

IN THE SUPREME COURT OF OHIO
2011

ORIGINAL

STATE OF OHIO,

Case No. 10-1660

Respondent-Appellee (No. 09AP-956)
Plaintiff-Appellee (No. 09AP-957)

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

-vs-

PAUL E. PALMER,

Court of Appeals
Case No. 09AP-956
09AP-957

Petitioner-Appellant (No. 09AP-956)
Defendant-Appellant (No. 09AP-957)

MERIT BRIEF OF RESPONDENT/PLAINTIFF/APPELLEE STATE OF OHIO

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STATEMENT OF FACTS

Effective in 1997, House Bill 180 enacted “Megan’s Law” for Ohio as part of a completely revamped R.C. Chapter 2950. The law set up a list of “sexually oriented offenses,” see former R.C. 2950.01(D) (eff. 1-1-97), and provided that persons convicted of such offenses would at least be required to register their address, annually verify their address for 10 years, and provide notice of change of address. Former R.C. 2950.04, .05, .06, & .07 (all eff. 7-1-97). The law also provided for a hearing at the time of sentencing, or upon recommendation of the ODRC for current prisoners, to determine whether the offender was a habitual sex offender for having a prior sex offense conviction or whether the offender was a “sexual predator” because he was likely to commit one or more sex offenses in the future. Former R.C. 2950.09 (eff. 1-1-97). The registration period for habituals was 20 years with annual verification (later increased for almost all such offenders to lifetime registration in 2003). The registration period for predators was for life with quarterly verification. Predators were all subject to community notification, while habituals were subject to such notification if the court ordered it. Former R.C. 2950.11 (eff. 1-1-97). Another category was later added for “aggravated sexual oriented offense” in 2002, with quarterly, lifetime registration and notification requirements. See former R.C. 2950.01(O).

In June 2007, the General Assembly passed, and the Governor approved, Senate Bill 10, often referred to as the Adam Walsh Act (“AWA”). The act was partly effective July 1, 2007, and the remainder was effective January 1, 2008. Instead of having three levels for “sexually oriented offenders,” “habitual sex offenders,” and “sexual predators,” the new law employs three “Tiers,” and it assigns offenders to such tiers largely based on the offense of

conviction and/or the number of convictions. See R.C. 2950.01(E), (F), & (G).

Effective January 1, 2008, Tier I offenders must register for fifteen years and must periodically verify their residence address with the sheriff on an annual basis. R.C. 2950.05(B)(3); R.C. 2950.06(B)(1). Tier II offenders must register for twenty-five years and periodically verify every 180 days. R.C. 2950.05(B)(2); R.C. 2950.06(B)(2). Tier III offenders must register for the rest of their life and periodically verify every 90 days. R.C. 2950.05(B)(1); R.C. 2950.06(B)(3). Tier III offenders are also subject to community notification. R.C. 2950.11. Sexual battery is a Tier III offense as a matter of law under the new scheme. R.C. 2950.01(G)(1)(a).

These consolidated appeals arise from two proceedings. In Common Pleas No. 95CR-5474, which became Appeals No. 09AP-956, Palmer pleaded guilty to sexual battery, a third-degree felony. (Trial Rec. 37-38) The court entered the judgment of conviction in January 1996; the sentence was 1.5 years with 112 days of credit. (Trial Rec. 43-45)

Under No. 95CR-5474, Palmer filed a petition contesting reclassification on March 6, 2008. (Trial Rec. 57-59) Palmer contended that he had now been classified as a Tier III offender under AWA. (Id.) He raised various constitutional and other challenges. (Id.)

The State filed a memorandum opposing the petition. (Trial Rec. 68-69)

Nothing was happening in the petition-contest case when, in a new criminal case under No. 09CR-3152, which became Appeals No. 09AP-957, Palmer was indicted in May 2009 on two counts for failing to provide notice of change of address and for failing to periodically verify his address. (Trial Rec. 2) Both counts alleged that the date of the offense was March 26, 2009, and both alleged that he was required to comply with the

registration scheme. (Id.) Both counts alleged that the most serious offense that was a basis for registration was the 1996 sexual-battery conviction. (Id.)

Palmer now filed on June 23, 2009, a motion for immediate disposition and a request for hearing under No. 95CR-5474. (Trial Rec. 86, 87) Palmer contended that he was not subject to registration, verification, or change-of-address requirements under the new law. (R. 87) Based on *State v. Champion*, 106 Ohio St.3d 120, 2005-Ohio-4098, Palmer contended that he had not had any duty to register under Megan's Law because his sexual-battery sentence expired before July 1, 1997. (Id.) Palmer contended that AWA only applied to offenders who were under a prior duty to register. (Id.)

Making the same arguments, Palmer also filed a motion to dismiss the indictment in No. 09CR-3152 on July 15, 2009. (Trial Rec. 26)

On July 28, 2009, the State filed a memorandum opposing the motion to dismiss in No. 09CR-3152. (Trial Rec. 34) The State contended that the duty-to-register issue could not be determined by pretrial motion to dismiss. (Id.) The State also contended that Palmer in fact had a duty to register under AWA. (Id.) AWA had deleted the statutory language that had prompted the *Champion* decision, and AWA unqualifiedly applied to sexually oriented offenses whenever the convictions occurred. (Id.)

Acknowledging that the State was relying on the same arguments in both cases, the defense filed a reply in the petition-contest proceeding in No. 95CR-5474 on August 21, 2009, disputing the State's duty-to-register contentions. (Trial Rec. 95)

Both cases came on for hearing on September 16, 2009, with the State opposing relief in both cases. (9-16-09 Tr. 4-9) The court found merit in Palmer's legal arguments.

(Id. 10-11) The court instructed Palmer's counsel to prepare entries. (Id. 11)

Later on September 16, 2009, entries were approved and filed in the two cases. In the petition-contest proceeding in No. 95CR-5474, the entry provided, as follows:

For good cause shown, the Court hereby GRANTS Defendant-Petitioner's relief requested in Paragraph 20 of his PETITION TO CONTEST RECLASSIFICATION and declares that Defendant-Petitioner is not subject to Revised Code Chapter 2950 based on his 1995 conviction. Furthermore, the defendant is not under any statutory duty to verify his current address or to register as required by R.C. 2950.04 through 2950.06. It is hereby ordered that Defendant-Petitioner's name be removed from all sexually oriented lists maintained by the local, state or federal government.

(Trial Rec. 97) In the criminal case in No. 09CR-3152, the entry provided, as follows:

For good cause shown, the Court hereby grants Defendant's Motion to Dismiss. The defendant is not under any statutory duty to verify his current address or to register as required by Revised Code Chapter 2950. It is hereby ordered that Defendant-Petitioner's name be removed from all sexually oriented lists maintained by the local, state or federal government. Defendant is to be released forthwith on this case.

(Trial Rec. 48-49)

The State filed a timely notice of appeal in both cases. (Trial Rec. 99 in No. 95CR-5474; Trial Rec. 53 in No. 09CR-3152) In the consolidated appeals, the State contended in the first assignment of error that the trial court had erred in the criminal case in dismissing the indictment based on the conclusion it would not be able to prove the duty-to-register element. (See State's Merit & Reply Briefs in each appeal) In the second assignment of error, the State contended that the trial court had erred in the petition-contest case in concluding that petitioner had no duty to register. (Id.) In the third assignment of error, the

State argued that the court's order was overbroad in ordering the removal of Palmer's name from "all sexually oriented lists," especially any such lists by the federal government. (Id.)

On June 1, 2010, two days before *State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, the Tenth District sustained all of the assignments of error. The Tenth District later denied Palmer's post-*Bodyke* application for reconsideration.

ARGUMENT

Response to First Proposition of Law: (A) The unqualified language of R.C. 2950.04(A)(2) applies the registration duty to all offenders who were convicted of sexually oriented offenses, regardless of when the offense or conviction occurred. Language in prior versions tying the registration duty to the date of the sentencing hearing or release from prison has been deleted, thereby rendering the holding of *State v. Champion*, 106 Ohio St.3d 120, 2005-Ohio-4098, inapposite.

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(D) The decision in *Bodyke*, 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 and cannot be afforded relief in such petition contests. Those offenders seeking judicial relief from application of the new registration scheme to them must resort to another procedural mechanism. (*State v. Bodyke*, 126 Ohio St.3d 266, 2010-Ohio-2424, limited)

Palmer's first proposition of law includes two "merits" issues of significance. The first is whether Palmer has a duty to register under the new statutory scheme as effective January 1, 2008. The second is whether *Bodyke* applies to offenders like Palmer who had no

prior classification, judicial or otherwise.

A question of jurisdiction overshadows these merits issues and must be decided first. When the lower court lacks jurisdiction, the appellate court has “jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.” *Steel Co. v. Citizen for Better Env’t* (1998), 523 U.S. 83, 95 (quoting other cases). “When an appellate court determines that the trial court was without jurisdiction, it is not proper for the reviewing court to decide the merits of the case.” *Stancourt v. Worthington City Sch. Dist. Bd. of Educ.*, 164 Ohio App.3d 184, 2005-Ohio-5702, ¶ 18 (quoting another case); *Bretton Ridge Homeowners Club v. DeAngelis* (1985), 22 Ohio App.3d 65, 68-69; *Bartlett v. Snouffer* (1945), 78 Ohio App. 384, 386.

“Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. * * * For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires.” *Steel Co.*, 523 U.S. at 101. Thus, jurisdictional problems must come to the forefront.

