] "The problem with this case is the fact that in 2001, when the Defendant was convicted, violations of *O.R.C. 2907.323(A)(3)* were not sexually oriented offenses. See Second District Court of Appeals cases, *St. v. Landers, Champaign App. No. 06CA42, 2008 Ohio 422* [**4] and *St. v. Jesse, Greene App. No. 06CA33, 2007 Ohio 670*.

[*P10] "Under then *O.R.C. 2950.01(E)*, a sexual predator was someone who was convicted of a sexually oriented offense. If the Defendant's offenses were not sexually oriented offenses, the Defendant could not have been adjudicated a sexual predator, and any such finding is void.

[*P11] "The stipulations in this case establish just that, and there is nothing in *O.R.C. 2950.01(A)(1)* which makes that part of the amended section retroactive (that is to say, that prior convictions of *2907.323(A)(3)* are now deemed to be sexually oriented offenses).

[*P12] "Hence, the Defendant in this case has never been convicted of a sexually oriented offense.

[*P13] "The Court finds by clear and convincing evidence that pursuant to *O.R.C. 2950.031(E)* the new registration requirements do not apply to the Defendant.

[*P14] "The Court finds by clear and convincing evidence the Defendant is not subject to registration or community notification requirements."

[*P15] The State appeals from this judgment.

II

[*P16] The State's sole assignment of error reads:

[*P17] "THE TRIAL COURT ERRED BY FINDING THAT THE APPELLEE WAS NOT SUBJECT TO CLASSIFICATION AND REGISTRATION AS A SEX OFFENDER UNDER *CHAPTER 2950 OF THE OHIO REVISED CODE* [**5] AS AMENDED BY SENATE BILL 10."

[*P18] The State claims that the trial court erred in concluding that the registration requirements under S.B. 10 do not apply retroactively to a person convicted of *R.C. 2907.323* prior to January 1, 2008. Relying upon *R.C. 2950.04(A)(2)*, the State asserts that the statute imposes registration requirements upon a person who commits a sexually oriented offense, regardless of when the offense was committed. The State notes that the present definition of "sexually oriented offense" includes *R.C. 2907.323(A)(3)*. The State thus argues that the registration and notification requirements in S.B. 10 apply retroactively to Cook. The State further argues that *Landers* and *Jesse* were based on prior versions of *R.C. Chapter 2950* and are inapplicable.

[*P19] In response, Cook emphasizes that the State concedes that nothing in *R.C. 2950.01* makes the definition of "sexually oriented offense" retroactive. Cook further argues that the trial court properly relied upon *Landers* and *Jesse* in concluding that a violation of *R.C. 2907.323* is not a sexually oriented offense.

[*P20] Statutes are presumed to apply prospectively, and a statute does not apply retroactively unless the General Assembly [**6] expressly makes the statute retroactive. *Hyle v. Porter, 117 Ohio St. 3d 165, 2008 Ohio 542, 882 N.E.2d 899, P7-8*. "Pursuant to *R.C. 1.48*, if the statute is silent on the question of its retroactive application, we must apply it prospectively only." *Id. at P10*. If the court determines that the statute has been made retroactive by the General Assembly, the

court must then address whether the statute violates the Retroactivity Clause set forth in *Section 28, Article II of the Ohio Constitution. Id. at P9.*

[*P21] Under S.B. 10, the definition of "sexually oriented offense" includes the violations specified in *R.C. 2950.01(A)* "on and after January 1, 2008, [and] any sexually oriented offense, as that term was defined in *section 2950.01 of the Revised Code* prior to January 1, 2008, that was committed prior to that date and that was not a registration exempt sexually oriented offense, as that term was defined in that section prior to January 1, 2008." *R.C. 2950.011.* A violation of *R.C. 2907.323(A)(3)* is a sexually oriented offense under *R.C. 2950.01(A)(1)* as of January 1, 2008. It is undisputed that a violation of *R.C. 2907.323(A)* was not a sexually oriented offense under prior versions of *R.C. 2950.01.*

[*P22] [**7] We agree with the trial court that the definition of "sexually oriented offense" does not include offenses that were added by S.B. 10 if they were committed prior to S.B. 10's effective date. By indicating that "sexually oriented offense" includes offenses included in prior versions of SORN, that were committed prior to January 1, 2008, and that required registration, *R.C. 2950.011* implicitly states that other offenses committed prior to January 1, 2008 are not included in the definition. In other words, the offenses added by S.B. 10 are to be considered "sexually oriented offenses" prospectively only. As conceded by the State, nothing in *R.C. 2950.01* indicates that the new offenses are to be treated as "sexually oriented offenses" retroactively. Accordingly, a person who committed a violation of *R.C. 2907.323(A)(3)* prior to January 1, 2008, is not subject to S.B. 10's registration and notification requirements.

[*P23] This interpretation is consistent with other provisions in S.B. 10.

[*P24] *R.C. 2950.03* sets forth the duty of various officials to notify offenders of their classification under the new tiered system. This section places the duty on a particular official based on whether the offender [**8] falls within a particular category. These categories include: (1) offenders in prison on or after January 1, 2008 for a sexually oriented offense, *R.C. 2950.03(A)(2)*; (2) those who are sentenced on or after January 1, 2008, *R.C. 2950.03(A)(2)*; (3) juveniles who are classified as a juvenile offender registrant on or after January 1, 2008, *R.C. 2950.03(A)(3)*; (4) juveniles who are classified as both a juvenile offender registrant and a public registry-qualified juvenile offender registrant on or after January 1, 2008, *R.C. 2950.03(A)(4)*; (5) an offender who has registered under SORN prior to December 1, 2007, *R.C. 2950.03(A)(5)(a)*; (6) an offender who registers with the sheriff between December 1, 2007 and January 1, 2008 based on a duty imposed prior to December 1, 2007, *R.C. 2950.03(A)(5)(b)*; (7) an offender who is in prison for a sexually oriented offense on December 1, 2007, *R.C. 2950.03(A)(5)(c)*; (8) an offender who commences a prison term on or after December 2, 2007, *R.C. 2950.03(A)(5)(d)*; and (9) a offender who is convicted of a sexually oriented offense between July 1, 2007 and January 1, 2008 and is not sentenced to a prison term, *R.C. 2950.03(A)(6).*

[*P25] Upon review of *R.C. 2950.03,* [**9] the notification provision does not reach all individuals who had ever been convicted of a "sexually oriented offense," as now defined by S.B. 10. Individuals whose offenses were not sexually oriented offenses prior to S.B. 10 and who were neither incarcerated nor registering prior to July 2007 would not fall within the notification provisions. For individuals who committed offenses prior to the effective date of S.B. 10, *R.C. 2950.03* appears to require notice only to those whose offenses had been subject to SORN under prior versions.

[*P26] Other provisions also support this conclusion. *R.C. 2950.031* expressly applies the new registration scheme to offenders who had previously registered a residence, school, institute of higher education, or employer under the prior SORN statute, and it requires the Attorney General to determine the offender's new classification under the new tiered classification statute. *R.C. 2950.031(A)(2)* requires the Attorney General to send notice to each offender who had previously registered under SORN.

[*P27] *R.C. 2950.033* makes clear that the registration requirements for those offenders whose duty to register was scheduled to terminate between July 1, 2007 and January [**10] 1, 2008 would not terminate as scheduled and that the duty would remain in effect under the new classification statutes. See, also, *R.C. 2950.07(A)(7)* (setting forth the initial registration date for offenders who had previously registered under a prior version of SORN).

[*P28] The State asserts that *R.C. 2950.04(A)(2)* requires an interpretation that the registration provisions apply retroactively to Cook. *R.C. 2950.04(A)(2)* provides:

[*P29] "(2) *Regardless of when the sexually oriented offense was committed*, each offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a sexually oriented offense shall comply with the following registration requirements described in divisions *(A)(2)(a)*, *(b)*, *(c)*, *(d)*, and *(e)* of this section:

[*P30] "(a) The offender shall register personally with the sheriff, or the sheriff's designee, of the county within three days of the offender's coming into a county in which the offender resides or temporarily is domiciled for more than three days.

[*P31] "(b) The offender shall register personally with the sheriff, or the sheriff's designee, of the county immediately upon coming into a county in which the offender attends a school or institution [**11] of higher education on a full-time or part-time basis regardless of whether the offender resides or has a temporary domicile in this state or another state.

[*P32] "(c) The offender shall register personally with the sheriff, or the sheriff's designee, of the county in which the offender is employed if the offender resides or has a temporary domicile in this state and has been employed in that county for more than three days or for an aggregate period of fourteen or more days in that calendar year.

[*P33] "(d) The offender shall register personally with the sheriff, or the sheriff's designee, of the county in which the offender then is employed if the offender does not reside or have a temporary domicile in this state and has been employed at any location or locations in this state more than three days or for an aggregate period of fourteen or more days in that calendar year.

[*P34] "(e) The offender shall register with the sheriff, or the sheriff's designee, or other appropriate person of the other state immediately upon entering into any state other than this state in which the offender attends a school or institution of higher education on a full-time or part-time basis or upon being employed in any [**12] state other than this state for more than three days or for an aggregate period of fourteen or more days in that calendar year regardless of whether the offender resides or has a temporary domicile in this state, the other state, or a different state." (Emphasis added.)

[*P35] Other portions of *R.C. 2950.04(A)* address initial registration immediately after sentencing, registration by delinquent children, and registration of individuals who have been convicted of sexually oriented offenses in another state, federal court, military court, Indian tribal court, or the court of another country.

[*P36] Although the phrase "[r]egardless of when the sexually oriented offense was committed" indicates that *R.C. 2950.04(A)* applies retroactively, see *State v. Ferguson, 120 Ohio St. 3d 7, 2008 Ohio 4824, 896 N.E.2d 110* (holding that former *R.C. 2950.041(A)* applies retrospectively), we note that the phrase must be interpreted in light of the definition of "sexually oriented offense." As stated above, "sexually oriented offense" includes violations of any sexually oriented offense, as that term was defined under a prior version of SORN, that were committed prior to January 1, 2008. The phrase "regardless of when [**13] *** committed" does not require an interpretation that offenses added by S.B. 10 are to be retroactively subject to SORN under S.B. 10.

[*P37] Viewing *R.C. Chapter 2950* as a whole, we conclude that the legislature did *not* intend violations of offenses added by S.B. 10 that were committed prior to January 1, 2008, to be subject to the registration and notification requirements. Rather, the statute, when read in its entirety, indicates the legislature's intent to impose registration requirements only upon those offenders who fall within the categories listed in *R.C. 2950.03*. Stated simply, *R.C. Chapter 2950* applies retroactively to those offenders whose existing registration requirements would expire after July 1, 2007 and to other offenders who were incarcerated or beginning their registration requirements under SORN shortly before the effective date of the new registration requirements.

[*P38] In this case, Cook was notified by the Attorney General because he was an offender who had registered under SORN prior to December 1, 2007. *R.C. 2950.03(A)(5)(a)*. It is clear, however, that Cook should not have been classified under SORN in 2001 and should not have been subject to SORN's registration requirements. [**14] Because Cook's violation of *R.C. 2907.323(A)(3)* occurred prior to the effective date of S.B. 10, Cook's violation is not a "sexually oriented offense" under the new statute.

[*P39] The assignment of error is overruled.

III

[*P40] The judgment of the trial court will be affirmed.

GRADY, J. and DONOVAN, J., concur.

LexisNexis

LEXSEE 2009 OHIO 3525

STATE OF OHIO, Plaintiff-Respondent-Appellee, - vs- JASON ETTENGER, Defendant-Petitioner-Appellant.

CASE NO. 2008-L-054

COURT OF APPEALS OF OHIO, ELEVENTH APPELLATE DISTRICT, LAKE COUNTY

2009 Ohio 3525*; *2009 Ohio App. LEXIS 3045

July 13, 2009, Decided

PRIOR HISTORY: [**1]

Appeal from the Court of Common Pleas, Case No. 08 MS 000039.

DISPOSITION: Reversed and Remanded.

COUNSEL: Charles E. Coulson, Lake County Prosecutor, and Teri R. Daniel, Assistant Prosecutor, Painesville, OH (For Plaintiff-Respondent-Appellee).

Richard J. Perez, Rosplock & Perez, Willoughby, OH (For Defendant-Petitioner-Appellant).

JUDGES: TIMOTHY P. CANNON, J. DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion, MARY JANE TRAPP, P.J., concurs in part, dissents in part with a Concurring/Dissenting Opinion.

OPINION BY: TIMOTHY P. CANNON

OPINION

TIMOTHY P. CANNON, J.

[*P1] Jason Ettenger appeals from a judgment of the Lake County Court of Common Pleas, which denied his petition to contest his reclassification as a Tier III offender under Ohio's new sex offender registration law. For the following reasons, we reverse judgment of the Lake County Court of Common Pleas and remand the matter for proceedings consistent with this opinion.

[*P2] On February 28, 2002, Ettenger was convicted in Cuyahoga County of one count of attempted sexual battery, a felony of the fourth degree, in violation of *R.C. 2923.02* and *R.C. 2907.03* following a guilty plea.

[*P3] After Ettenger's conviction, the state waived a sex offender classification hearing and, [**2] based on the evidence in the record and the stipulation between the state and Ettenger, the trial court classified him as a "sexually oriented offender." Under the former sex offender registration law, he was required to register at the sheriff's office of the county of his residence once a year for ten years.

[*P4] Under Ohio's Adam Walsh Act ("AWA"), which became effective on January 1, 2008, Ettenger has been reclassified as a Tier III offender. On November 29, 2007, he was notified by a letter from the Attorney General's Office informing him that he has been reclassified under the AWA as a Tier III offender, and he is now required to register personally with the sheriff's office once every 90 days for life.

[*P5] At the time he received the notice from the Attorney General's Office, Ettenger had resided in Lake County, Ohio for several years and was temporarily residing in Missouri.

[*P6] On January 29, 2008, he filed a petition in the Lake County Court of Common Pleas to contest his

reclassification, which he claimed to be a violation of his constitutional rights. The trial court held a hearing and denied his petition.

[*P7] Ettenger timely appealed, assigning the following error for our review:

[*P8] "[1.] [**3] The trial court erred when it denied appellant's petition challenging reclassification and reclassified his sex offender status, pursuant to Ohio's Adam Walsh Act, Senate Bill 10, an unconstitutional body of laws."

[*P9] Under the assignment of error, Ettenger raises six constitutional claims. For ease of discussion, Ettenger's arguments will be taken out of numerical order.

Ex Post Facto Clause

[*P10] Ettenger claims the retroactive application of Ohio's AWA to him constitutes an ex post facto law proscribed by Article I, Section 10 of the United States Constitution. That section provides: "No State shall *** pass any *** ex post facto Law." Under this provision, "any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, *** is prohibited as *ex post facto." Beazell v. Ohio (1925), 269 U.S. 167, 169-170, 46 S. Ct. 68, 70 L. Ed. 216.*

[*P11] Under well-established precedent, this provision is intended to apply (1) when a new law seeks to punish a prior action which did not constitute a crime at the time of its commission, or (2) when a new law seeks to increase the punishment for a crime following its actual commission. [**4] *State v. Wilson, 113 Ohio St.3d 382, 2007 Ohio 2202, at P30, 865 N.E.2d 1264.* (Citation omitted.)

[*P12] The "ex post facto" prohibition applies solely to criminal statutes. *State v. Byers, 7th Dist. No. 07 CO 39, 2008 Ohio 5051, at P12.* To determine whether a legislative enactment is to be considered civil or criminal for ex post facto purposes, the Supreme Court of Ohio has employed the "intent-effects" test. *State v. Cook (1998), 83 Ohio St.3d 404, 415, 1998 Ohio 291, 700 N.E.2d 570.* (Citations omitted.) In *In re: G.E.S., 9th Dist. No. 24079, 2008 Ohio 4076, at P18*, this test was described in the following manner:

[*P13] "First, the court must ask whether the legislature intended for the statute to be civil and non-punitive or criminal and punitive. *** The Ex Post Facto Clause only prohibits criminal statutes and punitive schemes. *** Thus, a determination that the legislature intended the statute to be punitive ends the analysis and results in a finding that the statute is unconstitutional. *** If, however, the legislature intended for the statute to be civil and non-punitive, then the court must ask whether the statutory scheme is so punitive in nature that its purpose or effect negates the legislature's intent. *** Accordingly, to withstand [**5] the Ex Post Facto Clause, a statute must be civil and non-punitive with regard to both the legislature's intent in enacting it and its actual effect upon enactment." (Citations omitted.)

[*P14] The provisions of Senate Bill 10 demonstrate the General Assembly's intent for the new statutory scheme to be punitive. Similar to the 1997 version of *R.C. Chapter 2950*, Senate Bill 10 contains language stating the exchange or release of certain information is not intended to be punitive. However, also probative of legislative intent is the manner of the legislative enactment's "codification or the enforcement procedures it establishes ***." *Smith v. Doe (2003), 538 U.S. 84, 94, 123 S. Ct. 1140, 155 L. Ed. 2d 164.* Placement of a statute "is not sufficient to support a conclusion that the legislative intent was punitive." *Id. at 95*; See, also *In re G.E.S., 2008 Ohio 4076, at P22.* While it is not dispositive, "[w]here a legislature chooses to codify a statute suggests its intent." *Mikaloff v. Walsh (N.D.Ohio 2007), 2007 U.S. Dist. LEXIS 65076, at *15. (Citation omitted.)* The placement of Senate Bill 10, along with the text, demonstrates the General Assembly's intent to transform classification and registration into a punitive scheme.

