

ORIGINAL

In the
Supreme Court of Ohio

ROMAN CHOJNACKI,

Appellant,

v.

OHIO ATTORNEY GENERAL [RICHARD
CORDRAY],

Appellee.

: Case Nos. 2008-0991
: 2008-0992
:
: On Appeal from the
: Warren County
: Court of Appeals,
: Twelfth Appellate District
:
: Court of Appeals Case
: No. CA200803040

**SUPPLEMENTAL MERIT BRIEF OF APPELLEE
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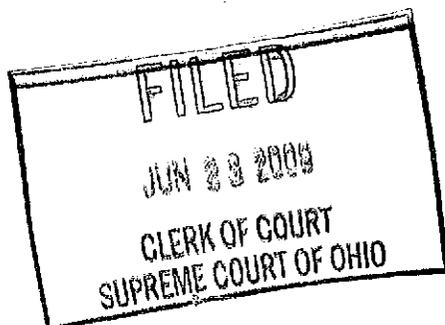


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INTRODUCTION

As part of his guilty plea to various sexual offenses, Appellant Roman Chojnacki admitted to having a year-long sexual relationship with a 13-year-old girl. The trial court sentenced him to 12 years in prison and, consistent with Ohio's then-existing sex offender law, instructed him to register as a sex offender with his county sheriff annually for 10 years. In 2007, the Attorney General notified Chojnacki that he had been reclassified under Ohio's newly enacted sex offender law, Senate Bill 10 ("S.B. 10"). Upon release from prison, he must now register twice a year for 25 years.

Under S.B. 10, the reclassifications for adult sex offenders are automatic, and the offenders are notified of their new classification by registered letter from the Attorney General. R.C. 2950.031. The law, however, permits an offender to request a hearing under R.C. 2950.031(E) if he wishes to contest the reclassification. Chojnacki exercised that option and filed a petition to contest his reclassification.

Chojnacki now claims that he and all reclassified offenders have a right to counsel in order to pursue reclassification challenges under R.C. 2950.031(E). Chojnacki first claims a right to counsel under the Sixth Amendment, on the theory that S.B. 10 is a criminal statute. He also claims a right to counsel under the Due Process Clause, on the alleged ground that fundamental rights are at stake in a reclassification challenge. Neither argument has merit.

First, Chojnacki's Sixth Amendment right-to-counsel claim turns entirely on whether S.B. 10 is a civil or criminal statute. That question is squarely before this Court in another case—*State v. Bodyke*, 2008-2502—which asks this Court to resolve whether S.B. 10 is a civil or criminal statute for purposes of an Ex Post Facto Clause challenge. (Indeed, oral argument for this case and *Bodyke* will be held on the same day). The Attorney General respectfully suggests that Chojnacki's right-to-counsel claim should not become the tail that wags the dog—that is,

this Court should first resolve through *Bodyke* whether S.B. 10 is a civil or criminal statute and then apply that ruling to this case. The civil-criminal distinction has been litigated throughout the *Bodyke* case, whereas that distinction is being addressed for the first time in Chojnacki's case only through this supplemental briefing. Moreover, resolving the civil-criminal issue through *Bodyke* is the most logical approach. If S.B. 10 is indeed criminal, then it cannot be retroactively applied to sex offenders like Chojnacki. As a result, the Attorney General's reclassification of Chojnacki would be void, and the right-to-counsel question would become moot because the State could not lawfully reclassify him in the first place. If the Court instead determines that S.B. 10 is civil, then Chojnacki has no Sixth Amendment right to counsel, since the Sixth Amendment only attaches to criminal proceedings. Either way, *Bodyke* will resolve Chojnacki's first claim.

If the Court chooses to address the civil-criminal distinction in this case, however, it should find that S.B. 10 is a civil statute. Although S.B. 10 revised the manner in which sex offenders are classified, the basic duties imposed on the offenders—the periodic verification of their residency and employment with the county sheriff—are the same duties imposed by the predecessor statutes upheld by this Court in *State v. Cook*, 83 Ohio St. 3d 404, 1998-Ohio-291, and *State v. Ferguson*, 120 Ohio St. 3d 7, 2008-Ohio-4824. As *Cook* and *Ferguson* recognized, sex offender registration and notification laws do not impose any affirmative restraints on the offender, they are not criminal sanctions, and they serve the remedial purpose of notifying the public about sex offenders in their communities. Therefore, S.B. 10 is not criminal, and the Sixth Amendment is not triggered.

Chojnacki's due process argument fares no better. This Court has recognized a right to counsel in civil proceedings only where an individual is threatened with the deprivation of

physical liberty or the loss of a fundamental right—for instance, in civil commitment proceedings, juvenile delinquency adjudications, parental termination proceedings, and the like. Chojnacki does not face a deprivation of liberty because sex offender registration and notification laws do not impose any physical restraints on the offender. See *Cook*, 83 Ohio St. 3d at 418. Nor is Chojnacki at risk of losing any other fundamental right. Rather, Chojnacki wishes to raise constitutional claims against the State in his reclassification challenge under R.C. 2950.031(E). But no court has ever held that a litigant’s desire to raise constitutional claims is a fundamental interest requiring the assistance of counsel.

In sum, neither the Sixth Amendment nor the Due Process Clause supports a right to counsel in sex offender reclassification challenges under R.C. 2950.031(E). The Twelfth District was therefore correct to dismiss Chojnacki’s appeal, and this Court should do the same.

STATEMENT OF THE CASE AND FACTS

Roman Chojnacki, then age 27, engaged in a sexual relationship with a 13-year-old girl between September 11 2004, and August 31, 2005. See *State v. Chojnacki* (8th Dist.), No. 88213, 2007-Ohio-4016, ¶ 2. The girl became pregnant, and later gave birth to his child. *Id.* On November 30, 2005, a Cuyahoga County grand jury indicted Chojnacki for 10 counts of sexual activity with a minor. *Id.* The parties reached a plea agreement, and Chojnacki pled guilty to three counts in the indictment. *Id.* ¶ 3. The common pleas court sentenced Chojnacki to four years in prison on each count, to be served consecutively. *Id.* ¶ 4. The court also notified him that he was as a “sexually-oriented offender”—the lowest category under Ohio’s former sex-offender registration law. Former R.C. 2950.01(D). That classification obligated Chojnacki to register annually as a sex offender with the sheriff of his county of residence and employment for a period of 10 years. Former R.C. 2950.06(B)(2); former R.C. 2950.07(B)(3).