In light of *Bodyke*, as interpreted by *Chojnacki v. Cordray*, 126 Ohio St.3d 321, 2010-Ohio-3212, it becomes clear that the petition-contest procedure invoked by Palmer under R.C. 2950.031(E) has been severed. The end result is that the common pleas court had no authority to grant Palmer any relief under the “petition” he filed pursuant to that statute. And even if some form of “inherent jurisdiction” survived the *Bodyke/Chojnacki*

severance, such jurisdiction would have included the authority to update the prior classification or non-classification to reflect current law.

A. *Bodyke*, *Chojnacki*, and Total Severance

The lead opinion in *Bodyke* was a plurality opinion having only the vote of three of the justices. But a fourth justice concurred in the syllabus and judgment, and so the syllabus provided the following law on the issue of separation of powers:

2. R.C. 2950.031 and 2950.032, which require the attorney general to reclassify sex offenders who have already been classified by court order under former law, impermissibly instruct the executive branch to review past decisions of the judicial branch and thereby violate the separation-of-powers doctrine.

3. R.C. 2950.031 and 2950.032, which require the attorney general to reclassify sex offenders whose classifications have already been adjudicated by a court and made the subject of a final order, violate the separation-of-powers doctrine by requiring the opening of final judgments.

Language in paragraphs 2 and 66 of the *Bodyke* plurality indicated that R.C. 2950.031 and R.C. 2950.032 had been facially severed in their entirety. But that language lacked a fourth vote, and therefore a facial severance could not occur through such statements. See *Kraly v. Vannewirk* (1994), 69 Ohio St.3d 627, 633.

Doubts about facial severance of R.C. 2950.031 and R.C. 2950.032 went away in light of *Chojnacki*. Six justices in *Chojnacki* 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.” Six justices now supported facial severance.

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 “now-severed provisions.”

Palmer might argue that no part of *Bodyke* found the petition-contest provisions unconstitutional. The State would agree, and the severance of the entire statutes was error. In fact, no part of these statutes should have been facially severed; at most, only paragraph (A) as applied to offenders having prior judicial classifications should have been severed. R.C. 1.50.

But things have gone far past this point. The language indicating facial severance in the *Bodyke* plurality makes no distinction between the AG’s role under paragraph (A) and the petition-contest procedures in paragraph (E). The *Bodyke* language severed the entire statutes, a view which plainly and expressly was adopted in *Chojnacki*. Per the *express* facial severance language of *Bodyke/Chojnacki*, R.C. 2950.031(E) and R.C. 2950.032(E) now stand severed. Per that language, the trial court lacked statutory authority to entertain the petition, and the appellate court would equally lack such authority. The “petition” should be dismissed.

B. No Inherent Jurisdiction in Criminal Cases

In the absence of statutory authority, Palmer might note that he filed his petition in criminal court and that such court would have “inherent jurisdiction.” But a claim of an inherent, unending post-judgment jurisdiction in a criminal court would be unprecedented.

A criminal court is a court of *law*, not a general court of equity. “A court of equity is in no sense a court of criminal jurisdiction.” *State ex rel. Chalfin v. Glick* (1961), 172 Ohio

St. 249, 252. “Except where there is express statutory authority therefor, equity has no criminal jurisdiction * * *.” Id. at 252 (quoting C.J.S.).

A criminal court does not have a roving commission to right all of the wrongs perceived by a defendant vis-à-vis how his conviction will purportedly be misused in an unconstitutional way. A criminal court does not have a general civil jurisdiction over the defendant, and such court has no jurisdiction to reach out and enjoin third parties administering the statutory scheme, especially when they have not been given notice and an opportunity to be heard. See, e.g., *State v. Thoman*, 10th Dist. No. 05AP-817, 2006-Ohio-1651, ¶ 11; *State v. DeMastry*, 5th Dist. No. 05CA15, 2005-Ohio-5175, ¶ 26 & n. 4; *State v. Cole*, 5th Dist. No. 2004-CA-108, 2005-Ohio-3048, ¶ 16. In short, the criminal court is not the criminal defendant’s all-purpose civil court.

Offenders filing petitions in their old criminal case might posit a theory of continuing jurisdiction based on the view that the criminal court classified them originally and therefore has the inherent jurisdiction to repel efforts by the General Assembly to undo the prior classification. Such a theory would be interesting, but it would create doctrinal difficulties for sex offenders. First, Palmer had no prior judicial classification, and so there was no prior judicial classification to “protect” here.

Second, nothing in such a theory would justify a common pleas court to “grant” the “petition to contest reclassification.” Such petitions invoked a special statutory proceeding under R.C. 2950.031(E) and R.C. 2950.032(E), and that proceeding has now been completely severed. The “petition” simply could not be “granted.”

Third, such a theory of inherent, continuing jurisdiction would allow the court itself

to modify its prior classification order. 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 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 reclassifying the offender as Tier I, Tier II, or Tier III in line with the revamped registration scheme. Such a judicial change would not violate the separation of powers, as the court itself would be changing its earlier order.

If this Court concludes that the trial court has inherent/continuing jurisdiction to entertain the “petition,” then the case should be remanded with instructions for the trial court to update the SORN classification to be consistent with the AWA Tier classification that is part of current statutory law. Palmer is a Tier III offender as a matter of law.

Nothing in the cases that are likely to be cited by Palmer would authorize the criminal court to entertain what amounts to a new civil action instituted by “petition.” Cases like *State ex rel. Pfeiffer v. Common Pleas Court* (1968), 13 Ohio St.2d 133, assume that the court has basic jurisdiction over the 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

criminal court can reach out without statutory authority and issue declaratory judgments and injunctive relief against third parties, especially after final judgment in the case.

In the end, a theory of inherent/continuing jurisdiction clashes with the notion discussed above that a court of criminal jurisdiction is not a general court of equity. The jurisdiction of the common pleas courts is as provided by law. 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.”). No statute authorizes the broad, never-ending jurisdiction that Palmer might posit here.

C. State not Contending that Palmer Lacks Other Judicial Remedies

The county public defender’s office has contended that the State is arguing that sex offenders should be left without a judicial remedy. This is a straw-man argument.

The State is *not* arguing that no judicial remedy is available. Instead, it is only arguing that relief cannot be granted under R.C. 2950.031(E) or R.C. 2950.032(E), the particular statutory provisions under which Palmer filed his “petition.”

Upon dismissal of a petition filed under R.C. 2950.031 or .032, the obvious judicial remedy to be sought would be declaratory and injunctive relief against being treated as a Tiered offender. But the office of the county public defender has contended in other cases that seeking declaratory/injunctive relief would be inadequate because, once such a civil complaint were filed, “[t]he state” would then “likely move[] to dismiss the action on grounds that there is no controversy remaining to be resolved.” This argument has implied that “the state” is engaging in a form of bait-and-switch, seeking the dismissal of the petition-contest action, only

then to seek dismissal of whatever declaratory or injunction action that might be filed later.

But the availability of such declaratory/injunctive relief is irrelevant to the State's argument here. The State narrowly points out the severance of the particular statute under which Palmer sought relief. Regardless of justiciability questions, this statutory action cannot proceed since the very statutory provisions allowing the proceeding have now been severed.

In addition, the same justiciability questions would hinder even petition-contest actions, if no live actual controversy continues to exist. Any question of non-justiciability would transcend the label of the proceeding, and lack of justiciability for one proceeding would mean that there is a lack of justiciability for the other as well. Given that non-justiciability would affect even petition contests, a red-herring about justiciability is irrelevant to the State's argument that statutory authority is now lacking to entertain "petitions."

D. Twelfth District Says No Jurisdiction in *Lyttle*

A true conflict exists between the Tenth and Twelfth Districts on this issue. In *Lyttle v. State*, 12th 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.~~

In a narrow respect, the two districts agree. Both agree that "no petition process

exists,” but they diverge from there. The Tenth District entertains sex-offender petition-based appeals and grants such offenders relief in such appeals. 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 be dismissed, as the common pleas court had no jurisdiction to rule on the petition to begin with.

E. Supreme Court has not Decided Jurisdictional Issue

Palmer likely will cite this Court’s actions in *Bodyke* and in subsequent summary dispositions as showing that this Court has already rejected the State’s no-jurisdiction argument. But it would be fundamentally incorrect to conclude that the Court has decided the jurisdictional issue by these actions. *Bodyke* did not reference the jurisdictional issue at all. It did not even reference the word “petition.” It was not ruling on the jurisdictional issue, and neither were the summary dispositions, which merely were based on *Bodyke*.

Issues often lurk in the record and are not decided by the appellate court. *Webster v. Fall* (1925), 266 U.S. 507, 511. Sometimes, an appellate court assumes issues without deciding them or simply does not address them. See, e.g., *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, ¶¶ 25-27 (validity of statute was assumed in earlier decision).

This Court has specifically rejected the concept of “implicit” precedent. In *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, the Court stated that the “perceived implications” of its *Foster* decision and later summary dispositions were not binding:

{¶ 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*. * * *

See, also, *B.F. Goodrich v. Peck* (1954), 161 Ohio St. 202.

In *State v. Lester*, 123 Ohio St.3d 396, 2009-Ohio-4225, ¶ 31, this Court refused to give precedential effect to an earlier summary reversal. The *Lester* 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. 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, stating 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). As stated in *Arizona Christian School Tuition Org. v. Winn* (2011), ___ U.S. ___, “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.” There are no “implicit” precedents, even on jurisdictional questions, and so *Bodyke* and the summary dispositions are not precedent on such questions.

The State’s arguments here represent the next step in this line of cases, with the State pressing the lack-of-jurisdiction issue in light of the facial severance.

