



**TABLE OF CONTENTS**

	<b>Page</b>
TABLE OF CONTENTS.....	ii
INTRODUCTION .....	1
STATEMENT OF THE CASE AND FACTS .....	2
THIS CASE PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF PUBLIC AND GREAT GENERAL INTEREST.....	3
ARGUMENT .....	5
State of Ohio’s Proposition of Law: .....	5
<i>Retroactive application of S.B.10 to out-of-state offenders who have never received a prior judicial adjudication of their sex offender status does not violate the separation- of-powers doctrine in the Ohio Constitution. ....</i>	<i>5</i>
A. S.B.10’s classification of Hartley does not offend separation of powers because it does not disturb a final judgment or divest the judiciary of an inherent power.....	5
B. S.B.10’s classification of Hartley did not violate <i>Bodyke</i> . ....	8
CONCLUSION.....	11
CERTIFICATE OF SERVICE .....	unnumbered
APPENDIX:	
<i>Hartley v. State</i> (5th Dist.), No. 10-CA-65, 2011-Ohio-96 .....	Exhibit 1

## INTRODUCTION

This Court presents a major remaining question about the validity of Ohio's new sex offender law, Senate Bill 10 ("S.B.10")—namely, the constitutionality of the law as applied to out-of-state sex offenders.

In 1996, Richard Hartley was convicted of Sexual Assault on a Minor in Colorado. He then moved to Ohio and took up residence in Licking County. In 2007, the Attorney General notified Hartley that he is a Tier III offender under S.B.10. Under that classification, Hartley must register as a sex offender with his county sheriff every 90 days for his lifetime.

Like many other sex offenders in Ohio, Hartley filed a legal challenge to his S.B.10 classification. The Fifth District agreed, concluding that the classification violated this Court's decision in *State v. Bodyke*, 126 Ohio St. 3d 266, 2010-Ohio-2424.

Not so. In *Bodyke*, the three individuals had prior judicial adjudications of their status under Ohio's old sex offender regime—Megan's Law. *Id.* at ¶ 29. Consistent with the General Assembly's directive, the Attorney General's Office reclassified them in 2007 under S.B.10. The three individuals filed a legal challenge, and this Court invalidated their S.B.10 reclassifications under the separation-of-powers doctrine. The Court concluded that the offenders' Megan's Law "classification[s] constitute[d] a final judgment" of a court, and "the General Assembly c[ould] not vest authority in the attorney general to reopen and revise the final decision[s] of a judge classifying a sex offender." *Id.* at ¶¶ 56-57.

This case is much different: there is no evidence Hartley has ever received a prior judicial adjudication of his sex offender status. His classification under S.B.10, therefore did not annul, reverse, or modify a final judgment of a court. As such, it could not violate the separation-of-powers doctrine.

The Fifth District rested its contrary holding on a tea leaf. It observed that *Bodyke* “did not speak to the out-of-state offender who had never been classified by court order under Ohio’s Megan’s Law.” But the court then noted that this Court reversed and remanded an appeal involving an out-of-state sex offender in *In re Sexual Offender Reclassification Cases*, 126 Ohio St. 3d 322, 2010-Ohio-3753. Therefore, the Fifth District concluded, *Bodyke*’s separation-of-powers holding must apply even in absence of a prior judicial adjudication.

That holding is momentous because it untethers *Bodyke* from its central holding—that S.B.10’s reclassification provisions offend separation of powers because they “impermissibly instructe[d] the executive branch to review *past decisions of the judicial branch*” and because they “requir[ed] the opening of *final judgments*.” *Bodyke*, 2010-Ohio-2424, at syl. (emphasis added). Given the substantial constitutional question at issue, this Court should accept jurisdiction in this case.

The Court should then hold this case for a decision in *State v. Dehler*, No. 2009-1974. Although the offender in *Dehler* never received a sex offender classification from a court, he too claims that his S.B.10 classification (which he received from the Attorney General) offends the separation-of-powers holding of *Bodyke*. Because Hartley is pressing an identical constitutional argument, the Court can decide *Dehler* and apply that holding here.

For these reasons, the Court should accept jurisdiction and hold this case for *Dehler*.