On June 30, 2007, the General Assembly passed S.B. 10 to align Ohio's sex offender registration laws with the recently enacted federal Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587. S.B. 10 promotes the same remedial goal and imposes the same type of obligations (periodic verification of residency and employment) as the old law. Nevertheless, it replaced the old classification regime with a new, three-tiered system. Under S.B. 10, the registration and notification obligations on an offender increase with each tier. R.C. 2950.06(B); R.C. 2950.07(B). Further, S.B. 10 assigns a tier to each adult offender based on his offense of conviction, and nothing else. R.C. 2950.01(E)-(G). The new tier classifications became effective on January 1, 2008.

S.B. 10 applies retroactively to sex offenders who, as of July 1, 2007, were subject to registration under the old sex-offender system. R.C. 2950.033. The law directs the Ohio Attorney General to identify each offender's tier classification under the statute, and then provide written notice to the offender of his new obligations. R.C. 2950.031; R.C. 2950.032. Consistent with this duty, the Attorney General notified Chojnacki—who was then incarcerated at the Warren Correctional Institution—that he was a Tier II offender based on his offense of conviction. As a Tier II offender, Chojnacki must register with his county sheriff every 180 days for a period of 25 years after his release from prison. R.C. 2950.06(B)(2); R.C. 2950.07(B)(2).

After receiving the Attorney General's letter, the offender has a right to contest the reclassification. See R.C. 2950.031(E); R.C. 2950.032(E). Chojnacki filed a petition in the Warren County Court of Common Pleas, challenging his S.B. 10 classification. He also filed a motion to appoint counsel, which the court denied.

Chojnacki appealed the denial of counsel. The Twelfth District dismissed the appeal, finding that the trial court's denial of the motion to appoint counsel was not a final appealable

order under R.C. 2505.02(B). The court did not reach the merits of Chojnacki's argument that he had a right to counsel. However, the court certified a conflict, noting that the Second District had ruled that the denial of counsel was an immediately appealable order.

This Court accepted jurisdiction on August 6, 2008, and directed the parties to brief “[w]hether a decision denying a request for appointment of counsel on a reclassification hearing . . . is a final appealable order.” *Chojnacki v. Rogers*, 119 Ohio St. 3d 1405, 2008-Ohio-3880. Oral argument was held on March 11, 2009. On March 23, 2009, the Court ordered briefing on two supplemental issues of law: (1) “Whether sex offender reclassification hearings conducted pursuant to the provision of Am.Sub.S.B. 10 are criminal or civil proceedings,” and (2) “Whether sex offenders are entitled to the appointment of counsel for Am.Sub.S.B. 10 reclassification hearings if those proceedings are civil in nature.” *Chojnacki v. Cordray*, 121 Ohio St. 3d 1419, 2009-Ohio-1283.

On April 8, 2009, this Court accepted jurisdiction in *State v. Bodyke*, 2008-2502. In *Bodyke*, the appellants argue that the retroactive application of S.B. 10 to adult offenders who had been previously classified under the old sex offender registration law violates a number of constitutional proscriptions—the Ex Post Facto Clause of the U.S. Constitution, the Retroactivity Clause of the Ohio Constitution, separation of powers, double jeopardy, due process, cruel and unusual punishment, and impairment of contracts. See Jur. Mem. (Dec. 31, 2008), *State v. Bodyke*, 2008-2502, at i. Due to the overlap of issues between *Bodyke* and *Chojnacki*, the Court has ordered that *Chojnacki* be calendared for oral argument on the same day as *Bodyke* and *In re Smith*, 2008-1624 (a separate constitutional challenge to the juvenile classification procedures in S.B. 10).

ARGUMENT

Attorney General's Proposition of Law No. I:

S.B. 10 is a civil law that advances the remedial interest of protecting the public.

In his supplemental brief, Chojnacki argues that his sex offender reclassification challenge under R.C. 2950.031(E) is a criminal, as opposed to a civil, proceeding. At oral argument, Chief Justice Moyer summarized the significance of this question: "If it's criminal, there is no question that your client would be entitled to counsel. If it's civil, then there is some question."

The answer to that question has now changed somewhat in light of this Court's acceptance of jurisdiction in *Bodyke*. That is, if S.B. 10 is a criminal statute, as Chojnacki claims, then the law cannot be retroactively applied to him under the Ex Post Facto Clause. Accordingly, his right-to-counsel claim becomes moot; indeed, the tier classification itself would be invalid and this entire proceeding would terminate. If S.B. 10 is instead a civil statute, then, as Chief Justice Moyer observed, the Court would have to determine whether Chojnacki has a civil right to counsel grounded in due process.

Because the threshold civil-criminal question is now squarely before the Court in *Bodyke*, and because that issue has been litigated throughout those proceedings, this Court need not and should not reach that weighty issue in this case given its awkward procedural posture. Instead, this Court should first decide the civil-criminal issue through *Bodyke* and then apply that ruling here. If this Court elects to address the distinction through this case, however, it should find that S.B. 10 is a civil statute.

A. The question whether S.B. 10 is a civil or criminal statute should be resolved in *State v. Bodyke* and that ruling should then be applied to this case.

As explained above, S.B. 10 orders the reclassification of every sex offender like Chojnacki who, as of July 1, 2007, was subject to the old registration system. The law also

allows those offenders to contest their S.B. 10 tier assignment. They can file a petition and request a hearing to “contest the manner in which the [Attorney General’s] letter . . . specifies that the new registration requirements apply to the offender” or “contest whether those new registration requirements apply at all.” R.C. 2950.031(E); see also R.C. 2950.032(E) (same).

