

**ORIGINAL**

IN THE SUPREME COURT OF OHIO  
2011

ROY E. HOSOM,

Petitioner-Appellee,

-vs-

STATE OF OHIO,

Respondent-Appellant

Case No. **11-0763**

On Appeal from the  
Franklin County Court  
of Appeals, Tenth  
Appellate District

Court of Appeals  
Case No. 10AP-671

**MEMORANDUM OF APPELLANT STATE OF OHIO IN SUPPORT OF  
JURISDICTION**

RON O'BRIEN 0017245  
Franklin County Prosecuting Attorney  
373 South High Street, 13<sup>th</sup> Floor  
Columbus, Ohio 43215  
Phone: 614-525-3555  
Fax: 614-525-6103  
E-mail: [sltaylor@franklincountyohio.gov](mailto:sltaylor@franklincountyohio.gov)

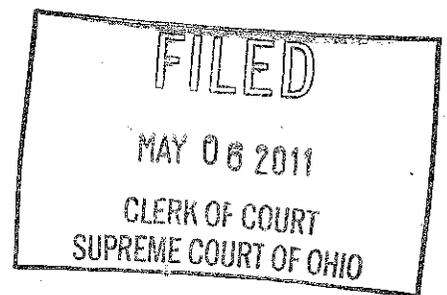
and

STEVEN L. TAYLOR 0043876 (Counsel of Record)  
Chief Counsel, Appellate Division

COUNSEL FOR APPELLANT STATE OF OHIO

YEURA R. VENTERS 0014879  
Franklin County Public Defender  
ALLEN V. ADAIR 0014851 (Counsel of Record)  
Assistant Public Defender  
373 South High Street, 12<sup>th</sup> Floor  
Columbus, Ohio 43215  
Phone: 614-525-8872

COUNSEL FOR APPELLEE



## TABLE OF CONTENTS

|   |     |
|---|-----|
| <b>EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION</b>   | 1   |
| <b>STATEMENT OF FACTS</b>   | 5   |
| <b>ARGUMENT</b>   | 6   |
| <b>First Proposition of Law:</b> The decision in <i>State v. Bodyke</i> , 126 Ohio St.3d 266, 2010-Ohio-2424, as interpreted in <i>Chojnacki v. Cordray</i> , 126 Ohio St.3d 321, 2010-Ohio-3212, has resulted in the entire severance of the petition-contest mechanisms created by R.C. 2950.031(E) and R.C. 2950.032(E). As a result, offenders cannot proceed under previously-filed petition contests, cannot be afforded relief in such petition contests, and appellate courts must vacate for lack of jurisdiction any lower court rulings already rendered on such petitions. Offenders seeking judicial relief from application of the new registration scheme must resort to another procedural mechanism. ( <i>State v. Bodyke</i> , 126 Ohio St.3d 266, 2010-Ohio-2424, limited) | 6   |
| <b>Second Proposition of Law:</b> The statutory authority to file a petition contesting reclassification has been severed. Absent the institution of a properly-filed civil case, a court that neither convicted nor classified the offender lacks jurisdiction to grant relief from reclassification.  | 6   |
| <b>CERTIFICATE OF SERVICE</b>   | 15  |
| <b>APPENDIX</b>   |     |
| Judgment (filed 3-29-11)  | A-1 |
| Decision (filed 3-29-11)  | A-2 |

## EXPLANATION OF WHY THIS COURT SHOULD ACCEPT JURISDICTION

The question presented here is an important one of whether an Ohio court has jurisdiction to grant relief under a “petition contesting reclassification” filed by an offender who was neither convicted in that court nor classified by that court. The present case should be considered a companion case to *Cook v. State*, Sup.Ct. No. 11-594, where the State is raising the same propositions of law. It is also a companion case to *Powell v. State*, Sup.Ct. No. 11-\_\_\_\_, being filed on the same day as the present memorandum.

The General Assembly had provided a statutory “petition-contest” procedure in R.C. 2950.031(E) and R.C. 2950.032(E), authorizing offenders to file petitions contesting reclassification. Many offenders filed these petitions in their courts of conviction, including the three offenders who challenged their reclassifications in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424. Many who were living in other counties filed their petitions in their counties of residence, as the statutes called for. Such petitions allowed sex offenders to challenge “new registration requirements” imposed by AWA.