F. Jurisdiction Ruling Would Be Applicable to Cases Pending on Direct Review

Some Tenth District decisions have contended that *Bodyke* apparently allows jurisdiction as to petitions filed before *Bodyke* was announced. “As best we can determine the desires of the Ohio Supreme Court, petitioners who filed their petitions prior to *Bodyke* being decided are entitled to the relief the Ohio Supreme Court granted to *Bodyke*.” *Cook v. Ohio*, 10th Dist. No. 10AP-641, 2011-Ohio-906, ¶ 9; *Powell v. State*, 10th Dist. No. 10AP-640, 2011-Ohio-1382, ¶ 2. But this Court has not addressed the jurisdictional issue at all. This Court’s silence cannot be turned into a nuanced ruling based on timing.

Any focus on the pre-*Bodyke* filing of a petition would be flawed. Regardless of when the “petition” was filed, this Court would be purporting to take actions well after the *Bodyke/Chojnacki* severance. But, after severance, the once-existing statutes could not supply any jurisdiction for the trial court to act on remand or for this appellate court to reinstate the trial court’s order under these now-severed statutes.

The pre-*Bodyke* filing of the “petitions” 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. Courts on direct review must apply current law governing jurisdiction, and so an appellate court should not draw a distinction based on when the “petitions” were filed. *Stella v. Kelley* (C.A. 1, 1995), 63 F.3d 71, 74 (“no conceivable bar to retroactive application of a ‘new,’ judicially declared rule”).

Palmer might rely on *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, ¶¶ 12

and 34, for the view that, once a tribunal obtains jurisdiction, its right to hear and determine the case is “perfect[ed]” and, “once conferred, it remains.” But this discussion assumes the existence of jurisdiction at the beginning of the case under a statute having the ability to confer such jurisdiction. When a statute is severed, the effect for pending cases is that the statute never was the law to begin with. *State v. Sullivan* (2001), 90 Ohio St.3d 502, 509. Jurisdiction was never “perfected” or “conferred” under the now-severed petition process.

G. Jurisdiction versus Merits

Some Tenth District decisions have “rejected” the State’s jurisdictional argument by contending that the offender is “entitled” to relief under *Bodyke*. See, e.g., *Wyatt v. State*, 10th Dist. No. 10AP-883, 2011-Ohio-2874, ¶ 10. But this language actually represents a refusal to decide the jurisdictional question by jumping directly to the merits. “It is axiomatic that courts will resolve questions of subject matter jurisdiction prior to determining the merits of a controversy.” *Hitt v. Tressler* (1983), 4 Ohio St. 3d 174, 175. “For in the absence of subject-matter jurisdiction, a court lacks the authority to do anything but announce its lack of jurisdiction and dismiss.” *Pratts*, ¶ 21. Even jurisdictional flaws related to “jurisdiction of the particular case” are “always reversible error on direct appeal * * *.” *Id.* ¶ 32. Addressing the merits first without resolving the jurisdictional issue “carries the courts beyond the bounds of authorized judicial action and thus offends fundamental principles of separation of powers.” *Steel Co.*, 523 U.S. at 94. Saying that a sex offender is “entitled” to *Bodyke* relief is no answer to the jurisdictional problem.

H. Core and Hazlett Memo Decisions Flawed

Two Tenth District panels have given lengthy memo decisions denying the State’s

Lyttle-based motions to certify a conflict based on their view that this Court has already decided the jurisdictional issue. *Hazlett v. State* (May 24, 2011), 10th Dist. No. 09AP-1069; *Core v. State* (Mar. 1, 2011), 10th Dist. No. 09AP-192. But several errors in these memo decisions weigh against following them.

The *Core/Hazlett* panels relied on this Court's denials of reconsideration in *State v. Adams*, Sup.Ct. No. 10-391, and *State v. Paul*, Sup.Ct. No. 10-506, as demonstrating that this Court has actually ruled on the jurisdictional issue. Concededly, when this Court declined review of the State's appeals in those cases after *Bodyke*, the State *did* seek reconsideration in part on the jurisdictional issue. This Court denied reconsideration. But there is no evidence that the Court "rejected the state's argument" by such denial, as the *Core/Hazlett* memo decisions contend.

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. Since the motions for reconsideration were denied without explanation in *Adams* and *Paul*, those denials have zero precedential value. Indeed, since this Court was merely denying reconsideration, it was merely letting stand its earlier decision not to accept review, a decision which in no way touched on the jurisdiction issue.

The *Core/Hazlett* panels' analysis of *Adams* and *Paul* was upside-down in another sense. The prior offenders in *Paul* and *Adams* had actually *won* relief based on their *invocation* of an AWA exemption, and so the State's other argument in seeking

reconsideration in *Adams* and *Paul* was that the offenders, per *Bodyke*, should be returned to their pre-AWA judicial classifications. If the decisions to decline review and deny reconsideration were really precedential, as the *Core/Hazlett* panels contended, such decisions declining review and denying reconsideration would reflect the conclusion that AWA *does* apply to prior judicially-classified offenders. The *Core/Hazlett* panels did not discuss this second aspect of the State's motions in *Adams* and *Paul*.

Based on *Adams* and *Paul*, the *Core/Hazlett* panels concluded that this Court has “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, as argued above, there are no “implied” precedents, even on jurisdictional issues..

I. R.C. 2950.11(F)(2)

Palmer’s “petition” was also partially based on seeking relief from community notification pursuant to R.C. 2950.11(F)(2). However, an analysis of this provision supports the view that it does not apply to offenders reclassified or newly classified by AWA. A number of the factors listed in R.C. 2950.11(F)(2) refer to the offense on which the offender is about to be sentenced. R.C. 2950.11(F)(2)(c), (d), (i). This language shows that this provision was meant to be employed at the time of sentencing by the sentencing court alone, not at later times. This Court has concluded that the sentencing court can employ this provision at the time of sentencing, but it has not decided whether the provision applies to offenders receiving a reclassification or new classification under AWA. *State v. McConville*, 124 Ohio St.3d 556, 2010-Ohio-958, ¶ 4 n. 1.

Even if a newly-classified offender can pursue relief under R.C. 2950.11(F)(2), the

relief would be limited. After the required hearing, the court at most could relieve a Tier III petitioner from community notification. It could not afford Tier III petitioners broader relief from registration requirements generally, and it could not afford any relief to Tier I or Tier II offenders, who did not face community notification.

Palmer made no effort to prove entitlement to relief from community notification anyway, and so the trial court's order cannot be upheld on that basis. The trial court lacked jurisdiction to rule on the "petition," and, therefore, the only proper order on appeal is to recognize the lack of jurisdiction, to vacate the Tenth District's merits ruling in the petition-based appeal, and to remand to the trial court with instructions to dismiss the "petition."

J. Statutory Duty to Register

The duty to register under Megan's Law hinged on language in former R.C. 2950.04(A)(1)(a), (b), and (c), which made the duty dependent on whether the offender was sentenced after July 1, 1997, whether the offender was released from prison from serving the sex-offense sentence after July 1, 1997, and/or whether the offender qualified as a habitual sex offender under the pre-existing registration scheme. In *Champion*, this Court emphasized the need for one of these time-related predicates in order for the registration law to apply. Even if the sex offender was released from prison after July 1, 1997, if the offender was only being released from the service of a non-sex-offense sentence, no duty to register applied upon release from prison.

Palmer bases his no-duty-to-register argument on this case law and statutory language. But such reliance is misplaced for at least two reasons. First, the duty to register imposed in current R.C. 2950.04(A)(2) is not dependent on a prior duty to register. Second,

the provisions upon which those cases relied, i.e., former R.C. 2950.04(A)(1)(a), (b), and (c), were *deleted* by AWA effective January 1, 2008, and therefore cannot be dispositive of any current duty to register. AWA *did* “overrule” *Champion* by deleting these provisions.

Regardless of whether prior law imposed a duty, the new AWA scheme effective January 1, 2008, did impose such a duty. R.C. 2950.04(A)(2) provides that convicted sex offenders must register in the counties where they reside, are temporarily domiciled, or are employed or attend school, and this duty applies, without limitation, to persons previously convicted of “sexually oriented offenses,” and expressly applies “[r]egardless of when the sexually oriented offense was committed * * *.” As stated in R.C. 2950.04(A)(2):

*(2) Regardless of when the sexually oriented offense was committed, each offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a sexually oriented offense shall comply with the following registration requirements described in divisions (A)(2)(a), (b), (c), (d), and (e) of this section: * * * (Emphasis added)*

This “regardless of” language makes the timing of Palmer’s sexually oriented offense irrelevant; whenever such offense or conviction occurred, Palmer must register.

Palmer points to provisions requiring that the AG reclassify offenders who were in prison on January 1, 2008, or who were required to register under the law as of July 1, 2007. See R.C. 2950.031, .032, and .033. But these reclassification provisions did not purport to limit the reach of the registration duty imposed by R.C. 2950.04(A)(2), which applies regardless of when the offense occurred.

Notably, R.C. 2950.043 specifically provides for the registration of *new* registrants who were convicted before December 1, 2007. R.C. 2950.043 provides:

If an offender or delinquent child registers with a sheriff

pursuant to section 2950.04 or 2950.041 of the Revised Code on or after December 1, 2007, if the offender or delinquent child previously has not registered under either section with that sheriff or any other sheriff, and if the offender or delinquent child was convicted of, pleaded guilty to, or was classified a juvenile offender registrant relative to the sexually oriented offense or child-victim oriented offense upon which the registration was based prior to December 1, 2007, as soon as practicable after the registration, the sheriff shall contact the attorney general, inform the attorney general of the registration, and forward to the attorney general in the manner specified in division (D) of section 2950.04 of the Revised Code all of the information and material specified in that division. Upon being informed of the registration and receiving the information and material, the attorney general shall comply with division (B) of section 2950.031 of the Revised Code.

This provision supports the view that there need not have been any registration duty extant prior to January 1, 2008, since entirely new registrations regarding such old convictions are now included within the registration scheme.