Chojnacki argues that reclassification challenges initiated by sex offenders are criminal proceedings. The premise of his argument is that S.B. 10 itself “is a criminal statute.” (Supp. Br. 5). He analyzes the statute under the U.S. Supreme Court’s seven-factor test for distinguishing between a civil remedy and a criminal punishment. (Supp. Br. 6-10, citing *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144). Chojnacki then states that, because “S.B. 10 is criminal in nature,” a petition under R.C. 2950.031(E) is “a critical stage of the criminal proceedings.” (Supp. Br. 10). Therefore, he claims entitlement to a lawyer.

This central question—whether S.B. 10 is a civil or criminal statute—is squarely before the Court in *Bodyke*. In that case, the appellants, a group of sex offenders, claim that S.B. 10’s tier classifications cannot be applied retroactively to them without violating the Ex Post Facto Clause of the U.S. Constitution. Their reasoning is that “the enforcement mechanisms [S.B. 10] established are *clearly criminal*.” Jur. Mem. (Dec. 31, 2008), *State v. Bodyke*, 2008-2502, at 6 (emphasis added). Just like Chojnacki, the *Bodyke* appellants then analyze the *Kennedy* factors in an attempt to demonstrate that S.B. 10 is a criminal statute. *Id.* at 6-9.

The ramifications of *Bodyke* are substantial. If this Court rules that S.B. 10 is a criminal statute, then the *Bodyke* appellants win on their Ex Post Facto claim, in which case S.B. 10 cannot be applied retroactively to any individual who committed a sex offense before the statute’s effective date—July 1, 2007. This group includes Chojnacki. Thus, if the appellants in *Bodyke* win, the reclassification of Chojnacki as a Tier II offender under S.B. 10 would be

invalid, and his petition challenging that classification under R.C. 2950.031(E), his request for counsel, and, indeed, this entire proceeding, would become moot. By contrast, if this Court rules in *Bodyke* that S.B. 10 is a civil statute, the *Bodyke* appellants would lose on their Ex Post Facto claim and Chojnacki would likewise lose on his first supplemental proposition of law. That is, if S.B. 10 is civil, Chojnacki has no Sixth Amendment right to counsel.

The Attorney General therefore urges the Court to resolve the civil-criminal question in *Bodyke* first, and then apply that holding to this case. *Bodyke* directly presents the question at hand, and the Court's decision will control the first supplemental proposition of law here. Further, *Bodyke* is a better vehicle for resolving the issue, since it presents a final appeal on the merits of the constitutional issues as opposed to an interlocutory appeal from a motion to appoint counsel. And finally, Chojnacki will suffer no prejudice or delay since this Court has ordered that this case be calendared for oral argument on the same day as *Bodyke*.

B. S.B. 10 is a civil statute and a reclassification challenge under S.B. 10 is a civil proceeding.

If the Court chooses to reach the merits of the civil-criminal issue in this case, it should find that a reclassification challenge under R.C. 2950.031(E) is a civil proceeding. Initially, it is important to recognize that a reclassification challenge is initiated by the offender *against* the State, and the offender is requesting relief *from* the State. The State is not seeking to impose any new punishments or duties on the offender at this hearing. Put simply, a reclassification challenge bears no resemblance to a traditional criminal proceeding.

Chojnacki instead asserts that S.B. 10 is a criminal statute and that a reclassification challenge under R.C. 2950.031(E), as a component of S.B. 10, is a criminal proceeding. This argument fails because the premise is wrong. Applying the *Kennedy v. Mendoza-Martinez* factors, this Court rejected arguments that Ohio's predecessor sex offender laws were criminal

laws that imposed criminal punishments. See *State v. Ferguson*, 120 Ohio St. 3d 7, 2008-Ohio-4824; *State v. Cook*, 83 Ohio St. 3d 404, 1998-Ohio-291. 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. By all measures, S.B. 10 is a civil statute. Therefore, a reclassification challenge under R.C. 2950.031(E) is a civil proceeding, and no Sixth Amendment right to counsel attaches.

1. S.B. 10 does not impose an affirmative disability or restraint.

Chojnacki first complains that S.B. 10's registration and notification requirements impose an affirmative disability on sex offenders. (Supp. Br. 6). That is wrong.

With respect to S.B. 10's registration duties, the highest classification (Tier III) requires the offender to register every 90 days for the rest of his life.¹ The old sex-offender law—which this Court held to be civil in nature—imposed those same exact obligations on offenders with a “sexual predator” classification. See former R.C. 2950.06(B)(1); former R.C. 2950.07(B)(1)). It is true that S.B. 10 imposes this quarterly registration requirement on a greater number of sex offenders, but that does not alter the constitutional inquiry. The dispositive point is that *Cook* held that such a requirement was not an affirmative disability or restraint: “The act of registering does not restrain the offender in any way.” 83 Ohio St. 3d at 418. Rather, it “is a *de minimus* administrative requirement” “comparable to renewing a driver’s license.” *Id.*; accord *State v. Hayden*, 96 Ohio St. 3d 211, 2002-Ohio-4169, ¶ 14. “This remains true regardless of whether [the offender] is required to register once a year for ten years, as under the old law, or twice a

¹ Chojnacki also notes that S.B. 10 prevents sex offenders from living within 1,000 feet of a school, pre-school, or child-care center. See R.C. 2950.034. But this requirement operates only prospectively, and does not apply to reclassified offenders like Chojnacki. See *Hyle v. Porter*, 117 Ohio St. 3d 165, 2008-Ohio-542. This restriction is therefore irrelevant to a determination of whether S.B. 10's reclassification provisions are civil or criminal in nature.

year for twenty-five years, as S.B. 10 now requires.” *State v. King* (2d Dist.), No. 08-CA-02, 2008-Ohio-2594, ¶ 16.

Furthermore, *Cook* observed that community notification provisions, such as those in S.B. 10, do not impose any restraint or disability on the offender: “the burden of dissemination is not imposed on the defendant, but rather on law enforcement.” 83 Ohio St. 3d at 418; see also *Cutshall v. Sundquist* (6th Cir. 1999), 193 F.3d 466, 475 (same).