But in *Bodyke*, as interpreted by *Chojnacki v. Cordray*, 126 Ohio St.3d 321, 2010-Ohio-3212, this Court severed these statutes entirely, including the “petition” provisions. This severance necessarily left the common pleas courts without the statutory authority to entertain the “petitions” that had been filed thereunder, especially for offenders who had filed their “petitions” in a court other than their court of conviction. The resulting apparent lack of jurisdiction is a question that most lower courts have not noticed. The State raised it in the present case, but the Tenth District made only a conclusory rejection of the jurisdictional objection. The Tenth District notably did not explain any jurisdictional basis for a Franklin County court to grant relief under a now-severed petition

process initiated by a Morgan County offender. In fact, with the severance of the petition-contest mechanism, common pleas courts have no jurisdiction to address “petitions” after the *Bodyke/Chojnacki* severance, especially those courts that did not classify the offender.

One court so far has addressed the issue head on. In *Lyttle v. State*, 12<sup>th</sup> Dist. No. CA2010-04-089, 2010-Ohio-6277, the Twelfth District correctly recognized that the severance of the petition-contest mechanism deprived the common pleas court (and thus the appellate court) of jurisdiction to rule on a petition filed by an offender convicted in that county. “With the severance of this section, no petition process exists for appellant to challenge whether he was exempt from registering under the Adam Walsh Act.” *Id.* ¶ 16. “In the absence of a petition process, the trial court was without jurisdiction to render its \* \* \* decision.” *Id.* ¶ 17. The court concluded that the trial court’s judgment ruling on the petition was “null and void” and that the offender’s appeal must be dismissed.

The *Lyttle* decision creates a conflict with the Tenth District’s approach. In some cases, even the Tenth District has recognized that “no petition process exists,” but the Tenth District has nevertheless proceeded to sustain the petitioner’s petition-based appeal. The Twelfth District agrees that no petition process exists, but it reaches an opposite conclusion from the Tenth District by concluding that the petitioner’s appeal must fail, as the common pleas court had no jurisdiction to rule on the petition to begin with, even as to the in-county offender in that case.

In the absence of any statutory basis for the Tenth District to conclude that a Franklin County court had jurisdiction, the Tenth District’s ruling apparently means that the Franklin County court must possess some form of inherent jurisdiction over the out-of-county offender’s case and/or classification. But, as stated *infra*, this strains “inherent

jurisdiction” past the breaking point and violates the jurisdictional-priority rule. At most, only the court that originally classified the offender could have any “inherent jurisdiction.”

In other cases, the Tenth District has drawn a distinction based on whether the petition was filed before *Bodyke* was announced. In the *Powell* case (being filed here today), the Tenth District stated that “the Supreme Court did not intend to nullify the petition process as to cases pending when *Bodyke* was decided and found that R.C. 2950.031(E) and R.C. 2950.032(E) should be severed from the statutes regarding reclassifications.” Petitioner might make the same argument here. But the panel’s jurisdictional ruling below cannot be upheld on this basis. The “did not intend to nullify” holding of *Powell* conflicts with other Tenth District cases, which recognized that “no petition process exists.” It also conflicts with *Chojnacki*, which plainly recognized that the entire statute, including the petition-process provisions, has been severed. Moreover, as pointed out *infra*, new rulings regarding jurisdiction apply to cases pending in the trial court or on direct review, regardless of when they were filed.

This Court has not decided the jurisdictional issue. *Bodyke* could not have been purporting to establish some sort of inherent jurisdiction as to out-of-county petitioners, as it was dealing with in-county petitioners. Indeed, even as to in-county offenders, *Bodyke* did not decide the jurisdictional question, and neither did the subsequent summary dispositions. As explained *infra*, this Court has held that there are no implicit precedents, even on jurisdictional questions.

If petitioner seeks to justify jurisdiction on the ground that some remnant of petition-contest authority remains from R.C. 2950.031 and R.C. 2950.032, then that claimed justification should heighten the need for review here. Such a justification would

constitute a retreat from the facial severance recognized in *Bodyke/Chojnacki*.

If petitioner seeks to justify jurisdiction based on a claim of “inherent jurisdiction,” then that claimed justification should likewise heighten the need for review. The source, scope and limits of any such jurisdiction would need to be explored and explained.

Petitioner might set forth a “parade of horrors” by contending that finding a lack of jurisdiction now would leave sex offenders “without a remedy.” Such hyperbole should not deter review. If sex offenders are worthy of *Bodyke* relief from a reclassification, they could obtain declaratory and injunctive relief pursuant to a properly filed civil complaint. Additionally, if jurisdiction is deemed “inherent” in the court that originally classified the offender, the offender could file a motion in that court. But there is no reason to cut jurisdictional corners by concocting a purported “inherent jurisdiction” for courts to entertain “petitions” filed by offenders classified by other Ohio courts.