[*P15] Senate [**6] Bill 10 is placed within Title 29, Ohio's Criminal Code. The specific classification and registration duties are directly related to the offense committed. Further, failure to comply with registration, verification, or notification requirements subjects an individual to criminal prosecution and criminal penalties. *R.C. 2950.99.* Specifically, pursuant to *R.C. 2950.99*, failure to comply with provisions of *R.C. Chapter 2950* is a felony.

[*P16] The following mandates by the legislature are also indicative of its intent for the new classification to be a portion of the offender's sentence. First, *R.C.*

2929.19(B)(4)(a), which is codified within the Penalties and Sentencing Chapter, states: "[t]he court *shall include in the offender's sentence* a statement that the offender is a tier III sex offender ***." (Emphasis added.) In addition, *R.C. 2929.23(A)*, titled "Sentencing for sexually oriented offense or child-victim misdemeanor offense ***," codified under the miscellaneous provision, states: "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* [**7] ***." (Emphasis added.) *R.C. 2929.23(B)* states: "[i]f an offender is being sentenced for a sexually oriented offense or a child-victim oriented offense that is a misdemeanor ***, the judge *shall include in the sentence* a summary of the offender's duties imposed under *R.C. 2950.04, 2950.041, 2950.05*, and *2950.06 of the Revised Code* and the duration of the duties." (Emphasis added.)

[*P17] As defined by the Ohio Revised Code, "sentence" is "the sanction or combination of sanctions imposed by the sentencing court on an offender who is convicted of or pleads guilty to an offense." *R.C. 2929.01 (E)(E)*. "Sanction" is defined in *R.C. 2929.01 (D)(D)* as "any penalty imposed upon an offender who is convicted of or pleads guilty to an offense, *as punishment for the offense*." (Emphasis added.)

[*P18] Therefore, the placement of Senate Bill 10 in the criminal code, along with the plain language of the bill, evidences the intent of the General Assembly to transform classification and registration into a punitive scheme.

[*P19] In *Cook*, the Supreme Court of Ohio analyzed the 1997 version of *R.C. Chapter 2950* and concluded the provisions were not punitive, since the General Assembly's purpose was "to promote public safety [**8] and bolster the public's confidence in Ohio's criminal and mental health systems." *State v. Cook, 83 Ohio St.3d at 417.*

[*P20] The *Cook* Court emphasized the statutory scheme's "narrowly tailored attack on th[e] problem[,]" stating "the notification provisions apply automatically *only* to sexual predators or, *at the court's discretion*, to habitual sex offenders. *** Required dissemination of registered information to neighbors and selected community officials likewise is an objectively reasonable measure to warn those in the community who are most likely to be potential victims." Id. (Emphasis added and internal citations omitted.) The *Cook* Court noted that the dissemination of the required information was available for inspection *only by law enforcement officials and "those most likely to have contact with the offender, e.g., neighbors, the director of children's services, school superintendents, and administrators of preschool and day care centers." Id. at 422.* (Emphasis added.)

[*P21] While the statute at issue in *Cook* restricted the access of an offender's information to "those persons necessary in order to protect the public[,]" Senate Bill 10 requires the offender's information to be open to [**9] public inspection and to be included in the internet sex offender and child-victim offender database. *R.C. 2950.081*. Not only does the public have unfettered access to an offender's personal information but, under Senate Bill 10, an offender has a legal duty to provide more information than was required under former *R.C. Chapter 2950.*

[*P22] 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 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 he may have; any e-mail addresses; all internet identifiers or telephone numbers that are registered to, or used by, the offender; and any other information that is required by the bureau of criminal identification and investigation. *R.C. 2950.04(C)*. The offender's information is placed into an internet [**10] registry. *R.C. 2950.081.*

[*P23] Furthermore, the *Cook* Court determined that former *R.C. Chapter 2950*, on its face, "is not punitive because it seeks to 'protect the safety and general welfare of the people of this state ***.'" *State v. Cook, 83 Ohio St.3d at 417*, citing former *R.C. 2950.02(B)* and *(A)(2)*. Recognizing this, the Supreme Court of Ohio, in *State v. Eppinger (2001), 91 Ohio St.3d 158, 165, 2001 Ohio 247, 743 N.E.2d 881*, stressed the importance of a sexual offender classification hearing and the significance of classifying offenders appropriately, stating:

[*P24] "[I]f we were to adjudicate all sexual offenders as sexual predators, we run the risk of 'being flooded with a number of persons who may or may not

deserve to be classified as high-risk individuals, with the consequence of diluting both the purpose behind and the credibility of the law. This result could be tragic for many.' *State v. Thompson,140 Ohio App. 3d 638, 748 N.E.2d 1144, 1998 WL 1032183.* Moreover, the legislature would never have provided for a hearing if it intended for one conviction to be sufficient for an offender to be labeled a 'sexual predator.'"

[*P25] Also of significance, the *Eppinger* Court noted that "[o]ne sexually oriented offense [**11] is not a clear predictor of whether that person is likely to engage in the future in one or more sexually oriented offenses, particularly if the offender is not a pedophile. Thus, we recognize that one sexually oriented conviction, without more, may not predict future behavior." *Id. at 162.*

[*P26] In addition, former *R.C. Chapter 2950* permitted trial courts to first conduct a hearing and consider numerous factors before classifying an individual as a sexual predator, a habitual sexual offender, or a sexually oriented offender. In the judicial review of prior legislation, such as Megan's Law and the original SORN Law, courts have noted with protective favor the ability of the trial courts to assess and classify offenders.

[*P27] Unlike the statute at issue in *Cook* and *Eppinger*, an individual's registration and classification obligations under Senate Bill 10 depend solely on his or her crime, not upon his or her ongoing threat to the community. The result is a ministerial rubber stamp on all offenders, regardless of any mitigating facts in the individual case. The legislative basis for this seems to be expert analysis that puts *all* offenders in one of two categories: those who have offended more than [**12] once, and those who have offended only once, but are likely to offend again at some point in the future. This process, as delineated in Senate Bill 10, has stripped the trial court from engaging in an independent classification hearing to determine an offender's likelihood of recidivism: expert testimony is no longer presented; written reports, victim impact statements, and presentence reports are no longer taken into consideration, nor is the offender's criminal and social history. See, *State v. Eppinger, 91 Ohio St.3d at 166-167.* Gone are the notice, hearing, and judicial review tenants of due process. Thus, there is no longer an independent determination as to the likelihood that a given offender would commit another crime.

[*P28] While the legislature may be entitled to adopt this questionable approach to apply to offenders from the date of passing the legislation, neither the Ohio Constitution nor the United States Constitution permit the retroactive application of Senate Bill 10 in its current form to individuals such as Ettenger.

[*P29] Moreover, to date, the majority of the current justices on the Supreme Court of Ohio have objected to the characterization of Ohio's sex offender classification [**13] system as a "civil" proceeding. In *State v. Wilson*, Justice Lanzinger, whose dissenting opinion was joined by Justice O'Conner, stated the "restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions." *State v. Wilson, 113 Ohio St. 3d 382, 2007 Ohio 2202, at P46, 865 N.E.2d 1264.* (Lanzinger, J., concurring in part and dissenting in part.) More recently, Justice Lanzinger again voiced her concern in a dissenting opinion in *State v. Ferguson*, where she stated "*R.C. 2950.09* has been transformed from remedial to punitive." *State v. Ferguson, 120 Ohio St. 3d 7, 2008 Ohio 4824, P45, 896 N.E.2d 110.* (Lanzinger, J., dissenting.) Her dissenting opinion in *Ferguson* was joined by Justices Pfeifer and Stratton. Thus, at one time or another, Justices Pfeifer, O'Connor, Stratton, and Lanzinger have all expressed their belief that the former version of Ohio's sex offender classification system was punitive rather than remedial.

[*P30] Furthermore, even if it were construed that the General Assembly's intent was civil in nature, Senate Bill 10 is unconstitutional due to its punitive effect as applied to Ettenger. In assessing the effect [**14] of a statute, the United States Supreme Court has "provid[ed] some guidance" by indicating certain factors to be applied in resolving this point. The factors include:

[*P31] "Whether the sanction involves an affirmative disability or restraint, *** whether it has historically been regarded as a punishment, *** whether it comes into play only on a finding of *scienter*, *** whether its operation will promote the traditional aims of punishment -- retribution and deterrence, *** whether the behavior to which it applies is already a crime, *** whether an alternative purpose to which it may rationally be connected is assignable for it, *** and whether it appears excessive in relation to the alternative purpose

assigned ***[.]" *Kennedy v. Mendoza-Martinez (1963), 372 U.S. 144, 168-169, 83 S. Ct. 554, 9 L. Ed. 2d 644. (Internal citations omitted.)*

[*P32] While the *Cook* Court concluded that (1) historically, the requirement of registration has been deemed a valid regulatory technique, and (2) the dissemination of information is considered non-punitive when it supports a proper state interest, it analyzed the 1997 version of *R.C. Chapter 2950. State v. Cook, 83 Ohio St.3d at 418-419.*

[*P33] Since *Cook*, the sexual offender laws have been significantly [**15] modified. For example, 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, 83 Ohio St.3d at 408.* Under the latest version of the scheme, however, the places where registration is required have 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. *R.C. 2950.04.* Not only is the offender now obligated to register in more counties, but he also has a legal duty to provide more information, as previously stated. Besides the change in the classification system, the increase in the duration and frequency of the requirements for registration, and the increase in the information provided, the access of the public to the information has been greatly increased through the use of [**16] an internet database that was previously established by the Ohio Attorney General.

[*P34] The Supreme Court of Alaska, in *Doe v. Alaska (2008), 189 P.3d 999*, recognized the effects of requiring an offender to place personal information on a public registry. The *Doe* Court stated:

[*P35] "*** [W]e agree with the conclusion of Justice Ginsburg, also dissenting in *Smith*, that ASORA [Alaska's Sex Offender Registration Act] 'exposes registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism.' *** In the decision reversed in *Smith*, the Ninth Circuit observed that '(b)y posting (registrants') names, addresses, and employer addresses on the internet, the Act subjects (registrants) to community obloquy and scorn that damage them personally and professionally.' *** The Ninth Circuit observed that the practical effect of this dissemination is that it leaves open the possibility that the registrant will be denied employment and housing opportunities as a result of community hostility. *** As Justice Souter noted in concurring in *Smith*, 'there is significant evidence of onerous practical effects of being listed on a sex offender registry.' *** Outside [**17] Alaska, there have been reports of incidents of suicide by and vigilantism against offenders on state registries. ***

[*P36] "***

[*P37] "*** ASORA requires release of information that is in part not otherwise public or readily available. Moreover, the regulations authorize dissemination of most ASORA registration information 'for any purpose, to any person.' *** Taken in conjunction with the Alaska Public Records Act, *** ASORA's treatment of this information, confirmed by the regulations, seems to require that the information be publicly available. By federal law, it is disseminated statewide, indeed worldwide, on the state's website. *** There is a significant distinction between retaining public paper records of a conviction in state file drawers and posting the same information on a state-sponsored website; this posting has not merely improved public access but has broadly disseminated the registrant's information, some of which is not in the written public record of the conviction. As the Alaska Court of Appeals noted, 'ASORA does provide for dissemination of substantial personal and biographical information about a sex offender that is not otherwise readily available from a single governmental [**18] source.' *** We also recognized in *Doe A* that several sex offenders had stated that they had lost their jobs, been forced to move from their residences, and received threats of violence following establishment of the registry, even though the facts of their convictions had always been a matter of public record. *** We therefore conclude that the harmful effects of ASORA stem not just from the conviction but from the registration, disclosure, and dissemination provisions." *Id. at 1009-1011.* (Internal citations omitted.)

[*P38] After careful examination of this opinion, we agree with the reasoning and conclusion of the *Doe* Court.

[*P39] As to whether the new registration and notification requirements must be viewed as consistent with historical forms of punishment, the United States Supreme Court, in *Smith v. Doe, 538 U.S. at 98*, held that the dissemination of truthful information concerning a sexual offender does not constitute a historical form of punishment when it is done in the furtherance of a legitimate governmental interest. As part of its analysis of an Alaskan sexual offender scheme, the *Smith* Court expressly rejected the argument that registration and notification requirements resemble [**19] the punishment of public shaming, as used in colonial times. *Id., at 98-99.* However, after the decision in *Smith* was rendered, the Supreme Court of Alaska, in *Doe*, determined that ASORA is punitive and in violation of the *due process clause of the Alaska Constitution. Doe v. State, 189 P.3d at 1015, 1019.* In analyzing whether the statute's effect has historically been regarded as punishment, the *Doe* Court stated:

[*P40] "ASORA does not expressly impose sanctions that have been historically considered punishment. *** Because registration acts such as ASORA are 'of fairly recent origin,' courts addressing this issue have determined that there is no historical equivalent to these registration acts. *** Some courts have instead considered whether the acts are analogous to the historical punishment of shaming; these courts have concluded that they are not. *** But the dissemination provision at least resembles the punishment of shaming *** and the registration and disclosure provisions 'are comparable to conditions of supervised release or parole.' *** And these provisions have effects like those resulting from punishment. The fact that ASORA's registration reporting provisions are comparable [**20] to supervised release or parole supports a conclusion that ASORA is punitive." *Id. at 1012.*

[*P41] Furthermore, Senate Bill 10 cannot promote the goals of retribution and deterrence when the classification of an offender is based solely upon the nature of the crime committed, not on an individual's recidivism potential.

[*P42] The *Cook* Court stated that registration and notification requirements are not intended to deter the behavior of the offender, but are instead intended to help the public protect itself from the harmful behavior. *State v. Cook, 83 Ohio St.3d at 420.* Furthermore, with the enactment of Senate Bill 10, the legislature contends that the dissemination of an offender's personal information is intended to protect public safety. *R.C. 2950.02.* The general assembly makes the assertion that "[s]ex offenders and offenders who commit child-victim oriented offenses pose a risk of engaging in further sexually abusive behavior even after being released from imprisonment, a prison term, or other confinement or detention ***." *R.C. 2950.02(A)(2).*

[*P43] However, under Senate Bill 10, every offender must provide identical information, and the information is published in the same manner for every offender. [**21] The only factor that differentiates the offenders is the frequency and duration of the registry. Furthermore, the offenders are not given the opportunity to petition the trial court to restrict the public dissemination of his or her personal information, since the public is allowed unrestricted access to the offender's personal information. If this were the case under Senate Bill 10, it is conceivable that the notification policy would promote the purpose of protecting the public from the offender's "harmful behavior."

[*P44] The new law as applied to this case resulted in an offender, with a clear expectation that his reporting was going to end in ten years, to be legislatively resentenced to an irrefutable lifetime of reporting. Based on the foregoing, Senate Bill 10 violates the ex post facto laws, as applied to Ettenger.

Retroactivity

[*P45] Ettenger argues even if the new law does not constitute an ex post facto law as applied to him, *Section 28, Article II of the Ohio Constitution* prohibits its retroactive application to an offender such as him who has already been sentenced and classified under the old law. We agree.

[*P46] *Section 28, Article II of the Ohio Constitution* states that "[t]he general [**22] assembly shall have no power to pass retroactive laws." The courts have interpreted the constitutional prohibition against retroactive laws to apply "to laws affecting substantive rights but not to the procedural or remedial aspects of such laws." *Kunkler v. Goodyear Tire & Rubber Co. (1988), 36 Ohio St.3d 135, 137, 522 N.E.2d 477.*

[*P47] A two-step standard is followed to decide if the retroactive application of a statute will be deemed to violate the constitutional clause. *State v. Consilio, 114*

Ohio St.3d 295, 2007 Ohio 4163, at P9-10, 871 N.E.2d 1167. (Citation omitted.) Pursuant to the first prong of the "retroactive" test, the language of the statute is reviewed to see whether the legislature expressly stated that retroactive application was intended. Id. (Citation omitted.) If the wording of the General Assembly is sufficiently explicit to show a retroactive intent, the statute is then reviewed to determine if it affects a substantive or remedial matter. Id. (Citation omitted.)

[*P48] A review of various provisions in the present version of *R.C. Chapter 2950* confirms that the General Assembly has clearly indicated that offenders who were classified under the prior version of the scheme are obligated to comply with the new [**23] requirements. See, e.g., *R.C. 2950.03, 2950.03(A)(5)(a), 2950.031, 2950.032(A), 2950.033(A).* Therefore, since the first prong of the test for retroactive application of a statute has been met, the analysis must focus on whether the provisions should be characterized as substantive or remedial. Such an application is not permitted in cases such as Ettenger's, since it has an adverse effect upon this offender's substantive rights.

[*P49] The *Cook* Court determined that applying Megan's Law to those convicted under prior law did not offend the Retroactivity Clause. *State v. Cook, 83 Ohio St.3d at 414.* In *Cook*, the Supreme Court of Ohio stated: "[t]o hold otherwise would be 'to find that society is unable to protect itself from sexual predators by adopting the simple remedy of informing the public of their presence.'" Id. (Citation omitted.)