2. S.B. 10’s registration and notification provisions do not resemble historical punishments.

Chojnacki incorrectly contends that S.B. 10’s registration requirements and community notification provisions are similar to conventional criminal punishments, such as probationary sentences and historical shaming practices. (Supp. Br. 7). Both comparisons were rejected by the U.S. Supreme Court in *Smith v. Doe* (2003), 538 U.S. 84. Registration requirements are not “parallel to probation or supervised release,” the Court said, because there was no ongoing supervisory element to these requirements and no “supervising officer” who may “seek the revocation of probation or release in case of infraction.” *Id.* at 101. Rather, any infraction must be handled in a separate prosecution. *Id.* at 102.

The Court in *Smith* also refused to link community notification to historical shaming devices: “[O]ur system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment.” *Id.* at 98. The Court found that “[t]he purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender.” *Id.* at 99; accord *Cutshall*, 193 F.3d at 475. So too, this Court has found that distributing information from a public criminal record is grounded in the “common law and the First Amendment,” *Cook*, 83 Ohio St. 3d at 419, and ““is necessary for the efficacy of the scheme,”” *Ferguson*, 2008-Ohio-4824 at ¶ 38 (quoting *Smith*, 538 U.S. at 99).

3. S.B. 10 does not contain a scienter requirement.

Chojnacki next contends that S.B. 10 indirectly incorporates a scienter requirement because the notification duties are triggered by conviction of a sex offense (which contains a mens rea element). (Supp. Br. 8). But Chojnacki misunderstands this *Kennedy* factor. The proper inquiry is whether there is a “scienter requirement indicated in [the law]” itself. *Cook*, 83 Ohio St. 3d at 419; see also *Cutshall*, 193 F.3d at 475 (scienter requirement must be found in the statute “on its face”). A plain reading of the statutory text confirms that S.B. 10, like its predecessors, contains no scienter requirement.

4. S.B. 10 does not promote the traditional aims of punishment.

As to the fourth *Kennedy* factor, Chojnacki claims that S.B. 10 was “designed in large part to have both a retributive and deterrent effect” “[g]iven the substantial restraints on physical liberty and the ostracism associated with sex-offender registration and notification.” (Supp. Br. 8). This argument fails on several levels.

First, Chojnacki’s premises are wrong. As *Cook* recognized, sex offender registration “does not *restrain* the offender in any way.” 83 Ohio St. 3d at 418 (emphasis added). And the fact that community notification may heighten public ostracism does not establish a hidden retributive or deterrent purpose. The point of sex offender registration and notification is community awareness, see R.C. 2950.02, which this Court has endorsed as a valid regulatory purpose, see *Cook*, 83 Ohio St. 3d at 421. “[T]he attendant humiliation” is not a statutory objective, “but a collateral consequence of a valid regulation.” *Smith*, 538 U.S. at 99.

Second, even if S.B. 10’s provisions had some collateral deterrent effect, the analysis does not change. “[T]he mere presence of a deterrent purpose” does not transform a valid regulatory scheme into a criminal punishment. *Id.* at 102 (quoting *Hudson v. United States* (1997), 522 U.S. 93, 105). And, as this Court has noted, any deterrent effect from sex-offender registration

and notification laws is minuscule when compared to the deterrent effect of traditional criminal punishments. See *Cook*, 83 Ohio St. 3d at 420. In this case, for instance, Chojnacki faced a potential 50-year sentence for his sex offenses. See *Chojnacki*, 2007-Ohio-4016 at ¶ 2. Given these severe criminal sanctions, any argument that a 25-year registration and notification period promotes a significant deterrent effect is not persuasive.

5. Any punishment under S.B. 10 flows from a new violation of the statute.

Chojnacki further complains that S.B. 10 is criminal because it “applies only to behavior which is already a crime.” (Supp. Br. 9). But this same argument was made, and rejected, in *Smith* and *Cook*. It is true that that “[t]he regulatory scheme applies only to past conduct, which was, and is, a crime.” *Smith*, 538 U.S. at 105. But S.B. 10 is not imposing new punishment on that past conduct. Rather, “[t]he obligations the statute imposes are the responsibility of registration, a duty not predicated upon some present or repeated violation.” *Id.* And “any . . . punishment flows from a failure to register, a new violation of the statute, not from a past sex offense.” *Cook*, 83 Ohio St. 3d at 421.

6. S.B. 10 serves the remedial purpose of protecting the public, and is not excessive in relation to that purpose.

As to the final *Kennedy* factor, Chojnacki admits that S.B. 10 “advances a legitimate, regulatory purpose . . . to protect the public from dangerous sex offenders,” but argues that “the sanction is excessive in relation to the stated goal.” (Supp. Br. 9). As a preliminary matter, Chojnacki fails to recognize that this “excessiveness inquiry . . . is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy.” *Smith*, 538 U.S. at 105. Rather, the question is “whether the regulatory means chosen are reasonable in light of the nonpunitive objective.” *Id.*

Chojnacki contends that S.B. 10 is excessive in two ways. He first observes that the S.B. 10 classification process is “tied solely to the fact of conviction as opposed to any finding of future dangerousness.” (Supp. Br. 9). But the U.S. Supreme Court in *Smith* rejected a similar challenge to Alaska’s sex offender registration law because it used categorical, as opposed to individualized, judgments: “The State’s determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment.” 538 U.S. at 104; accord *King*, 2008-Ohio-2594 at ¶ 22 (“[T]he General Assembly merely adopted an alternative approach to the regulation and categorization of sex offenders.”). This Court has also affirmed the use of automatic statutory classifications under Ohio’s old sex offender law. See *Hayden*, 2002-Ohio-4169 at ¶ 18 (“[T]he sexually oriented offender designation attaches as a matter of law.”).

Chojnacki next claims that sex offender laws are ineffective. See Supp. Br. 10 (“[E]mpirical evidence . . . demonstrates the inefficacy of sex-offender registration laws in actually protecting the public from harm.”). Therefore, he says, they must be “excessive in relation to any public safety goal.” (Supp. Br. 10). That theory is flawed for three reasons.