**The issue of jurisdiction is before this Court in *State v. Palmer*, No. 10-1660**, a case in which the in-county petitioner is contending that his petition should have been granted and the State is contending that the common pleas court had no jurisdiction due to the *Bodyke/Chojnacki* severance. This Court has unqualifiedly granted review in *Palmer*. This Court would be justified to grant and hold the present case pending *Palmer*.

On the other hand, the present case involves an out-of-county petitioner. Granting review and allowing briefing and argument would be justified to allow the parties to explore the jurisdictional complications that are specific to out-of-county petitioners.

The present case raises substantial constitutional questions regarding the jurisdiction of the common pleas court. Answering those questions would also have great public or general interest and would benefit the bench and bar.

## STATEMENT OF FACTS

In 1998, petitioner was convicted on one count of rape in Morgan County, the victim being less than 13 years old. The court sentenced petitioner to nine years. The court indicated that petitioner was a sexually oriented offender.

Following the passage of Senate Bill 10, defendant was reclassified as a Tier III offender, rape being a Tier III offense. R.C. 2950.01(G)(1)(a). He filed a petition contesting reclassification in Franklin County Common Pleas Court. The State filed a memorandum opposing the petition.

After a stay of proceedings, and after this Court decided *Bodyke*, the court granted the petition in an entry filed on July 6, 2010, without holding a hearing and without notice to the State. The entry wrongly stated that petitioner's 10-year registration duty began in 1998 (rather than after his release from his nine-year prison term). Claiming that petitioner had completed his 10-year registration duty, the court ordered that petitioner's name be removed from all Ohio sex-offender registries and databases.

The State appealed, raising four assignments of error, including the lack of jurisdiction after the severance of the petition-contest procedures, and including the errors related to when the duty to register began and whether the order removing him from all databases was overbroad.

The Tenth District conceded that the petition process has been severed, but it still concluded that petitioners like Hosom are entitled to relief. The court sustained the State's assignments of error related to the beginning of the duty to register and the removal-from-database issue. A timely motion to certify conflict remains pending.

## ARGUMENT

**First Proposition of Law:** The decision in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, as interpreted in *Chojnacki v. Cordray*, 126 Ohio St.3d 321, 2010-Ohio-3212, has resulted in the entire severance of the petition-contest mechanisms created by R.C. 2950.031(E) and R.C. 2950.032(E). As a result, offenders cannot proceed under previously-filed petition contests, cannot be afforded relief in such petition contests, and appellate courts must vacate for lack of jurisdiction any lower court rulings already rendered on such petitions. Offenders seeking judicial relief from application of the new registration scheme must resort to another procedural mechanism. (*State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, limited)

**Second Proposition of Law:** The statutory authority to file a petition contesting reclassification has been severed. Absent the institution of a properly-filed civil case, a court that neither convicted nor classified the offender lacks jurisdiction to grant relief from reclassification.

*Bodyke* and *Chojnacki* have created serious complications for petition-contest proceedings initiated in the trial court by severing R.C. 2950.031 and R.C. 2950.032 in their entirety, including the petition-contest procedures created in those very statutes.

### A.

In the weeks after *Bodyke*, there had been some doubt about whether *Bodyke* had accomplished a facial severance of R.C. 2950.031 and R.C. 2950.032 in their entirety. Although language to that effect was set forth in the three-justice plurality opinion, the plurality did not have a fourth vote for that language. Justice Pfeifer's concurrence in judgment merely concurred in the final result, "Judgments reversed", not in all of the reasoning that the plurality used to reach that result. And although Justice O'Donnell concurred in the holding that there was a separation-of-powers violation, he did not concur in the remedy portion of the plurality opinion discussing severance.

But doubts about facial severance of R.C. 2950.031 and R.C. 2950.032 went away in

light of *Chojnacki*, in which six justices concluded that *Bodyke* “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.”

*Chojnacki* makes it clear that the severance extends to the petition-contest provisions as well. The issue in *Chojnacki* was whether the offender had a right to counsel for the petition-contest hearing. The Court found the issue moot because “[t]he reclassification hearing which has resulted in this appeal and the related certified question arose under the *now-severed provisions* of R.C. 2950.031 and R.C. 2950.032.” *Chojnacki*, at ¶ 6 (emphasis added). The import of this language is that there should be no petition contest and no petition-contest hearing because those procedures arise under R.C. 2950.031(E) and R.C. 2950.032(E), which are “now-severed provisions.”

