

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 : Case No. 2009-1974
 Plaintiff-Appellee, :
 : On Appeal from the Trumbull
 v. : County Court of Appeals
 : Eleventh Appellate District
 LAMBERT DEHLER, :
 : Court of Appeals
 Defendant-Appellant. : Case No. 2008-T-0061

REPLY BRIEF FOR APPELLANT LAMBERT DEHLER

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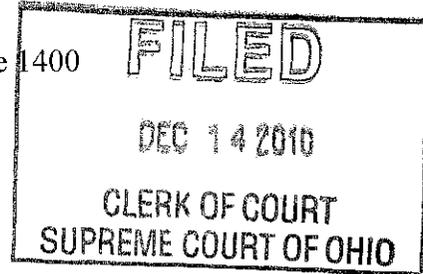


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REPLY ARGUMENT

FIRST PROPOSITION OF LAW¹

The retroactive application of Senate Bill 10 violates Ohio's separation-of-powers doctrine, the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution, and the Retroactivity Clause of Section 28, Article II of the Ohio Constitution. Fifth Amendment to the United States Constitution; Section 10, Article I of the United States Constitution; and Sections 10, 28, and 1, Articles I, II, and IV, respectively, of the Ohio Constitution.

- I. The retroactive application of Senate Bill 10 to Mr. Dehler violates both the separation-of-powers doctrine and the remedy as this Court formulated in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424.²**

In *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, this Court severed R.C. 2950.031 and R.C. 2950.032. In its merit brief, the State argues that the *Bodyke* severance remedy was only to be applied to individuals who had prior final judicial orders of classification. See State's Merit Brief at 10-13. The State specifically argues that "since [Mr. Dehler] has no

¹ This "First Proposition of Law" was presented to this Court in Mr. Dehler's memorandum in support of jurisdiction as "Proposition of Law No. V."

² Mr. Dehler's argument in support of his First Proposition of Law is restricted to replying to the State and Ohio Attorney General arguments regarding the separation-of-powers doctrine. Mr. Dehler rests on his merits brief regarding all other issues under this proposition.

The State and the Attorney General argue that Mr. Dehler has forfeited separation-of-powers doctrine arguments because they were not presented to the Eleventh District Court of Appeals. See Merit Brief of State of Ohio at 13 and Brief of Amicus Curiae Ohio Attorney General at 19. Although Mr. Dehler presented the issue in the trial court, he did not raise it in his court of appeals brief. Instead, the appellate court addressed the issue sua sponte. See *State v. Dehler*, 2009-Ohio-5059 at ¶93 (court opinion) and ¶¶99-103 (concurring opinion).

If Mr. Dehler is forbidden from arguing that his reclassification violates *Bodyke* and the separation-of-powers doctrine, the remainder of his First Proposition of Law and the argument in support of it are essentially identical to the proposition and argument presented by the petitioner in *State v. Williams*, Case No. 2009-0088, which is awaiting oral argument in this Court. Those arguments need not be repeated here; should the Court determine he is barred from arguing about the separation of powers, Mr. Dehler suggests that the merit of his First Proposition of Law should be determined on the basis of the arguments presented in *Williams*.

prior judicial sex offender classification to fall back upon, R.C. 2950.032 should not be stricken in his case and those of offenders [sic] like him.” *Id.* See also Merit Brief of Amicus Curiae Ohio Attorney General at 23-25 (arguing that the reclassification of Mr. Dehler was not improper despite *Bodyke*’s severance of R.C. 2950.032), hereinafter *AG Brief*.

The Court has already been rejected this argument. As the Court is well aware, the State of Ohio and the Attorney General filed a motion responding to the judgment and opinion in the *Bodyke* case. See Joint Motion for Reconsideration and/or Clarification filed in *State v. Bodyke*, Case No. 2008-2502 (June 14, 2010), at 6-7. In their motion, the Attorney General and the State suggested that the *Bodyke* “separation-of-powers reasoning does not appear to fit” those like Mr. Dehler, who were incarcerated before July 1, 1997 “and received lengthy prison terms that extended past July 1, 2007” *Id.* They then conceded that that “if *Bodyke* facially struck down R.C. 2950.031 and R.C. 2950.032 . . . then this group of offenders will benefit from the *Bodyke* remedy as well.” *Id.* at 7.