First, the *Kennedy* factors are “considered in relation to the statute on its face.” *Kennedy*, 372 U.S. at 169. Chojnacki’s reliance on empirical evidence has no place in determining whether a statute is civil or criminal.

Second, even if empirical evidence were relevant, two of Chojnacki’s own studies undermine his central premise—that sex offender registration and notification laws “do[] very little to advance public safety.” (Supp. Br. 10). In one study, the authors collected rape statistics from ten states that had implemented sex offender laws. See Bob E. Vásquez et al., *The Influence of Sex Offender Registration and Notification Laws in the United States* (2008), 54

Crime & Delinq. 175, reproduced in Chojnacki Appendix, at A-68. They next analyzed whether or not there was a statistically significant change in the monthly incidences of rapes after the effective date of the law. *Id.* at A-77. Although the results were mixed in the different states, the authors noted that “[t]he rape incidences in Hawaii, Idaho, and Ohio . . . significantly decreased after the introduction of the sex offender notification laws.” *Id.* at A-79 (emphasis added). And in a second study cited by Chojnacki, the authors compared trends in national crime data to the effective date of sex offender laws in various states, including Ohio. See J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* (2008), reproduced in Chojnacki Appendix, at A-87. They found “evidence that sex offender registration and notification laws decreased the total frequency of sex offenses in the states . . . examine[d].” *Id.* at A-91. Specifically, the authors concluded that “[t]he registration of released sex offenders alone is associated with a significant decrease in the frequency of crime.” *Id.* (emphasis added). Therefore, Chojnacki’s own studies confirm—or, at the very least, support—the view that sex offender laws directly promote public safety.

Third, the primary purpose of sex offender registration and notification laws is community awareness and preparation, *not* rehabilitation or deterrence of the individual offender. See R.C. 2950.02(A)(1) (“If the public is provided adequate notice and information about offenders and delinquent children who commit sexually oriented offenses or who commit child-victim oriented offenses, members of the public and communities can develop constructive plans to prepare themselves and their children.”). Even if Chojnacki could demonstrate that sex offender laws did not improve overall public safety, the laws still advance a legitimate non-punitive objective—empowering individuals, parents, and neighborhoods to take precautions as they so desire. See

Ferguson, 2008-Ohio-4824 at ¶ 36; accord *Smith*, 538 U.S. at 102-03. Therefore, the last *Kennedy* factor is satisfied. See *Smith*, 538 U.S. at 105.

In conclusion, the General Assembly declared its intent in S.B. 10 to create a civil, remedial scheme to “protect the safety and general welfare of the people of this state” from sexually abusive behavior. R.C. 2950.02(B). As this Court has stated, “only the clearest proof will be adequate” under the *Kennedy* factors “to negate a declared remedial intention” and “show that a statute has a punitive effect.” *Cook*, 83 Ohio St. 3d at 418. Chojnacki has failed to meet that burden. He has not established that S.B. 10 is a criminal law and, therefore, he cannot claim a Sixth Amendment right to counsel.

Attorney General’s Proposition of Law No. II:

There is no due process right to state-appointed counsel in an S.B. 10 reclassification challenge because the offender is not threatened with a deprivation of liberty or a fundamental right.

If S.B. 10 is a civil statute (and it is), Chojnacki still claims a due process right to state-appointed counsel for his reclassification challenge under R.C. 2950.031(E). This argument has no merit. The right to counsel attaches in civil proceedings only where the individual faces a deprivation of liberty or the loss of a fundamental right. See *Lassiter v. Dep’t of Social Servs. of Durham Cty.* (1981), 452 U.S. 18, 26-27. Chojnacki faces neither potential loss in his reclassification challenge. Nor has he established that counsel’s presence is necessary to guard against the risk of an erroneous S.B. 10 classification.

A. State-appointed counsel is not required because the S.B. 10 reclassification process does not threaten an offender’s liberty.

It is well established that a litigant has a right to appointed counsel in civil proceedings “if . . . he may be deprived of his physical liberty.” *Lassiter*, 452 U.S. at 27. Chojnacki claims that his physical liberty is now at risk because “the threat of incarceration has increased significantly

based upon [his] classification within the S.B. 10 tier classification system.” (Supp. Br. 18). That argument is wrong.

This Court has repeatedly held that sex offender registration and notification laws do not impose physical restraints on the offender. See *Hayden*, 2002-Ohio-4169 at ¶ 14; *Cook*, 83 Ohio St. 3d at 418. Therefore, the fact that Chojnacki’s reporting requirements increased in duration and frequency under S.B. 10 is also not an impairment of his personal liberty. See *Doe v. Dann* (N.D. Ohio 2008), No. 1:08-cv-220, 2008 U.S. Dist. Lexis 45228, at *36-37 (no protected liberty interest in S.B. 10 reclassifications). And absent that impairment, no right to counsel attaches under due process.

Chojnacki instead maintains that “the risk of incarceration” from his S.B. 10 reclassification is “sufficient to trigger the right to counsel under the Fourteenth Amendment.” (Supp. Br. 18). In other words, he claims that the law’s increased reporting duties make his noncompliance—and therefore a future criminal prosecution and conviction—more likely. But that has never been the test for appointment of counsel in civil proceedings. Again, the relevant inquiry is whether the “proceedings . . . may result in commitment to an institution.” *In re Gault* (1967), 387 U.S. 1, 41. If the litigant faces the threat of incarceration or commitment in *that* proceeding, the right to counsel is triggered. See, e.g., *In re Fisher* (1974), 39 Ohio St. 2d 71, 80 (right to counsel in civil commitment proceedings because of the “obvious deprivation of liberty arising from physical restraints upon a committed individual’s freedom”).

