ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	* Supreme Court Case No. 08-2502
	*
Appellee,	* On Appeal from the
	* Huron County Court of
vs.	* Court of Appeals, Sixth
	* Appellate District
CHRISTIAN N. BODYKE,	*
et al.,	* Court of Appeals
	* Case Nos. H-07-040
Appellants	* H-07-041
	* H-07-042

MEMORANDUM OF APPELLANTS IN OPPOSITION TO JOIN MOTION FOR RECONSIDERATION AND/OR CLARIFICATION

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MEMORANDUM OF APPELLANTS IN OPPOSITION TO JOIN MOTION FOR RECONSIDERATION AND/OR CLARIFICATION

On June 3, 2010, this Court found that portions of Ohio's Adam Walsh Act violated the separation-of-powers doctrine. *State v. Bodyke*, Slip Opinion No. 2010-Ohio-2424. As a remedy, the Court severed R.C. 2950.031 and 2050.032, "excising" them and holding "that after severance, they may not be enforced." *Id.* at ¶ 66. The ruling is clear and unambiguous. The statutorily mandated reclassifications of sexual offenders were improper.

The State of Ohio and amicus Attorney General (collectively "Movants"), while disclaiming any interest in revisiting that holding, ask this Court for "reconsideration and/or clarification." They assert that they cannot determine how to proceed since they cannot figure out whether the Court actually intended to sever R.C. 2950.031 and 2950.032 or only to limit their application.

Because Movants can point to no basis for reconsideration, because this Court's opinion is clear, unambiguous, and resolves the issues the Movants raise (albeit in ways that are not to their liking), and because granting the motion would require this Court to examine all the issues raised in *Bodyke*, including those it previously "decline[d] to address," *Id.* at ¶ 62, the motion should be denied.

I. <u>The Movants' claim of confusion is really an assertion of unhappiness.</u>

The Movants' assert that they cannot tell whether the Court meant what it said when it severed R.C. 2950.031 and 2950.032 and determined that they are not part of Ohio law and cannot be enforced. The problem, they assert (although presented as a joint motion, the issue as presented is of consequence only to amicus, the

Attorney General) is that the Attorney General cannot determine how to reclassify all the people it previously reclassified.

There are, Movants say, three groups of people who were reclassified pursuant to Ohio's Adam Walsh Act. If the Court meant what it said, then all of those people must be reclassified. But if the Court did not mean what it said, if it did not actually sever those sections of the Act, then only one or two of those groups of people would need to be reclassified. It would then be necessary for the Attorney General to review the records of each reclassified person to determine the group to which he or she belongs. Depending on the group, the person would or would not be reclassified.

The Attorney General's self-declared dilemma is a chimera. There is nothing unclear or ambiguous about the remedy the Court ordered.

> Applying these standards, we conclude that severance of R.C. 2950.031 and 2950.032, the reclassification provisions in the AWA, is the proper remedy. By excising the unconstitutional component, we do not "detract from the overriding objectives of the General Assembly," i.e., to better protect the public from the recidivism of sex offenders, and the remainder of the AWA, "which is capable of being read and of standing alone, is left in place." *Foster* at ¶ 98. We therefore hold that R.C. 2950.031 and 2950.032 are severed and, that after severance, they may not be enforced. R.C. 2950.031 and 2950.032 may not be applied to offenders previously adjudicated by judges under Megan's Law, and the classifications and community-notification and registration orders imposed previously by judges are reinstated.

Bodyke, at ¶ 66.

Movants actual interest is not in clarifying the severance order which is clear on its face. Rather, movants want to limit its effect. The Attorney General claims that "[a]bsent clarification from this Court . . . [it] does not know what classifications

to input [into e-SORN] for a significant segment of sex offenders." But that's self-evidently false. The correct classifications are the ones the individuals had before they were reclassified.

Because it is not possible that the Attorney General is really confused, the only possibility is that the Attorney General wants a different result. It's declaration of confusion and uncertainty is really no more than an assertion of dissatisfaction with the Court's ruling.

II. <u>There is no basis for reconsideration.</u>

Although the Movants caption their motion as one for "reconsideration and/or clarification," they disclaim any actual interest in reconsideration.

> Neither the State nor the Attorney General is asking the Court to reverse its holding that two provisions in the Ohio Adam Walsh Act (the "Walsh Act"), which required the Attorney General to reclassify sex offenders who had been judicially classified under the old Megan's Law, violate the separation-of-powers doctrine.

That they do not formally seek reconsideration is wise, since there is no basis for it. Reconsideration is proper under two circumstances: (1) when there is "an obvious error" in the court's decision; (2) when an issue "was either not considered at all or was not fully considered when it should have been." *Matthews v. Matthews* (1981), 5 Ohio App.3d 140, 143.