[*P50] In *State v. Wilson, 113 Ohio St. 3d 382, 2007 Ohio 2202, at P32, 865 N.E.2d 1264*, the Supreme Court of Ohio relied upon its prior holding in *Cook, supra*, to hold that sex offender classification proceedings under *R.C. Chapter 2950* are civil in nature. However, as observed by Justice Lanzinger in the dissent of *State v. Wilson*, *R.C. Chapter 2950* was amended subsequent to the *Cook* decision. Justice [**24] Lanzinger, joined by Justice O'Connor, stated: "*R.C. Chapter 2950* has been amended since *Cook* and *Williams* *** and the simple registration process and notification procedures considered in those two cases are now different." *Id. at P45.* (Lanzinger, J., concurring in part and dissenting in part.)

[*P51] After distinguishing the then-current laws with those at issue under *Cook* and *Williams*, Justice Lanzinger stated:

[*P52] "While protection of the public is the avowed goal of *R.C. Chapter 2950*, we cannot deny that severe obligations are imposed upon those classified as sex offenders. All sexual predators and most habitual sex offenders are expected, for the remainder of their lives, to register their residences and their employment with local sheriffs. Moreover, this information will be accessible to all. The stigma attached to sex offenders is significant, and the potential exists for ostracism and harassment, as the *Cook* court recognized. *** Therefore, I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result [**25] of the offender's actions." *Id. at P46. (Internal citation omitted.)*

[*P53] Thereafter, in *State v. Ferguson, 120 Ohio St. 3d 7, 2008 Ohio 4824, at P27-P40, 896 N.E.2d 110*, the Supreme Court of Ohio again relied upon *State v. Cook, 83 Ohio St.3d 404, 1998 Ohio 291, 700 N.E.2d 570*, *State v. Williams, 114 Ohio St.3d 103, 2007 Ohio 3268, 868 N.E.2d 969*, and *State v. Wilson, 113 Ohio St. 3d 382, 2007 Ohio 2202, 865 N.E.2d 1264*, in determining that the amended provisions of *R.C. Chapter 2950*, under Senate Bill 5, were not in violation of the retroactivity clause of the Ohio Constitution.

[*P54] Justice O'Connor, writing for the majority, noted that she had joined Justice Lanzinger's dissent in *Wilson, supra*, "but it did not garner sufficient votes to form the majority ***." *State v. Ferguson, 120 Ohio St. 3d 7, 2008 Ohio 4824, at P30, fn. 4, 896 N.E.2d 110.* After a close reading of *Ferguson*, however, it appears to be distinguishable from *Wilson*. In writing for the majority, Justice O'Connor made a very important distinction, as Ferguson had been previously classified a sexual predator with a potential of lifetime reporting. *Id. at P4.* The opinion stated:

[*P55] "[W]e observe that an offender's classification as a sexual predator is a collateral consequence of the offender's criminal acts rather than a form of punishment per se. Ferguson has not established that [**26] he had any reasonable expectation of finality in a collateral consequence that *might* be removed. Indeed, the record before us is entirely devoid of such an argument and of any evidence that would support a reasonable conclusion that Ferguson was likely to have his classification removed. Absent such an expectation,

there is no violation of the Ohio Constitution's retroactivity clause." *Id. at P34.* (Emphasis sic.)

[*P56] While the prohibition against ex post facto laws applies only to criminal cases, the retroactivity provisions of the Ohio Constitution apply in criminal and civil cases. As a result, this reasonable "expectation of finality" described by Justice O'Connor in *Ferguson, supra*, may be outcome-determinative in the instant case regardless of the classification of Senate Bill 10. To reiterate, the Supreme Court of Ohio has held that a "'later enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, *unless the past transaction or consideration created at least a reasonable expectation of finality.*'" *Cook, 83 Ohio St.3d at 412.* (Emphasis added.) For instance, where a litigant's case comes to a conclusion, he or she *may* [**27] have a right to a reasonable "expectation of finality." This reasonable "expectation of finality" is applicable to all offenders except the most heinous offenders, labeled sexual predators, as noted by Justice O'Connor in *Ferguson, supra.*

[*P57] In this regard, the same conclusion should not be reached for offenders in the following scenarios: Offender # 1 committed a rape and was declared a sexual predator with potential reporting and residency restrictions for the rest of his life, such as the offender in *State v. Ferguson, 120 Ohio St. 3d 7, 2008 Ohio 4824, 896 N.E.2d 110*; Offender # 2, like Ettenger, pled guilty to one count of an F-4 attempted sexual battery and stipulated to the classification of a sexually oriented offender "based on agreement of defense and the prosecution" after 2002, pre-SORN. Offender # 2 served six years of an agreed ten-year reporting period but under Senate Bill 10 has been legislatively reclassified as a Tier III offender, subject to residency restrictions and reporting for the rest of his life.

[*P58] In the instant case, Ettenger certainly had a reasonable expectation that his classification and attendant requirements were to last a finite period of ten years. Further, this reasonable expectation [**28] of finality was based on the agreement with the state of Ohio. Yet, through the enactment of Senate Bill 10, Ettenger is subject to *mandatory lifetime* reporting. The prospect of this result could have easily changed his decision to enter a guilty plea in his case and instead proceed to trial.

[*P59] Based on the foregoing and when applied retroactively to offenders such as Ettenger, Senate Bill 10 violates the Ex Post Facto Clause of the United States Constitution and *Section 28, Article II of the Ohio Constitution* when [**29] an offender had a reasonable expectation of finality. The same result would not necessarily be true where an offender had been adjudicated a sexual predator, or if the offender, at the time of his conviction, had not yet been classified but could have been classified as a sexual predator. This is primarily due to the fact, as observed by Justice O'Connor, that these individuals never had any expectation that their registration requirements would end prior to the passage of Senate Bill 10. However, those individuals who had been classified with resulting specific, terminable reporting requirements should be given the protections afforded by the United States and Ohio Constitutions.

Impairment of Contracts

[*P60] Ettenger also argues that his sex offender classification pursuant to former *R.C. Chapter 2950* was part of his plea agreement and, therefore, his reclassification with additional obligations imposed constitutes an impairment of an obligation of contract prohibited by *Section 28, Article II of the Ohio Constitution* and Clause 1, Section 10, Article I of the United States Constitution.

[*P61] Ettenger asserts that the provisions of Senate Bill 10 cannot be applied to him because it would violate [**30] the terms of his plea agreement and would result in a breach of his contract with the state. According to Ettenger, the state had agreed as part of the plea bargain to recommend to the court that he be classified as a "sexually oriented offender." In light of this, he argues that the Attorney General cannot attempt to reclassify him without breaching the terms of the plea agreement.

[*P62] We recognize a plea agreement is considered a contract between the state and a criminal defendant; as a result, such an agreement is subject to the general laws of contracts. *State v. Butts (1996), 112 Ohio App.3d 683, 685-686, 679 N.E.2d 1170.* Therefore, if one side violates a term of a plea agreement, the other party has a right to pursue certain remedies, including the rescission of the agreement. *State v. Walker, 6th Dist. No. L-05-1207, 2006 Ohio 2929, at P13.*

[*P63] As part of Ettenger's plea bargain, the state

and defense counsel stipulated that he was to be classified a "sexually oriented offender pursuant to *O.R.C. 2950.01*." At the March 20, 2008 hearing, defense counsel stated:

[*P64] "[T]his case was negotiated so that the offenses that he was originally charged with were reduced, and as part of that plea bargain, [the state [**31] and Ettenger] stipulated that [Ettenger] was only a sexually oriented offender, and [Ettenger] relied on that. *** That's what he understood that the result was going to be, and that's why [Ettenger] entered the plea."

[*P65] This agreement was further evidenced in a journal entry dated May 7, 2002, indicating Ettenger plead guilty, was classified a sexually oriented offender, and address registration and verification was ordered annually for 10 years. The entry further states: "[t]his finding based on agreement of defense and prosecution."

[*P66] The classification category has always been an important part of the plea considerations in these cases. Indeed, those common pleas judges who deal with plea bargains in sex cases on a regular basis know that classification issues play an important role in the process. Common Pleas Judge James DeWeese, Richland County, in a thorough and practical opinion noted: "[a]n observer who visits a courtroom when sex offenders are sentenced will see that sex offenders usually view the sex offender labeling, registration and community notification requirements as the most punitive and most odious part of their sentence." *Sigler v. Ohio* (Aug. 11, 2008), Richland C.P. No. 07 CV 1863, unreported. [**32] Reversed by *Sigler v. State, 5th Dist. No. 08-CA-79, 2009 Ohio 2010.* In this case, Ettenger, the prosecutor, and the court agreed on his registration status. That should be the end of it. Reclassification by the state legislature clearly may have impacted Ettenger's decision to enter a plea and forego his right to trial.

[*P67] Therefore, in the instant matter, the enactment of the new sexual offender scheme under Senate Bill 10 constitutes a breach of Ettenger's prior plea agreement. Ettenger's contention that his reclassification constitutes an impairment of a contract is with merit.

Double Jeopardy

[*P68] Ettenger claims his reclassification constitutes successive punishment and is therefore a double jeopardy violation pursuant to the *Fifth* and *Fourteenth Amendments of the United States Constitution*, and *Section 10, Article I of the Ohio Constitution*, all of which forbid the imposition of multiple criminal punishments for the same offense in successive proceedings.

[*P69] The Supreme Court of Ohio has held:

[*P70] "The *Fifth Amendment to the United States Constitution* provides that 'no person shall *** be subject for the same offence to be twice put in jeopardy of life or limb.' [**33] Similarly, *Section 10, Article I, Ohio Constitution* provides, 'No person shall be twice put in jeopardy for the same offense.'" *State v. Zima, 102 Ohio St.3d 61, 2004 Ohio 1807, at P16, 806 N.E.2d 542.*

[*P71] The double jeopardy provision has been interpreted to apply in two basic situations: (1) when the state tries to pursue a second prosecution based upon the same facts; and (2) when the state attempts to impose a second punishment for the same offense. *State v. Byers, 2008 Ohio 5051, at P100.* However, the double jeopardy prohibition can only be invoked when the conduct of the government involves criminal punishment. *State v. Williams (2000), 88 Ohio St.3d 513, 528, 2000 Ohio 428, 728 N.E.2d 342.*

[*P72] As concluded in our analysis of Ettenger's retroactivity and ex post facto arguments, Senate Bill 10 is punitive in nature. Furthermore, as previously stated, at one time or another, Justices Pfeifer, O'Connor, Stratton, and Lanzinger have all expressed their belief that the former version of Ohio's sex offender classification system was punitive rather than remedial.

[*P73] Now, through the enactment of Senate Bill 10, Ohio's sex offender classification system has been revamped, increasing the frequency, duration, and extent of the reporting requirements. [**34] Of specific concern is the "automatic" nature of the new classification system. An offender's classification status is *solely* based on the crime he or she has committed. If an offender commits an offense set forth in *R.C. 2950.01 (G)*, or attempts to commit one of those offenses, he or she is classified as a Tier III offender and is forced to comply with the onerous registration requirements for the rest of his or her life. Moreover, unlike the former version of the statute, the offender is not entitled to a hearing where a judge could make an independent evaluation of the offender's specific likelihood of recidivism based on the offender's criminal history, psychiatric evaluations, age, and facts of the

underlying offense. In light of this significant change, our analysis of Ettenger's retroactivity and ex post facto arguments, and the reasons set forth in Justice Lanzinger's above-noted dissenting opinions, Ohio's sex offender classification system is clearly punitive in nature.

[*P74] In this matter, Ettenger pled guilty to one count of attempted sexual battery. In 2002, he was sentenced for this offense and adjudicated a sexually oriented offender. He had an expectation of finality in [**35] that his reporting requirements would end in ten years. Now, additional punitive measures have been placed on Ettenger, as he is required to comply with the new registration requirements every 90 days for the rest of his life. Essentially, Ettenger is being punished a second time for the same offense. Accordingly, the application of the current version of R.C. 2950 to Ettenger violates the *Double Jeopardy Clauses of the Ohio* and *United States Constitutions*.

Separation of Powers

[*P75] Ettenger also asserts that the new law violates the doctrine of separation of powers. Specifically, he claims it usurps the court's prior adjudication of him as a sexually oriented offender and by doing so it encroaches upon the authority reserved for the judiciary branch.

[*P76] The Seventh District evaluated a similar claim in *State v. Byers, 2008 Ohio 5051* and found no violation of the doctrine of separation of powers. The Seventh District adopted the following analysis provided in *State v. Slagle, 145 Ohio Misc.2d 98, 2008 Ohio 593, 884 N.E.2d 109*:

[*P77] "'[T]he 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 [**36] 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.'" *Byers, at P73*, quoting *Slagle, at P21* and also citing *In re Smith, 3d Dist No. 1-07-58, 2008 Ohio 3234, at P39* and *In re G.E.S., 2008 Ohio 4076, at P42*.

[*P78] The judiciary is empowered to hear a controversy between adverse parties, ascertain the facts, and apply the law to the facts to render a final judgment. *State v. Swank, 11th Dist. No. 2008-L-019, 2008 Ohio 6059, at P99*, citing *Fairview v. Giffee (1905), 73 Ohio St. 183, 190, 76 N.E. 865, 3 Ohio L. Rep. 494*. In the criminal context, the judiciary is empowered to determine if a crime has been committed and the penalty to be imposed on a defendant.

[*P79] No abrogation of final judicial decisions occurred when a previously convicted offender such as Ettenger is reclassified subject to additional requirements. Therefore, the new law as applied to someone in Ettenger's situation does not violate [**37] the doctrine of separation of powers.

Substantive Due Process Rights and Privacy

[*P80] Ettenger also argues that the residency restrictions added by Senate Bill 5 in 2003 and enhanced by Senate Bill 10 violate the substantive component of the Due Process Clauses in the *Fourteenth Amendment to the United States Constitution* and in *Section 16, Article I of the Ohio Constitution*, as well as the right to privacy guaranteed by *Section 1, Article 1 of the Ohio Constitution*.

[*P81] Pursuant to his reclassification, Ettenger is barred from residing within 1,000 feet of a school, pre-school, or child care center. He claims these restrictions loom over any residence selected by him because of the possibility of being uprooted and forced to abandon his home if a school or a day care center opens near his residence. He argues the restrictions violate his substantive due process right as it interferes with his liberty interest to live where he wishes and his right to privacy.

[*P82] Ettenger has failed to demonstrate that he has been injured by the residency restriction imposed by Senate Bill 10, for he has not claimed ownership or residence within 1,000 feet of the prohibited facilities, as enumerated above. Further, [**38] Ettenger has not claimed he was forced to change residences as a result of Senate Bill 10. See *State v. Bruce, 8th Dist. No. 89641, 2008 Ohio 926, at P10-11*; *State v. Pierce, 8th Dist. No. 88470, 2007 Ohio 3665, at P33*. Since Ettenger does not show or even allege an actual injury by the residency

restrictions imposed by Senate Bill 10, we find his claim to be without merit.

Conclusion

[*P83] Ettenger's assignment of error has merit to the extent indicated.

[*P84] The result in this case would not necessarily be the same for someone who either was, or could have been, adjudicated a sexual predator under prior law. Even though the current law is determined to be punitive in nature, unless the record would establish otherwise, the disparity of impact of the current law on an individual classified as a sexual predator is likely to be de minimus. That would significantly alter the analysis in this case, since a lifetime of reporting is a lifetime of reporting.

[*P85] The judgment of the Lake County Common Pleas Court is hereby reversed, and this matter is remanded for proceedings consistent with this opinion.

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion,

MARY JANE TRAPP, P.J., concurs [**39] in part, dissents in part with a Concurring/Dissenting Opinion.

CONCUR BY: DIANE V. GRENDELL; MARY JANE TRAPP (In Part)

CONCUR

DIANE V. GRENDELL, J., concurs in judgment only with a Concurring Opinion.

[*P86] I concur with the judgment ultimately reached by the majority, that Ettenger may not be constitutionally reclassified under the provisions of the Adam Walsh Act. However, I disagree entirely with the analysis employed by the majority. Accordingly, I concur in judgment only. Ettenger'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.

[*P87] The application of the Adam Walsh Act, amending Ohio's Sex Offender Registration and Notification Act, to previously 87 The application of the Adam Walsh Act, amending Ohio's Sex Offender Registration and Notification Act, to previously journalized final sentencing judgments or orders violates the constitutional doctrine of separation of powers because it legislatively vacates the settled and journalized final judgments of the judicial branch of government.

[*P88] The doctrine of separation of powers limits the ability of the General Assembly to exercise the powers of and exert an [**40] influence over the judicial branch of government. "The administration of justice by the judicial branch of the government cannot be impeded by the other branches of the government in the exercise of their respective powers." *State ex rel. Johnston v. Taulbee (1981), 66 Ohio St.2d 417, 423 N.E.2d 80*, at paragraph one of the syllabus.

[*P89] "[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, 75 N.E. 939, 3 Ohio L. Rep. 412*; *Gompf v. Wolfinger (1902), 67 Ohio St. 144, 65 N.E. 878*, at paragraph three of the syllabus ("[a] judgment which is final by the laws existing when it is rendered cannot constitutionally be made subject to review by a statute subsequently enacted"). Cf. *Plaut v. Spendthrift Farm, Inc. (1995), 514 U.S. 211, 219, 115 S. Ct. 1447, 131 L. Ed. 2d 328* (Congress may not interfere with the power of the federal judiciary "to render dispositive judgments" by "command[ing] the federal courts to reopen final judgments") (citation omitted).

