[Cite as *State v. Ettenger*, 2009-Ohio-3525.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Respondent-Appellee,	:	**CASE NO. 2008-L-054**
- vs -	:	
JASON ETTENGER,	:	
Defendant-Petitioner-Appellant.	:	

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

Judgment: Reversed and Remanded.

July 13, 2009

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

Richard J. Perez, Rosplock & Perez, Interstate Square Building I, 4230 State Route 306, Suite 240, Willoughby, OH 44094-9204 (For Defendant-Petitioner-Appellant).

TIMOTHY P. CANNON, J.

{¶1} 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.

{¶2} 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.

{¶3} After Ettenger's conviction, the state waived a sex offender classification hearing and, 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.

{¶4} 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.

{¶5} 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.

{¶6} 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.

{¶7} Ettenger timely appealed, assigning the following error for our review:

{¶8} "[1.] 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."

{¶9} 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

{¶10} 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.

{¶11} 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. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶30. (Citation omitted.)

{¶12} The "ex post facto" prohibition applies solely to criminal statutes. *State v. Byers*, 7th Dist. No. 07 CO 39, 2008-Ohio-5051, at ¶12. 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. (Citations omitted.) In *In re: G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076, at ¶18, this test was described in the following manner:

{¶13} "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 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.)

{¶14} 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. 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 ¶22. 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.

{¶15} Senate 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.

{¶16} 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 ***." (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.)

{¶17} 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.)

{¶18} 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.

{¶19} 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 and bolster the public's confidence in Ohio's criminal and mental health systems." *State v. Cook*, 83 Ohio St.3d at 417.

{¶20} 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.)

{¶21} 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 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.

{¶22} 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 registry. R.C. 2950.081.

{¶23} 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, stressed the importance of a sexual offender classification hearing and the significance of classifying offenders appropriately, stating:

{¶24} "[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 (Apr. 1, 1999), Cuyahoga App. No. 73492, unreported, 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.'"

{¶25} Also of significance, the *Eppinger* Court noted that "[o]ne sexually oriented offense 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.

{¶26} 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.

{¶27} 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 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.

{¶28} 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.

{¶29} 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 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*, 2007-Ohio-2202, at ¶46. (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*, 113 Ohio St.3d 7, 2008-Ohio-4824, at ¶45. (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.

{¶30} 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 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:

{¶31} "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. (Internal citations omitted.)

{¶32} 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.

{¶33} Since *Cook*, the sexual offender laws have been significantly 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 an internet database that was previously established by the Ohio Attorney General.

{¶34} 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:

{¶35} "*** [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 Alaska, there have been reports of incidents of suicide by and vigilantism against offenders on state registries. ***

{¶36} "***

{¶37} "*** 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 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.)

{¶38} After careful examination of this opinion, we agree with the reasoning and conclusion of the *Doe* Court.

{¶39} 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 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:

{¶40} "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 to supervised release or parole supports a conclusion that ASORA is punitive." Id. at 1012.

{¶41} 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.

{¶42} 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).

{¶43} However, under Senate Bill 10, every offender must provide identical information, and the information is published in the same manner for every offender. 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."

{¶44} 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

{¶45} 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.

{¶46} Section 28, Article II of the Ohio Constitution states that "[t]he general 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.

{¶47} 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 ¶9-10. (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.)

{¶48} 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 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.

{¶49} 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.)

{¶50} In *State v. Wilson*, 2007-Ohio-2202, at ¶32, 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 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 ¶45. (Lanzinger, J., concurring in part and dissenting in part.)

{¶51} After distinguishing the then-current laws with those at issue under *Cook* and *Williams*, Justice Lanzinger stated:

{¶52} "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 of the offender's actions." Id. at ¶46. (Internal citation omitted.)

{¶53} Thereafter, in *State v. Ferguson*, 2008-Ohio-4824, at ¶27-¶40, the Supreme Court of Ohio again relied upon *State v. Cook*, 83 Ohio St.3d 404, *State v. Williams*, 114 Ohio St.3d 103, 2007-Ohio-3268, and *State v. Wilson*, 2007-Ohio-2202, 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.

{¶54} 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*, 2008-Ohio-4824, at ¶30, fn. 4. 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 ¶4. The opinion stated:

{¶55} "[W]e observe that an offender's classification as a sexual predator is a collateral consequence of the offender's criminal acts rather than a form of punishment per se. Ferguson has not established that he had any reasonable expectation of finality in a collateral consequence that *might* be removed. 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 ¶34. (Emphasis sic.)

{¶56} 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* 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.

{¶57} 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*, 2008-Ohio-4824; 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.

{¶58} 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 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.

{¶59} 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 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

{¶60} 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.

{¶61} Ettenger asserts that the provisions of Senate Bill 10 cannot be applied to him because it would violate 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.

{¶62} 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. 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 ¶13.

{¶63} 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:

{¶64} "[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 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."

{¶65} 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."