Palmer asserted below that application of the new R.C. Chapter 2950 to previous convictions would be “retroactive” and that there is no crystal-clear indication that the General Assembly intended such an application. The State disputes whether it would be “retroactive,” since “[s]tatutes that reference past events to establish current status have been held not to be retroactive.” *State ex rel. Plavcan v. School Emp. Retirement Sys. of Ohio* (1994), 71 Ohio St.3d 240, 243. For example, a statute using a pre-existing conviction to disqualify the offender from starting or continuing employment after the effective date is “prospective in application.” *Doe v. Ronan*, 127 Ohio St.3d 188, 2010-Ohio-5072, ¶ 27. In any event, the so-called “presumption of prospective operation” in R.C. 1.48 is sufficiently rebutted by the phrase “[r]egardless of when the sexually oriented offense was committed *

* *.” Such language makes it clear that the timing of the offense makes no difference.

Palmer is essentially asking this Court to disregard the “[r]egardless of when” phrase. But every part of the statutory scheme is presumed to be effective, see R.C. 1.47(B), and so this “regardless of when” phrase cannot be disregarded. “A basic rule of statutory construction requires that ‘words in statutes should not be construed to be redundant, nor should any words be ignored.’” *D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health* (2002), 96 Ohio St.3d 250, 2002-Ohio-4172, ¶ 26 (quoting another case). The statute “must be construed as a whole and given such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative.” *State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.* (1917), 95 Ohio St. 367, 372-73. The duty to register unqualifiedly applies to sexually oriented offenders regardless of when the offense/conviction occurred.

Nor can such unqualified language be limited by the judicial insertion of additional language. “In determining legislative intent it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.” *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127. “The court must first look to the plain language of the statute itself to determine the legislative intent. We apply a statute as it is written when its meaning is unambiguous and definite. An unambiguous statute must be applied in a manner consistent with the plain meaning of the statutory language.” *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, ¶ 9 (citations omitted). “We have held that a court may not add words to an unambiguous statute, but must apply the

statute as written.” Id. at ¶ 15; see, also, *State ex rel. Moorehead v. Indus. Comm.*, 112 Ohio St.3d 27, 2006-Ohio-6364, ¶¶ 15, 19.

Palmer will err if he contends that the “definitions” themselves must be expressly made “retroactive” to apply to prior offenses. The definitions serve as building blocks for the later provisions of the statutory scheme in R.C. 2950.02 through R.C. 2950.99. The definitions themselves could be completely silent as to “retroactivity” and yet be made applicable to prior offenses by the other provisions in R.C. Chapter 2950, such as R.C. 2950.04(A)(2). In any event, the definitions themselves do reach back to prior offenses. See R.C. 2950.01(A)(11) (“sexually oriented offense” includes “any former law of this state” etc.).

The Tenth District agreed with the State’s arguments in these respects, and, like the State, the Tenth District relied on *State v. Bundy*, 2nd Dist. No. 23063, 2009-Ohio-5395. In *Bundy*, the Second District concluded that, regardless of any prior absence of a duty to register, AWA imposes such a duty. The court noted that AWA deleted the statutory language relied upon in *Champion*. Instead, the new law requires under R.C. 2950.04(A)(2) that sexually oriented offenders register “[r]egardless of when the sexually oriented offense was committed * * *.” *Bundy*, at ¶¶ 45-46. The court concluded that “[t]he law in effect on January 1, 2008, eliminates any time-frames for registration of sex offenders. Thus, regardless of when a sexually oriented offense has been committed, the offender has a duty to register.” Id. ¶ 49. The court reiterated that “the law that became effective in January 2008, applies to all offenders who have been convicted of a sexually oriented offense,

regardless of when the offense was committed. R.C. 2950.04(A)(2). Therefore, as we said, Bundy's prior status is irrelevant." Id. ¶ 55.

Palmer points out that *Bundy* was one of the cases summarily reversed after *Bodyke*. *In re Sexual Offender Reclassification Cases*, 126 Ohio St.3d 322, 2010-Ohio-3753. But the summary reversal is inconsequential to this question of statutory law. This Court stated that it was reversing the *Bundy* decision "as to those portions of the judgment that rejected constitutional challenges to the Adam Walsh Act on separation-of-powers grounds." Id. at ¶55. But there was no separation-of-powers ruling in *Bundy*, and so the "reversal" is at best problematic. This is why summary reversals should not be accorded precedential weight.

In any event, since the summary reversal in *Bundy* only pertained to a constitutional issue, the *statutory* question discussed in *Bundy* and *Palmer* is unaffected. The statutory holding of those cases remains good law. Even though Palmer had no duty to register under prior law, he has such a duty now by reason of the broad "regardless of when" language.

In the end, Palmer's statutory argument fails on its face. Even though there was no duty to register under the Megan's Law scheme per *Champion*, the absence of such duty makes no difference to Palmer's duty to register under current law. His sexual battery conviction is a "sexually oriented offense," see R.C. 2950.01(A)(1), and it is enough to create a duty to register under current law, see R.C. 2950.04(A)(2), whenever it occurred.

K. Palmer's Flawed Statutory Arguments

Palmer errs in relying on a number of statutory provisions. His citation to the notification provisions in R.C. 2950.03 actually *supports* the State's point, as the General Assembly made a specific provision for notification as to new registrants who were newly

registering for old convictions. R.C. 2950.03(A)(5)(b). This provision, consistent with R.C. 2950.043, confirms that the new scheme reaches offenders who were not under a duty to register under prior law. In any event, the absence of a notification provision for Palmer would not have countermanded the broad “regardless of when” clause in R.C. 2950.04(A)(2) anyway, as that duty to register is not dependent on a prior notification of such duty, and the lack of notification does not negate the duty to register. See *infra*, at pp. 37-38.

Palmer errs in relying on the “continuation” provisions in R.C. 2950.06(B)(4) and R.C. 2950.07(A)(8). These subsections provide that, if the offender had a duty to register under Megan’s Law and now has a duty to register under AWA, the AWA duty is considered to be a continuation of the prior Megan’s Law duty. But this is unremarkable, as the new statutory scheme was clearly meant to include such old registrants as well. Making provision for a continuation rule as to this group of old registrants does not purport to limit the reach of the registration duty that is newly imposed on Palmer. The statutory scheme reaches old registrants *and* new registrants, and provisions related to old registrants are not inherently or logically inconsistent with the scheme reaching Palmer too.

Palmer also errs in relying on the registration provisions in R.C. 2950.04(A)(1). For offenders *sentenced in an Ohio court after January 1, 2008*, to a prison sentence or other type of confinement, the offender before being transferred to the prison or other confinement must be immediately taken to the sheriff’s office to personally register in that county. R.C. 2950.04(A)(1)(a) & (c). Upon the offender’s release from prison or other confinement, the offender then has a duty to register under R.C. 2950.04(A)(2) in his counties of residence, school, and employment. R.C. 2950.04(A)(1)(d).

Palmer argues that R.C. 2950.04(A)(1)(d) shows that the duty under R.C. 2950.04(A)(2) “is a directive on how an offender should register only after registration pursuant to 2950.04(A)(1) has been followed.” Brief, at 9. But paragraph (A)(1) is merely designed to get newly-sentenced prisoners and confinees into the registration database. This get-them-in-the-system provision does not control the operation of paragraph (A)(2), which is the central registration provision for adult offenders convicted in Ohio. Under Palmer’s illogic, offenders newly sentenced only to community control would have no duty to register under paragraph (A)(2), since they are not subject to the paragraph (A)(1) provisions. And offenders having a prior Megan’s Law duty would have no duty to register under paragraph (A)(2) either, even though Palmer himself points to other provisions showing that the statutory scheme was meant to apply to old registrants who were not subject to paragraph (A)(1) because they were sentenced before January 1, 2008.

Paragraph (A)(1) merely addresses a subgroup of prisoners/confinees who are subject to the central registration provisions in paragraph (A)(2). Paragraph (A)(1) does not control how paragraph (A)(2) applies to other groups of offenders. If it did, the central duty-to-register provisions would be limited to offenders sentenced to prison/confinement after January 1, 2008, a result which is contradicted by (A)(2) and several other provisions.

Finally, Palmer errs in several respects in contending that it would be “illogical” to read paragraph (A)(2) as applying to offenders lacking a prior Megan’s Law classification, since out-of-state offenders are only required to register if they have a duty to register in their state of conviction. To be sure, when the out-of-state offender moves to Ohio, the statute focuses on whether, at the time of such move, the offender has a duty to register in

the state of conviction. R.C. 2950.04(A)(4). But the out-of-state offender could be in exactly the same position as Palmer, as the other state's duty to register could have been imposed very recently at the time of the move, even though no such duty existed at the time of conviction. There is no "illogic," especially when the out-of-state provisions in paragraph (A)(4) contain the identical "regardless of when" language as paragraph (A)(2).

L. *Bodyke* Requires Prior Judicial Classification

Palmer also contends that he should prevail under *Bodyke*, even though there was no prior judicial classification or even prior statutory classification. This argument should be rejected for several reasons, including the express language of *Bodyke* itself.

The *Bodyke* separation-of-powers holding repeatedly focused on the prior court order or judgment *classifying* the offender. The syllabus, plurality, and concurrence mentioned "classified by court order," "classifications * * * adjudicated by a court," and like-minded phrases 16 times. *Bodyke*, at paragraphs two and three of syllabus, and at ¶¶ 54, 55, 56, 57, 59, 60, 61, 66, 67, 68, 75, 91.