Per the *express* and *unqualified* facial severance language of *Bodyke/Chojnacki*, R.C. 2950.031(E) and R.C. 2950.032(E) now stand severed. The common pleas court could not entertain the “petition” based thereon. The Tenth District should have sustained the State’s first assignment of error and vacated the common pleas court’s ruling for lack of jurisdiction.

#### B.

Petitioner might claim that the common pleas court had inherent jurisdiction to grant him relief, but *Bodyke* did not purport to rely on any inherent-jurisdiction approach, and the common pleas court could not have any conceivable inherent authority to address a case involving an offender convicted and/or classified in another county. Such a theory of inherent jurisdiction creates extreme doctrinal difficulties for sex offenders.

First, nothing in such a theory would justify a common pleas court, acting post-*Bodyke*, to “grant” a “petition to contest reclassification.” Such a petition invokes a special

statutory proceeding under R.C. 2950.031(E) or R.C. 2950.032(E), and that proceeding has now been wholly severed. The “petition” simply cannot be “granted” after such severance.

Second, this petitioner cannot benefit from such a theory of inherent jurisdiction. Pursuant to R.C. 2950.031(E), petitioner filed his “petition” in his county of residence or domicile. At most, only a sentencing court that originally classified the offender would have “inherent” authority to reinstate the original classification.

The court that first classified the petitioner would be the only court potentially having “inherent” jurisdiction because that court was the first to have the classification issue. Under the jurisdictional-priority rule, “[a]s between [state] courts of concurrent jurisdiction, the tribunal whose power is first invoked by the institution of prior proceedings acquires jurisdiction, to the exclusion of all other tribunals, to adjudicate upon the whole issue and to settle the rights of the parties.” *State ex rel. Racing Guild of Ohio v. Morgan* (1985), 17 Ohio St.3d 54, 56, quoting *State ex rel. Phillips v. Polcar* (1977), 50 Ohio St. 2d 279.

Third, a theory of continuing jurisdiction potentially would allow a court itself to modify the prior classification. This theory of jurisdiction is consistent with a continuing control over the prior order that would allow modification in light of changed circumstances. In that respect, any prior classification and “registration order” would be analogous to injunctive relief. No one has a “vested right” in prospective injunctive relief, as such relief necessarily operates in futuro. *Landgraf v. USI Film Products* (1994), 511 U.S. 244, 273-74. Prospective injunctive relief based on statutory law is subject to modification or vacation when a significant change in the underlying statutory law has occurred, even when the original injunction was the result of a consent decree. *Horne v. Flores* (2009), 129 S.Ct. 2579, 2593; *Agostini v. Felton* (1997), 521 U.S. 203, 215; Civ.R. 60(B)(4). As a result, an

invocation of continuing jurisdiction comes with the prospect of the court adopting the legislative modification and itself reclassifying the offender to Tier I, Tier II, or Tier III in line with the revamped registration scheme. Such a judicial change could not violate the separation of powers, as the court itself would be changing the earlier classification.

In this case, even if the Franklin County court had inherent jurisdiction, there would then be a need to remand the case to the lower court for that court to update petitioner's classification in a manner consistent with current law.

Fourth, even under a theory of "inherent" jurisdiction, the common pleas court that originally classified the offender would have no authority to issue *further* orders that do more than what it originally had done. For example, if the original order did not calculate an end-date of the registration duty, then neither should a court acting under "inherent jurisdiction" calculate one. While *State ex rel. Pfeiffer v. Common Pleas Court* (1968), 13 Ohio St.2d 133, describes a court's inherent power "to enforce its own proper orders," such power would extend only so far as needed to restore what it had done before.

Nothing in the cases likely to be cited by petitioner would authorize the court to entertain what amounts to a new civil action instituted by "petition." Cases like *Pfeiffer* assume that the court has basic jurisdiction over a case originally and that, within that case, it has inherent authority to preserve judicial powers and processes and to protect the litigants. They do not assume that a court can reach out and issue declaratory judgments and order injunctive relief as to third parties in the absence of a properly instituted civil action. Even in properly-instituted civil proceedings for injunctive relief, the civil court cannot issue a new injunction in the case after final judgment. *Hikmet v. Turkoglu*, 10th Dist. No. 09AP-1104, 2010-Ohio-4514.

