ORIGINAL

IN THE SUPREME COURT OF OHIO

NO: 2009-1086

ROBERT GILDERSLEEVE, ET. AL	:
Appellants	:
vs.	:
STATE OF OHIO	:
Appellee	:

APPELLANTS' BRIEF IN OPPOSITION TO THE STATE'S MOTION FOR RECONSIDERATION

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Now come Appellants Ralph Wells and Robert Zamora, by and through undersigned counsel, and file this response in opposition to appellee's motion for reconsideration of this Court's August 17, 2010 order reversing the judgment of the Eighth District Court of Appeals. This Court should deny the State's request for the reasons set forth in the attached brief.

Respectfully Submitted,

ROBERT L. TOBIK, ESQ.
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Cullen Sweeney, Counsel of Record
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Counsel for Appellants

BRIEF

With this motion for reconsideration, the State raises arguments previously considered and rejected by this Court in denying the Ohio Attorney General's motion for reconsideration in *State v. Bodyke*. The State's motion for reconsideration in this case should similarly be denied.

This case arose when seventeen individuals, formerly classified as sex offenders under Ohio's Megan's Law, were reclassified with more onerous obligations and burdens by virtue of Senate Bill 10, otherwise known as Ohio's Adam Walsh Act ("AWA"). All of these individuals challenged the constitutionality of the AWA on, among other things, separation of powers grounds. This Court accepted their consolidated appeal, stayed briefing, and held the appeal for decision in *State v. Bodyke*, Ohio Supreme Court Case No. 2008-2502.[1]

On June 3, 2010, this Court held that the "reclassification provisions in the AWA, are unconstitutional because they violate the separation-of-powers doctrine." *State v. Bodyke*, __ Ohio St. 3d __, 2010-Ohio-2424, ¶¶ 2 and 67. To remedy this constitutional violation, this Court held that "the reclassification of sex offenders by the attorney general are invalid, and reinstate[d] the prior judicial classifications of sex offenders." *Id.*

The Ohio Attorney General moved for partial reconsideration of this Court's decision in *Bodyke*. Specifically, the Attorney General argued that *Bodyke* did not apply to individuals that did not have an HB 180 classification hearing and/or were not

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[1] This Court also accepted the State's cross-appeal to address the retroactive application of a specific provision of the AWA: R.C. 2950.11(F)(2). The State's cross-appeal is now moot because the AWA does not apply to appellants.

classified by a specific judgment entry under Megan's Law. On August 17, 2010, this Court denied the motion for reconsideration.

That same day, this Court applied *Bodyke* to all 17 petitioners in this case and held that their prior classifications under Megan's Law must be reinstated. The State does not challenge this ruling with respect to 15 of the 17 petitioners. However, it asks this Court to reconsider its decision with respect to two petitioners, Ralph Wells and Robert Zamora. The State's motion to reconsider should be denied.

Ralph Wells

The State argues that *Bodyke* should not apply to Ralph Wells because Wells "did not receive a H.B. 180 hearing" and was classified as a sexually oriented offender by operation of law. The State's argument fails because this Court, in *Bodyke* itself, reinstated the Megan's Law classification of an offender who, like Ralph Wells, did not have an H.B. 180 hearing.

Bodyke involved three petitioners, Christian Bodyke, David Schwab, and Gerald Phillips. Unlike Bodyke and Schwab, Gerald Phillips did not have an H.B. 180 hearing or a court-ordered classification. This Court did not, however, limit its decision to Bodyke and Schwab. Rather, it applied *Bodyke*'s holding to all three petitioners. Moreover, this Court denied the Ohio Attorney General's motion to reconsider *Bodyke*'s application to Phillips and other reclassified offenders who received their classification merely by virtue of their convictions. *State v. Bodyke*, __ Ohio St. 3d, 2010 Ohio 3737.

The State's request for reconsideration regarding Wells merely rehashes the arguments made by the Ohio Attorney General in its motion for reconsideration in *Bodyke*. It should similarly be denied.

Robert Zamora

The State also argues that *Bodyke* does not apply to Robert Zamora because his classification as a sexually oriented offender under Megan's Law was based on a 1985 California conviction for an offense the Ohio Attorney General determined to be substantially equivalent to gross sexual imposition.

This Court should reject this argument because out-of-state offenders are indistinguishable from in-state offenders who did not receive an H.B. 180 hearing and therefore *Bodyke* should apply to them as well.[2] Indeed, this Court has consistently applied *Bodyke* to reinstate Megan's Law classifications of out-of-state offenders. *See e.g. Dunn v. State*, Case No. 2010-97 (1998 Arkansas conviction); *Robinson v. State*, Case No. 2010-100 (New York conviction). In *Bodyke*, this Court completely severed the statutory provisions which purported to authorize the Attorney General to reclassify Megan's Law offenders (R.C. 2950.031 and 2950.032). Because there is no longer any legal authority upon which to reclassify Mr. Zamora, the State's argument therefore fails.

Accordingly, the State's motion to reconsider Robert Zamora's case should be denied.

WHEREFORE, based upon the foregoing, appellants Ralph Wells and Robert Zamora respectfully request that this Court deny the State of Ohio's motion for reconsideration.

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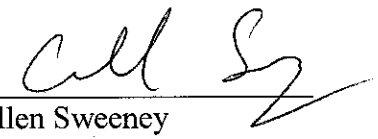
[2] The State suggests that out-of-state offenders are different because "any requirement that an out-of-state offender register as a Sexual Predator under Ohio's Megan's Law arose by operation of law." (State's Br. at 3-4). That purported distinction is irrelevant because Zamora is a sexually oriented offender and his registration in Ohio pre-dated the enactment of the default predator classification provision in 2007. *Former* R.C. 2950.09(A)(1) (eff. 1/2/07).

Respectfully Submitted,



Cullen Sweeney
Assistant Public Defender

CERTIFICATE OF SERVICE

A copy of the foregoing Brief in Opposition to the State's Motion for Reconsideration was hand-delivered upon William D. Mason, and/or a member of his staff, at The Justice Center, 9th Floor, 1200 Ontario Street, Cleveland, Ohio on this 31 day of August 2010.

Cullen Sweeney
Counsel of Record for Appellants