This focus on prior *judicial* classifications is also clear from the ratio decidendi of the *Bodyke* holding, which contended, repeatedly, that reclassifying the offender amounted to *reviewing* and *opening prior judicial orders*. All three paragraphs of the *Bodyke* syllabus discussed this problem, and the plurality and concurring opinions emphasized this point as well. *Id.* at ¶¶ 55-62, 74. Again, the separation-of-powers holding was inextricably tied to the existence of a prior judicial classification that was being overturned by reclassification.

Under *Bodyke*, a court must have previously referenced the classification in a ruling, judgment, or order for there to be a separation-of-powers violation. *Green v. State*, 1st Dist.

No. C-090650, 2010-Ohio-4371, ¶¶ 5-10; *Boswell v. State*, 12th Dist. No. CA2010-01-006, 2010-Ohio-3134. As stated in *Green*:

{¶8} The Twelfth Appellate District held in *Boswell v. State* that *Bodyke* does not apply to cases where there is no prior court order classifying the offender under Megan’s Law. The *Boswell* court stated, “Based upon the precise language used by the supreme court, it is clear that the *Bodyke* decision solely applies to those ‘sex offenders that were already classified by judges under Megan’s Law’ and that were subsequently reclassified under Ohio’s Adam Walsh Act. [Citations omitted.] In *Bodyke*, the supreme court did not address the constitutionality of Ohio’s Adam Walsh Act under the separation of powers doctrine as to those offenders that were not classified as sex offenders before the enactment of Ohio’s Adam Walsh Act.”

{¶9} We hold that the supreme court’s decision in *Bodyke* does not apply to cases in which there is no prior court order classifying the offender under a sex-offender category. If there is no prior judicial order classifying the sex offender, then reclassification by the attorney general under Senate Bill 10 does not violate the separation-of-powers doctrine because it does not require the opening of a final court order or a review by the executive branch of a past decision of the judicial branch. In cases where there has been no prior judicial adjudication of the offender under a sex offender category, our holding in *Sewell* is still applicable.

{¶10} Because Green was never adjudicated by a court under a sex-offender category pursuant to Megan’s Law, there is no final judicial order classifying him. Green was “automatically” classified as a sexually oriented offender by operation of the former law. Therefore, the *Bodyke* decision does not apply to Green, and pursuant to our holding in *Sewell*, his reclassification by the attorney general under Senate Bill 10 does not violate the separation-of-powers doctrine. The third assignment of error is overruled.
(Footnotes omitted)

Beyond the repeated references in *Bodyke* to the precondition of a prior judicial classification, the “reinstatement” remedy itself mentioned in the *Bodyke* plurality shows

that a prior judicial classification is required. The plurality indicated that “prior judicial classifications of sex offenders” would be reinstated and that “the classifications and community-notification and registration orders imposed previously by judges are reinstated.” Id. ¶¶ 2, 66. Absent a prior judicial classification, there is no “prior judicial classification” to “reinstate,” nor is there any classification “imposed previously by judges” to “reinstate.”

Some have contended that *Bodyke* is implicated merely when a court has entered a judgment of conviction for a classified sex offense, regardless of whether the court itself mentioned the resulting classification. But this “silent judgment” theory would severely misread the holding of *Bodyke*, a holding which repeatedly focused on the prior court order or judgment *classifying* the offender. The “reinstatement” remedy itself shows that a prior judicial classification is required, as there otherwise would be no “prior judicial classification” to reinstate.

M. Sex Offender Phillips in *Bodyke*

Some have contended that *Bodyke* reaches offenders who were not judicially classified because one of the offenders in *Bodyke* – offender Phillips – had not been judicially classified but still won appellate relief. But the absence of a prior judicial classification as to Phillips was never mentioned by the plurality opinion or by the concurrence, and their ruling cannot be taken as being a ruling on the basis of some unmentioned fact. Indeed, the relief to be afforded to Phillips – according to the *Bodyke* plurality – was to “reinstate the prior judicial classifications of sex offenders.” *Bodyke*, at ¶ 2. The plurality proceeded as if there had been a prior judicial classification as to Phillips, and its holding was limited – over and over again – to offenders who received prior judicial

classifications. One can question whether offender Phillips actually received any real appellate relief, when the reversal called for the reinstatement of a “prior judicial classification” that did not exist for Phillips.

Palmer will contend that the *Bodyke* Court must have known that Phillips lacked a prior judicial classification. The parties’ briefs in *Bodyke* mentioned the lack of a prior judicial classification, as did the dissent. But the plurality and concurrence failed to address or mention that fact.

It is also well known that a *dissent* does not create precedent. In the *United Auto.* case, this Court discussed some prior decisions in which the court could have addressed, but did not address, a jurisdictional issue. In two of the prior cases, dissenters had pointed out the jurisdictional problem. But the court had not taken up the jurisdictional issue and did not expressly address it in either case. This Court held in *United Auto.* that the prior decisions lacked precedential effect on the unaddressed jurisdictional issue.

United Auto. confirms that the dissent in *Bodyke* could not create precedent. Only a majority of four could do that, and there was no such majority opinion in *Bodyke*. In any event, the plurality and concurring opinions failed to address the dissent’s point about Phillips’ lack of a prior judicial classification. Indeed, when the plurality fashioned relief, it *said* that it was ordering that “prior judicial classifications of sex offenders” would be reinstated and that “the classifications and community-notification and registration orders imposed previously by judges are reinstated.” *Id.* ¶¶ 2, 66. In effect, Palmer will be contending that the Court created precedent that no judicial classification was needed, even though it was making repeated representations that it was only reinstating prior judicial

classifications. This is an upside-down view of what constitutes a “holding” or “precedent.”

In the final analysis, the Court declined to take up the separation-of-powers implications vis-à-vis offenders who were not judicially classified, notwithstanding Phillips’ specific case before them. This was a missed opportunity, but the fact remains that the Court’s holding could extend no further than it *said* it went.

N. Summary Dispositions did not Decide Issue

Palmer will also attempt to rely on several summary dispositions as somehow settling the issue of whether an offender can obtain *Bodyke* relief without a prior judicial classification. But the actual language of the summary dispositions left the door open for the prosecutors to argue on remand that the offenders could not receive *Bodyke* relief. In *all* of the summary dispositions in question, the cases were being “remanded to the trial courts for further proceedings, if any, necessitated by *State v. Bodyke*.” Thus, offenders Robinson, Crawford, Beck, Wells, Zamora, Dunn, Santoro, and Collier did not win outright victory in this Court’s summary dispositions. In fact, the cases were being remanded based expressly on *Bodyke*, which repeatedly emphasized the need for a prior judicial classification.

Even this Court’s denial of the State’s motion for reconsideration in the *Wells* and *Zamora* cases in the *Gildersleeve* group of cases is inconclusive. Wells and Zamora had received the same open-remand language that would allow the prosecutor to argue on remand that they were not entitled to *Bodyke* relief because they had not been judicially classified. The Court’s unexplained denial of the State’s motion for reconsideration as to Wells and Zamora therefore could have merely reflected the Court’s belief that reconsideration was unnecessary, the Court having already given the State an open-remand

proceeding where it could raise its argument.

Such summary reversals do not provide precedent for the view a prior judicial classification is unnecessary. Since the *Bodyke* plurality and concurrence so clearly *did* require a prior judicial classification, and since the summary reversals expressly invoked *Bodyke*, the conclusion would easily follow that a prior judicial classification is required.

It would be fundamentally incorrect for this Court to give precedential effect to summary dispositions that did not expressly decide that a prior judicial classification was unnecessary. Such an “implicit” reading of the summary dispositions would be incorrect in light of the actual, open-remand language used and in light of *Payne* and *Lester*, which specifically hold that summary dispositions shall not be given precedential weight.

In three cases, *Green* (No. 10-1882), *Clager* (No. 11-442), and *Core* (No. 11-586), this Court has accepted review of the prior-judicial-classification issue and is holding those cases pending the outcome of *State v. Williams* (No. 09-88). If this Court had already decided the issue, the offender’s appeal in *Green* would have received a summary reversal and this Court would have declined review of the State’s appeals in the other cases.

O. Extension of *Bodyke* Would Violate Separation of Powers

The unfounded extension of *Bodyke* to offenders lacking a prior judicial classification would actually violate the separation-of-powers reasoning of *Bodyke* by invading the prerogatives of the legislative branch. In the absence of a prior judicial classification, the classification of such offenders under Megan’s Law was purely statutory, and so their treatment and status under current law cannot be understood to invade any judicial prerogative or order.

A legislative change of a prior legislative scheme represents an inherently legislative function that could not possibly intrude on any proper prerogative of another branch of government. “[T]he authority to legislate is for the General Assembly alone * * *.” *Bodyke*, ¶ 52 (plurality). “The General Assembly has plenary power to enact legislation * * *.” *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, ¶ 10. “The power and responsibility of legislation is always upon the existing General Assembly.” *Id.* ¶ 16 (quoting another case). As between the three branches, it is not the role of the judicial branch to control this legislative function on “separation of powers” grounds.

There is no requirement that courts must occupy a “classification” role in sex-offender registration schemes. This registration scheme presumptively falls within the General Assembly’s exercise of the police power. “[P]rotection of the public is a paramount government function enforced through the police power.” *State v. Cook* (1998), 83 Ohio St.3d 404, 421. R.C. Chapter 2950 “is an exercise of the police power * * *.” *State v. Williams* (2000), 88 Ohio St.3d 513, 525. The exercise of the police power inheres in the General Assembly. See *State v. Thompkins* (1999), 75 Ohio St.3d 558, 560 (“valid exercise of the General Assembly’s police powers”). While the General Assembly can assign disputed factual issues to the courts for resolution, such as it did with the predator issue under prior law, there is no requirement that the General Assembly make the exercise of its police power in setting up a regulatory scheme turn on such a factual issue.