In the end, no statute authorizes the kind of broad, never-ending jurisdiction that petitioner will likely argue for here, especially as to courts that did not originally classify the offender. See Article IV, Section 4, Ohio Constitution (“The courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.”). Recognition of such a broad, never-ending jurisdiction is not justifiable by claims of “inherent” authority, especially as to courts that did not originally classify the offender.

C.

This Court has not already ruled on the jurisdictional question. *Bodyke* did not mention at all the petition-contest process that the offenders invoked under R.C. 2950.031(E). The word “petition” was not even mentioned. *Bodyke* therefore does not resolve the jurisdictional objection that the *Bodyke/Chojnacki* decisions have created through facial severance. The State’s arguments here represent the next step in this line of cases, pressing the lack-of-jurisdiction issue in light of the facial severance and in light of the fact that the Franklin County court had not originally classified the offender.

Petitioner likely will argue that the State’s lack-of-jurisdiction argument is “illogical” given what this Court did in *Bodyke* by providing relief to the offenders in that case and given this Court’s many summary dispositions based on *Bodyke*. The fact remains, however, that facial severance is an accomplished fact after *Bodyke/Chojnacki*. These statutes simply do not exist anymore and therefore do not provide a basis for jurisdiction. And, as stated above, *Bodyke* could not have been ruling on a purported inherent jurisdiction as to out-of-county offenders, as all three of the *Bodyke* offenders filed in their court of conviction.

D.

This Court would not have created an unprecedented extension of “inherent jurisdiction” by mere implication, as this Court has no “implied” precedents. In *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, this Court specifically stated that the “perceived implications” of decisions and summary dispositions are not controlling:

{¶ 10} We recognize that this court remanded for resentencing some cases in which the initial sentencing by the trial court had occurred after *Blakely* was decided, but where the defendant had seemingly failed to object on *Blakely* grounds to the sentence imposed. \* \* \*. However, this court did not then definitively resolve the issue presented by this case; thus, it is appropriate to do so now.

{¶ 11} Both *Payne* and the majority of Ohio’s appellate districts have construed our silence as to remands as settling this issue. In doing so, they have overlooked our holding that “[a] reported decision, although a case where the question might have been raised, is entitled to no consideration whatever as settling \* \* \* a question not passed upon or raised at the time of the adjudication.” *State ex rel. Gordon v. Rhodes* (1952), 158 Ohio St. 129, \* \* \* paragraph one of the syllabus.

{¶ 12} Thus, we are not bound by any perceived implications that may have been inferred from *Foster*. \* \* \*

As further stated in *B.F. Goodrich v. Peck* (1954), 161 Ohio St. 202, paragraph four of the syllabus: “A reported decision, although in a case where the question might have been raised, is entitled to no consideration whatever as settling, by judicial determination, a question not passed upon at the time of the adjudication.”

In *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, this Court again refused to give precedential effect to a summary reversal. The Court emphasized that the summary reversal had not come after full briefing and that, under *Payne*, a “summary-remand

decision of this court does not settle for future cases unaddressed issues \* \* \*.” This Court rejected the notion that its earlier summary reversal “implicitly” created precedent.

In light of *Payne* and *Lester*, unless an appellate decision actually takes up and decides the legal issue, the decision “is entitled to no consideration whatever as settling” that legal issue. Notions of “implicit” precedent are simply incorrect.

This no-implicit-precedent concept applies even to jurisdictional questions. The *Payne* and *Lester* Courts both cited *State ex rel. United Auto., Aerospace & Agricultural Implement Workers of Am. v. Bur. of Workers' Comp.*, 108 Ohio St.3d 432, 2006-Ohio-1327, ¶ 46, which agreed with the United States Supreme Court on this point, recognizing that “when questions of jurisdiction have been passed on in prior decisions sub silentio, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.” *Id.* (internal quotation marks omitted). Such cases “lack precedential effect.” *Id.* “[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect”. *Id.* (quoting another case).

“When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed.” *Arizona Christian School Tuition Organization v. Winn* (2011), \_\_\_ U.S. \_\_\_ (Slip Op. at 17). In short, there are no “implicit” precedents, even on jurisdictional questions.

*Bodyke* itself had not addressed any basis for jurisdiction to entertain such “petitions.” To be sure, this Court provided appellate relief to the offenders in *Bodyke* and to many offenders in subsequent summary dispositions in petition-contest-based appeals, but it did not rule on the critical jurisdictional question now being presented here.