This Court denied the motion for reconsideration and/or clarification over the dissents of Justices O’Donnell and Cupp, both of whom would have granted clarification for the “limited purpose” of clarifying that “particular sex offenders [who] have not been previously ‘adjudicated by a court’ to be within a particular classification under prior law . . . are not affected by the *Bodyke* decision.” *State v. Bodyke*, 126 Ohio St.3d 1235, 2010-Ohio-3737, at ¶14 (reconsideration ruling, O’Donnell and Cupp, JJ., dissenting), hereinafter *Bodyke Recon*. There is simply no way to square this Court’s denial of clarification in *Bodyke* with the argument the State and the Attorney General now advance—the separation-of-powers doctrine and severance arguments presented in the *Bodyke* reconsideration motion and in the government’s briefs in this case are identical.

The Court rejected these arguments with good reason, as they rely upon a novel theory that *Bodyke* created a wholly new creature: an “as-applied severance remedy.” State’s Merit Brief at 13. There is no such thing as “as-applied severance” of a statute—the entire concept is nonsensical, and neither the State nor the Attorney General has identified a single case that relies on the concept.

A statute that is facially invalid is usually struck down in its entirety. See *Houston v. Hill* (1987), 482 U.S. 451; *Martin v. City of Struthers* (1943), 319 U.S. 141. But the use of the more limited remedy of severance is appropriate if the three-part test from *Geiger v. Geiger* (1927), 117 Ohio St. 451, 160 N.E. 28, 5 Ohio L. Abs. 829, is met. See *Bodyke* at ¶64-66. In general, “a severable statute is one that can still be valid even if one part of it is struck down as invalid by a court.” *Black’s Law Dictionary* 957 (Abr. 6th ed. 1991) (defining “Severable”). See also *New York v. Ferber* (1982), 458 U.S. 747, 769, fn. 24 (“[I]f the federal statute is not subject to a narrowing construction and is impermissibly overbroad, *it nevertheless should not be stricken down on its face; if it is severable, only the unconstitutional portion is to be invalidated*”) (emphasis added).

The concept of severance only makes sense if the offending portion of the statute is no longer enforceable. Cf. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at ¶97 (holding that because provisions of the Ohio sentencing statutes “have no meaning now that judicial findings are unconstitutional . . . [those provisions] are severed and excised in their entirety. . .”). And, in accord with this long-established rule, *Bodyke* itself states that the State may not pick and choose who receives the benefit of the severance remedy, because “after severance, [R.C. 2950.031 and R.C. 2950.032] may not be enforced.” *Bodyke* at ¶66.

Severance may seem to be a strong remedy, but it is a more limited remedy than outright invalidation of an entire statute. But apparently unsatisfied with the Court's restraint, the State and the Attorney General would have the Court craft a new and heretofore unknown version of "severance" which merely severs the offending provision for some people, some of the time. There is a name for this proposed remedy—it is normally called "legislation." Cf. 128 Ohio S.B. 316 (As Introduced). And it would be deeply ironic if, in applying the separation-of-powers doctrine, this Court were to adopt the State's "legislative severance."

The Attorney General argues that it has already restored the Megan's Law classifications of all offenders eligible for relief under *Bodyke*. *AG Brief* at 14. It is true as a result of the *Bodyke* decision, the Ohio Attorney General has reverted thousands of sex offenders to their classifications under Ohio's Megan's Law. But the Attorney General's reversion decisions do not fully comply with *Bodyke*. For example, although the classifications of offenders who were judicially classified as sexual predators and habitual sexual offenders have been reverted, the Attorney General has refused to apply *Bodyke* to offenders who were illegally denied a classification proceeding after the effective date of Megan's Law—even though those offenders may have been reporting for years as "sexually oriented offenders" by operation of law as a result of *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, and even though those offenders were considered so unlikely to reoffend that trial judges deemed it unnecessary to hold sexual predator hearings for them. Similarly, the Attorney General has refused to revert the classifications of offenders whose convictions occurred out of state, no matter what duties those offenders had under originating state's registration law. Compare *Bodyke Recon* at ¶4 (dissenting opinion, interpreting *Bodyke* to apply only to offenders who were "adjudicated by a court") with *Clager v. State*, Licking App. No. 10-CA-49, 2010-Ohio-6074, at ¶¶14-25 (discussing cases of