#### **STATEMENT OF THE CASE AND FACTS**

On December 12, 1996 the Appellee, Richard Hartley, was convicted in Jefferson County, Colorado of Sexual Assault on a Minor. See *Hartley v. State* (5th Dist.), No. 10-CA-65, 2011-Ohio-96, ¶ 2.

In December of 2007, the Attorney General’s Office notified Hartley that he was a Tier III sex offender under S.B.10. *Id.* at ¶ 3. Hartley then filed a petition in common pleas court

contesting that classification on January 30, 2008. *Id.* at ¶ 4. The trial court found the classification invalid under this Court’s decision in *Bodyke*. *Id.* at ¶ 5.

The State appealed, and the Fifth District affirmed on authority of its recent decision in *Clager v. State* (5th Dist.), No. 10-CA-49, 2010-Ohio-6074. The court relied on the holding in *Bodyke*, *Clager* and *State v. Parrish* (5<sup>th</sup> Dist.), No. 10-CA-64, 2010 6415<sup>1</sup>.

It then reaffirmed its conclusion in *Clager* “that out-of-state offenders are not subject to the Ohio Attorney General’s reclassification as it violates the separation of powers doctrine.” *Id.* at ¶ 36.

The State now appeals from that judgment.

**THIS CASE PRESENTS A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS  
OF PUBLIC AND GREAT GENERAL INTEREST**

One need only study the Court’s current docket to confirm that the constitutionality of S.B.10 presents a substantial question. The Court will hear oral argument in four such disputes over the next month: *State v. Williams*, No. 09-0088 (constitutionality of S.B.10 as applied to offenders who committed their offenses before, but were sentenced after, the effective date of the law); *State v. Dehler*, No. 09-1974 (constitutionality of S.B.10 as applied to offenders who received a Megan’s Law designation by operation of law); *In re C.P.*, No. 10-0731 (constitutionality of S.B.10 as applied to serious youthful offenders); *In re Messmer*, No. 10-0780 (constitutionality of S.B.10 as applied to juvenile sex offenders). This case presents one of the last remaining issues—whether the State of Ohio can constitutionally apply S.B.10 to out-of-state sex offenders who moved into Ohio, but were never classified by court order under the old Megan’s Law.

---

<sup>1</sup> The State has filed a Memorandum in Support of Jurisdiction in this case. Please see Case No. 2011-0237 filed with this Court on February 10, 2011.

The Fifth District relied on *Bodyke* to answer that question. It said that Hartley's S.B.10 classification is invalid under the separation-of-powers doctrine even though Hartley has never had a prior *judicial* adjudication of his sex offender status. The offender in *Dehler* is pressing an identical claim. In that case, the offender entered prison in 1993 and received an S.B.10 classification in 2007. Despite the fact that no court ever adjudicated his sex offender status, the offender claims that his S.B.10 classification violates the separation-of-powers holding of *Bodyke*. See Merit Br. of Apt., at 5-14, *State v. Dehler*, No. 09-1974 (Oct. 7, 2010). The Court saw fit to accept jurisdiction in that case. Because this case presents an identical legal question, the Court should again grant review.

Furthermore, the constitutionality of S.B.10 is of great interest to the State and its citizens. The primary purpose of S.B. 10 is community awareness and preparation. 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 . . ."). Further, the General Assembly enacted S.B.10 in an effort to comply with the federal Adam Walsh Act. Finally, S.B.10 implements a uniform system of classification and registration across the State, thereby allowing for efficient and effective administration of the law by the Attorney General and the county sheriffs.

The Fifth District's decision sows further confusion about the validity of this law with respect to out-of-state sex offenders. That confusion will bedevil those offenders who moved to Ohio from another state and may not understand the extent of their registration duties; the county sheriffs who now lack guidance as to their responsibilities for this class of offenders; and the county prosecutors who must enforce and prosecute violations of S.B.10. Indeed, the Fifth

District has already employed its expansive reading of *Bodyke* to vacate the conviction of an out-of-state sex offender who failed to provide notice to the county sheriff of his intent to move into the area. See *State v. Lloyd* (5th Dist.), No. 09-CA-12, 2010-Ohio-6562, ¶¶18-20.