In this case, Chojnacki’s physical liberty is not at risk in his R.C. 2950.031(E) reclassification challenge. Instead, one of two things will occur: either the trial court will reduce his S.B. 10 tier classification, or it will leave him at Tier II. Under no circumstances can the court order Chojnacki’s physical confinement to an institution or jail at the close of the

proceedings. Only that possibility—“where the litigant may lose his physical liberty if he loses the litigation”—triggers the right to counsel in civil proceedings. *Lassiter*, 452 U.S. at 25. There is simply no authority for Chojnacki’s novel theory that a speculative risk of incarceration, premised on his speculative future violation of the law, is sufficient to trigger the right.²

B. State-appointed counsel is not required because the S.B. 10 reclassification process does not implicate any protected interest.

Chojnacki next argues that, even if his S.B. 10 reclassification is not a “direct threat to personal liberty,” he has a constitutional right to counsel because the personal interests at stake are “substantial.” (Supp. Br. 19, 20). Chojnacki states that counsel is needed to allow offenders to advance a litany of constitutional claims—ex post facto, double jeopardy, retroactivity, impairment of contracts, and the like. He also says that appointed counsel is needed to investigate the correctness of the Attorney General’s S.B. 10 tier assignment. (Supp. Br. 21).

These arguments fail on multiple grounds. First, it is essential to appreciate the origin and posture of a petition under R.C. 2950.031(E). It is a civil proceeding initiated by the *offender*, not the State. Yet Chojnacki does not cite, nor is the Attorney General aware of, any authority recognizing a due process right to appointed counsel where the litigant himself initiates the civil proceeding against the government.

Second, Chojnacki has not demonstrated “that he was deprived of a protected liberty or property interest” as a result of his S.B. 10 reclassification. *Hayden*, 2002-Ohio-4169 at ¶ 14;

² Chojnacki’s reliance on *Vitek v. Jones* (1980), 445 U.S. 480, is unavailing. In *Vitek*, the U.S. Supreme Court determined that prisoners contesting an involuntary transfer to a mental hospital were entitled to state-appointed counsel. The reason was that “commitment to a mental hospital produces ‘a massive curtailment of liberty.’” *Id.* at 491 (citation omitted). And because the deprivation of liberty in a mental hospital is “qualitatively different” from the deprivation of liberty in a prison, the inmate was entitled to counsel before the transfer could occur. *Id.* at 493. In this case, by contrast, there can be *no* deprivation of liberty at the S.B. 10 reclassification hearing. The judge cannot order physical confinement or restraint of the offender. Absent that possibility, the right to counsel is not triggered.

accord *Doe*, 2008 U.S. Dist. Lexis 45228, at *36-37. Chojnacki mistakenly characterizes his desire to advance “nuanced arguments of law” in his reclassification petition as a cognizable interest under the Due Process Clause. (Supp. Br. 21). To be sure, Chojnacki can try to raise any legal claim he wants. But no court has ever characterized the desire to assert legal claims as a protected liberty or property interest. If that were so, indigent litigants of all stripes would be entitled to counsel in civil proceedings under the Due Process Clause—notably, in habeas proceedings and post-conviction challenges where the petitioner’s interest in asserting constitutional claims is far weightier. Neither this Court nor the U.S. Supreme Court has accepted such a theory. See *State v. Crowder* (1991), 60 Ohio St. 3d 151, 152 (citing *Pennsylvania v. Finley* (1987), 481 U.S. 551) (no constitutional right to counsel in post-conviction proceedings).

Chojnacki also contends that his “interest in being properly classified under S.B. 10’s tier classification system” is cognizable under the Due Process Clause. (Supp. Br. 20). But the Court’s decision in *Hayden* forecloses that theory. In *Hayden*, a sex offender challenged his classification as a “sexually oriented offender” under Ohio’s old sex offender law. 2002-Ohio-4169 at ¶ 1. That classification was automatically imposed by virtue of the offender’s conviction for a qualifying sex offense. *Id.* ¶ 9. The offender argued that the classification violated due process because he was not afforded a hearing. *Id.* ¶ 13. This Court disagreed, finding that “the registration requirement” did not implicate “a protected liberty or property interest.” *Id.* ¶ 14. The Court first reaffirmed its prior holding that sex offender registration does not impose “any bodily restraint.” *Id.* The Court then questioned the value of a hearing; the offender’s “conviction for a sexually oriented offense automatically conferred on him the status of a sexually oriented offender.” *Id.* ¶ 16. Finally, the Court rejected the offender’s argument that a

hearing was needed “to avoid the possibility of mistakes” in this classification process because the offender had not made an allegation of “any particular mistake.” *Id.* ¶ 17.

Hayden controls here. Chojnacki “has not shown that he was deprived of a protected liberty or property interest as a result of the [S.B. 10] registration requirement.” *Id.* ¶ 14. Further, his claim that appointed counsel is needed to ensure proper classification under S.B. 10 is “pure conjecture.” *Id.* ¶ 17. Like the offender in *Hayden*, Chojnacki has not asserted that the Attorney General made “any particular mistake” in applying S.B. 10 to his case. *Id.*

In short, Chojnacki has not identified any constitutionally protected interest at stake in a proceeding under R.C. 2950.031(E). Accordingly, his due process claim to appointed counsel is without merit.

C. Even if Chojnacki could identify a protected liberty interest or fundamental right, no counsel is needed because the risk of erroneous classification is minimal.

Even if Chojnacki could identify a cognizable liberty interest or fundamental right, he still cannot claim a right to appointed counsel under the Due Process Clause because he has not demonstrated that counsel’s presence is necessary to guard against the risk of an erroneous S.B. 10 reclassification. See *Mathews v. Eldridge* (1970), 424 U.S. 319, 335 (explaining that due process requires consideration of three factors: (1) the liberty interest or fundamental right that may be affected; (2) the risk of erroneous deprivation of such an interest; and (3) the government’s interest, including the fiscal and administrative burdens that the additional procedural requirement would entail).

First, Chojnacki claims that, absent counsel, he will not be able to present complex constitutional attacks on S.B. 10—separation of powers, retroactivity, ex post facto, double jeopardy, cruel and unusual punishment, and impairment of contracts. (Supp. Br. 21). This argument is without merit. No court has ever identified a litigant’s desire to raise constitutional

challenges as a proper consideration under the *Matthews* factors. Moreover, the *Bodyke* appellants have raised, and this Court has agreed to resolve, all of those constitutional issues. If the Court finds a constitutional deficiency, S.B. 10 cannot be applied retroactively, and these R.C. 2950.031(E) reclassification challenges will become moot. If the Court in *Bodyke* rejects these constitutional claims and affirms the validity of S.B. 10, sex offenders will no longer have any basis for raising the claims anew.