[*P90] A determination of an offender's classification under former *R.C. Chapter 2950* constituted a final judicial order. *State v. Washington, 11th Dist. No. 99-L-015, 2001 Ohio 8905, 2001 Ohio App. LEXIS 4980, at *9* ("a defendant's status as [**41] 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 P6* ("[i]nasmuch as a sexual predator classification is an order that affects a substantial right in a special proceeding, it is final and appealable"); cf. *State v. Nader, 10th Dist. No. 05AP-91, 2005 Ohio 5171, at P1* (the State appealed the trial court's finding that the offender was not a sexually oriented offender); *State v. Williamson, 5th Dist. No. 04 CA 75, 2005 Ohio 3524, at P8* (the offender appealed the trial court's finding that he was a sexually oriented offender).

[*P91] 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 P9* (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 [**42] barred sexual predator classifications when an initial classification request had been dismissed on the grounds that the court believed *R.C. Chapter 2950* to be unconstitutional") (citation omitted); *State v. Dignan, 11th Dist. No. 2008-T-0044, 2008 Ohio 3732, at P7* (dismissing, as untimely, offender's appeal of his sex offender classification).

[*P92] In the present case, Ettenger's status as a sexually oriented offender became final when it was journalized by the trial court on March 7, 2002. Good legislative intentions notwithstanding, that status cannot be legislatively vacated by the subsequent application of the Adam Walsh Act.

[*P93] The majority's analysis rests on the erroneous conclusion that the Adam Walsh Act is punitive and, thus, violates the Ex Post Facto Clause of the United States Constitution, the *Retroactivity Clause (Section 28, Article II) of the Ohio Constitution,* and the constitutional prohibitions against double jeopardy. In reaching these conclusions, the majority engages in much unwarranted speculation regarding the Legislature's motivations for enacting the Adam Walsh Act.

[*P94] The Legislature's intent in passing the Act is expressly stated: "it is the general assembly's intent [**43] to protect the safety and general welfare of the people of this state" and "the policy of this state to require the exchange *** of relevant information about sex offenders and child-victim offenders among public agencies and officials and to authorize the release *** of necessary and relevant information about sex offenders and child-victim offenders to members of the general public as a means of assuring public protection *** is not punitive." *R.C. 2950.02(B).* [1]

> 1 It should also be recognized that Ohio was required by federal law to pass the Adam Walsh Act or risk losing "10 percent of the funds that would otherwise be allocated *** to the jurisdiction under *** the Omnibus Crime Control and Safe Streets Act of 1968." *Section 16925(a), Title 42, U.S.Code.*

[*P95] In the absence of such a statement, consideration of the Act's placement within the criminal code and the provisions commanding that an offender's classification be included in his or her sentence would be relevant. Given the Legislature's express statement of intent, however, such inquiry is unnecessary.

[*P96] It is also unnecessary to comment on what the majority considers the Legislature's "questionable approach" to protecting the public [**44] from sexual offenders. "Any constitutional analysis must begin with *** the understanding that it is not this court's duty to assess the wisdom of a particular statute." *Groch v. GMC, 117 Ohio St.3d 192, 2008 Ohio 546, at P141, 883 N.E.2d 377.*

[*P97] The majority also errs in its conclusion that the effects of the Act's provisions are punitive, regardless of the Legislature's motives for enacting them. In support, the majority notes that sexual offenders are "now obligated to register in more counties," "provide more information," and, for some offenders, the registration period is extended. [2]

> 2 The majority asserts that the Adam Walsh Act "cannot promote the goals of retribution and deterrence when the classification of an offender is based solely upon the nature of the crime committed, not on an individual's recidivism potential." This fact actually supports the conclusion that the effect of the Act is regulatory rather than punitive. The "goals of retribution and deterrence" are quintessentially punitive goals. Cf. *R.C. 2929.11 (A)* ("[t]he overriding purposes of felony sentencing are to protect the public from future crime by the offender and others and to punish the offender"). Moreover, the United States [**45] Supreme Court has held that "[t]he *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences". *Smith v. Doe (2003), 538 U.S. 84, 103, 123 S. Ct. 1140, 155 L. Ed. 2d 164.*

[*P98] These aspects of the Adam Walsh Act, however, were already present in prior amendments to R.C. Chapter 2150 as part of Am.Sub.S.B. No. 5. In *State v. Ferguson, 120 Ohio St.3d 7, 2008 Ohio 4824, 896 N.E.2d 110,* the Ohio Supreme Court held that these amendments could be applied retroactively.

[*P99] In *Ferguson*, the appellant argued the retroactive application of the following provisions violated the Ex Post Facto and *Retroactivity Clauses*: "sex offenders are required to personally register with the sheriff in their county of residence, the county in which they attend school, and the county in which they work, and *** they must do so every 90 days"; and "any statements, information, photographs, and fingerprints required to be provided by the offender [for the purposes of community-notification] are public records and are included in the Internet database of sex offenders maintained by the Attorney General's office." *Id. at P9* and *P10* respectively.

[*P100] With respect [**46] to the *Retroactivity Clause*, the Supreme Court rejected the argument that "the General Assembly has transmogrified the remedial statute into a punitive one by the provisions enacted through S.B. 5." *Id. at P32.* Since amended *R.C. Chapter 2950* still constituted "a civil, remedial statute," it did not violate the Ex Post Facto Clause. *Id. at P43.*

[*P101] The changes enacted by the Adam Walsh Act are not qualitatively different from those enacted by S.B. 5. Under *Ferguson*, therefore, their retroactive application does not violate the Ex Post Facto or *Retroactivity Clauses*.

[*P102] Finally, I take exception with the majority's conclusion that only sexual offenders who were subject to "specific, terminable reporting requirements" [**47] possessed a reasonable expectation of finality in the conditions of their classification. The expectation of finality does not derive from the eventual termination of the classification, but, rather, from the fact that one's classification was rendered as part of the trial court's final judgment. An offender who is sentenced for life has just as much expectation that he will serve a life sentence as the offender who is sentenced for ten years expects to serve a ten-year sentence.

[*P103] Therefore, I affirm for the reasons stated above. Ettenger'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.

DISSENT BY: MARY JANE TRAPP (In Part)

DISSENT

MARY JANE TRAPP, P.J., concurs in part, dissents in part with a Concurring/Dissenting Opinion.

[*P104] I concur with the majority's conclusion that the residency restrictions do not violate Mr. Ettenger's substantive due process and privacy rights. I also concur with its conclusion that no abrogation of final judicial decisions occurs in violation of the separation of powers when a previously convicted offender such as Mr. Ettenger is reclassified subject to additional requirements.

[*P105] [**48] I respectfully dissent, however, regarding the majority's determination that Senate Bill 10 is criminal rather than civil and thus violative of the prohibition against ex post facto laws and retroactive legislation.

[*P106] I recognize that the Supreme Court of Ohio has become more divided on the issue of whether the registration and notification statute has evolved from a remedial and civil statute into a punitive one. As Justice Lanzinger stated in her concurring in part and dissenting in part opinion in *Wilson*: "I do not believe that we can continue to label these proceedings as civil in nature. These restraints on liberty are the consequences of specific criminal convictions and should be recognized as part of the punishment that is imposed as a result of the offender's actions." See, also, *State v. Ferguson, 120 Ohio St.3d 7, 2008 Ohio 4824, 896 N.E.2d 110* (Lanzinger, J., dissenting). Therefore, I believe Senate Bill 10 merits review by the Supreme Court of Ohio to address the issue of whether the current version of *R.C. Chapter 2950* has been transformed from remedial to punitive law. I decline, however, to join the majority in its prognostications as to what the court might determine when it reviews [**49] Senate Bill 10 which imposes substantially more onerous reporting and notification requirements on sex offenders.

[*P107] Before that court revisits the issue, however, I believe, we, as an inferior court, are bound to apply its holdings in *Cook, Wilson*, and *Ferguson*, as we did in the unanimously decided case in *State v. Swank, 11th Dist. No. 2008-L-019, 2008 Ohio 6059.* See, also, *State v. Charette, 11th Dist. No. 2008-L-069, 2009 Ohio 2952.* Unless and until the highest court of the state decides otherwise, the principle of stare decisis dictates that we follow our court's precedent providing litigants their entitled predictability and stability.

[*P108] Furthermore, I disagree with the majority's analysis on Mr. Ettenger's impairment of contract claim.

He asserts that the application of the provisions of Senate Bill 10 to him would violate the terms of his plea agreement and therefore would result in a breach of his contract with the state.

[*P109] I recognize a plea agreement is considered a contract between the state and a criminal defendant. As a result, such an agreement is subject to the general laws of contracts. *State v. Butts (1996), 112 Ohio App.3d 683, 686, 679 N.E.2d 1170.* Therefore, if one side violates a term [**50] of a plea agreement, the other party has a right to pursue certain remedies, including the rescission of the agreement. *State v. Walker, 6th Dist. No. L-05-1207, 2006 Ohio 2929, P13.*

[*P110] However, in applying the elementary rules of contract law to plea agreements, the courts of Ohio have held that an alleged breach of such an agreement

cannot be based upon an action which occurs following the performance of the various terms. See, e.g., *State v. Pointer, 8th Dist. No. 85195, 2005 Ohio 3587, P9.* That is, once a criminal defendant has entered his guilty plea and punishment has been imposed by the trial court, a breach of contract can no longer occur because both sides have fully performed their respective obligations under the plea agreement. Because the registration and notification requirements of the new law, just as in former *R.C. Chapter 2950*, are merely remedial conditions imposed upon offenders after their release from prison and not additional punishment, they do not affect any plea agreement previously entered into between the offender and the state. Therefore, the enactment of the new sexual offender scheme under Senate Bill 10 does not constitute a breach of a prior plea agreement. [**51] See, also, *Slagle v. State, 145 Ohio Misc.2d 98, 2008 Ohio 593, 884 N.E.2d 109.*

[*P111] Finally, I disagree with the majority's conclusion that Mr. Ettenger's reclassification constitutes successive punishment and thus a double jeopardy violation. The double jeopardy provision has been interpreted to apply in two basic situations: (1) when the state tries to pursue a second prosecution based upon the same facts; and (2) when the state attempts to impose a second punishment for the same offense. *Byers at P100.* However, the double jeopardy prohibition can only be invoked when the conduct of the government involves criminal punishment. *State v. Williams (2000), 88 Ohio St.3d 513, 528, 2000 Ohio 428, 728 N.E.2d 342.*

[*P112] In *Williams*, the Supreme Court of Ohio considered the question of whether the provisions of the 1997 version of *R.C. Chapter 2950* imposed a second criminal penalty for purposes of the *Double Jeopardy Clause*. The court emphasized that, as part of its prior discussion in *Cook*, it had expressly held that the registration and notification requirements provided in that version of *R.C. Chapter 2950* were not criminal in nature and did not inflict any punishment. The *Williams* court then determined that the holding in *Cook* dictated a conclusion [**52] that the enforcement of the registration and notification requirements did not result in a double jeopardy violation. Id.

[*P113] As I believe the new registration and notification requirements are civil in nature pursuant to the existing case authority, the *Williams* holding would still be controlling as to the present version of *R.C. Chapter 2950.*

[*P114] For these reasons, I dissent from the judgment as well as the majority's analysis on Mr. Ettenger's retroactivity, ex post facto, double jeopardy, and impairment of contract claims, but concur on the majority's analysis on the separation of power and substantive due process issues.

LexisNexis

LEXSEE 2009 OHIO 312

STATE OF OHIO, Plaintiff-Appellee, v. RONALD MESSER, Defendant-Appellant.

Case No. 08CA3050

COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT, ROSS COUNTY

2009 Ohio 312*; *2009 Ohio App. LEXIS 266

January 20, 2009, File-stamped

SUBSEQUENT HISTORY: Discretionary appeal allowed by *State v. Messer, 121 Ohio St. 3d 1499, 2009 Ohio 2511, 907 N.E.2d 323, 2009 Ohio LEXIS 1512 (Ohio, June 3, 2009)*

DISPOSITION: [**1] JUDGMENT AFFIRMED.

COUNSEL: Timothy Young, Ohio Public Defender, and Sarah M. Schregardus, Assistant Ohio Public Defender, Columbus, Ohio, for appellant.

Michael M. Ater, Ross County Prosecutor, and Jeffrey C. Marks, Assistant Ross County Prosecutor, Chillicothe, Ohio, for appellee.

JUDGES: Roger L. Kline, Presiding Judge. Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

OPINION BY: Roger L. Kline

OPINION

DECISION AND JUDGMENT ENTRY

Kline, P.J.:

[*P1] Ronald Lynn Messer appeals the Ross County Common Pleas Court's order overruling his constitutional challenge to his reclassification as a Tier III Sex Offender under *R.C. 2950*, as amended by Senate Bill 10 ("S.B. 10"). On appeal, Messer first contends that the trial court violated his constitutional right to counsel when it denied his motion for the appointment of counsel in the underlying proceedings in the trial court. Because Messer's classification as a Tier III sex offender is civil and remedial in nature, and because he is not being deprived of a liberty interest, we disagree and find that he had no right to counsel. Next, Messer contends that S.B. 10 violates the Ex Post Facto Clause of the United States Constitution and the prohibition against retroactive laws contained [**2] in the Ohio Constitution. Because *R.C. Chapter 2950* remains civil in nature, and not punitive in nature, we disagree and find that S.B. 10 does not violate the Ex Post Facto Clause or the *Ohio Constitution*'s prohibition on retroactive laws. Messer next contends that S.B. 10 violates the separation of powers doctrine. Because S.B. 10 does not interfere with the power of the judiciary, we disagree. Messer next contends that his reclassification constitutes multiple punishments in violation of the *Double Jeopardy Clause of the United States* and *Ohio Constitutions*. Because S.B. 10 remains civil in nature, we disagree. Finally, Messer contends that the residency restrictions contained in S.B. 10 violate his right to Due Process of law. Because Messer has no standing to challenge the constitutionality of the residency restriction, we do not address his argument. Accordingly, we affirm the judgment of the trial court.

I.

[*P2] In January 1999, Messer was convicted of two counts of rape in the Clermont County Common Pleas Court. In March 2002, Messer was classified under Ohio's previous sex offender laws by the same court as a

sexually oriented offender. In early January 2008, while incarcerated [**3] at the Chillicothe Correctional Institution, Messer received a Notice of New Classification and Registration Duties from the Ohio Attorney General notifying him of his new classification as a Tier III sex offender under S.B. 10.

[*P3] In January 2008, Messer filed a petition in Ross County to contest his reclassification as a Tier III sex offender, pursuant to *R.C. 2905.031(E)*. Messer requested the court to appoint an attorney to represent him during the reclassification hearing. The trial court denied Messer's request for counsel. Following a hearing in which neither Messer nor the state presented any evidence, the trial court overruled Messer's constitutional challenges to S.B. 10 and found that "none of the factors set forth in *Section 2950.11(E)(2)* * * * excepting the defendant from the community notification requirements of *Section 2950.11*" applied.

[*P4] Messer now appeals asserting the following assignment of error: (1) "The trial court violated Mr. Messer's constitutional rights by denying his motion for appointment of counsel"; (2) "The reclassification of Mr. Messer constitutes a violation of the Separation of Powers' Doctrine"; (3) "The retroactive application of SB 10 violates the [**4] prohibition on ex post facto laws"; (4) "The application of SB 10 to Mr. Messer violates the prohibition on retroactive laws"; (5) "The reclassification of Mr. Messer constitutes impermissible multiple punishment under the *Double Jeopardy Clause*"; and (6) "The residency restrictions of SB 10 violate Due Process."

II.

[*P5] Messer does not dispute the facts as applied to these constitutional provisions and S.B. 10. Messer contends that S.B. 10 violates various constitutional provisions. His arguments only involve the interpretation of these constitutional provisions as they relate to S.B. 10. He further argues that we should interpret S.B. 10 as criminal, instead of civil, so that he has a right to an attorney. Hence, his arguments are all legal questions that we review de novo. See, e.g., *State v. Downing, Franklin App. No. 08AP-48, 2008 Ohio 4463, P6*, citing *Stuller v. Price, Franklin App. No. 03AP30, 2003 Ohio 6826, P14*; *State v. Green, Lawrence App. No. 07CA33, 2008 Ohio 2284, P7.*

[*P6] Statutes enacted in Ohio are "presumed to be constitutional." *State v. Ferguson, 120 Ohio St.3d 7, 2008 Ohio 4824, P12, 896 N.E.2d 110*, citing *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas (1967), 9 Ohio St.2d 159, 224 N.E.2d 906.* [**5] This presumption remains until one challenging a statute's constitutionality shows, "beyond reasonable doubt, that the statute is unconstitutional." Id., citing *Roosevelt Properties Co. v. Kinney (1984), 12 Ohio St.3d 7, 12 Ohio B. 6, 465 N.E.2d 421.*

III.

[*P7] We will first address, out of order, Messer's third and fourth assignments of error. In these assignments of error, Messer argues that S.B. 10's retroactive application is an unconstitutional ex post facto law in violation of the United States Constitution and a violation of the Ohio Constitution's prohibition against retroactive laws.