One final word: Although this case presents a substantial constitution question and is of public and great general interest, its resolution will require no additional expenditure of judicial resources. As mentioned above, the same legal issue is now before the Court in *Dehler*. The Court can accept jurisdiction of this case, hold it for *Dehler*, and then apply that decision to either affirm or reverse the Fifth District's judgment.

## ARGUMENT

### **State of Ohio's Proposition of Law:**

*Retroactive application of S.B.10 to out-of-state offenders who have never received a prior judicial adjudication of their sex offender status does not violate the separation-of-powers doctrine in the Ohio Constitution.*

#### **A. S.B.10's classification of Hartley does not offend separation of powers because it does not disturb a final judgment or divest the judiciary of an inherent power.**

"[T]he concept of separation of powers . . . is implicitly embedded in the entire framework of . . . the Ohio Constitution." *S. Euclid v. Jemison* (1986), 28 Ohio St. 3d 157, 159. This doctrine ensures that "each of the three grand divisions of the government [are] protected from encroachments by the others." *Fairview v. Giffie* (1905), 73 Ohio St. 183, 187.

The separation-of-powers doctrine prohibits those laws that "impermissibly threaten[] the institutional integrity of the Judicial Branch." *Bodyke*, 2010-Ohio-2424, at ¶ 53. Although defining this boundary "is not always easy," *id.* at ¶ 50, this Court has announced four key principles.

First, a state law may not "vest[] officials in the executive branch with the power to review judicial decisions." *Id.* at ¶ 53 (citation omitted). In *Jemison*, for instance, the Court invalidated

a statute that authorized the Registrar of Motor Vehicles to review and reverse a trial court order suspending a driver's license, certificate of registration, or registration plates. 28 Ohio St. 3d at 160-61. That law unconstitutionally "grant[ed] appellate review to an executive administrator, in a manner that conflicts with the constitutional powers of the courts of appeals." *Id.* at 161.

No such infirmity exists in this case. The record contains no evidence that a court has ever adjudicated Hartley's sex offender status. Thus, the Attorney General's administrative classification of Hartley to a Tier III offender did not involve a review or reversal of any prior judicial decision.

Second, a legislative act offends separation of powers if it attempts to "annul, reverse, or modify a judgment of a court already rendered." *Barlett v. State* (1905), 73 Ohio St. 54, 58. The Court invoked that principle in *Bodyke*. There, the three individuals had prior judicial adjudications of their sex offender status under Megan's Law. *Bodyke*, 2010-Ohio-2424, at ¶ 29. This Court held that those "classification[s] constituted a final judgment" of a court, and "the General Assembly c[ould] not vest authority in the attorney general to reopen and revise the final decision[s] of a judge classifying a sex offender." *Id.* at ¶¶ 56-57 (citation omitted).

Hartley is not analogous to the offenders in *Bodyke* because, unlike those offenders, he never received a prior judicial adjudication of his Megan's Law status. Thus, his reclassification under S.B.10 did not annul, reverse, or modify a final judgment of a court.

Third, the General Assembly may not enact a law that "abridge[s] . . . power . . . inherent and necessary to the exercise of judicial functions." *Hale v. State* (1896), 55 Ohio St. 210, syl. ¶ 1. This Court's decision in *State v. Hochhausler*, 76 Ohio St. 3d 455, illustrates this principle. There, a driver challenged the constitutionality of his administrative license suspension. He also requested a stay of the suspension pending resolution of the litigation, but state law specified that

any judicial stay of the suspension order “shall not be given administrative effect.” *Id.* at 463. Invoking the separation-of-powers doctrine, this Court struck down the law because it deprived the judicial branch of its inherent “power to grant or deny stays” of executive branch actions. *Id.* at 464.

The question here is whether S.B.10 limits any inherent power of the judiciary. The judiciary has no inherent authority to conduct hearings and perform individualized assessments of a sex offender’s future dangerousness. That power was conferred by the General Assembly in 1997 under Megan’s Law—and only then for the limited purpose of determining whether a sex offender should receive the most severe “sexual predator” designation.