Second, Chojnacki claims that appointed counsel is necessary to ensure that the “Attorney General has classified petitioner []correctly.” (Supp. Br. 21). This assertion is unsupported. Even 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. In this case, for instance, the Attorney General identified Chojnacki’s offense of conviction (sexual activity with a minor, R.C. 2907.04) and matched it to the appropriate S.B. 10 classification (Tier II, R.C. 2950.01(F)(1)(b)).

A court handling a reclassification petition under R.C. 2950.031(E) performs the same ministerial inquiry—it first locates the offender’s criminal record, and then confirms that the Attorney General correctly matched the offense of conviction with the proper S.B. 10 tier. The ease of the inquiry is shown by the Adam Walsh Act offense chart, created by the Attorney General and disseminated by the Ohio Public Defender. See Ohio Offense Tiers, Adam Walsh Act, *available at* https://www.opd.ohio.gov/AWA_Information/AW_SB10_Tiers.pdf (attached as Exhibit A). Given the simplicity of the exercise and the low risk of erroneous classification, the existing process is more than adequate to double-check the Attorney General’s reclassification notices.

Attorney General's Proposition of Law No. III:

There is no right to state-appointed counsel in an S.B. 10 reclassification challenge under R.C. 120.16 or the Equal Protection Clause.

Several county public defender offices and the Ohio ACLU, as amici, offer two other arguments to claim a right to state-appointed counsel in R.C. 2950.031(E) proceedings. First, they contend that reclassified offenders like Chojnacki have a statutory right to counsel under R.C. 120.16. (Amicus Br. 12-14). Second, they argue that these offenders are entitled to counsel as a matter of equal protection. (Amicus Br. 24-25). Neither proposition has merit.

A. R.C. 120.16 does not provide a statutory right to counsel in an S.B. 10 reclassification challenge.

The amici first contend that Chojnacki has a statutory right to counsel under R.C. 120.16—the statute defining the role and responsibilities of the county public defenders. (Amicus Br. 12). They further cite to a 1999 opinion by then-Attorney General Betty Montgomery, who determined that R.C. 120.16 required county public defenders to represent indigent sex offenders in “sexual predator” hearings under Ohio’s old sex offender law. See 1999 Op. Att’y Gen. No. 99-031, 1999 Ohio AG Lexis 31. The amici misconstrue both the statute and the Attorney General’s opinion.

Under R.C. 120.16(A)(1), “[t]he county public defender shall provide legal representation to indigent adults and juveniles *who are charged* with the commission of an offense or act that is a violation of a state statute and for which the penalty or any possible adjudication includes the potential loss of liberty.”³ (Emphasis added). Put simply, the public defender’s statutory duties are triggered when the State *charges* the individual with an offense.

³ R.C. 120.16(A)(1) also requires the county public defender to appear “in postconviction proceedings as defined in this section.” That circumstance is not applicable here. A reclassification challenge under R.C. 2950.031(E) is not a “postconviction proceeding”; it is not a collateral attack on the underlying judgment of conviction. See generally R.C. 2953.21.

That requirement has not been met here. The State has not “charged” Chojnacki “with the commission of an offense or act” in this proceeding. Nor has the State even initiated the proceeding at bar. Chojnacki did. He filed a petition against the Attorney General under R.C. 2950.031(E) to contest his S.B. 10 reclassification. That does not trigger R.C. 120.16(A)(1).

The amici also draw no support from the Attorney General’s 1999 opinion. Under Ohio’s old sex offender law, an individual who was convicted of or pled guilty to a “sexually oriented offense” could further be classified as a “sexual predator” by the trial court. For most offenders, the “sexual predator” designation could be imposed only after a full evidentiary hearing. See *Cook*, 83 Ohio St. 3d at 407 (citing former R.C. 2950.09(B)(1),(C)(2)). The old statute afforded the offender the right to counsel at the hearing, the right to testify, and the right to call and cross examine witnesses. *Id.* The trial court then considered a series of statutory factors—the offender’s age, his criminal record, his mental state, his mental capacity, the victim’s age, the nature of the offense, and the like—to determine whether the offender was likely to engage in future offenses. *Id.* at 407-08 (citing former R.C. 2950.09(B)(2)(a)-(j)). If the trial court imposed the “sexual predator” designation, the offender’s registration duties would increase in frequency and duration. *Id.* at 408.

In a 1999 opinion, the Attorney General determined that the county public defenders were required under R.C. 120.16 to represent indigent defendants in these “sexual predator” hearings. The Attorney General cited the “general rule that whenever an indigent defendant is constitutionally or statutorily entitled to court-appointed legal representation, the representation is provided through one of the systems established by R.C. Chapter 120.” 1999 Ohio AG Lexis 31, at *6. Significantly, the Attorney General also observed that the (now former) sex offender law afforded defendants “a statutory right to be represented by counsel” at the sexual predator

hearing. *Id.* at *5 (citing former R.C. 2950.09(B)(1),(C)(2)). The Attorney General then analyzed the language of R.C. 120.16 and concluded that county public defenders were obligated to provide representation in the hearings. *Id.* at *9-14.

Central to the Attorney General's analysis was the fact that the old sex offender law explicitly granted offenders "a statutory right to have counsel appointed . . . at such a hearing." *Id.* at *5. The Attorney General then determined that that right was properly effectuated through R.C. Chapter 120.

The Attorney General's position in this case is fully consistent with that 1999 opinion. Unlike the old law, S.B. 10 does *not* afford offenders like Chojnacki a statutory right to counsel in a reclassification challenge under R.C. 2950.031(E). Moreover, as explained above, neither the Sixth Amendment nor the Due Process Clause confers a constitutional right to counsel. Absent such an independent statutory or constitutional right to counsel, the mandatory representation provisions of R.C. 120.16 are not triggered.