out-of-state offenders decided by this Court based on *Bodyke*). And it has refused to reclassify those offenders such as Mr. Dehler himself, who has never been brought back to court for a hearing, and who the Attorney General admits is a sexually-oriented offender under old law pursuant to *Hayden*,³ but who remains incarcerated after the effective date of Senate Bill 10. See *AG Brief* at 1 (noting that Mr. Dehler is a “sexually-oriented offender” under old law) and 13-14, (conceding that the Attorney General “has interpreted *Bodyke* narrowly to cover only those sex offenders who had received a prior judicial adjudication of their Megan’s Law status”). Moreover, because the Ohio Attorney General has reclassified all previously classified habitual sex offenders and sexual predators, the impact of Senate Bill 10 on the remaining offenders—all of whom were previously sexually-oriented offenders by adjudication or pursuant to *Hayden*—is even more acute. And given that neither the Attorney General nor the State takes issue with Mr. Dehler’s suggestion that he remains bound to comply with the requirements of Megan’s Law pursuant to R.C. 1.58, this Court should conclude that the separation-of-powers doctrine and the severance remedy enunciated in *Bodyke* applies to Mr. Dehler and to all other offenders who were previously classified under Megan’s Law.

³ The Attorney General’s position conflicts with the brief of the State of Ohio, which argues that in order for Mr. Dehler to be classified a sexually-oriented offender, ODRC had to first notify the trial court of its recommendation under former R.C. 2950.09(C)(1)(b). This is incorrect—under former R.C. 2950.01 and as noted in *Hayden*, a Megan’s Law offender who did not fit within one of the other classifications was automatically classified as a sexually-oriented offender, and Mr. Hayden himself was classified as such without benefit of a hearing. *Hayden* at ¶¶14-18.

SECOND PROPOSITION OF LAW⁴

Petitioners in Senate Bill 10 classification proceedings are entitled to court-appointed counsel. Sixth and Fourteenth Amendments of the United States Constitution; Section 16, Article I of the Ohio Constitution.

If this Court's decision in *Bodyke* is applied to Mr. Dehler, no reclassification challenge hearing is necessary. See *State v. Bodyke*, 2010-Ohio-2424, at ¶66 (severing R.C. 2950.031, which provided individuals the statutory right to contest his or her Senate Bill 10 classification). But Mr. Dehler suggests that if this Court concludes that he can be classified as anything other than a sexually-oriented offender, he remains entitled to a hearing and to counsel: under the Sixth Amendment, under the Due Process Clause of the Fourteenth Amendment, and under R.C. 120.16.

The source of Mr. Dehler's right to a hearing and to counsel is of far less concern than whether we continue to demand that effective barriers stand against the unjust deprivation of liberty by the government. It shocks the conscience that an individual could be subject to the burdens of either Megan's Law or Senate Bill 10 with no more fanfare than a form letter from the Attorney General, and it can hardly be deemed just or fair to deny any person the assistance of knowledgeable and skilled counsel in challenging such action. The mere fact that an action may be called "civil" does not justify the dismissal of these concerns as trivial. The issue is not whether sex offenders present a danger to society or whether they are deserving of society's disdain. Rather, the issue is whether—as citizens of this nation—they deserve the protection of our Constitution, which they unquestionably do.

⁴ This Proposition of Law was presented in Mr. Dehler's MISJ as Proposition of Law IV.

I. A Senate Bill 10 reclassification challenge hearing is a critical stage of the criminal proceedings.

Mr. Dehler maintains that sex offender reclassification challenge proceedings are a critical stage of a criminal prosecution. If the state seeks to classify him as anything other than a sexually-oriented offender as described in *Hayden*, he must be afforded a hearing with counsel, as classification under Senate Bill 10 would effectively constitute a resentencing, and enhancement of his classification under former law would require a hearing and counsel by operation of the former statute.

As this Court noted in *State v. Gowdy* (2000), 88 Ohio St.3d 387, 398, “[a]t a sexual offender classification hearing, decisions are made regarding classification, registration, and notification that will have a profound impact on a defendant’s life.” In *State v. Eppinger* (2001), 91 Ohio St.3d 158, 165, the Court observed that “if we were to adjudicate all sexual offenders as sexual predators, we run the risk of ‘being flooded with a number of persons who may or may not deserve to be classified as high-risk individuals, with the consequence of diluting both the purpose behind and the credibility of the law. This result could be tragic for many.’” But the effect of Senate Bill 10 was to do just what *Eppinger* warned against, and move thousands of low-risk offenders from the lowest category of offender under Megan’s Law to Tier III, the highest category under the Adam Walsh Act.