[*P8] "The general assembly shall have no power to pass retroactive laws * * *." Section 28, Article I of the Ohio Constitution. A retroactive statute is "unconstitutional if it retroactively impairs vested substantive rights, but not if it is merely remedial in nature." *Hyle v. Porter, 117 Ohio St.3d 165, 2008 Ohio 542, P7, 882 N.E.2d 899*, citing *State v. Consilio, 114 Ohio St.3d 295, 2007 Ohio 4163, 871 N.E.2d 1167.* As noted by the Supreme Court of Ohio, "Ohio retroactivity analysis does not prohibit all increased burdens; it prohibits only increased punishment." *Ferguson at P39.*

[*P9] In determining whether a statute is unconstitutionally retroactive, courts must "first [**6] determine whether the General Assembly expressly made the statute retrospective[,]" and if so, courts must then determine "whether the statute restricts a substantive right or is remedial." *Id. at P13. (Citations omitted.)* In considering the first prong, we note that "[s]tatutes are presumed to apply only prospectively unless the General Assembly specifically indicates that a statute applies retrospectively." *Id. at P16*, citing *R.C. 1.48*; *Doe v. Archdiocese of Cincinnati, 109 Ohio St.3d 491, 2006 Ohio 2625, P 40, 849 N.E.2d 268.* Typically, a statute must clearly state that it applies retroactively. Id.

[*P10] Here, the legislature intended to apply the tier classification set forth in S.B. 10 retroactively. *State v. Graves, Ross App. No. 07CA3004, 179 Ohio App. 3d 107, 2008 Ohio 5763, PP9-10, 900 N.E.2d 1045*; see, also *State v. Byers, Columbiana App. No. 07CA39, 2008*

Ohio 5051, PP59-63 (concluding that "Senate Bill 10's tier classification system was intended to apply retroactively to all offenders[,]" but such conclusion "is not a determination that all of Senate Bill 10 applies retroactively, rather, it is only an opinion that the tier classification system is intended to apply retroactively"). As a result, we move to the second prong of the [**7] analysis.

[*P11] Next, we must determine if S.B. 10 "impairs vested substantive rights" or whether it is "merely remedial in nature[.]" *Ferguson at P27.* Despite the fact that the Supreme Court of Ohio has recently "been more divided in [their] conclusions about whether the statute has evolved from a remedial one into a punitive one," the Supreme Court of Ohio has continued to find "that *R.C. Chapter 2950* is a remedial statute." *Id. at PP29-30.*

[*P12] Based upon the reasoning in *Ferguson*, which concluded that *R.C. Chapter 2950*, as amended by S.B. 5, remains civil in nature, and not punitive in nature, we conclude that the S.B. 10 version of *R.C. Chapter 2905* also remains civil in nature. This court has already reached such a conclusion. See *Graves, supra*; *State v. Longpre, Ross App. No. 08CA3017, 2008 Ohio 3832, P15.* We find no reason to reassess our determinations in *Graves* or *Longpre* at this time. Consequently, we find that Messer has not shown beyond a reasonable doubt that S.B. 10 is unconstitutional. *Ferguson, supra, at P12*, citing *Roosevelt Properties Co., supra.*

[*P13] Accordingly, we overrule Messer's third and fourth assignments of error.

IV.

[*P14] In his first assignment of error, Messer argues that [**8] the trial court violated his right to counsel when it denied his motion for appointed counsel in the *R.C. 2950.031(E)* proceedings below. Messer asserts a number of arguments in support of his alleged right to appointed counsel, namely: (1) that S.B. 10 imposes criminal punishment; (2) that S.B. 10 deprives him of a substantial liberty interest triggering a substantive due process right to counsel; and (3) that he possesses a right to counsel under the *Fourteenth Amendment to the U.S. Constitution.*

[*P15] While *R.C. 2950.031(E)* gives Messer the right to a hearing to contest the application of S.B. 10 to him, "the legislation does not authorize the appointment of counsel." *State v. King, Miami App. No. 08-CA02, 2008 Ohio 2594, P4, fn1.* Messer contends that he possesses a right to appointed counsel because SB 10 imposes criminal punishment, as opposed to a mere civil regulatory scheme. As set forth above, we disagree and conclude that SB 10 remains civil in nature. "[L]itigants have no generalized right to appointed counsel in civil actions." *Graham v. City of Findlay Police Dept., Hancock App. No. 5-01-32, 2002 Ohio 1215*, citing *State ex rel. Jenkins v. Stern (1987), 33 Ohio St.3d 108, 515 N.E.2d 928*; *Roth v. Roth (1989), 65 Ohio App.3d 768, 585 N.E.2d 482.* [**9] As a result, Messer has no right to appointed counsel in this civil matter.

[*P16] Messer, however, maintains that he is entitled to appointed counsel in this action because he has been deprived of a substantial liberty interest in his prior classification. In support of his contention, Messer cites the Alaska Supreme Court case of *Doe v. State, Dept. Of Public Safety (2004), 92 P.3d 398.* Ohio courts, however, have distinguished *Doe* because it was decided "strictly on an interpretation of the Alaska Constitution" and because the conviction in *Doe* was set aside by a court before imposition of the registration requirements. *King at P33.*

[*P17] Further, Messer had no liberty interest in his previous classification. In Ohio, "[e]xcept 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." *State v. Cook (1998), 83 Ohio St.3d 404, 412, 1998 Ohio 291, 700 N.E.2d 570*, citing *State ex rel. Matz v. Brown (1988), 37 Ohio St.3d 279, 281-282, 525 N.E.2d 805.* As a result, convicted sex offenders "have no reasonable expectation that [their] criminal conduct would not be subject to future versions of *R.C. Chapter 2950.*" [**10] *King at P33.* Based on *Cook*, courts conclude that "convicted sex offenders have no reasonable 'settled expectations' or vested rights concerning the registration obligations imposed on them." Id. Thus, because Messer has no settled expectation regarding his registration obligations, he has not been deprived of any liberty interest. Id.

[*P18] Therefore, we find that Messer has no right to appointed counsel in his *R.C. 2950.031(E)* proceeding.

[*P19] Accordingly, we overrule Messer's first assignment of error.

V.

[*P20] In his second assignment of error, Messer argues that his reclassification as a Tier III sex offender under S.B. 10 violates the separation of powers. Messer asserts that S.B. 10 legislatively requires the executive branch to overrule final judgments entered by trial courts, i.e., an offender's previous classification as determined by a court. Messer also contends that S.B. 10 interferes with a judiciary function, i.e., a court's power to sentence an offender.

[*P21] Initially, it must be noted that a statute violating "the doctrine of separation of powers is unconstitutional." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward, 86 Ohio St.3d 451, 475, 1999 Ohio 123, 715 N.E.2d 1062.* "The separation-of-powers [**11] 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." *State v. Thompson, 92 Ohio St.3d 584, 586, 2001 Ohio 1288, 752 N.E.2d 276,* citing *Zanesville v. Zanesville Tel. & Telegraph Co. (1900), 63 Ohio St. 442, 59 N.E. 109.* The doctrine's purpose "is to create a system of checks and balances so that each branch maintains its integrity and independence." Id., citing *State v. Hochhausler (1996), 76 Ohio St.3d 455, 1996 Ohio 374, 668 N.E.2d 457; S. Euclid v. Jemison (1986), 28 Ohio St.3d 157, 28 Ohio B. 250, 503 N.E.2d 136.*

[*P22] Pursuant to the Ohio Constitution, "the General Assembly is vested with the power to make laws." Id., citing *Section 1, Article II, Ohio Constitution.* The Ohio General Assembly is prohibited "from exercising 'any judicial power, not herein expressly conferred.'" Id., citing *Section 32, Article II, Ohio Constitution.* Courts, on the other hand, "possess all powers necessary to secure and safeguard the free and untrammeled exercise of their judicial functions and cannot be directed, controlled or impeded therein by other branches of the government." Id. [**12] (Citations omitted.)

[*P23] Messer first contends that S.B. 10 legislatively requires the Attorney General, an executive official, to vacate an existing court judgment regarding his sex offender classification that was judicially determined in his underlying case. Ohio courts have rejected such a contention and conclude that S.B. 10 does not violate the doctrine of separation of powers by abrogating final court judgments. *In re Smith, Allen App. No. 1- 07-58, 2008 Ohio 3234; Byers, supra; Slagle v. State, 145 Ohio Misc.2d 98, 2008 Ohio 593, 884 N.E.2d 109.* One Ohio court noted, "[t]he classification of sex offenders into categories has always been a legislative mandate, not an inherent power of the courts" and "[w]ithout the legislature's creation of sex offender classifications, no such classification would be warranted." *In re Smith at P39,* citing *Slagle.* Thus, sex offender classification is nothing more "than a creation of the legislature, and therefore, the power to classify is properly expanded or limited by the legislature." Id.

[*P24] Another Ohio court similarly determined that S.B. 10 "is not an encroachment on the power of the judicial branch of Ohio's government." *Slagle at P21.* In *Slagle,* the court [**13] concluded that S.B. 10 does not abrogate "final judicial decisions without amending the underlying applicable law" or "order the courts to reopen a final judgment." *Id.* Instead, S.B. 10 "changes the different sexual offender classifications and time spans for registration requirements, among other things, and [requires] that the new procedures be applied to offenders currently registering under the old law or offenders currently incarcerated for committing a sexually oriented offense." Id.

[*P25] Here, we agree with the foregoing conclusions and find that S.B. 10 does not abrogate final judicial determinations. Messer's sex offender classification is nothing more than a collateral consequence arising from his criminal conduct. See *Ferguson at P34.* Further, as set forth above, Messer has no reasonable expectation that his "criminal conduct would not be subject to future versions of *R.C. Chapter 2950.*" *King at P33.* Thus, it cannot be said that S.B. 10 abrogates a final judicial determination in violation of the doctrine of separation of powers.

[*P26] Next, Messer contends that S.B. 10 violates the doctrine of separation of powers because it interferes with the judiciary's power to sentence a sex [**14] offender. As set forth above, S.B. 10 is not criminal or punitive in nature. *Ferguson at P32; Graves, supra; Longpre, supra.* Because S.B. 10 is civil and remedial in nature, it does not interfere with a court's power to impose a sentence. See *State v. Swank, Lake App. No. 2008-L-019, 2008 Ohio 6059, P99.*

[*P27] Therefore, we find that Messer has not

shown beyond a reasonable doubt that S.B. 10 is unconstitutional. *Ferguson at P12.*

[*P28] Accordingly, Messer's second assignment of error is overruled.

VI.

[*P29] In his fifth assignment of error, Messer contends that his reclassification as a Tier III sex offender constitutes multiple punishment in violation of the *double jeopardy clauses of the United States* and *Ohio Constitutions.*

[*P30] "The *Double Jeopardy Clause* states that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'" *State v. Williams, 88 Ohio St.3d 513, 527-528, 2000 Ohio 428, 728 N.E.2d 342,* citing *Fifth Amendment to the United States Constitution*; see, also, *Section 10, Article I, Ohio Constitution.* The *double jeopardy clauses in the United States* and *Ohio Constitutions* prevent states "from punishing twice, or from attempting a second time to criminally punish for the same [**15] offense." *Id., at 528,* citing *Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501*; *Witte v. United States (1995), 515 U.S. 389, 115 S. Ct. 2199, 132 L. Ed. 2d 351.* As a result, "[t]he threshold question in a double jeopardy analysis, therefore, is whether the government's conduct involves criminal punishment." Id., citing *Hudson v. United States (1997), 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450.*

[*P31] As set forth in our analysis above, *R.C. Chapter 2950* remains civil and remedial in nature, and not punitive, following the enactment of S.B. 10. Thus, Messer's contention in this regard is without merit. See *Ferguson, supra*; *Williams, supra*; *Graves, supra.* Therefore, we find that Messer has not shown beyond a reasonable doubt that S.B. 10 is unconstitutional. *Ferguson at P12.*

[*P32] Accordingly, we overrule Messer's fifth assignment of error.

VII.

[*P33] In his sixth assignment of error, Messer argues that the residency restrictions set forth in S.B. 10 violate his right to due process. Messer contends that such restrictions "not only operate as a direct restraint on Mr. Messer's liberty, but they infringe upon Mr. Messer's fundamental right to live where he wishes, as well as his right to privacy." Messer fails to show that he has standing to assert this argument by showing present harm [**16] or that the argument is ripe for review.

[*P34] *R.C. 2950.034(A),* as amended by S.B. 10, provides that "[n]o person who has been convicted of, is convicted of, has pleaded guilty to, or pleads guilty to a sexually oriented offense or a child-victim oriented offense shall establish a residence or occupy residential premises within one thousand feet of any school premises or preschool or child day-care center premises." The Supreme Court of Ohio holds that this provision "was not expressly made retrospective," and thus, "does not apply to an offender who bought his home and committed his offense before the effective date of the statute." *Hyle at syllabus.*

[*P35] Here, however, there is no evidence that Messer owns a home at all, or, if he does, whether it falls within 1,000 feet of a school, preschool or day-care center. Instead, the only information from the record regarding Messer's current residence is that he is incarcerated by the state of Ohio.

[*P36] Ohio courts hold that, where the offender does not presently claim to reside "within 1,000 feet of a school, or that he was forced to move from an area because of his proximity to a school[,]" the offender "lacks standing to challenge the constitutionality" [**17] of the residency restrictions. *State v. Peak, Cuyahoga App. No. 90255, 2008 Ohio 3448, PP8-9*; see, also, *State v. Pierce, Cuyahoga App. No. 88470, 2007 Ohio 3665, P33*; *State v. Amos, Cuyahoga App. No. 89855, 2008 Ohio 1834*; *Coston v. Petro (S.D. Ohio 2005), 398 F.Supp.2d 878, 882-883.* "'The constitutionality of a state statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied and who has not been injured by its alleged unconstitutional provision.'" *Pierce at P33,* citing *State v. Brown, Cuyahoga App. No. 86577, 2006 Ohio 4584,* quoting *Palazzi v. Estate of Gardner (1987), 32 Ohio St.3d 169, 512 N.E.2d 971, syllabus.*

[*P37] Further, where an offender "is currently in prison," that offender is not presently subject to the residency restrictions, resulting in no present harm being inflicted on the offender. *State v. Freer, Cuyahoga App. No. 89392, 2008 Ohio 1257, PP29-30.* In such instances,

Ohio courts have dismissed due process challenges to the residency restrictions on the grounds that such issue was not ripe for review. *Id. at P30.*

[*P38] Messer has failed to show standing to challenge the constitutionality [**18] of the residency restriction contained in *R.C. 2950.034*, or that the claim is ripe for review.

[*P39] Accordingly, we overrule Messer's sixth assignment of error.

VIII.

[*P40] Having overruled all of Messer's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted by the trial court or this court, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of proceedings in that court. The stay as herein continued will terminate in any event at the expiration of the sixty-day period.

The stay shall terminate earlier if the appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day appeal period pursuant to *Rule II, Sec.2 of the Rules of Practice of the Ohio Supreme Court.* [**19] Additionally, if the Ohio Supreme Court dismisses the appeal prior to expiration of said sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27* for the Rules of Appellate Procedure. Exceptions.

Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY:

Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to *Local Rule No. 14*, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

LexisNexis

LEXSEE 2009 OHIO 2404

STATE OF OHIO, Plaintiff-Appellee -vs- ERIC PERKINS, Defendant-Appellant

Case No. 08-CA-0020

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, COSHOCTON COUNTY

2009 Ohio 2404; 2009 Ohio App. LEXIS 1997

May 20, 2009, Date of Judgment Entry

PRIOR HISTORY: [**1]

CHARACTER OF PROCEEDING: Criminal appeal from the Coshocton County Court of Common Pleas, Case No. 08-CI-0072.

DISPOSITION: Affirmed.

COUNSEL: For Plaintiff-Appellee: JASON W. GIVEN, Coshocton County Asst. Prosecutor, Coshocton, OH.

For Defendant-Appellant: JEFFREY A. MULLEN, Coshocton County Public Defender, Coshocton, OH.

JUDGES: Hon. Sheila G. Farmer P.J., Hon. W. Scott Gwin J., Hon. Julie A. Edwards J. Farmer, P.J., and Edwards, J., concur.

OPINION BY: W. Scott Gwin

OPINION

Gwin, J.,

[*P1] Defendant-appellant Eric Perkins, appeals from the trial court's denial of the petition contesting his reclassification as a Tier II sex offender under *R.C. 2950.01, et seq.*, as amended by S.B.10, also known as the "Adam Walsh Act" ["AWA"] a law which was in effect on the date the trial court re-classified appellant, but which was not in effect on the date he committed the sexual offense in question. Appellant now challenges the constitutionality of Ohio's Senate Bill 10, effective January 1, 2008, which eliminated the prior sex offender classifications and substituted a three-tier classification system based on the offense committed. Appellant maintains that *R.C. Chapter 2950*, as amended by S.B. 10, violates the federal and Ohio constitutional prohibitions [**2] against ex post facto or retroactive laws, the doctrine of separation of powers and amounts to double jeopardy. Briefly, the relevant facts of this case are as follows.

[*P2] Appellant was convicted in the State of Florida of a violation similar to that of *R.C. 2907.04*, Unlawful Sexual Conduct with a Minor, in either 1999 or 2000. As a result of appellant's conviction, upon moving to Coshocton County, Ohio, appellant was classified as a sexually oriented offender and ordered to adhere to the reporting requirements set forth for that classification.

[*P3] On or about December 1, 2007, appellant received a "Notice of New Classification and Registration Duties," based on Ohio's Adam Walsh Act, from the Office of the Attorney General. The Notice indicated that he was being classified as a Tier III Offender.

[*P4] On January 25, 2008, appellant timely filed a Petition to Contest Application of the Adam Walsh Act with the Court of Common Pleas pursuant to *R.C. 2950.031(E)* and *2950.032(E)*, challenging both the level of his classification and the application of the Act itself.