B. Equal protection does not require the appointment of counsel in an S.B. 10 reclassification challenge.

For individuals sentenced for a qualifying sex offense on or after January 1, 2008, the S.B. 10 classification occurs "at the time of sentencing." R.C. 2950.03(A)(2). Because the offender has a Sixth Amendment right to counsel at a sentencing hearing, he enjoys a collateral benefit of having counsel present for his S.B. 10 classification. The amici complain that reclassified offenders like Chojnacki do not enjoy this benefit, and that this differential treatment violates equal protection. (Amicus Br. 24-25). But this claim does not turn on any suspect category, and the amici have not demonstrated that the existing system is irrational.

It is true that a newly classified offender enjoys the benefit of counsel's presence for his S.B. 10 classification because the classification occurs during the sentencing hearing.

Nevertheless, the amici have not explained how counsel's presence materially assists that offender. They say, in passing, that "court-appointed counsel . . . can and should raise misclassification and constitutional arguments regarding the application of the Adam Walsh Act." (Amicus Br. 25). This assertion is unsupported. First, the trial court's S.B. 10 classification of new sex offenders is ministerial. The court, having just presided over the individual's criminal proceedings, matches the offense of conviction with the applicable S.B. 10 tier. Defense counsel has no role in the process, and the risk of error is remote.

Second, the amici have not explained what constitutional arguments should be raised with respect to newly classified sex offenders. The constitutional challenges up to this point have contested the *retroactive* application of S.B. 10. to offenders who had previously been classified under Ohio's old sex offender law. Any classification after January 1, 2008 will, by definition, be a *prospective* application of S.B. 10. The Attorney General is not involved in, nor have the amici cited to, any pending constitutional challenges attacking the prospective application of S.B. 10.

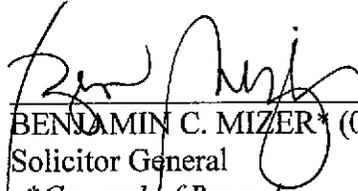
In sum, although newly classified offenders enjoy the presence of counsel during their S.B. 10 classifications, that presence is largely irrelevant. The classification process is automatic, and the offender receives no tangible benefit. Therefore, any disparate treatment between newly-classified offenders and reclassified offenders under S.B. 10 is superficial, and the guarantee of equal protection is not violated.

CONCLUSION

For these reasons, the Court should affirm the decision below.

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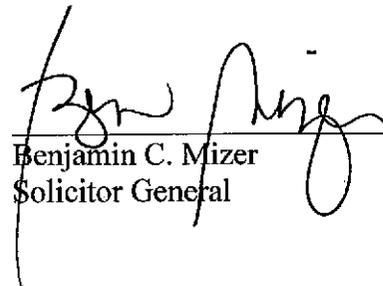

Benjamin C. Mizer
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EXHIBIT A

OHIO OFFENSE TIERS

<u>TIER 1</u>	<u>TIER 2</u>	<u>TIER 3</u>
1. 2907.07 Importuning	1. 2907.21 Compelling Prostitution	1. 2907.02 Rape
2. 2907.04 Unlawful Sexual Conduct with a Minor, non-consensual and offender less than 4 years older than victim, not previously convicted of 2907.02, 2907.03, or 2907.04, or former 2907.12 (FSP)**	2. 2907.321 Pandering Obscenity Involving a Minor	2. 2907.03 Sexual Battery
3. 2907.08 Voyeurism	3. 2907.322 Pandering Sexually Oriented Material Involving a Minor	3. 2903.01 Agg. Murder with sexual motivation
4. 2907.06 Sexual Imposition	4. 2907.323 (A)(1) and (2) Illegal Use of a Minor in Nudity-oriented Material or Performance	4. 2903.02 Murder with sexual motivation
5. 2907.05 (A)(1)-(3), (5) Gross Sexual Imposition	5. 2907.04 when offender is at least 4 years older; or when the offender is less than 4 years older and has prior conviction for 2907.02, 2907.03, 2907.04, or former 2907.12 (FSP)	5. 2903.04(A) Unlawful Death or termination of pregnancy as a result of committing or attempt to commit a felony with sexual motivation
6. 2907.323 (A)(3) Illegal Use of a Minor in Nudity-oriented Material or Performance	6. 2907.05 (A)(4) Gross Sexual Imposition victim under 13	6. 2905.01 (A)(4) Kidnapping of minor to engage in sexual activity
7. 2905.05 (B) Child Enticement with sexual motivation {new under SB 10}	7. 2919.22 (B)(5) Child Endangering	7. 2905.01 (B) Kidnapping of minor, not by parent
8. 2907.32 Pandering Obscenity	8. 2905.01 (A)(1)-(3), (5) Kidnapping with sexual Motivation	8. 2907.05 (B) {New section of GSI}
9. 2903.211 (A)(3) Menacing by Stalking with sexual motivation {new under SB10}	9. 2905.01 (A)(4) Kidnapping victim over 18	9. 2903.11 Felonious Assault with sexual motivation
10. 2905.03(B) Unlawful Restraint with sexual motivation {new under SB 10}	10. 2905.02 (B) Abduction with sexual motivation {new under SB 10}	10. Pre-AWA predators unless re-classified after hearing under ORC 2950.031 or 2950.032
11. Includes an attempt, complicity or conspiracy to commit any of these offenses	11. Any sexual offense that occurs after the offender has been classified as a Tier I offender.	11. Any sexual offense that occurs after the offender is classified as a Tier II or III offender.
12. Child-victim offender not in Tier II or III.	12. Includes an attempt, complicity or conspiracy to commit any of these offenses	12. Automatic classification after SVP specification 2971.03
	13. Pre-AWA Habitual offenders, unless re-classified after hearing under ORC 2950.031 or 2950.032	14. Includes an attempt, complicity or conspiracy to commit any of these offenses

* Any law from another jurisdiction that is comparable to these offenses shall fall within that same tier.

** This offense should be removed in future.