Automatic offense-based classification has long been the law in Ohio. The State’s original sex offender law, enacted in 1963, contained no individualized hearing element. Anyone convicted of two sex offenses was automatically labeled a sex offender. See Former R.C. 2950.01(A) (1996). Megan’s Law also used automatic offense-based classifications for its two lower designations (“sexually oriented offender” and “habitual offender”). There was no judicial factfinding: “The trial court . . . merely engage[d] in the ministerial act of rubber-stamping the registration requirement on the offender.” *State v. Hayden*, 96 Ohio St. 3d 211, 2002-Ohio-4169, ¶ 16. Other civil disabilities likewise attach to convictions without regard to an offender’s future dangerousness. See, e.g., R.C. 2151.86 (felony conviction precludes child-care center employment); R.C. 2923.13 (felony conviction precludes gun ownership). This history demonstrates that the choice of how a civil disability attaches—whether automatically by operation of law or selectively through individualized judicial determinations—is left up to the legislature. So long as the disability is “civil,” the judiciary has no inherent authority to require individualized hearings before the disability attaches.

Fourth, the General Assembly may not “authorize[] the executive branch to prosecute and impose punishment for a crime.” *State v. Sterling*, 113 Ohio St. 3d 255, 2007-Ohio-1790, ¶ 31. In *State ex rel. Bray v. Russell* (2000), 89 Ohio St. 3d 132, for instance, the Court invalidated a state law that authorized the parole board to extend a prisoner’s sentence if he committed a criminal offense while in prison, regardless of whether the prisoner was actually prosecuted. *Id.* at 135. This law unconstitutionally enlarged the role of the executive branch, the Court said, because “[t]he determination of guilt in a criminal matter and the sentencing of a defendant convicted of a crime are solely the province of the judiciary.” *Id.* at 136.

In this case, the General Assembly has not sought to determine Hartley’s guilt or extend his criminal sentence, nor has it assigned those tasks to the Attorney General. And at no point has this Court (or any other court) found a separation-of-powers infirmity in a system where an individual’s “conviction for a sexually oriented offense automatically confer[s] on him” a sex offender designation. *Hayden*, 2002-Ohio-4169, at ¶ 16.

A proper exposition of the separation-of-powers doctrine can be found in Judge Grendell’s concurring opinion in *State v. Dehler* (9th Dist.), No. 008-T-0061, 2009-Ohio-5059. Where a sex offender “has been previously classified . . . in a valid judgment entry rendered by a court of competent jurisdiction,” she correctly noted “that judgment may not be impaired by subsequent legislative enactment.” *Id.* at ¶ 102. In this case, however, Hartley “has not been previously classified as a sexual offender” by a court. *Id.* at ¶ 103. Thus, “the application of the Adam Walsh Act to [Hartley] does not disturb the settled judgment of a court of competent jurisdiction,” and “there is no constitutional impediment to his classification” under S.B.10. *Id.*

**B. S.B.10’s classification of Hartley did not violate *Bodyke*.**

Although the Attorney General’s classification of Hartley clearly does not violate separation of powers, the Fifth District seemed to think that it violated the holding of *Bodyke*.

As evidence, it pointed to this Court’s decision to reverse and remand a case involving an out-of-state sex offender in *In re Sexual Offender Cases*, 126 Ohio St. 3d 322, 2010-Ohio-3753. Therefore, the Fifth District believed, *Bodyke* must have invalidated all of the Attorney General’s classifications under S.B.10, not just those classifications that impermissibly reopened and modified a final court judgment.

The Fifth District read too much into that remand order, which was not accompanied by any analysis or explanation. In fact, an examination of the entire *Bodyke* opinion confirms that the Court’s remedy was far more tailored.

The Court invalidated only those S.B.10 classifications that offended the separation-of-powers doctrine. The Court emphasized that it was only “excising the unconstitutional component” of S.B.10—that is, the component directing “the attorney general to reopen and revise *the final decision of a judge* classifying a sex offender.” *Bodyke*, 2010-Ohio-2424, at ¶¶ 57, 66 (emphasis added). That remedy left “the remainder of the AWA, ‘which is capable of being read and of standing alone, . . . in place.’” *Id.* at ¶ 66 (citation omitted). The Court again reaffirmed the narrow scope of its remedy in the final line of its opinion: “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.” *Id.* (emphasis added).