Decisions that merely assume the existence of jurisdiction do not create precedent on the

jurisdictional question. There are no “implicit” precedents, even on jurisdictional issues.

E.

The Tenth District’s focus in other cases on the pre-*Bodyke* filing of the petition is also flawed. Regardless of when the “petition” was filed, the Tenth District was remanding the case for the common pleas court to grant the “petition” now. But, after severance, the once-existing statutes simply cannot supply any jurisdiction for the common pleas court to act or for the appellate court to order the granting of a “petition.”

The pre-*Bodyke* filing of the “petition” is irrelevant for the additional reason that an ouster of the trial court’s jurisdiction even carries over to the appellate court when the case is on direct review. As stated in *Landgraf*, 511 U.S. at 274:

We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed. Thus, in *Bruner v. United States*, 343 U.S. 112, 116-117 (1952), relying on our “consistent” practice, we ordered an action dismissed because the jurisdictional statute under which it had been (properly) filed was subsequently repealed. See also *Hallowell v. Commons*, 239 U.S. 506, 508-509 (1916); *Assessors v. Osbornes*, 76 U.S. 567 (1870). \* \* \* Application of a new jurisdictional rule usually “takes away no substantive right but simply changes the tribunal that is to hear the case.” *Hallowell*, 239 U.S. at 508. Present law normally governs in such situations because jurisdictional statutes “speak to the power of the court rather than to the rights or obligations of the parties,” *Republic Nat. Bank of Miami*, 506 U.S. at 100 (THOMAS, J. , concurring).

(Parallel citations and footnote omitted)

“A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only.” *Firestone Tire & Rubber Co. v. Risjord* (1981), 449 U.S. 368, 379-80. “[S]ubject

matter jurisdiction \* \* \* can be raised at any time, and when raised, the issue is not whether the court had jurisdiction at some time in the past, but whether the court today still has jurisdiction.” *Mills v. Maine* (C.A.1, 1997), 118 F.3d 37, 49. Thus, courts on direct review must apply current law governing jurisdiction, and so an appellate court cannot properly draw a distinction based on when the “petition” was filed.

F.

A continuing problem is posed by the Tenth District’s memorandum decision in *Core v. State* (Mar. 1, 2011), 10<sup>th</sup> Dist. No. 09AP-192. In that memo decision, the *Core* panel denied the State’s motion to certify conflict based on the Twelfth District’s *Lyttle* decision. For a discussion of the many flaws in the *Core* panel’s memo decision, see the State’s appeal in *Core v. State*, Sup.Ct. No. 11-586.

Because the State expects the Tenth District to deny its pending motion to certify conflict based on a conclusory citation to the flawed *Core* memo decision, the State here will address the main problems with that memo decision.

In denying certification on the jurisdiction issue, the *Core* panel believed that this Court “has, at minimum, implicitly (if not explicitly) rejected the state’s argument that severance of R.C. 2950.031 and 2950.032 deprived the common pleas courts of jurisdiction \* \* \*.” But the State had cited *Payne*, in which this Court specifically stated that “perceived implications” are not controlling. There are no implicit precedents, even on jurisdictional questions. This point was missed by the *Core* panel.

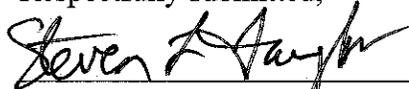
The *Core* panel took its concept of “implicit” precedent so far that it concluded that this Court had *actually decided* the jurisdictional question by way of an unexplained order denying reconsideration in regard to an order declining discretionary review in two

State's appeals. This Court can decline to accept review of a case on its discretionary docket for any number of reasons, including docket control. This is why an order declining review is not a comment on the merits, see Sup.Ct.R.Rep.Op. 8(B), and why an order denying reconsideration in that regard would not be a comment on the merits either. But the *Core* panel actually believes that such orders have law-giving significance, a conclusion that is far removed from the concept of binding precedent discussed in *Payne*.

Unless this Court intervenes, the State expects that the *Core* memo decision will continue to be a font of error, all flowing from a misunderstanding of what constitutes precedent. So far, three motions to certify conflict have been incorrectly denied based on the *Core* memo decision, in *Core* itself (now Sup. Ct. No. 11-586), in *Cook v. State* (now Sup. Ct. No. 11-594), and in *Powell v. State* (being filed here today). The same erroneous denial of certification based on *Core* will likely occur in the present case.

While nominally purporting to follow this Court's precedents, the Tenth District is doing the opposite by disregarding this Court's decision in *Payne* and similar cases.