{¶66} 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. 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.

{¶67} 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

{¶68} 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.

{¶69} The Supreme Court of Ohio has held:

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

{¶71} 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 ¶100. 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.

{¶72} 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.

{¶73} 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. 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.

{¶74} 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 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

{¶75} 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.

{¶76} 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:

{¶77} "'[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 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 ¶73, quoting *Slagle*, at ¶21 and also citing *In re Smith*, 3d Dist No. 1-07-58, 2008-Ohio-3234, at ¶39 and *In re G.E.S.*, 2008-Ohio-4076, at ¶42.

{¶78} 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 ¶99, citing *Fairview v. Giffee* (1905), 73 Ohio St. 183, 190. 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.

{¶79} 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 the doctrine of separation of powers.

Substantive Due Process Rights and Privacy

{¶80} 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 1 of the Ohio Constitution, as well as the right to privacy guaranteed by Section 1, Article 1 of the Ohio Constitution.

{¶81} 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.

{¶82} 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, 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 ¶10-11; *State v. Pierce*, 8th Dist. No. 88470, 2007-Ohio-3665, at ¶33. 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

{¶83} Ettenger's assignment of error has merit to the extent indicated.

{¶84} 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.

{¶85} 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 in part, dissents in part with a Concurring/Dissenting Opinion.

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

{¶86} 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.

{¶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.

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

{¶89} "[I]t is well settled that the legislature cannot annul, reverse or modify a judgment of a court already rendered." *Bartlett v. Ohio* (1905), 73 Ohio St. 54, 58; *Gompf v. Wolfinger* (1902), 67 Ohio St. 144, at paragraph three of the syllabus ("[a] judgment which is final by the laws existing when it is rendered cannot constitutionally be made subject to review by a statute subsequently enacted"). Cf. *Plaut v. Spendthrift*

Farm, Inc. (1995), 514 U.S. 211, 219 (Congress may not interfere with the power of the federal judiciary "to render dispositive judgments" by "command[ing] the federal courts to reopen final judgments") (citation omitted).

{¶90} 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 a sexually oriented offender *** arises from a finding rendered by the trial court, which in turn adversely affects a defendant's rights by the imposition of registration requirements"); *State v. Dobrski*, 9th Dist. No. 06CA008925, 2007-Ohio-3121, at ¶6 ("[i]nasmuch as a sexual predator classification is an order that affects a substantial right in a special proceeding, it is final and appealable"); cf. *State v. Nader*, 10th Dist. No. 05AP-91, 2005-Ohio-5171, at ¶1 (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 ¶8 (the offender appealed the trial court's finding that he was a sexually oriented offender).

{¶91} Accordingly, if either party failed to appeal such a determination within thirty days, as provided for in App.R. 4(A), the judgment became settled. Subsequent attempts to overturn such judgments have been barred under the principles of res judicata. See *State v. Lucerno*, 8th Dist. No. 89039, 2007-Ohio-5537, at ¶9 (applying res judicata where the State failed to appeal the lower court's determination that House Bill 180/Megan's Law was unconstitutional: "the courts have barred sexual predator classifications when an initial classification request had been dismissed on the grounds that the court believed R.C. Chapter 2950 to be unconstitutional") (citation omitted);

State v. Dignan, 11th Dist. No. 2008-T-0044, 2008-Ohio-3732, at ¶7 (dismissing, as untimely, offender's appeal of his sex offender classification).

{¶92} 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.

{¶93} 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.

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

{¶95} 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

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 24, U.S.Code.

be included in his or her sentence would be relevant. Given the Legislature's express statement of intent, however, such inquiry is unnecessary.

{¶96} It is also unnecessary to comment on what the majority considers the Legislature's "questionable approach" to protecting the public 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 ¶141.

{¶97} 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]

{¶98} 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, the Ohio Supreme Court held that these amendments could be applied retroactively.

{¶99} 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,

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 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.

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 ¶9 and ¶10 respectively.

{¶100} With respect 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 ¶32. Since amended R.C. Chapter 2950 still constituted "a civil, remedial statute," it did not violate the Ex Post Facto Clause. Id. at ¶43.

{¶101} 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.

{¶102} Finally, I take exception with the majority's conclusion that only sexual offenders who were subject to "specific, terminable reporting requirements" 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.

{¶103} 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.

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

{¶104} 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.

{¶105} 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.

{¶106} 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 (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 Senate Bill 10 which imposes substantially more onerous reporting and notification requirements on sex offenders.

{¶107} 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, 2008-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.

{¶108} 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.

{¶109} 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. 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, ¶13.

{¶110} 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, ¶9. 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. See, also, *Slagle v. State*, 145 Ohio Misc.2d 98, 2008-Ohio-593.

{¶111} 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 ¶100. 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.

{¶112} 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 that the enforcement of the registration and notification requirements did not result in a double jeopardy violation. Id.

{¶113} 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.

{¶114} 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.