Because there was no prior judicial classification as to Palmer, the General Assembly has merely changed its earlier laws as to Palmer. It has not “overruled” a judgment. “[N]o one has a vested right in having the law remain the same over time. If by relying on existing

law in arranging his affairs, a citizen were made secure against any change in legal rules, the whole body of our law would be ossified forever.” *East Liverpool v. Columbiana Cty.*

Budget Comm., 114 Ohio St.3d 133, 2007-Ohio-3759, ¶ 30.

Rather than protecting the judicial branch from an intrusion by the legislative branch, the extension of *Bodyke* to offenders lacking a prior judicial classification would intrude upon the legislative branch’s inherent function to amend statutory law. Such an extension would amount to a drastic and unconstitutional extension of *Bodyke*.

There would be other serious ramifications from such an extension. For if the General Assembly could not impose a new registration requirement on Palmer, when none existed before, then every registrant who was newly classified by Megan’s Law also would potentially have a separation-of-powers complaint too, including predators who were classified as such before their release from prison. This would potentially gut the registration scheme as to a substantial number of Megan’s Law registrants as well. Instead of *Bodyke* “reinstating” these offenders’ old Megan’s Law classifications, the end result could be to wipe clean their classifications even under Megan’s Law. This Court did not intend such a result, given its express limiting of its *Bodyke* holding to offenders having prior judicial classifications, and given its desire to “reinstate” such classifications.

P. Executive Branch Actions Create No Bar to Legislative Change

Some offenders lacking a prior judicial classification might contend that there is a separation-of-powers problem if the Sheriff’s Office treated them as a sexually oriented offender. But, again, the *Bodyke* holding only has relevance to the reclassification of offenders who have a prior *judicial* classification. Nothing in *Bodyke* would support the view that there

is a separation-of-powers problem in changing the law so that a prior administrative classification is overtaken by statutory changes. The Executive Branch enforces and executes the legislative scheme and is subservient to it. There is no Executive Branch prerogative to disregard the law.

This is shown by the well-known principle that estoppel does not apply to governmental officials exercising a governmental function. “Principles of equitable estoppel generally may not be applied against the state or its agencies when the act or omission relied on involves the exercise of a governmental function.” *Sun Refining & Marketing Co. v. Brennan* (1987), 31 Ohio St.3d 306, 307. “If a government agency is not permitted to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of all citizens in obedience to the rule of law is undermined. To hold otherwise would be to grant defendants a right to violate the law.” *Ohio State Bd. of Pharmacy v. Frantz* (1990), 51 Ohio St.3d 143, 146; see, also, *Hortman v. Miamisburg*, 110 Ohio St.3d 194, 2006-Ohio-4251, ¶ 25. An administrative official cannot alter the law by executive fiat or by error, and so any separation-of-powers claim must fail if it is based on what someone did in the sheriff’s office. Administrative actions cannot be controlling over the General Assembly’s legislative prerogative to change the law.

Q. *Bodyke/Chojnacki* Severance does not Benefit Offenders Lacking Prior Judicial Classification

The State disagrees with the view that offenders lacking a prior judicial classification can piggyback their claim for relief on the *Bodyke/Chojnacki* severance. Palmer errs in contending that the AG’s reclassification letter was the sole entrée to AWA Tiered status. The unsevered remainder of the statutory scheme *still* classifies or reclassifies the offender,

and it *still* does so as a matter of law. Courts claiming that *Bodyke* benefits such offenders have not addressed this important point about the remainder of the statutory scheme still classifying/reclassifying the offender.

Even throwing out the AG's reclassification letter would not aid someone like Palmer. The duty to register set forth in R.C. 2950.04 is not dependent on the AG's letter. The statutes themselves define Palmer as a sexually oriented offender and as a Tier III offender by reason of his sexual battery conviction. R.C. 2950.01(A)(1), (G)(1)(a). The AG's letter merely served to provide some modicum of notice to the offenders, which allowed the offenders to file a petition contesting the reclassification within 60 days. R.C. 2950.031(E). But even absent such letter, the statutory duty to register still applies. Thus, the presence or absence of the AG's letter is inconsequential here.

Even if Palmer had never received such a letter, he would still be subject to his Tiered duties to register, as shown by the case law indicating that the absence of formal notice "does not affect the duty to register." *State v. Freeman*, 8th Dist. No. 86740, 2006-Ohio-2583, ¶19, quoting *State v. Cooper*, 1st Dist. No. C-030921, 2004-Ohio-6428, ¶ 23. Non-registration is a strict-liability offense. *State v. Cook* (1998), 83 Ohio St.3d 404, 419-20 ("no scienter requirement"; "failing to register alone, without more, is sufficient to trigger criminal punishment"); *State v. Blanton*, 184 Ohio App.3d 611, 2009-Ohio-5334, ¶¶ 12-25. Making provision for notification merely serves the non-punitive purpose of helping maximize compliance. *Smith v. Doe* (2003), 538 U.S. 84, 95-96.

This Court itself has recognized that the classifications and duties under the new law are imposed *as a matter of law*. In *State v. Clayborn*, 125 Ohio St.3d 450, 2010-Ohio-2123,

¶¶ 4, 14, this Court noted that the “conviction automatically classified Clayborn as a Tier II sexual offender pursuant to S.B. 10, with registration duties every 180 days for 25 years” and recognized that “the classification occurred as a matter of law”. As the Tenth District concluded in *Miller v. Cordray*, 184 Ohio App.3d 754, 2009-Ohio-3617, ¶ 23, the “duty to register pursuant to R.C. Chapter 2950 is not contingent upon the Ohio Attorney General first classifying [the offender] as a tiered sex offender. Rather, the duty to register requires only that the offender be convicted of or pleaded guilty to a sexually oriented offense.” Thus, notwithstanding the severance of R.C. 2950.031(A), offenders lacking a prior judicial classification would still have a duty to register as Tiered offenders. And since they have no valid separation-of-powers challenge in their own right, such petitioners can receive no benefit from *Bodyke*.¹

The statutory scheme represents a belt-and-suspenders approach, and *Bodyke/Chojnacki* at most severed the suspenders (the AG letter) while leaving in place the remainder of the scheme, the “belt,” which automatically classified such petitioners.

In seeking to sever R.C. 2950.031 and R.C. 2950.032 in their entirety, the *Bodyke* plurality emphasized that, “[b]y excising the unconstitutional component, we do not detract from the overriding objectives of the General Assembly, i.e., to better protect the public from the recidivism of sex offenders, and *the remainder of the AWA, which is capable of being read and of standing alone, is left in place.*” *Bodyke*, at ¶ 66 (internal quotation marks omitted; emphasis added). As a result, the *Bodyke* plurality did not purport to vitiate the

¹ The summary reversal of *Bundy* would be distinguishable. The offender in that case had received a judicial classification as sexually oriented offender by the court previously. *Bundy*, 2009-Ohio-5395, ¶ 8. No such affirmative classification occurred here.

other parts of the AWA that subject Palmer to a current Tier status. And since no prior judicial classification is involved, it would work no separation-of-powers violation to apply a new Tier status to Palmer.

The *Bodyke* plurality's "left in place" language also refutes Palmer's misreading of *State v. Gingell*, 128 Ohio St.3d 444, 2011-Ohio-1481. The defendant in *Gingell* had received a prior judicial classification, and therefore *Gingell* does not benefit those like Palmer lacking such a classification. Moreover, *Gingell* did not say that all prosecutions under AWA were barred; rather, *Gingell* only found the prosecution invalid in that case "[b]ecause the application of the AWA was based upon an unlawful reclassification * * *." Id. at ¶ 8. Given the *Bodyke* plurality's insistence that "the remainder of the AWA * * * is left in place", *Bodyke* and *Gingell* do not support Palmer's claim that all of AWA is inapplicable to old offenders, even offenders lacking a prior judicial classification.

R. Other Constitutional Challenges

Palmer raises ex post facto, retroactivity, and procedural and substantive due process objections. These were not raised in the memo supporting jurisdiction and were not ruled upon by either court below. They should not be addressed here.

The ex post facto and retroactivity challenges fail. Several cases, including *State v. Cook* (1998), 83 Ohio St.3d 404, *State v. Williams* (2000), 88 Ohio St.3d 513, *Smith v. Doe* (2003), 538 U.S. 84, and *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, support the view that the new registration system properly considers prior convictions in regulating current conditions and circumstances, and it does so without being "punitive." For a full discussion of why AWA survives such challenges, see the 11-17-10 amicus brief of Franklin

County Prosecutor Ron O'Brien in *Williams* (Sup.Ct. No. 09-88).

There is no cognizable due process interest involved in the periodic act of registration/verification, which is merely a de minimis burden for which due process guarantees are inapplicable. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, ¶ 14; id. ¶ 21 (Cook, J., concurring).

No individualized risk assessment is required. The State can “legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness,” and “can dispense with individual predictions of future dangerousness and allow the public to assess the risk on the basis of accurate, nonprivate information about the registrants’ convictions ***.” *Smith*, 538 U.S. at 104.

Procedural due process does not require that the registration scheme create a “no risk” defense to its requirements. *Conn. Dept. of Public Safety v. Doe* (2003), 538 U.S. 1. “[T]he legislature has the power in cases of this kind to make a rule of universal application” and “to legislate with respect to convicted sex offenders as a class * * *.” *Smith*, 538 U.S. at 104 (quoting in part another case).

Palmer’s first proposition of law does not warrant relief.

Response to Second Proposition of Law: A criminal defendant cannot obtain pretrial dismissal of a charge on the ground that the prosecution will be unable to prove an element of the offense at trial. There is no “summary judgment” procedure in criminal cases.