Respectfully submitted,



STEVEN L. TAYLOR 0043876 (Counsel of Record)  
Counsel for Appellant

#### CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered on this 6<sup>th</sup> day of May, 2011, to office of Allen Adair, 373 South High Street, 12<sup>th</sup> Floor, Columbus, Ohio 43215, counsel for appellee.



STEVEN L. TAYLOR

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

MAR 29 PM 12:45  
CLERK OF COURTS

Roy E Hosom,

Plaintiff-Appellee,

v

State of Ohio,

Defendant-Appellant.

No 10AP-671  
(C P C No 08MS-01-0152)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on March 29, 2011, the state's first and second assignments of error are overruled, the third and fourth assignments of error are sustained, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part. This cause is remanded to that court to issue an order reinstating appellee's reporting requirements as a sexually oriented offender. Costs shall be assessed equally between the parties.

SADLER, J., BRYANT, P J , and TYACK, J.

By   
\_\_\_\_\_  
Judge Lisa L. Sadler

m

Tot. Circuit

20760 - K74

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

FILED  
2011 MAR 29 PM 12:37  
CLERK OF COURTS

Roy E Hosom,

Plaintiff-Appellee,

v.

State of Ohio,

Defendant-Appellant.

No 10AP-671  
(C P C No 08MS-01-0152)  
(REGULAR CALENDAR)

D E C I S I O N

Rendered on March 29, 2011

*Ron O'Brien*, Prosecuting Attorney, and *Kimberly Bond*, for appellant.

*Yeura R. Venters*, Public Defender, and *Allen V. Adair*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Appellant, state of Ohio, filed this appeal seeking reversal of a judgment by the Franklin County Court of Common Pleas granting the petition of appellee, Roy E Hosom, challenging his reclassification as a Tier III sex offender. For the reasons that follow, we affirm in part and reverse in part.

A-2

{¶2} In 1998, appellee entered a plea of guilty and was convicted in the Morgan County Court of Common Pleas on one count of rape. Appellee was sentenced to a term of nine years of incarceration and was designated a sexually oriented offender. Pursuant to the provisions of Ohio's version of the Adam Walsh Act ("AWA"), appellee received a notification from the Ohio Attorney General informing him that he had been reclassified as a Tier III sex offender.

{¶3} Appellee filed a pro se petition challenging this classification, along with a motion seeking to stay enforcement of the community notification provisions applicable to him under the AWA. The state filed a memorandum opposing the petition and motion to stay. The trial court appointed counsel for appellee, who filed a second petition, which included a request for relief from the AWA notification requirements.<sup>1</sup>

{¶4} The trial court granted the stay of the notification requirements, and subsequently stayed the case pending the outcome of litigation pending in various cases. On July 6, 2010, the trial court, without holding a hearing, lifted the stay and granted appellee's petition. The court relied on the decision by the Supreme Court of Ohio in *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, in which the court found that the reclassification provisions of the AWA were unconstitutional. In its entry, the trial court concluded that appellee's reporting requirements as a sexually oriented offender had been completed, and directed that appellee's name be removed from any

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<sup>1</sup> We note that the case was incorrectly filed identifying the state as the plaintiff and appellee as the defendant. Since appellee filed this action, which is civil rather than criminal in nature, the case should more properly show appellee as the plaintiff and the state as the defendant.

sex offender databases, including those operated by the Franklin County Sheriff and the Ohio Attorney General.

{¶5} The state filed this appeal, asserting four assignments of error:

**FIRST ASSIGNMENT OF ERROR**

The trial court erred in granting the petition when it was based in major part on R.C. 2950.031(E), which is part of a statute that has been severed in its entirety.

**SECOND ASSIGNMENT OF ERROR**

The trial court erred in failing to conduct the hearing required by R.C. 2950.031 before granting defendant's petition.

**THIRD ASSIGNMENT OF ERROR**

The trial court erred in determining that defendant's duty to register commenced on September 28, 1998, and that the "registration duty is completed "

**FOURTH ASSIGNMENT OF ERROR**

The trial court erred in ordering that defendant's "name and personal information shall be removed from all of Ohio's sex offender registries and databases, including the databases of the Franklin County Sheriff and the Ohio Attorney General."