The defendant has the right to have counsel present during all critical stages of an adversarial encounter with the government. *Mempa v. Rhay* (1967), 389 U.S. 128; *Estelle v. Smith* (1981), 451 U.S. 454, 469. Sentencing is a critical stage in a criminal case, and counsel’s presence is therefore necessary. Because *Bodyke* establishes that Senate Bill 10 reclassification interferes with a settled determination that changes his obligations to the state, any attempt on the part of the state to impose a Senate Bill 10 classification upon Mr. Dehler would require a

hearing and the appointment of counsel, as it effectively resentences him to additional consequences.

Notably, in 1999, the Ohio Attorney General issued a formal opinion concluding that a hearing to determine an offender's classification pursuant to former R.C. 2950.09 was a critical stage of the criminal proceedings, thus requiring county public defenders to represent the indigent offender. Attorney General Opinion 99-031 (Apr. 29, 1999). The Attorney General noted that the statute mandates that a condition precedent to the hearing is that a defendant must be charged and convicted of a sexually-oriented offense. *Id.* at 8. Therefore, "a hearing to determine whether a defendant is a sexual predator is a 'stage of the proceedings following arrest, detention, service of summons, or indictment' for persons convicted of such offenses . . . for which the penalty includes the potential loss of liberty." *Id.* at 9, 14. See also Brief of Amicus Curiae Cuyahoga County Public Defender at 12-13 (arguing that R.C. 120.16, as interpreted by OAG Op. 99-031, requires the appointment of counsel at sex offender classification hearings).

Misclassification at a Senate Bill 10 reclassification hearing presents far more significant dangers for both the public and for defendants than defendants faced in 1999. Cf. *Eppinger*, 91 Ohio St.3d at 165. And while the government suggests that because Mr. Dehler "navigated his way through the court system quite adeptly" he should be denied the right to counsel, this Court should focus on the proceedings, rather than the outcome, in evaluating whether the right to counsel attaches. As argued above, given this Court's decision in *Bodyke*, the remaining group of old-law offenders (including Mr. Dehler) should be automatically reverted to their prior classifications. But if the State attempts to alter those classifications, such alteration must trigger a hearing in the underlying criminal case, and that hearing is a critical stage at which counsel must be provided.

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

As may be implied from the argument above, Mr. Dehler contends that after “considering any relevant precedents and . . . assessing the several interests that are at stake,” counsel is guaranteed for sex offender classification hearings as a result of “fundamental fairness” and due process. *Lassiter v. Dep't. of Soc. Serv's* (1981), 452 U.S. 18, 24. While there is a presumption against appointed counsel when the litigant does not directly face confinement, that presumption is rebuttable. *Lassiter*, 452 U.S. at 26-27 (weighing *Mathews v. Eldridge* (1970), 424 U.S. 319 factors to determine whether a due process right to counsel attaches). Here, the private interests that would be protected by counsel are substantial, the government's interests in correct classification and in protecting the public are enhanced by providing counsel and the risk that erroneous decisions will be made is already significant and is only heightened unless a hearing with counsel is provided. *Mathews*, 424 U.S. at 335.

The logic behind *Gideon v. Wainwright* (1963), 372 U.S. 335, applies most directly in those proceedings that have a punitive component—where the result of the hearing may be a deprivation of rights or the attachment of duties that make the case similar to a criminal proceeding. Cf. *Kennedy v. Mendoza-Martinez* (1963), 372 U.S. 144, 168-169. And because the disabilities and duties imposed under Senate Bill 10 are either within the realm of punishment itself or so close to being punishment, cf. *Bodyke* at ¶¶16-28 (describing Senate Bill 10 changes to sex offender law, and suggesting that some members of the Court would consider such changes to have crossed into punishment), the government's interest in correct classification, the interest in protecting against erroneous classification, and the offender's private interest in being

free of wrongly-imposed disabilities and duties is beyond reasoned dispute. Cf. *Mathews*, 424 U.S. at 335.