Given the lack of jurisdiction over the issues presented in the “petition” proceeding, the issue becomes whether the trial court could address the statutory duty-to-register issue as raised in Palmer’s pretrial motion to dismiss in the new criminal case. The constitutional separation-of-powers issue was not raised in Palmer’s motion to dismiss, and so the question

of whether that constitutional issue could have been raised by pretrial motion to dismiss was not presented to the trial or appellate courts, making the resolution of that question improper in this appeal. For the following reasons, the duty-to-register issue was not properly raised in the pretrial motion to dismiss.

One of the elements of the charges was that Palmer had a duty to register, to provide periodic verification, and to provide change of address at the time of March 26, 2009, the date listed in the indictment. In Palmer's motion to dismiss, he cited the *Champion* case as requiring that the offender must have been sentenced or under incarceration for the sexually oriented offense conviction on or after July 1, 1997, in order for the duty to register to have applied. He further contended that, absent a prior duty to register, he could have no duty to register under R.C. Chapter 2950 as effective January 1, 2008. The State opposed the motion to dismiss by contending that there is no summary judgment procedure in criminal cases. Despite that argument, the trial court proceeded to address the merits of the duty-to-register issue. The Tenth District correctly reversed.

“[A] motion to dismiss * * * tests the sufficiency of the indictment, without regard to the quantity or quality of evidence that may be produced by either the state or the defendant.” *State v. Patterson* (1989), 63 Ohio App.3d 91, 95. “When a defendant in a criminal action files a motion to dismiss that goes beyond the face of the indictment, he is, essentially, moving for summary judgment,” and there is no such criminal procedure. *State v. Tipton* (1999), 135 Ohio App.3d 227, 228. For example, in an obscenity prosecution, obscenity is an essential element of the crime and therefore that issue cannot be determined before trial. *State v. McNamee* (1984), 17 Ohio App.3d 175, 176. “The issue as to the legal

sufficiency of the evidence is not properly raised by a pretrial motion * * *.” Id.; see, also, *State v. Scott*, 174 Ohio App.3d 446, 2007-Ohio-7065, ¶ 9. If trial courts were to entertain such pretrial “summary judgment” motions to dismiss, “trial courts would soon be flooded with pretrial motions to dismiss alleging factual predicates in criminal cases,” and “[a]lready overburdened prosecutors would be forced to respond to such attacks with specific evidence in advance of trial.” *State v. Varner* (1991), 81 Ohio App.3d 85, 86-87.

This Court has concluded that, upon a motion to dismiss, a court *can* consider material outside the four corners of the indictment when the “motion did not embrace what would be the general issue at trial.” *State v. Brady*, 119 Ohio St.3d 375, 2008-Ohio-4493, ¶ 18. “Because [the defendant’s] pretrial motion to dismiss did not require a determination of the general issue for trial, Crim.R. 12(C) allowed the trial court to consider it.” Id. This Court distinguished cases like *Varner*, in which the motion to dismiss challenged whether the evidence would support conviction, “because they involved pretrial motions to dismiss that required consideration of the general issue for trial.” Id.

Whether Palmer was subject to registration duties on the date of the indicted offenses (3-26-09) was a general issue for trial. To the extent Palmer was contending that his sexual-battery sentence expired before the effective date of Megan’s Law, that factual assertion was a matter that went beyond the face of the indictment and therefore was not properly litigated in a pretrial motion to dismiss. There had been no jury-trial waiver, and so the trial court even lacked jurisdiction to determine the elemental duty-to-register issue. *State v. Reese*, 106 Ohio St.3d 65, 2005-Ohio-3806, ¶ 9.

The Eighth District addressed a similar situation in *State v. Caldwell*, 8th Dist. No.

92219, 2009-Ohio-4881, concluding that the duty-to-register issue cannot be determined by pretrial motion to dismiss. See, also, *State v. Jackson*, 6th Dist. No. L-06-1105, 2007-Ohio-1870, ¶ 10 (duty-to-register argument in motion was not “proper procedure for dismissal”).

The defense argument relied on facts that were not alleged in the indictment. While the indictment alleged that the 1996 sexual battery conviction was the most serious offense that was a basis for registration duties, it did not assert that sexual battery was the only such basis. In addition, Palmer’s argument was premised on the allegation that he had completed his sexual-battery sentence before July 1, 1997. But the indictment did not state what sentence had been imposed, or what jail time credit had been recognized, and so Palmer’s motion to dismiss necessarily invited the court to go beyond the indictment.

Although the existence of a duty to register is a question of law, the development of facts related to that issue must await a trial. To be sure, if such facts were undisputed at trial, the court would then be faced with the legal question of whether the evidence showed that Palmer had a duty to register. If the evidence of duty was insufficient, the court could grant a motion for judgment of acquittal.

A trial is not “unnecessary.” A trial is the lone designated mechanism by which the elements of the crime and any affirmative defenses are factually litigated. The facts asserted by the defense were not cognizable “as a matter of law,” but, rather, required the factual development that a trial would entail.

This is not to say that the “trial” needs to be elaborate. The defense could waive jury, and the parties could stipulate facts. But, interestingly, there was no effort to waive jury in the present case. What the defense apparently seeks is a one-way street; a proceeding

in which it can litigate the facts it thinks favorable to its legal theory, but in which the court cannot actually find the defendant guilty if it reaches a contrary legal or factual conclusion. The Criminal Rules do not recognize such a one-way procedure.

If the indictment fails to state an offense, the defense can file a motion to dismiss. Otherwise, the defense must await trial in order to develop the facts favorable to its legal theory, a trial in which the trier of fact will also be empowered to find the defendant guilty.

Palmer's argument rests in part on expediency, contending that the court should be able to entertain motions to dismiss based on "unequivocally demonstrate[d]" facts. But the very determination of what is "unequivocally demonstrated" would still absorb the resources of the bench and bar, and such determination would still occur without a valid jury waiver in place enabling the court to make such determinations. Palmer's expediency argument also ignores the fact that there are expedient methods under the Criminal Rules for the court to address such cases, i.e., a valid jury waiver and a stipulation of facts, for example. It is hardly expedient to saddle trial courts with time-consuming "summary judgment" procedures in large numbers of criminal cases in search of the small number of cases that might truly meet an "unequivocally demonstrated" standard.

To some degree, a "summary judgment" procedure would be helpful to the State, as the State can appeal as of right from a dismissal but not from a Crim.R. 29 acquittal. But, on the whole, the drain on judicial, prosecutorial, and defense-bar resources for such "summary judgment" motions would far outweigh any small benefit to be gained through the ability of the State to appeal in particular cases. The lack of a valid jury waiver as to the elemental fact to be determined precludes any real consideration of such a "summary

judgment procedure.

Palmer errs in claiming that *Champion* provides “implicit approval” for a pretrial summary judgment procedure. While the duty-to-register issue in that case was litigated by pretrial motion, neither side questioned the propriety of that procedure, and so the *Champion* Court was not faced with the issue. As noted previously, there are no “implicit” precedents. *Payne*, ¶¶ 10, 12. More relevant than *Champion* is this Court’s decision in *Brady*, which recognized that pretrial motions cannot “embrace what would be the general issue at trial.”

Id. ¶ 18. Palmer’s second proposition of law lacks merit.

Response to Third Proposition of Law: A common pleas court cannot order that an offender’s name be removed from all sexually oriented lists maintained by local, state, or federal government, as the court lacks jurisdiction to afford such broad injunctive relief.

The trial court awarded overbroad and unwarranted relief when it ordered that Palmer’s “name be removed from all sexually oriented lists maintained by the local, state or federal government.” A court of criminal jurisdiction lacks authority to issue injunctive relief; the petition-contest procedure authorized by R.C. 2950.031(E) did not allow such broad relief; and Palmer had not proven any entitlement to such broad relief.

Insofar as the petition-contest proceeding was concerned, R.C. 2950.031(E) only allowed the court to grant relief in relation to “new registration requirements under Chapter 2950 of the Revised Code as it will exist under the changes that will be implemented on January 1, 2008.” The court’s authority was limited to determining how the registration requirements under R.C. Chapter 2950 apply to the offender. Moreover, when the court determined that the registration requirements did not apply at all, the court’s power was limited to issuing “an order that specifies that the new registration requirements do not apply

to the offender” and to forwarding such order to BCI, a state agency. R.C. 2950.031(E).

The trial court’s broad “all lists” removal order exceeded this authority in several respects. At most, the court only had the ability to determine how local or state agencies would administer lists or databases maintained pursuant to R.C. 2950.13. The court had no authority to control whether and how local, state, or federal governmental agencies might keep other lists of sex offenders. Such agencies, most particularly law enforcement agencies, might keep lists of known sex offenders available for investigative purposes. The trial court had no authority to control how or whether such agencies would include Palmer’s name on a list of sex offenders as a general matter.

Likewise, state law enforcement agencies might keep such lists, irrespective of the registry and database administered under R.C. 2950.13. Because the court in the petition-contest proceeding could determine whether a duty to register existed, the court could order relief that effectively required BCI to remove Palmer’s name from the registry or database maintained under R.C. 2950.13. But the court could not go further and prevent state law enforcement agencies from keeping a list of known sex offenders for investigative or other purposes. Palmer *is* a convicted sex offender, regardless of when his sex-offense conviction occurred, and local, state, and federal agencies could keep a sex-offender list or database handy regardless of R.C. Chapter 2950. So long as the list was not maintained under R.C. Chapter 2950, the trial court had no business regulating any such list.