{¶6} Resolution of the state's first assignment of error requires consideration of the decisions by the Supreme Court of Ohio in *Bodyke* and *Chojnacki v Cordray*, 126 Ohio St.3d 321, 2010-Ohio-3212. In *Bodyke*, the court concluded that R.C. 2950.031 and 2950.032, which provided for reclassification of sex offenders by the Ohio Attorney General, were unconstitutional because they violated the separation of powers by allowing an executive branch official to change a judicially made designation regarding a defendant's sex offender status. *Bodyke* at ¶2. The court concluded that the

A-4

appropriate remedy was to sever R.C. 2950.031 and 2950.032, and return those defendants who had been reclassified by the Attorney General to their previous judicially designated status. *Id.*

{¶7} Shortly after *Bodyke* was decided, the court clarified the scope of the *Bodyke* remedy in *Chojnacki*. The issue in *Chojnacki* was whether the denial of appointed counsel to a party seeking to challenge a reclassification by filing a petition as set forth in R.C. 2950.031 and 2950.032 constituted a final appealable order. The court concluded that after the severance of R.C. 2950.031 and 2950.032 in *Bodyke*, any issues regarding the petition process for challenging a reclassification were moot. *Chojnacki* at ¶6.

{¶8} The state argues that after *Chojnacki's* clarification of the scope of the *Bodyke* remedy, the trial court in this case had no authority to rule on appellee's petition, and the petition should therefore have been dismissed. However, in our post-*Bodyke* and *Chojnacki* cases, we have drawn a distinction between the severance portion of the *Bodyke* remedy and that portion of the *Bodyke* remedy that ordered the sex offenders in that case to be returned to their previous judicially determined sex offender classifications. We have consistently recognized that, notwithstanding the severance of the statutory provisions under which the reclassification petitions were filed, petitioners such as appellee are entitled to orders directing their return to those previous classifications. *State v. Watkins*, 10th Dist. No. 09AP-669, 2010-Ohio-4187; *State v. Miliner*, 10th Dist. No. 09AP-643, 2010-Ohio-6117; *State v. Hazlett*, 10th Dist. No. 09AP-1069, 2010-Ohio-6119; *Core v. State*, 10th Dist. No. 09AP-192, 2010-Ohio-6292; *Cook v. State*, 10th Dist. No. 10AP-641, 2011-Ohio-906

{¶9} Consistent with this precedent, the trial court did not err when it concluded that appellee was entitled to an order directing that he be returned to his previous sex offender classification. Accordingly, the state's first assignment of error is overruled.

{¶10} In its second assignment of error, the state argues that the trial court erred when it granted appellee's petition without first holding a hearing as required by R.C. 2950.031(E). That statutory section provides that a petitioner challenging a reclassification by the Attorney General is entitled to a hearing as a matter of right. Thus, under the statute, it is clear that a court could not deny a petition without holding a hearing, the state by its assignment of error is essentially arguing the inverse – that the court is also required to hold a hearing prior to the granting of a petition. Thus, although the state's assignment of error is worded, as is the statute, in terms of the petitioner's right to a hearing, the state is essentially arguing that the statute also provides the state with a right to a hearing.

{¶11} However, this is the type of issue found to be moot under *Bodyke* and *Chojnacki*. Because the petition process set forth in R.C. 2950.031 and 2950.032 was severed, any issues relating to that petition process, including whether the statute provides the state with the same right to a hearing as a petitioner, no longer constitute any justiciable controversy and are therefore moot.

{¶12} Consequently, the state's second assignment of error is overruled as moot.

{¶13} In its third and fourth assignments of error, the state takes issue with the trial court's order finding that appellee had completed his reporting requirements, and was therefore no longer required to register as a sexually oriented offender.

Specifically, the state argues that appellee's duty to register as a sexually oriented offender did not arise until his release from incarceration in 2007, and the ten-year reporting period would therefore run until 2017. Similarly, the state argues in its fourth assignment of error that the trial court's order directing the Franklin County Sheriff and the Ohio Attorney General to remove appellee's name from any sex offender databases operated by those officials was an error because it was premised on the idea that appellee had completed his reporting requirements.

{¶14} Appellee has conceded these two errors, agreeing that appellee's required reporting period as a sex offender did not begin until he was released from incarceration. Consequently, the state's third and fourth assignments of error are sustained, and this case must be remanded for the trial court to issue an order reinstating appellee's reporting requirements as a sexually oriented offender.

{¶15} Having overruled the state's first two assignments of error and sustained the state's third and fourth assignments of error, we hereby affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas, and remand this case for further proceedings consistent with this opinion.

*Judgment affirmed in part,  
reversed in part;  
cause remanded with instructions.*

BRYANT, P.J , and TYACK, J., concur.

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A-7