CONCLUSION

For the foregoing reasons, Mr. Dehler asks this Court to determine that this Court's decision in *State v. Bodyke*, 2010-Ohio-2424, applies to him. Furthermore, Mr. Dehler asks this Court to determine that Senate Bill 10 is criminal in nature. In the alternative, Mr. Dehler asks this Court to find that he is entitled to court-appointed counsel under the Due Process Clauses of the United States and Ohio Constitutions, regardless of whether those hearings are deemed criminal in nature.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

BY: 

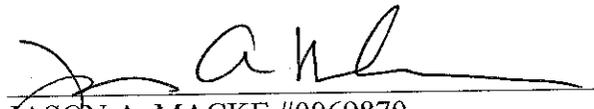
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I hereby certify that a copy of the foregoing **Reply Brief of Appellant Lambert Dehler** has been sent by regular U.S. mail, postage prepaid, to Deena L. DeVico, Trumbull County Assistant Prosecutor, addressed to her office at Trumbull County Prosecutor's Office, Trumbull County Administration Building, 160 High Street NW, 4th Floor, Warren, Ohio 44481; to Alexandra T. Schimmer, Chief Deputy Solicitor General, addressed to her office at the Attorney General of Ohio, 30 East Broad St., 17th Floor, Columbus, Ohio 43215; and to Cullen Sweeney, Assistant Cuyahoga County Public Defender, addressed to his office at the Cuyahoga County Public Defender's Office, 310 Lakeside Ave, Ste. 200, Cleveland, Ohio 44113, on this 14th day of December, 2010.


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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

LAMBERT DEHLER,

Defendant-Appellant.

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Case No. 2009-1974

On Appeal from the Trumbull
County Court of Appeals
Eleventh Appellate District

Court of Appeals

Case No. 2008-T-0061

APPENDIX TO

REPLY BRIEF FOR APPELLANT LAMBERT DEHLER

LEXSTAT O.R.C. 120.16

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 128TH OHIO GENERAL ASSEMBLY AND FILED
 WITH THE SECRETARY OF STATE THROUGH FILE 54 ***
 *** ANNOTATIONS CURRENT THROUGH JULY 1, 2010 ***
 *** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 1, 2010 ***

TITLE 1. STATE GOVERNMENT
 CHAPTER 120. PUBLIC DEFENDERS
 COUNTY PUBLIC DEFENDER COMMISSION

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§ 120.16. When representation to be provided; notice to accused

(A) (1) The 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 and in postconviction proceedings as defined in this section.

(2) The county public defender may provide legal representation to indigent adults and juveniles charged with the violation of an ordinance of a municipal corporation for which the penalty or any possible adjudication includes the potential loss of liberty, if the county public defender commission has contracted with the municipal corporation to provide legal representation for indigent persons charged with a violation of an ordinance of the municipal corporation.

(B) The county public defender shall provide the legal representation authorized by division (A) of this section at every stage of the proceedings following arrest, detention, service of summons, or indictment.

(C) The county public defender may request the state public defender to prosecute any appeal or other remedy before or after conviction that the county public defender decides is in the interests of justice, and may provide legal representation in parole and probation revocation matters and matters relating to the revocation of community control or post-release control under a community control sanction or post-release control sanction.

(D) The county public defender shall not be required to prosecute any appeal, postconviction remedy, or other proceeding, unless the county public defender is first satisfied there is arguable merit to the proceeding.

(E) Nothing in this section shall prevent a court from appointing counsel other than the county public defender or from allowing an indigent person to select the indigent person's own personal counsel to represent the indigent person. A court may also appoint counsel or allow an indigent person to select the indigent person's own personal counsel to assist the county public defender as co-counsel when the interests of justice so require.

(F) Information as to the right to legal representation by the county public defender or assigned counsel shall be afforded to an accused person immediately upon arrest, when brought before a magistrate, or when formally charged, whichever occurs first.

(G) If a court appoints the office of the county public defender to represent a petitioner in a postconviction relief proceeding under *section 2953.21 of the Revised Code*, the petitioner has received a sentence of death, and the proceeding relates to that sentence, all of the attorneys who represent the petitioner in the proceeding pursuant to the appointment, whether an assistant county public defender or the county public defender, shall be certified under Rule 20 of the

Rules of Superintendence for the Courts of Ohio to represent indigent defendants charged with or convicted of an offense for which the death penalty can be or has been imposed.

(H) As used in this section:

- (1) "Community control sanction" has the same meaning as in *section 2929.01 of the Revised Code*.
- (2) "Post-release control sanction" has the same meaning as in *section 2967.01 of the Revised Code*.

HISTORY:

136 v H 164 (Eff 1-13-76); 138 v H 204 (Eff 7-30-79); 140 v S 271 (Eff 9-26-84); 146 v S 258 (Eff 10-16-96); 149 v H 94. Eff 9-5-2001; 149 v H 490, § 1, eff. 1-1-04.