[*P5] On August 26, 2008, the court heard arguments on the Petition. The parties entered a stipulation that the correct classification in [**3] this

case is Tier II rather than Tier III. The court accepted the joint stipulation and modified the classification to Tier II Offender by Judgment Entry on August 29, 2008. By separate Judgment Entry on September 12, 2008, the court denied the remaining relief requested in appellant's Petition, and granted appellee's Motion to Dismiss.

[*P6] It is from the trial court's September 12, 2008 Judgment Entry that appellant now appeals, raising the following four assignments of error:

[*P7] "I. THE COURT ERRED IN DENYING APPELLANT'S PETITION IN THAT THE ADAM WALSH ACT AS RETROACTIVELY APPLIED IS AN IMPERMISSIBLE *EX POST FACTO LAW.*

[*P8] "II. THE COURT ERRED IN DENYING APPELLANT'S PETITION AS APPLICATION OF OHIO'S AWA IN HIS CASE IS A RETROACTIVE LAW.

[*P9] "III. THE COURT ERRED IN DENYING APPELLANT'S PETITION IN THAT HIS RECLASSIFICATION VIOLATES THE SEPARATION OF POWERS DOCTRINE.

[*P10] "IV. THE COURT ERRED IN DENYING APPELLANT'S PETITION IN THAT APPLICATION OF THE AWA IN HIS CASE REPRESENTED A DOUBLE JEOPARDY VIOLATION."

I & II.

[*P11] In his first two assignments of error appellant maintains that his classification as a tier two sex offender pursuant to the Adam Walsh Act violates the prohibitions against ex post facto and [**4] retroactive laws that impair vested, substantive rights provided in the United States and Ohio Constitutions.

[*P12] This court has examined identical arguments and has rejected them. *State v. Gooding, 5th Dist. No. 08 CA 5, 2008 Ohio 5954 at P37*; See, also, *Sigler v. State, Richland App. No. 08-CA-79, 2009 Ohio 2010.* Virtually every Appellate District in the State has upheld the AWA against the identical challenges raised by appellant. See, *State v. Graves, 179 Ohio App.3d 107, 2008 Ohio 5763, 900 N.E.2d 1045*; *Holcomb v. State, Third Dist. Nos. 8-08-23, 8-08-25, 8-08-26, 8-08-24, 2009 Ohio 782*; *State v. Bodyke, 6th Dist. Nos. H-07-040, H07-041, H07-042, 2008 Ohio 6387*; *State v. Byers, 7th Dist. No. 07CO39, 2008 Ohio 5051*; *State v. Ellis, 8th Dist. No. 90844, 2008 Ohio 6283*; *State v. Honey, 9th Dist. No. 08CA0018-M, 2008 Ohio 4943*; *State v. Christian, 10th Dist. No. 08AP-170, 2008 Ohio 6304*; *State v. Swank, 11th Dist. No. 2008-L-019, 2008 Ohio 6059*; *State v. Williams, 12th Dist. No. CA2008-02-029, 2008 Ohio 6195.*

[*P13] Upon thorough review of appellant's arguments, we shall follow the law set forth in our decisions in *Gooding and Sigler*. On the authority of the foregoing decisions, appellant's first and second assignments [**5] of error are overruled.

III. & IV.

[*P14] In his third assignment of error, appellant maintains that the legislative enactment of Senate Bill 10 unconstitutionally infringes on the power of the judiciary by stripping it of the right to determine the classification of sexual offenders. In his fourth assignment of error, appellant argues that Senate Bill 10 violates the *Double Jeopardy Clause* contained in the *Fifth Amendment of the United States Constitution* and in *Section 10, Article I of the Ohio Constitution.* Specifically, appellant argues that because Senate Bill 10 is punitive in its intent and effect, the registration and community notification provisions of the statute unconstitutionally inflict a second punishment upon a sex offender for a singular offense.

[*P15] In *State ex rel. Bray v. Russell (2000), 89 Ohio St.3d 132, 2000 Ohio 116, 2000 Ohio 117, 2000 Ohio 119, 729 N.E.2d 359* the Ohio Supreme Court explained the doctrine of separation of powers: "[t]his court has repeatedly affirmed that the doctrine of separation of powers is 'implicitly embedded in the entire framework of those sections of the Ohio Constitution that define the substance and scope of powers granted to the three branches of state government's. *Euclid v. Jemison (1986), 28 Ohio St.3d 157, 158-159, 28 OBR 250, 251, 503 N.E.2d 136, 138*; [**6] *State v. Warner (1990), 55 Ohio St.3d 31, 43-44, 564 N.E.2d 18, 31.* See *State ex rel. Ohio Academy of Trial Lawyers v. Sheward (1999), 86 Ohio St.3d 451, 475, 1999 Ohio 123, 715 N.E.2d 1062, 1085*; *State v. Hochhausler (1996), 76 Ohio St.3d 455, 463, 1996 Ohio 374, 668 N.E.2d 457, 465-466.* See also, *State v. Firouzmandi, 5th Dist. No. 2006-CA-41, 2006 Ohio 5823 at P46.*

[*P16] "'The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of

the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others.' *State ex rel. Bryant v. Akron Metro. Park Dist. (1929), 120 Ohio St. 464, 473, 166 N.E. 407, 410.* See, also, *Knapp v. Thomas (1883), 39 Ohio St. 377, 391-392*; *State ex rel. Finley v. Pfeiffer (1955), 163 Ohio St. 149, 56 O.O. 190, 126 N.E.2d 57,* paragraph one of the syllabus." *Id. at 134,729 N.E.2d at 361.*

[*P17] In our constitutional scheme, the judicial power resides in the judicial branch. *Section 1, Article IV of the Ohio Constitution.* The determination of guilt in a criminal matter and the [**7] sentencing of a defendant convicted of a crime are solely the province of the judiciary. See *State ex rel. Atty. Gen. v. Peters (1885), 43 Ohio St. 629, 648, 4 N.E. 81, 86.* See, also, *Stanton v. Tax Comm. (1926), 114 Ohio St. 658, 672, 4 Ohio Law Abs. 286, 151 N.E. 760, 764* ("the primary functions of the judiciary are to declare what the law is and to determine the rights of parties conformably thereto"); *Fairview v. Giffee (1905), 73 Ohio St. 183, 190, 76 N.E. 865, 867, 3 Ohio L. Rep. 494* ("It is indisputable that it is a judicial function to hear and determine a controversy between adverse parties, to ascertain the facts, and, applying the law to the facts, to render a final judgment.").

[*P18] The classification of sex offenders, however, is a creature and mandate of the legislature that does not implicate the inherent power of the courts. *State v. Bodyke, 6th Dist. Nos. H-07-040, H-07-041, H-07-042, 2008 Ohio 6387, at P 22.* For this reason, several courts of appeals, including this court, have concluded that the Adam Walsh Act does not violate the separation of powers doctrine. See: *In re: Smith, 3d Dist. No. 01-07-58, 2008 Ohio 3234, at P 39*; *State v. Messer, 4th Dist. No. 08CA3050, 2009 Ohio 312, at P 23-26*; *In re: A.R., 5th Dist. No. 08-CA-17, 2008 Ohio 6581, at P 34*; [**8] *State v. Byers, 7th Dist. No. 07CO39, 2008 Ohio 5051, at P 73-74*; *State v. Reinhardt, 9th Dist. 08CA0012-M, 2009 Ohio 1297 at P29 State v. Williams, 12th Dist. No. CA2008-02-029, 2008 Ohio 6195, at P 99-102*; This Court agrees with the rationale offered by these courts and concludes that the Adam Walsh Act does not violate the separation of powers doctrine.

[*P19] Appellant's final argument under the fourth assignment of error asserts that Ohio's Adam Walsh Act constitutes a second punishment in violation of the *Double Jeopardy Clause of the United States Constitution* and a similar provision in the Ohio Constitution

[*P20] Ohio's Adam Walsh Act is not a criminal, punitive statutory scheme and does not constitute punishment for purposes of the *double jeopardy clauses. Sewell v. State, 1st Dist. No. C-080503, 2009 Ohio 872, at P 16-27*; *State v. Byers, 7th Dist. No 07 CA 39, 2008 Ohio 5051, at P 100-103*; *Brooks v. State, 9th Dist. NO., 2008CA009452, 2009 Ohio 1825 at P21-25* ; *State v. Reinhardt, 9th Dist. 08CA0012-M, 2009 Ohio 1297 at 28*; *State v. Williams, 12th Dist. No. CA2008-02-029, 2008 Ohio 6195 at P 107-111.*

[*P21] This Court agrees with the rationale offered by these other districts and concludes that [**9] the Adam Walsh Act does not violate the *Double Jeopardy Clause of the United States Constitution* or the Ohio Constitution.

[*P22] Appellant's third and fourth assignments of error are overruled.

[*P23] The judgment of the Coshocton County Court of Common Pleas is affirmed.

By Gwin, J.,

Farmer, P.J., and

Edwards, J., concur

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. JULIE A. EDWARDS

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Coshocton County Court of Common Pleas is affirmed. Costs to appellant.

HON. W. SCOTT GWIN

HON. SHEILA G. FARMER

HON. JULIE A. EDWARDS

LEXSTAT O.R.C. 2950.01

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH JULY 6, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 1, 2009 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2950. SEX OFFENDER REGISTRATION AND NOTIFICATION

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ORC Ann. 2950.01 (2009)

§ 2950.01. Definitions

As used in this chapter, unless the context clearly requires otherwise:

(A) "Sexually oriented offense" means any of the following violations or offenses committed by a person, regardless of the person's age:

(1) A violation of *section 2907.02, 2907.03, 2907.05, 2907.06, 2907.07, 2907.08, 2907.21, 2907.32, 2907.321 [2907.32.1], 2907.322 [2907.32.2]*, or *2907.323 [2907.32.3] of the Revised Code*;

(2) A violation of *section 2907.04 of the Revised Code* when the offender is less than four years older than the other person with whom the offender engaged in sexual conduct, the other person did not consent to the sexual conduct, and the offender previously has not been convicted of or pleaded guilty to a violation of *section 2907.02, 2907.03*, or *2907.04 of the Revised Code* or a violation of former *section 2907.12 of the Revised Code*;

(3) A violation of *section 2907.04 of the Revised Code* when the offender is at least four years older than the other person with whom the offender engaged in sexual conduct or when the offender is less than four years older than the other person with whom the offender engaged in sexual conduct and the offender previously has been convicted of or pleaded guilty to a violation of *section 2907.02, 2907.03*, or *2907.04 of the Revised Code* or a violation of former *section 2907.12 of the Revised Code*;

(4) A violation of *section 2903.01, 2903.02*, or *2903.11 of the Revised Code* when the violation was committed with a sexual motivation;

(5) A violation of division (A) of *section 2903.04 of the Revised Code* when the offender committed or attempted to commit the felony that is the basis of the violation with a sexual motivation;

(6) A violation of division (A)(3) of *section 2903.211 [2903.21.1] of the Revised Code*;

(7) A violation of division (A)(1), (2), (3), or (5) of *section 2905.01 of the Revised Code* when the offense is

committed with a sexual motivation;

(8) A violation of division (A)(4) of *section 2905.01 of the Revised Code*;

(9) A violation of division (B) of *section 2905.01 of the Revised Code* when the victim of the offense is under eighteen years of age and the offender is not a parent of the victim of the offense;

(10) A violation of division (B) of section 2905.02, of division (B) of section 2905.03, of division (B) of section 2905.05, or of division (B)(5) of *section 2919.22 of the Revised Code*;

(11) A violation of any former law of this state, any existing or former municipal ordinance or law of another state or the United States, any existing or former law applicable in a military court or in an Indian tribal court, or any existing or former law of any nation other than the United States that is or was substantially equivalent to any offense listed in division (A)(1), (2), (3), (4), (5), (6), (7), (8), (9), or (10) of this section;

(12) Any attempt to commit, conspiracy to commit, or complicity in committing any offense listed in division (A)(1), (2), (3), (4), (5), (6), (7), (8), (9), (10), or (11) of this section.

(B) (1) "Sex offender" means, subject to division (B)(2) of this section, a person who is convicted of, pleads guilty to, has been convicted of, has pleaded guilty to, is adjudicated a delinquent child for committing, or has been adjudicated a delinquent child for committing any sexually oriented offense.

(2) "Sex offender" does not include a person who is convicted of, pleads guilty to, has been convicted of, has pleaded guilty to, is adjudicated a delinquent child for committing, or has been adjudicated a delinquent child for committing a sexually oriented offense if the offense involves consensual sexual conduct or consensual sexual contact and either of the following applies:

(a) The victim of the sexually oriented offense was eighteen years of age or older and at the time of the sexually oriented offense was not under the custodial authority of the person who is convicted of, pleads guilty to, has been convicted of, has pleaded guilty to, is adjudicated a delinquent child for committing, or has been adjudicated a delinquent child for committing the sexually oriented offense.

(b) The victim of the offense was thirteen years of age or older, and the person who is convicted of, pleads guilty to, has been convicted of, has pleaded guilty to, is adjudicated a delinquent child for committing, or has been adjudicated a delinquent child for committing the sexually oriented offense is not more than four years older than the victim.

(C) "Child-victim oriented offense" means any of the following violations or offenses committed by a person, regardless of the person's age, when the victim is under eighteen years of age and is not a child of the person who commits the violation:

(1) A violation of division (A)(1), (2), (3), or (5) of *section 2905.01 of the Revised Code* when the violation is not included in division (A)(7) of this section;

(2) A violation of division (A) of section 2905.02, division (A) of section 2905.03, or division (A) of *section 2905.05 of the Revised Code*;

(3) A violation of any former law of this state, any existing or former municipal ordinance or law of another state or the United States, any existing or former law applicable in a military court or in an Indian tribal court, or any existing or former law of any nation other than the United States that is or was substantially equivalent to any offense listed in division (C)(1) or (2) of this section;

(4) Any attempt to commit, conspiracy to commit, or complicity in committing any offense listed in division

(C)(1), (2), or (3) of this section.

(D) "Child-victim offender" means a person who is convicted of, pleads guilty to, has been convicted of, has pleaded guilty to, is adjudicated a delinquent child for committing, or has been adjudicated a delinquent child for committing any child-victim oriented offense.

(E) "Tier I sex offender/child-victim offender" means any of the following:

(1) A sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any of the following sexually oriented offenses:

(a) A violation of *section 2907.06, 2907.07, 2907.08,* or *2907.32 of the Revised Code*;

(b) A violation of *section 2907.04 of the Revised Code* when the offender is less than four years older than the other person with whom the offender engaged in sexual conduct, the other person did not consent to the sexual conduct, and the offender previously has not been convicted of or pleaded guilty to a violation of *section 2907.02, 2907.03,* or *2907.04 of the Revised Code* or a violation of former *section 2907.12 of the Revised Code*;

(c) A violation of division (A)(1), (2), (3), or (5) of *section 2907.05 of the Revised Code*;

(d) A violation of division (A)(3) of *section 2907.323 [2907.32.3] of the Revised Code*;

(e) A violation of division (A)(3) of section 2903.211 [2903.21.1], of division (B) of section 2905.03, or of division (B) of *section 2905.05 of the Revised Code*;

(f) A violation of any former law of this state, any existing or former municipal ordinance or law of another state or the United States, any existing or former law applicable in a military court or in an Indian tribal court, or any existing or former law of any nation other than the United States, that is or was substantially equivalent to any offense listed in division (E)(1)(a), (b), (c), (d), or (e) of this section;

(g) Any attempt to commit, conspiracy to commit, or complicity in committing any offense listed in division (E)(1)(a), (b), (c), (d), (e), or (f) of this section.

(2) A child-victim offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a child-victim oriented offense and who is not within either category of child-victim offender described in division (F)(2) or (G)(2) of this section.

(3) A sex offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any sexually oriented offense and who a juvenile court, pursuant to *section 2152.82, 2152.83, 2152.84,* or *2152.85 of the Revised Code*, classifies a tier I sex offender/child-victim offender relative to the offense.

(4) A child-victim offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any child-victim oriented offense and who a juvenile court, pursuant to *section 2152.82, 2152.83, 2152.84,* or *2152.85 of the Revised Code*, classifies a tier I sex offender/child-victim offender relative to the offense.

(F) "Tier II sex offender/child-victim offender" means any of the following:

(1) A sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any of the following sexually oriented offenses:

(a) A violation of *section 2907.21, 2907.321 [2907.32.1],* or *2907.322 [2907.32.2] of the Revised Code*;

(b) A violation of *section 2907.04 of the Revised Code* when the offender is at least four years older than the other person with whom the offender engaged in sexual conduct, or when the offender is less than four years older than the other person with whom the offender engaged in sexual conduct and the offender previously has been convicted of or pleaded guilty to a violation of *section 2907.02*, *2907.03*, or *2907.04 of the Revised Code* or former *section 2907.12 of the Revised Code*;

(c) A violation of division (A)(4) of section 2907.05 or of division (A)(1) or (2) of *section 2907.323 [2907.32.3] of the Revised Code*;

(d) A violation of division (A)(1), (2), (3), or (5) of *section 2905.01 of the Revised Code* when the offense is committed with a sexual motivation;

(e) A violation of division (A)(4) of *section 2905.01 of the Revised Code* when the victim of the offense is eighteen years of age or older;

(f) A violation of division (B) of section 2905.02 or of division (B)(5) of *section 2919.22 of the Revised Code*;

(g) A violation of any former law of this state, any existing or former municipal ordinance or law of another state or the United States, any existing or former law applicable in a military court or in an Indian tribal court, or any existing or former law of any nation other than the United States that is or was substantially equivalent to any offense listed in division (F)(1)(a), (b), (c), (d), (e), or (f) of this section;

(h) Any attempt to commit, conspiracy to commit, or complicity in committing any offense listed in division (F)(1)(a), (b), (c), (d), (e), (f), or (g) of this section;

(i) Any sexually oriented offense that is committed after the sex offender previously has been convicted of, pleaded guilty to, or has been adjudicated a delinquent child for committing any sexually oriented offense or child-victim oriented offense for which the offender was classified a tier I sex offender/child-victim offender.