Movants do not even suggest that there is an error – obvious or otherwise – in the Court's decision. Nor do they say that an issue was not considered or not fully considered. Their entire claim is that the Court ordered a remedy broader than absolutely necessary to solve the problem it identified.

Rather than severing R.C. 2950.031 and 2950.032, Movants would have this Court limit their application to only one group of the sex offenders reclassified under those sections. That desire points to neither an error in this Court's decision nor an inadequately considered issue. It points, rather, to a desire to limit the scope of the decision.[1] The Attorney General is dissatisfied and wants this Court to change its ruling. No more and no less.

But general dissatisfaction with a ruling is not a basis on which reconsideration should be granted.

III. The Court's Chosen Remedy is Clear and Unambiguous and there is nothing to clarify.

The Movants' declared confusion and uncertainty comes from an inability to determine whether this Court intended to sever R.C. 2950.031 and 2950.032 or only to limit their application. The Movants cannot tell which the Court intended, they say, because although the Court announced that it was severing the sections, that it was "excising" them, and that they could not be enforced, it based that decision on the Ohio Adam Walsh Act's violation of the separation-of-powers doctrine and on the inability of the legislative and executive departments to overturn judicial classifications. There is, the Movants say, language in *Bodyke* which "could be read to signify an as-applied remedy." (Joint Motion at 3.) And although Movants do not quite say it, they are asking this Court to revise the remedy to be that "as applied" one.

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[1] Movants acknowledge that their concern is the scope of the remedy in the last substantive sentence of their motion. "Because the scope of the remedy is not clear from the decision, clarification is needed."

Lawyers, of course, are trained to parse language, to find in court rulings what they seek. So it is that Movants are able to find the odd phrase in *Bodyke* which could perhaps be understood to suggest that the Court might not have intended to sever R.C. 2950.031 and 2950.032 but, rather, to limit their application. But that is not the language of the remedy the Court imposed. The Court imposed severance. If the remedy sweeps a shade more broadly than the problem, the fault is in the need to find a proper means to cure the General Assembly's overreaching.

IV. <u>Granting the Movant's request would require a complete revisiting of the issues.</u>

Appellants Bodyke, Schwab, and Phillips asserted six propositions of law.

> Those propositions aver that the application of the AWA to offenders whose crimes were committed before the AWA's effective dates violates (1) the Ex Post Facto Clause of the federal Constitution, (2) the Retroactivity Clause of the Ohio Constitution, (3) the separation-of-powers doctrine embodied in the Ohio Constitution, and (4) the Double Jeopardy Clause of the state and federal Constitutions. They also assert that the AWA, as applied to sex offenders whose cases were adjudicated under the provisions of Megan's Law, violates due process and constitutional protections against cruel and unusual punishment and against impairment of contracts.

Bodyke, at ¶ 1, fn. 1.

The Court's conclusion that reclassification was unconstitutional, when coupled with the remedy of severance, obviated any need to resolve issues other than the separation of powers. "In light of our conclusion," the Court noted, "we decline to address the remaining constitutional claims at this time." *Id.* at ¶ 62.

If the Court were to grant the motion and limit the scope of the remedy, those other issues would become critical and would have to be addressed. Granting the motion, then, would require a complete reconsideration of the case. Upon that

reconsideration, appellants suggest, the Court would once again determine that R.C. 2950.031 and 2950.032 should be severed and have no further effect.

CONCLUSION

Movants assert that granting their motion "will benefit" everyone. The State will benefit, even "the offenders themselves" will benefit. (Joint Motion at 1.) The reason is that if the Court grants the motion, then nobody will be confused about which of the people who were reclassified should have the reclassifications rescinded. In fact, nobody is confused about it. The Court severed the sections providing for reclassification and said they are of no effect. All of the people reclassified under Ohio's Adam Walsh Act are to have their reclassifications rescinded.

The benefit the Movants actually seek benefits nobody. In fact, it complicates things for everyone. The Attorney General, county prosecutors, county sheriffs, and offenders who were reclassified would all have to make case by case determinations, subject to challenge and confusion, about whether this or that person's reclassification should be rescinded. Litigation will ensue. The issues will continue to percolate, and this Court will need to resolve all the outstanding issues it was able to leave unaddressed.

Were reconsideration or clarification necessary, the price in complexity, confusion, and uncertainty might be unavoidable. But where the Court's decision was clear and unambiguous, where it got nothing wrong and left nothing out, there is need for neither reconsideration nor clarification.

The motion should be denied.

Respectfully submitted,

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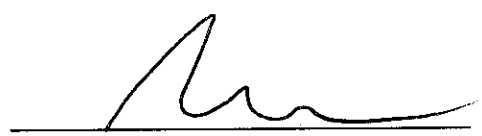
This 24th day of June 2010.



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