This language demonstrates that the *Bodyke* Court chose a scalpel, and not a sledgehammer, for its remedy. It invalidated only those S.B.10 sex offender classifications that purported to modify a final court judgment. The Court did not address—nor did its remedy touch on—the constitutionality of any other S.B.10 classification.

For the Fifth District to say otherwise ignores this Court's well-established tradition of judicial restraint. In *Bodyke*, three sex offenders with prior judicial adjudications of their Megan's Law status alleged a separation-of-powers violation. This Court agreed. The question of S.B.10's constitutionality with respect to those sex offenders who never received a prior judicial adjudication was not before the Court. For the Fifth District to now say that *Bodyke* decided that question would mean that this Court "answer[ed] a hypothetical question merely for the sake of answering it"—something that it does not do. *Ahmad v. AK Steel Corp.*, 119 Ohio St. 3d 1210, 2008-Ohio-4082, ¶ 3 (O'Connor, J., concurring). After all, the "hallmark of judicial restraint is to rule only on . . . an actual controversy." *Id.*; accord *Meyer v. United Parcel Serv., Inc.*, 122 Ohio St. 3d 104, 2009-Ohio-2463, ¶ 53 ("[T]he cardinal principle of judicial restraint [is that] if it is not necessary to decide more, it is necessary not to decide more.") (citation omitted).

**CONCLUSION**

For the foregoing reasons, the Court should accept jurisdiction and hold the case for decision in *State v. Dehler*, No. 2009-1974.

Respectfully submitted,

KENNETH W. OSWALT (0037208)  
Licking County Prosecutor



TRACY F. VAN WINKLE (0075572)\*  
Assistant Prosecuting Attorney

*\*Counsel of Record*

20 South Second St., 4th Floor  
Newark, OH 43055  
740-670-5255  
740-670-5241 fax

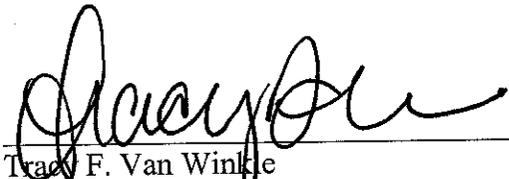
Counsel for Respondent-Appellant  
State of Ohio

**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served by U.S. mail this 23<sup>rd</sup> day of February 2011, upon the following:

Richard L. Hartley  
2490 Pine Grove Road  
Lancaster, OH 43130

Office of the Ohio Public Defender  
250 E. Broad Street, Suite 1400  
Columbus, OH 43215

  
\_\_\_\_\_  
Tracy F. Van Winkle  
Assistant Prosecuting Attorney

**FILED**

2011 JAN 12 A 9 42

CLERK OF COURTS  
OF APPEALS  
LICKING COUNTY OH  
GARY R. WALTERS

COURT OF APPEALS  
LICKING COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

RICHARD L. HARTLEY

Petitioner-Appellee

-vs-

STATE OF OHIO

Respondent-Appellant

JUDGES:

Hon. William B. Hoffman, P. J.

Hon. Sheila G. Farmer, J.

Hon. John W. Wise, J.

Case No. 10 CA 65

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal from the Court of Common  
Pleas, Case No. 2008 CV 00273

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

APPEARANCES:

For Petitioner-Appellee

RICHARD L. HARTLEY  
PRO SE  
2490 Pine Grove Road  
Lancaster, Ohio 43130

For Respondent-Appellant

KENNETH W. OSWALT  
LICKING COUNTY PROSECUTOR  
ALICE L. BOND  
ASSISTANT PROSECUTOR  
20 South Second Street, 4<sup>th</sup> Floor  
Lancaster, Ohio 43130

Wise, J.

{¶1} Respondent-Appellant, the State of Ohio, appeals the decision of the Court of Common Pleas, Licking County, granting a petition filed by Petitioner-Appellee Richard L. Hartley contesting his Ohio Attorney General reclassification as a Tier III sex offender under R.C. 2950.01, et seq., as amended by S.B. 10, also known as the "Adam Walsh Act" ("AWA"). The relevant facts leading to this appeal are as follows.