(2) A child-victim offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any child-victim oriented offense when the child-victim oriented offense is committed after the child-victim offender previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for committing any sexually oriented offense or child-victim oriented offense for which the offender was classified a tier I sex offender/child-victim offender.

(3) A sex offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any sexually oriented offense and who a juvenile court, pursuant to *section 2152.82*, *2152.83*, *2152.84*, or *2152.85 of the Revised Code*, classifies a tier II sex offender/child-victim offender relative to the offense.

(4) A child-victim offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any child-victim oriented offense and whom a juvenile court, pursuant to *section 2152.82*, *2152.83*, *2152.84*, or *2152.85 of the Revised Code*, classifies a tier II sex offender/child-victim offender relative to the current offense.

(5) A sex offender or child-victim offender who is not in any category of tier II sex offender/child-victim offender set forth in division (F)(1), (2), (3), or (4) of this section, who prior to January 1, 2008, was adjudicated a delinquent child for committing a sexually oriented offense or child-victim oriented offense, and who prior to that date was determined to be a habitual sex offender or determined to be a habitual child-victim offender, unless either of the following applies:

(a) The sex offender or child-victim offender is reclassified pursuant to *section 2950.031 [2950.03.1]* or *2950.032 [2950.03.2] of the Revised Code* as a tier I sex offender/child-victim offender or a tier III sex

offender/child-victim offender relative to the offense.

(b) A juvenile court, pursuant to *section 2152.82, 2152.83, 2152.84*, or *2152.85 of the Revised Code*, classifies the child a tier I sex offender/child-victim offender or a tier III sex offender/child-victim offender relative to the offense.

(G) "Tier III sex offender/child-victim offender" means any of the following:

(1) A sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any of the following sexually oriented offenses:

(a) A violation of *section 2907.02* or *2907.03 of the Revised Code*;

(b) A violation of division (B) of *section 2907.05 of the Revised Code*;

(c) A violation of *section 2903.01, 2903.02*, or *2903.11 of the Revised Code* when the violation was committed with a sexual motivation;

(d) A violation of division (A) of *section 2903.04 of the Revised Code* when the offender committed or attempted to commit the felony that is the basis of the violation with a sexual motivation;

(e) A violation of division (A)(4) of *section 2905.01 of the Revised Code* when the victim of the offense is under eighteen years of age;

(f) A violation of division (B) of *section 2905.01 of the Revised Code* when the victim of the offense is under eighteen years of age and the offender is not a parent of the victim of the offense;

(g) A violation of any former law of this state, any existing or former municipal ordinance or law of another state or the United States, any existing or former law applicable in a military court or in an Indian tribal court, or any existing or former law of any nation other than the United States that is or was substantially equivalent to any offense listed in division (G)(1)(a), (b), (c), (d), (e), or (f) of this section;

(h) Any attempt to commit, conspiracy to commit, or complicity in committing any offense listed in division (G)(1)(a), (b), (c), (d), (e), (f), or (g) of this section;

(i) Any sexually oriented offense that is committed after the sex offender previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for committing any sexually oriented offense or child-victim oriented offense for which the offender was classified a tier II sex offender/child-victim offender or a tier III sex offender/child-victim offender.

(2) A child-victim offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any child-victim oriented offense when the child-victim oriented offense is committed after the child-victim offender previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for committing any sexually oriented offense or child-victim oriented offense for which the offender was classified a tier II sex offender/child-victim offender or a tier III sex offender/child-victim offender.

(3) A sex offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any sexually oriented offense and who a juvenile court, pursuant to *section 2152.82, 2152.83, 2152.84*, or *2152.85 of the Revised Code*, classifies a tier III sex offender/child-victim offender relative to the offense.

(4) A child-victim offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any child-victim oriented offense and whom a juvenile court, pursuant to *section 2152.82, 2152.83, 2152.84*, or *2152.85 of the Revised Code*, classifies a tier III sex offender/child-victim offender relative to the current offense.

(5) A sex offender or child-victim offender who is not in any category of tier III sex offender/child-victim offender set forth in division (G)(1), (2), (3), or (4) of this section, who prior to January 1, 2008, was convicted of or pleaded guilty to a sexually oriented offense or child-victim oriented offense or was adjudicated a delinquent child for committing a sexually oriented offense or child-victim oriented offense and classified a juvenile offender registrant, and who prior to that date was adjudicated a sexual predator or adjudicated a child-victim predator, unless either of the following applies:

(a) The sex offender or child-victim offender is reclassified pursuant to *section 2950.031 [2950.03.1]* or *2950.032 [2950.03.2] of the Revised Code* as a tier I sex offender/child-victim offender or a tier II sex offender/child-victim offender relative to the offense.

(b) The sex offender or child-victim offender is a delinquent child, and a juvenile court, pursuant to *section 2152.82, 2152.83, 2152.84*, or *2152.85 of the Revised Code*, classifies the child a tier I sex offender/child-victim offender or a tier II sex offender/child-victim offender relative to the offense.

(6) A sex offender who is convicted of, pleads guilty to, was convicted of, or pleaded guilty to a sexually oriented offense, if the sexually oriented offense and the circumstances in which it was committed are such that division (F) of *section 2971.03 of the Revised Code* automatically classifies the offender as a tier III sex offender/child-victim offender;

(7) A sex offender or child-victim offender who is convicted of, pleads guilty to, was convicted of, pleaded guilty to, is adjudicated a delinquent child for committing, or was adjudicated a delinquent child for committing a sexually oriented offense or child-victim offense in another state, in a federal court, military court, or Indian tribal court, or in a court in any nation other than the United States if both of the following apply:

(a) Under the law of the jurisdiction in which the offender was convicted or pleaded guilty or the delinquent child was adjudicated, the offender or delinquent child is in a category substantially equivalent to a category of tier III sex offender/child-victim offender described in division (G)(1), (2), (3), (4), (5), or (6) of this section.

(b) Subsequent to the conviction, plea of guilty, or adjudication in the other jurisdiction, the offender or delinquent child resides, has temporary domicile, attends school or an institution of higher education, is employed, or intends to reside in this state in any manner and for any period of time that subjects the offender or delinquent child to a duty to register or provide notice of intent to reside under *section 2950.04* or *2950.041 [2950.04.1] of the Revised Code.*

(H) "Confinement" includes, but is not limited to, a community residential sanction imposed pursuant to *section 2929.16* or *2929.26 of the Revised Code.*

(I) "Prosecutor" has the same meaning as in *section 2935.01 of the Revised Code.*

(J) "Supervised release" means a release of an offender from a prison term, a term of imprisonment, or another type of confinement that satisfies either of the following conditions:

(1) The release is on parole, a conditional pardon, under a community control sanction, under transitional control, or under a post-release control sanction, and it requires the person to report to or be supervised by a parole officer, probation officer, field officer, or another type of supervising officer.

(2) The release is any type of release that is not described in division (J)(1) of this section and that requires the person to report to or be supervised by a probation officer, a parole officer, a field officer, or another type of supervising officer.

(K) "Sexually violent predator specification," "sexually violent predator," "sexually violent offense," "sexual motivation specification," "designated homicide, assault, or kidnapping offense," and "violent sex offense" have the

same meanings as in *section 2971.01 of the Revised Code.*

(L) "Post-release control sanction" and "transitional control" have the same meanings as in *section 2967.01 of the Revised Code.*

(M) "Juvenile offender registrant" means a person who is adjudicated a delinquent child for committing on or after January 1, 2002, a sexually oriented offense or a child-victim oriented offense, who is fourteen years of age or older at the time of committing the offense, and who a juvenile court judge, pursuant to an order issued under *section 2152.82, 2152.83, 2152.84, 2152.85,* or *2152.86 of the Revised Code,* classifies a juvenile offender registrant and specifies has a duty to comply with *sections 2950.04, 2950.041 [2950.04.1], 2950.05,* and *2950.06 of the Revised Code.* "Juvenile offender registrant" includes a person who prior to January 1, 2008, was a "juvenile offender registrant" under the definition of the term in existence prior to January 1, 2008, and a person who prior to July 31, 2003, was a "juvenile sex offender registrant" under the former definition of that former term.

(N) "Public registry-qualified juvenile offender registrant" means a person who is adjudicated a delinquent child and on whom a juvenile court has imposed a serious youthful offender dispositional sentence under *section 2152.13 of the Revised Code* before, on, or after January 1, 2008, and to whom all of the following apply:

(1) The person is adjudicated a delinquent child for committing, attempting to commit, conspiring to commit, or complicity in committing one of the following acts:

(a) A violation of *section 2907.02 of the Revised Code,* division (B) of *section 2907.05 of the Revised Code,* or *section 2907.03 of the Revised Code* if the victim of the violation was less than twelve years of age;

(b) A violation of *section 2903.01, 2903.02,* or *2905.01 of the Revised Code* that was committed with a purpose to gratify the sexual needs or desires of the child.

(2) The person was fourteen, fifteen, sixteen, or seventeen years of age at the time of committing the act.

(3) A juvenile court judge, pursuant to an order issued under *section 2152.86 of the Revised Code,* classifies the person a juvenile offender registrant, specifies the person has a duty to comply with *sections 2950.04, 2950.05,* and *2950.06 of the Revised Code,* and classifies the person a public registry-qualified juvenile offender registrant, and the classification of the person as a public registry-qualified juvenile offender registrant has not been terminated pursuant to division (D) of *section 2152.86 of the Revised Code.*

(O) "Secure facility" means any facility that is designed and operated to ensure that all of its entrances and exits are locked and under the exclusive control of its staff and to ensure that, because of that exclusive control, no person who is institutionalized or confined in the facility may leave the facility without permission or supervision.

(P) "Out-of-state juvenile offender registrant" means a person who is adjudicated a delinquent child in a court in another state, in a federal court, military court, or Indian tribal court, or in a court in any nation other than the United States for committing a sexually oriented offense or a child-victim oriented offense, who on or after January 1, 2002, moves to and resides in this state or temporarily is domiciled in this state for more than five days, and who has a duty under *section 2950.04* or *2950.041 [2950.04.1] of the Revised Code* to register in this state and the duty to otherwise comply with that applicable section and *sections 2950.05* and *2950.06 of the Revised Code.* "Out-of-state juvenile offender registrant" includes a person who prior to January 1, 2008, was an "out-of-state juvenile offender registrant" under the definition of the term in existence prior to January 1, 2008, and a person who prior to July 31, 2003, was an "out-of-state juvenile sex offender registrant" under the former definition of that former term.

(Q) "Juvenile court judge" includes a magistrate to whom the juvenile court judge confers duties pursuant to division (A)(15) of *section 2151.23 of the Revised Code.*

(R) "Adjudicated a delinquent child for committing a sexually oriented offense" includes a child who receives a serious youthful offender dispositional sentence under *section 2152.13 of the Revised Code* for committing a sexually oriented offense.

(S) "School" and "school premises" have the same meanings as in *section 2925.01 of the Revised Code.*

(T) "Residential premises" means the building in which a residential unit is located and the grounds upon which that building stands, extending to the perimeter of the property. "Residential premises" includes any type of structure in which a residential unit is located, including, but not limited to, multi-unit buildings and mobile and manufactured homes.

(U) "Residential unit" means a dwelling unit for residential use and occupancy, and includes the structure or part of a structure that is used as a home, residence, or sleeping place by one person who maintains a household or two or more persons who maintain a common household. "Residential unit" does not include a halfway house or a community-based correctional facility.

(V) "Multi-unit building" means a building in which is located more than twelve residential units that have entry doors that open directly into the unit from a hallway that is shared with one or more other units. A residential unit is not considered located in a multi-unit building if the unit does not have an entry door that opens directly into the unit from a hallway that is shared with one or more other units or if the unit is in a building that is not a multi-unit building as described in this division.

(W) "Community control sanction" has the same meaning as in *section 2929.01 of the Revised Code.*

(X) "Halfway house" and "community-based correctional facility" have the same meanings as in *section 2929.01 of the Revised Code.*

HISTORY:

146 v H 180 (Eff 1-1-97); 147 v S 111 (Eff 3-17-98); 147 v H 565 (Eff 3-30-99); 148 v H 502 (Eff 3-15-2001); 149 v S 3 (Eff 1-1-2002); 149 v S 175 (Eff 5-7-2002); 149 v H 485 (Eff 6-13-2002); 149 v H 393. Eff 7-5-2002; 149 v H 490, § 1, eff. 1-1-04; 150 v S 5, § 1, eff. 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v S 57, § 1, eff. 1-1-04; 150 v H 473, § 1, eff. 4-29-05; 151 v S 260, § 1, eff. 1-2-07; 152 v S 10, § 1, eff. 1-1-08.

LEXSTAT O.R.C. 2950.11

*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH JULY 6, 2009 ***
*** ANNOTATIONS CURRENT THROUGH APRIL 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JUNE 1, 2009 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2950. SEX OFFENDER REGISTRATION AND NOTIFICATION

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ORC Ann. 2950.11 (2009)

§ 2950.11. Community notification provisions

(A) Regardless of when the sexually oriented offense or child-victim oriented offense was committed, if a person is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a sexually oriented offense or a child-victim oriented offense or a person is or has been adjudicated a delinquent child for committing a sexually oriented offense or a child-victim oriented offense and is classified a juvenile offender registrant or is an out-of-state juvenile offender registrant based on that adjudication, and if the offender or delinquent child is in any category specified in division (F)(1)(a), (b), or (c) of this section, the sheriff with whom the offender or delinquent child has most recently registered under *section 2950.04, 2950.041 [2950.04.1]*, or *2950.05 of the Revised Code* and the sheriff to whom the offender or delinquent child most recently sent a notice of intent to reside under *section 2950.04* or *2950.041 [2950.04.1] of the Revised Code*, within the period of time specified in division (C) of this section, shall provide a written notice containing the information set forth in division (B) of this section to all of the persons described in divisions (A)(1) to (10) of this section. If the sheriff has sent a notice to the persons described in those divisions as a result of receiving a notice of intent to reside and if the offender or delinquent child registers a residence address that is the same residence address described in the notice of intent to reside, the sheriff is not required to send an additional notice when the offender or delinquent child registers. The sheriff shall provide the notice to all of the following persons:

(1) (a) Any occupant of each residential unit that is located within one thousand feet of the offender's or delinquent child's residential premises, that is located within the county served by the sheriff, and that is not located in a multi-unit building. Division (D)(3) of this section applies regarding notices required under this division.

(b) If the offender or delinquent child resides in a multi-unit building, any occupant of each residential unit that is located in that multi-unit building and that shares a common hallway with the offender or delinquent child. For purposes of this division, an occupant's unit shares a common hallway with the offender or delinquent child if the entrance door into the occupant's unit is located on the same floor and opens into the same hallway as the entrance door to the unit the offender or delinquent child occupies. Division (D)(3) of this section applies regarding notices required under this division.

(c) The building manager, or the person the building owner or condominium unit owners association authorizes to exercise management and control, of each multi-unit building that is located within one thousand feet of the

offender's or delinquent child's residential premises, including a multi-unit building in which the offender or delinquent child resides, and that is located within the county served by the sheriff. In addition to notifying the building manager or the person authorized to exercise management and control in the multi-unit building under this division, the sheriff shall post a copy of the notice prominently in each common entryway in the building and any other location in the building the sheriff determines appropriate. The manager or person exercising management and control of the building shall permit the sheriff to post copies of the notice under this division as the sheriff determines appropriate. In lieu of posting copies of the notice as described in this division, a sheriff may provide notice to all occupants of the multi-unit building by mail or personal contact; if the sheriff so notifies all the occupants, the sheriff is not required to post copies of the notice in the common entryways to the building. Division (D)(3) of this section applies regarding notices required under this division.

(d) All additional persons who are within any category of neighbors of the offender or delinquent child that the attorney general by rule adopted under *section 2950.13 of the Revised Code* requires to be provided the notice and who reside within the county served by the sheriff;

(2) The executive director of the public children services agency that has jurisdiction within the specified geographical notification area and that is located within the county served by the sheriff;

(3) (a) The superintendent of each board of education of a school district that has schools within the specified geographical notification area and that is located within the county served by the sheriff;

(b) The principal of the school within the specified geographical notification area and within the county served by the sheriff that the delinquent child attends;

(c) If the delinquent child attends a school outside of the specified geographical notification area or outside of the school district where the delinquent child resides, the superintendent of the board of education of a school district that governs the school that the delinquent child attends and the principal of the school that the delinquent child attends.

(4) (a) The appointing or hiring officer of each chartered nonpublic school located within the specified geographical notification area and within the county served by the sheriff or of each other school located within the specified geographical notification area and within the county served by the sheriff and that is not operated by a board of education described in division (A)(3) of this section;

(b) Regardless of the location of the school, the appointing or hiring officer of a chartered nonpublic school that the delinquent child attends.