{¶2} In 1996, appellee was convicted of sexual assault in the State of Colorado.<sup>1</sup> He thereafter moved to Ohio. There is no documentation in the record that appellee was ever classified, via a hearing in Colorado, Ohio, or elsewhere, as a sexual offender under any category.

{¶3} In December 2007, the Ohio Attorney General sent appellee a notice of new classification as a Tier III offender under the AWA.

{¶4} On January 30, 2008, appellee filed a petition in the Licking County Court of Common Pleas to contest his reclassification.

{¶5} On June 18, 2010, shortly after the Ohio Supreme Court's *Bodyke* decision (see *infra*), the trial court granted appellee's petition.

{¶6} Appellant State of Ohio filed a notice of appeal on June 29, 2010. It herein raises the following sole Assignment of Error:

{¶7} "I. THE TRIAL COURT ERRED IN FINDING THAT A SEX OFFENDER'S CLASSIFICATION WAS VOID BASED ON THE SEPARATION OF POWER (SIC) DOCTRINE OF THE OHIO CONSTITUTION, WHERE THE UNDERLYING SEX OFFENSE CONVICTION OCCURRED OUT-OF-STATE."

---

<sup>1</sup> Appellee conceded the existence of the conviction in his petition contesting reclassification.

## I.

{¶8} In *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, 933 N.E.2d 753, the Ohio Supreme Court severed R.C. 2950.031 and 2950.032, the reclassification provisions of the Adam Walsh Act, and held that after severance, those provisions could not be enforced. The Court further held that R.C. 2950.031 and 2950.032 may not be applied to offenders previously adjudicated by judges under "Megan's Law." See also *Chojnacki v. Cordray*, 126 Ohio St.3d 321, 933 N.E.2d 800, 2010-Ohio-3212, ¶5.

{¶9} The State's arguments in the case sub judice in support of reversing the trial court's disallowance of reclassification are essentially as follows. First, the State contends that there is no separation of powers conflict under *Bodyke* where the judicial branch has taken no action as to sexual offender classification, or, if any action had been taken, it would have been via another state's judiciary. Next, the State maintains that a person convicted of a sex offense in another state is not substantially similar to a person judicially categorized by an Ohio judge for purposes of a separation of powers analysis. Finally, the State urges that a Tier III classification occurs as a matter of law pursuant to R.C. 2950.01(G), and that deficiencies in the administrative procedures for reclassification would have no effect on such reclassification.

{¶10} However, in *State v. Clager*, Licking App.No.10-CA-49, 2010-Ohio-6074, this Court found that even out-of-state offenders are not subject to an Ohio Attorney General reclassification based on the doctrine of separation of powers. More recently, in *Parrish v. State*, Licking App.No. 10-CA-64, 2010-Ohio - - - -, this Court applied *Bodyke* and *Clager* to hold that a petitioner's challenge to reclassification was properly granted,

even though there was no indication that the out-of-state court had ever classified the petitioner as a sexual offender.

{¶11} Upon review, the State's present arguments do not persuade us to deviate from our rationale in *Clager* and *Parrish*.

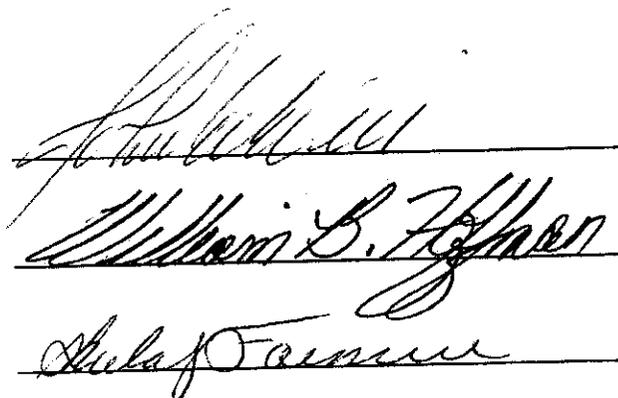
{¶12} The State's sole Assignment of Error is therefore overruled.

{¶13} For the foregoing reasons, the judgment of the Court of Common Pleas, Licking County, Ohio, is affirmed.

By: Wise, J.

Hoffman, P. J., and

Farmer, J., concur.



JUDGES