(5) The director, head teacher, elementary principal, or site administrator of each preschool program governed by Chapter 3301. of the Revised Code that is located within the specified geographical notification area and within the county served by the sheriff;

(6) The administrator of each child day-care center or type A family day-care home that is located within the specified geographical notification area and within the county served by the sheriff, and the provider of each certified type B family day-care home that is located within the specified geographical notification area and within the county served by the sheriff. As used in this division, "child day-care center," "type A family day-care home," and "certified type B family day-care home" have the same meanings as in *section 5104.01 of the Revised Code.*

(7) The president or other chief administrative officer of each institution of higher education, as defined in *section 2907.03 of the Revised Code*, that is located within the specified geographical notification area and within the county served by the sheriff, and the chief law enforcement officer of the state university law enforcement agency or campus police department established under *section 3345.04* or *1713.50 of the Revised Code*, if any, that serves that institution;

(8) The sheriff of each county that includes any portion of the specified geographical notification area;

(9) If the offender or delinquent child resides within the county served by the sheriff, the chief of police, marshal, or other chief law enforcement officer of the municipal corporation in which the offender or delinquent child resides or, if the offender or delinquent child resides in an unincorporated area, the constable or chief of the police department or police district police force of the township in which the offender or delinquent child resides;

(10) Volunteer organizations in which contact with minors or other vulnerable individuals might occur or any organization, company, or individual who requests notification as provided in division (J) of this section.

(B) The notice required under division (A) of this section shall include all of the following information regarding the subject offender or delinquent child:

(1) The offender's or delinquent child's name;

(2) The address or addresses of the offender's or public registry-qualified juvenile offender registrant's residence, school, institution of higher education, or place of employment, as applicable, or the residence address or addresses of a delinquent child who is not a public registry-qualified juvenile offender registrant;

(3) The sexually oriented offense or child-victim oriented offense of which the offender was convicted, to which the offender pleaded guilty, or for which the child was adjudicated a delinquent child;

(4) A statement that identifies the category specified in division (F)(1)(a), (b), or (c) of this section that includes the offender or delinquent child and that subjects the offender or delinquent child to this section;

(5) The offender's or delinquent child's photograph.

(C) If a sheriff with whom an offender or delinquent child registers under *section 2950.04, 2950.041 [2950.04.1],* or *2950.05 of the Revised Code* or to whom the offender or delinquent child most recently sent a notice of intent to reside under *section 2950.04* or *2950.041 [2950.04.1] of the Revised Code* is required by division (A) of this section to provide notices regarding an offender or delinquent child and if, pursuant to that requirement, the sheriff provides a notice to a sheriff of one or more other counties in accordance with division (A)(8) of this section, the sheriff of each of the other counties who is provided notice under division (A)(8) of this section shall provide the notices described in divisions (A)(1) to (7) and (A)(9) and (10) of this section to each person or entity identified within those divisions that is located within the specified geographical notification area and within the county served by the sheriff in question.

(D) (1) A sheriff required by division (A) or (C) of this section to provide notices regarding an offender or delinquent child shall provide the notice to the neighbors that are described in division (A)(1) of this section and the notices to law enforcement personnel that are described in divisions (A)(8) and (9) of this section as soon as practicable, but no later than five days after the offender sends the notice of intent to reside to the sheriff and again no later than five days after the offender or delinquent child registers with the sheriff or, if the sheriff is required by division (C) of this section to provide the notices, no later than five days after the sheriff is provided the notice described in division (A)(8) of this section.

A sheriff required by division (A) or (C) of this section to provide notices regarding an offender or delinquent child shall provide the notices to all other specified persons that are described in divisions (A)(2) to (7) and (A)(10) of this section as soon as practicable, but not later than seven days after the offender or delinquent child registers with the sheriff or, if the sheriff is required by division (C) of this section to provide the notices, no later than five days after the sheriff is provided the notice described in division (A)(8) of this section.

(2) If an offender or delinquent child in relation to whom division (A) of this section applies verifies the offender's or delinquent child's current residence, school, institution of higher education, or place of employment address, as applicable, with a sheriff pursuant to *section 2950.06 of the Revised Code*, the sheriff may provide a written notice containing the information set forth in division (B) of this section to the persons identified in divisions (A)(1) to

(10) of this section. If a sheriff provides a notice pursuant to this division to the sheriff of one or more other counties in accordance with division (A)(8) of this section, the sheriff of each of the other counties who is provided the notice under division (A)(8) of this section may provide, but is not required to provide, a written notice containing the information set forth in division (B) of this section to the persons identified in divisions (A)(1) to (7) and (A)(9) and (10) of this section.

(3) A sheriff may provide notice under division (A)(1)(a) or (b) of this section, and may provide notice under division (A)(1)(c) of this section to a building manager or person authorized to exercise management and control of a building, by mail, by personal contact, or by leaving the notice at or under the entry door to a residential unit. For purposes of divisions (A)(1)(a) and (b) of this section, and the portion of division (A)(1)(c) of this section relating to the provision of notice to occupants of a multi-unit building by mail or personal contact, the provision of one written notice per unit is deemed as providing notice to all occupants of that unit.

(E) All information that a sheriff possesses regarding an offender or delinquent child who is in a category specified in division (F)(1)(a), (b), or (c) of this section that is described in division (B) of this section and that must be provided in a notice required under division (A) or (C) of this section or that may be provided in a notice authorized under division (D)(2) of this section is a public record that is open to inspection under *section 149.43 of the Revised Code*.

The sheriff shall not cause to be publicly disseminated by means of the internet any of the information described in this division that is provided by a delinquent child unless that child is in a category specified in division (F)(1)(a), (b), or (c) of this section.

(F) (1) Except as provided in division (F)(2) of this section, the duties to provide the notices described in divisions (A) and (C) of this section apply regarding any offender or delinquent child who is in any of the following categories:

(a) The offender is a tier III sex offender/child-victim offender, or the delinquent child is a public registry-qualified juvenile offender registrant, and a juvenile court has not removed pursuant to *section 2950.15 of the Revised Code* the delinquent child's duty to comply with *sections 2950.04, 2950.041 [2950.04.1], 2950.05,* and *2950.06 of the Revised Code*.

(b) The delinquent child is a tier III sex offender/child-victim offender who is not a public-registry qualified juvenile offender registrant, the delinquent child was subjected to this section prior to the effective date of this amendment as a sexual predator, habitual sex offender, child-victim predator, or habitual child-victim offender, as those terms were defined in *section 2950.01 of the Revised Code* as it existed prior to the effective date of this amendment, and a juvenile court has not removed pursuant to *section 2152.84* or *2152.85 of the Revised Code* the delinquent child's duty to comply with *sections 2950.04, 2950.041 [2950.04.1], 2950.05,* and *2950.06 of the Revised Code*.

(c) The delinquent child is a tier III sex offender/child-victim offender who is not a public registry-qualified juvenile offender registrant, the delinquent child was classified a juvenile offender registrant on or after the effective date of this amendment, the court has imposed a requirement under *section 2152.82, 2152.83,* or *2152.84 of the Revised Code* subjecting the delinquent child to this section, and a juvenile court has not removed pursuant to *section 2152.84* or *2152.85 of the Revised Code* the delinquent child's duty to comply with *sections 2950.04, 2950.041 [2950.04.1], 2950.05,* and *2950.06 of the Revised Code*.

(2) The notification provisions of this section do not apply to a person described in division (F)(1)(a), (b), or (c) of this section if a court finds at a hearing after considering the factors described in this division that the person would not be subject to the notification provisions of this section that were in the version of this section that existed immediately prior to the effective date of this amendment. In making the determination of whether a person would have been subject to the notification provisions under prior law as described in this division, the court shall consider the following factors:

(a) The offender's or delinquent child's age;

(b) The offender's or delinquent child's prior criminal or delinquency record regarding all offenses, including, but not limited to, all sexual offenses;

(c) The age of the victim of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made;

(d) Whether the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made involved multiple victims;

(e) Whether the offender or delinquent child used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;

(f) If the offender or delinquent child previously has been convicted of or pleaded guilty to, or been adjudicated a delinquent child for committing an act that if committed by an adult would be, a criminal offense, whether the offender or delinquent child completed any sentence or dispositional order imposed for the prior offense or act and, if the prior offense or act was a sex offense or a sexually oriented offense, whether the offender or delinquent child participated in available programs for sexual offenders;

(g) Any mental illness or mental disability of the offender or delinquent child;

(h) The nature of the offender's or delinquent child's sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;

(i) Whether the offender or delinquent child, during the commission of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made, displayed cruelty or made one or more threats of cruelty;

(j) Whether the offender or delinquent child would have been a habitual sex offender or a habitual child victim offender under the definitions of those terms set forth in *section 2950.01 of the Revised Code* as that section existed prior to the effective date of this amendment;

(k) Any additional behavioral characteristics that contribute to the offender's or delinquent child's conduct.

(G) (1) The department of job and family services shall compile, maintain, and update in January and July of each year, a list of all agencies, centers, or homes of a type described in division (A)(2) or (6) of this section that contains the name of each agency, center, or home of that type, the county in which it is located, its address and telephone number, and the name of an administrative officer or employee of the agency, center, or home.

(2) The department of education shall compile, maintain, and update in January and July of each year, a list of all boards of education, schools, or programs of a type described in division (A)(3), (4), or (5) of this section that contains the name of each board of education, school, or program of that type, the county in which it is located, its address and telephone number, the name of the superintendent of the board or of an administrative officer or employee of the school or program, and, in relation to a board of education, the county or counties in which each of its schools is located and the address of each such school.

(3) The Ohio board of regents shall compile, maintain, and update in January and July of each year, a list of all institutions of a type described in division (A)(7) of this section that contains the name of each such institution, the county in which it is located, its address and telephone number, and the name of its president or other chief administrative officer.

(4) A sheriff required by division (A) or (C) of this section, or authorized by division (D)(2) of this section, to

provide notices regarding an offender or delinquent child, or a designee of a sheriff of that type, may request the department of job and family services, department of education, or Ohio board of regents, by telephone, in person, or by mail, to provide the sheriff or designee with the names, addresses, and telephone numbers of the appropriate persons and entities to whom the notices described in divisions (A)(2) to (7) of this section are to be provided. Upon receipt of a request, the department or board shall provide the requesting sheriff or designee with the names, addresses, and telephone numbers of the appropriate persons and entities to whom those notices are to be provided.

(H) (1) Upon the motion of the offender or the prosecuting attorney of the county in which the offender was convicted of or pleaded guilty to the sexually oriented offense or child-victim oriented offense for which the offender is subject to community notification under this section, or upon the motion of the sentencing judge or that judge's successor in office, the judge may schedule a hearing to determine whether the interests of justice would be served by suspending the community notification requirement under this section in relation to the offender. The judge may dismiss the motion without a hearing but may not issue an order suspending the community notification requirement without a hearing. At the hearing, all parties are entitled to be heard, and the judge shall consider all of the factors set forth in division (K) of this section. If, at the conclusion of the hearing, the judge finds that the offender has proven by clear and convincing evidence that the offender is unlikely to commit in the future a sexually oriented offense or a child-victim oriented offense and if the judge finds that suspending the community notification requirement is in the interests of justice, the judge may suspend the application of this section in relation to the offender. The order shall contain both of these findings.

The judge promptly shall serve a copy of the order upon the sheriff with whom the offender most recently registered under *section 2950.04, 2950.041 [2950.04.1],* or *2950.05 of the Revised Code* and upon the bureau of criminal identification and investigation.

An order suspending the community notification requirement does not suspend or otherwise alter an offender's duties to comply with *sections 2950.04, 2950.041 [2950.04.1], 2950.05,* and *2950.06 of the Revised Code* and does not suspend the victim notification requirement under *section 2950.10 of the Revised Code.*

(2) A prosecuting attorney, a sentencing judge or that judge's successor in office, and an offender who is subject to the community notification requirement under this section may initially make a motion under division (H)(1) of this section upon the expiration of twenty years after the offender's duty to comply with division (A)(2), (3), or (4) of section 2950.04, division (A)(2), (3), or (4) of *section 2950.041 [2950.04.1]* and *sections 2950.05* and *2950.06 of the Revised Code* begins in relation to the offense for which the offender is subject to community notification. After the initial making of a motion under division (H)(1) of this section, thereafter, the prosecutor, judge, and offender may make a subsequent motion under that division upon the expiration of five years after the judge has entered an order denying the initial motion or the most recent motion made under that division.

(3) The offender and the prosecuting attorney have the right to appeal an order approving or denying a motion made under division (H)(1) of this section.

(4) Divisions (H)(1) to (3) of this section do not apply to any of the following types of offender:

(a) A person who is convicted of or pleads guilty to a violent sex offense or designated homicide, assault, or kidnapping offense and who, in relation to that offense, is adjudicated a sexually violent predator;

(b) A person who is convicted of or pleads guilty to a sexually oriented offense that is a violation of division (A)(1)(b) of *section 2907.02 of the Revised Code* committed on or after January 2, 2007, and either who is sentenced under *section 2971.03 of the Revised Code* or upon whom a sentence of life without parole is imposed under division (B) of *section 2907.02 of the Revised Code*;

(c) A person who is convicted of or pleads guilty to a sexually oriented offense that is attempted rape committed on or after January 2, 2007, and who also is convicted of or pleads guilty to a specification of the type

described in *section 2941.1418 [2941.14.18], 2941.1419 [2941.14.19],* or *2941.1420 [2941.14.20] of the Revised Code*;

(d) A person who is convicted of or pleads guilty to an offense described in division (B)(3)(a), (b), (c), or (d) of *section 2971.03 of the Revised Code* and who is sentenced for that offense pursuant to that division;

(e) An offender who is in a category specified in division (F)(1)(a), (b), or (c) of this section and who, subsequent to being subjected to community notification, has pleaded guilty to or been convicted of a sexually oriented offense or child-victim oriented offense.

(I) If a person is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a sexually oriented offense or a child-victim oriented offense or a person is or has been adjudicated a delinquent child for committing a sexually oriented offense or a child-victim oriented offense and is classified a juvenile offender registrant or is an out-of-state juvenile offender registrant based on that adjudication, and if the offender or delinquent child is not in any category specified in division (F)(1)(a), (b), or (c) of this section, the sheriff with whom the offender or delinquent child has most recently registered under *section 2950.04, 2950.041 [2950.04.1],* or *2950.05 of the Revised Code* and the sheriff to whom the offender or delinquent child most recently sent a notice of intent to reside under *section 2950.04* or *2950.041 [2950.04.1] of the Revised Code,* within the period of time specified in division (D) of this section, shall provide a written notice containing the information set forth in division (B) of this section to the executive director of the public children services agency that has jurisdiction within the specified geographical notification area and that is located within the county served by the sheriff.

(J) Each sheriff shall allow a volunteer organization or other organization, company, or individual who wishes to receive the notice described in division (A)(10) of this section regarding a specific offender or delinquent child or notice regarding all offenders and delinquent children who are located in the specified geographical notification area to notify the sheriff by electronic mail or through the sheriff's web site of this election. The sheriff shall promptly inform the bureau of criminal identification and investigation of these requests in accordance with the forwarding procedures adopted by the attorney general pursuant to *section 2950.13 of the Revised Code.*

(K) In making a determination under division (H)(1) of this section as to whether to suspend the community notification requirement under this section for an offender, the judge shall consider all relevant factors, including, but not limited to, all of the following:

(1) The offender's age;

(2) The offender's prior criminal or delinquency record regarding all offenses, including, but not limited to, all sexually oriented offenses or child-victim oriented offenses;

(3) The age of the victim of the sexually oriented offense or child-victim oriented offense the offender committed;

(4) Whether the sexually oriented offense or child-victim oriented offense the offender committed involved multiple victims;

(5) Whether the offender used drugs or alcohol to impair the victim of the sexually oriented offense or child-victim oriented the offender committed or to prevent the victim from resisting;

(6) If the offender previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for committing an act that if committed by an adult would be a criminal offense, whether the offender completed any sentence or dispositional order imposed for the prior offense or act and, if the prior offense or act was a sexually oriented offense or a child-victim oriented offense, whether the offender or delinquent child participated in available programs for sex offenders or child-victim offenders;

(7) Any mental illness or mental disability of the offender;

(8) The nature of the offender's sexual conduct, sexual contact, or interaction in a sexual context with the victim of the sexually oriented offense the offender committed or the nature of the offender's interaction in a sexual context with the victim of the child-victim oriented offense the offender committed, whichever is applicable, and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;

(9) Whether the offender, during the commission of the sexually oriented offense or child-victim oriented offense the offender committed, displayed cruelty or made one or more threats of cruelty;

(10) Any additional behavioral characteristics that contribute to the offender's conduct.

(L) As used in this section, "specified geographical notification area" means the geographic area or areas within which the attorney general, by rule adopted under *section 2950.13 of the Revised Code*, requires the notice described in division (B) of this section to be given to the persons identified in divisions (A)(2) to (8) of this section.

HISTORY:

146 v H 180 (Eff 7-1-97); 147 v H 396 (Eff 1-30-98); 147 v H 565 (Eff 3-30-99); 148 v H 471 (Eff 7-1-2000); 149 v S 3 (Eff 1-1-2002); 149 v S 175 (Eff 5-7-2002); 149 v H 485. Eff 6-13-2002; 150 v S 5, § 1, Eff 7-31-03; 150 v H 473, § 1, eff. 4-29-05; 151 v H 15, § 1, eff. 11-23-05; 151 v S 17, § 1, eff. 8-3-06; 151 v S 260, § 1, eff. 1-2-07; 152 v S 10, § 1, eff. 1-1-08.