The court’s “all lists” removal order was particularly erroneous in relation to the federal government. Offenders having state sex-offense convictions can have a direct duty to register under federal law, regardless of whether the state has adopted implementing

legislation. *United States v. Shenandoah* (C.A. 10, 2010), 595 F.3d 151, 157-58; *United States v. Gould* (C.A. 4, 2009), 568 F.3d 459, 464-66. The federal duty applies “to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment” of the federal SORNA in 2006. 28 CFR 72.3; 42 U.S.C. 16913(a), (b), and (d). Federal guidelines call for the states to implement a registration scheme applicable to persons having a prior conviction for a sex offense who “remain in the system as prisoners, supervisees, or registrants or * * * reenter the system through a subsequent criminal conviction,” even if the subsequent criminal conviction is not for a sex offense. 73 Federal Register 38030, 38031, 38035-36, 38046. Reentry into the system includes conviction for merely jailable offenses. *Id.* at 38045.

Palmer’s reply memorandum filed in No. 95CR-5474 expressly eschewed any reliance on federal statutory law. (Trial Rec. 95) Given that the petition-contest proceeding was limited to the determination of registration requirements under R.C. Chapter 2950, no one had a reason to litigate the possible applicability of a federal duty to register. Yet, the court’s order broadly ordered that Palmer’s name must be removed from all federal sexually oriented lists. The court had no authority to issue such an order, and it had no legal or factual basis to believe that removal from any such federal list was legally required or legally appropriate, especially in light of the federal government not having been given notice and an opportunity to be heard.

The court’s “all lists” removal order stands on an even weaker footing after *Bodyke/Chojnacki*, which have resulted in the facial severance of R.C. 2950.031(E), effectively depriving the trial court of any statutory authority to issue orders vis-à-vis even

the state registration requirements. And none of the law enforcement agencies had been served with a proper civil complaint or summons so that the court might have acquired jurisdiction over such agencies via regular civil jurisdiction.

The court's "all lists" order also fails in the new criminal case. The sole question before the court was whether the indictment should be dismissed. Its sole authority was to dismiss the indictment. It had no authority to issue orders to third parties enjoining them.

As stated above, a criminal court is a court of *law*, not a court of equity. A criminal court does not have a roving commission to issue injunctive orders against third parties, especially when those third parties have not been given notice or opportunity to be heard. See, e.g., *Thoman*, ¶ 11 (criminal court's order issued against Children Services vacated; "nowhere in the applicable statutes is the court given authority to order parties *other than the offender* to do any acts as a condition of the offender's community control sanction."); emphasis sic); *DeMastry*, ¶ 26 & n. 4 ("The criminal charges were brought by the State of Ohio, not Fairfield County. As such, the trial court has no jurisdiction arising from the criminal case to order Fairfield County to act."; "even when an agency of the State is bound by a plea agreement, the criminal trial court that presided over the criminal matter has no authority over that agency unless that agency was a party to the criminal case."); *Cole*, ¶ 16 (complaint about Parole Board violating plea agreement not properly raised in motion to withdraw plea; "Although the parole board is an agent of the state, and bound by the plea agreement, the parole board is not a party in this criminal matter. The trial court had no authority over the parole board. A civil declaratory judgment action is the proper remedy in this instance."). Since the court had determined that it would dismiss the indictment, its

criminal jurisdiction had been exhausted.

Of course, a criminal court *does* have the authority to protect its criminal proceedings from interference by third parties, including those who would intimidate witnesses or commit contempt. No such circumstance is involved here.

Palmer attempts to read the court orders narrowly by contending that the orders directed at “sexually oriented lists” meant that the court was only addressing lists maintained for purposes under R.C. Chapter 2950. But “sexually oriented lists” is not a defined legal term, and “sexually oriented” could readily be understood to apply to any sex-offender list, not just lists maintained under R.C. Chapter 2950. The orders’ inclusion of the “federal government” on the list of enjoined agencies confirms that the trial court did not limit its order to only lists maintained under R.C. Chapter 2950. Palmer makes no attempt to defend the “federal government” part of the order.

In contending that courts have common-law authority to limit information contained in law-enforcement records, Palmer cites *Pepper Pike v. Doe* (1981), 66 Ohio St.2d 374. But *Pepper Pike* is inapposite. The concept of judicial expungement recognized in that case does not apply to criminal convictions, as expungement of convictions is governed by R.C. 2953.32 et seq. *State v. Davidson*, 10th Dist. No. 02AP-665, 2003-Ohio-1448, ¶ 15 (“When there has been a conviction, only statutory expungement is available.”). The record shows that Palmer is not a “first offender” who could receive expungement of a conviction under those statutes, as he has unrelated convictions for robbery and burglary. In addition, a sexual-battery conviction is not expungeable at all. R.C. 2953.36(B). Palmer’s third proposition of law does not warrant relief.

CONCLUSION

The State requests that this Court reverse and vacate the judgment in No. 09AP-956 and remand that case to the trial court for dismissal of the petition because of a lack of jurisdiction. In the alternative, if there is jurisdiction, the State requests that this Court affirm the judgment in No. 09AP-956. In the alternative, if there is jurisdiction, and if Palmer's separation-of-powers claim has merit, this Court should remand to the trial court with instructions to update Palmer's status consistent with current law as a Tier III offender.

The State requests that this Court affirm the judgment in No. 09AP-957.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was hand delivered on this 11th day of July, 2011, to the office of David Strait, 373 South High Street, 12th Floor, Columbus, Ohio 43215, counsel for Paul Palmer.


STEVEN L. TAYLOR
Chief Counsel, Appellate Division

§ 2950.01. Definitions.

As used in this chapter, unless the context clearly requires otherwise:

(A) "Sexually oriented offense" means any of the following violations or offenses committed by a person, regardless of the person's age:

(1) A violation of section 2907.02, 2907.03, 2907.05, 2907.06, 2907.07, 2907.08, 2907.21, 2907.32, 2907.321 [2907.32.1], 2907.322 [2907.32.2], or 2907.323 [2907.32.3] of the Revised Code;

(2) A violation of section 2907.04 of the Revised Code when the offender is less than four years older than the other person with whom the offender engaged in sexual conduct, the other person did not consent to the sexual conduct, and the offender previously has not been convicted of or pleaded guilty to a violation of section 2907.02, 2907.03, or 2907.04 of the Revised Code or a violation of former section 2907.12 of the Revised Code;

(3) A violation of section 2907.04 of the Revised Code when the offender is at least four years older than the other person with whom the offender engaged in sexual conduct or when the offender is less than four years older than the other person with whom the offender engaged in sexual conduct and the offender previously has been convicted of or pleaded guilty to a violation of section 2907.02, 2907.03, or 2907.04 of the Revised Code or a violation of former section 2907.12 of the Revised Code;

(4) A violation of section 2903.01, 2903.02, or 2903.11 of the Revised Code when the violation was committed with a sexual motivation;

(5) A violation of division (A) of section 2903.04 of the Revised Code when the offender committed or attempted to commit the felony that is the basis of the violation with a sexual motivation;

(6) A violation of division (A)(3) of section 2903.211 [2903.21.1] of the Revised Code;

(7) A violation of division (A)(1), (2), (3), or (5) of section 2905.01 of the Revised Code when the offense is committed with a sexual motivation;

(8) A violation of division (A)(4) of section 2905.01 of the Revised Code;

(9) A violation of division (B) of section 2905.01 of the Revised Code when the victim of the offense is under eighteen years of age and the offender is not a parent of the victim of the offense;

(10) A violation of division (B) of section 2905.02, of division (B) of section 2905.03, of division (B) of section 2905.05, or of division (B)(5) of section 2919.22 of the Revised Code;

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(11) A violation of any former law of this state, any existing or former municipal ordinance or law of another state or the United States, any existing or former law applicable in a military court or in an Indian tribal court, or any existing or former law of any nation other than the United States that is or was substantially equivalent to any offense listed in division (A)(1), (2), (3), (4), (5), (6), (7), (8), (9), or (10) of this section;

(12) Any attempt to commit, conspiracy to commit, or complicity in committing any offense listed in division (A)(1), (2), (3), (4), (5), (6), (7), (8), (9), (10), or (11) of this section.

(B) (1) "Sex offender" means, subject to division (B)(2) of this section, a person who is convicted of, pleads guilty to, has been convicted of, has pleaded guilty to, is adjudicated a delinquent child for committing, or has been adjudicated a delinquent child for committing any sexually oriented offense.

(2) "Sex offender" does not include a person who is convicted of, pleads guilty to, has been convicted of, has pleaded guilty to, is adjudicated a delinquent child for committing, or has been adjudicated a delinquent child for committing a sexually oriented offense if the offense involves consensual sexual conduct or consensual sexual contact and either of the following applies:

(a) The victim of the sexually oriented offense was eighteen years of age or older and at the time of the sexually oriented offense was not under the custodial authority of the person who is convicted of, pleads guilty to, has been convicted of, has pleaded guilty to, is adjudicated a delinquent child for committing, or has been adjudicated a delinquent child for committing the sexually oriented offense.

(b) The victim of the offense was thirteen years of age or older, and the person who is convicted of, pleads guilty to, has been convicted of, has pleaded guilty to, is adjudicated a delinquent child for committing, or has been adjudicated a delinquent child for committing the sexually oriented offense is not more than four years older than the victim.

(C) "Child-victim oriented offense" means any of the following violations or offenses committed by a person, regardless of the person's age, when the victim is under eighteen years of age and is not a child of the person who commits the violation:

(1) A violation of division (A)(1), (2), (3), or (5) of section 2905.01 of the Revised Code when the violation is not included in division (A)(7) of this section;

(2) A violation of division (A) of section 2905.02, division (A) of section 2905.03, or division (A) of section 2905.05 of the Revised Code;

(3) A violation of any former law of this state, any existing or former municipal ordinance or law of another state or the United States, any existing or former law applicable in a military court or in an Indian tribal court, or any existing or former law of any nation other than the United States that is or was substantially equivalent to any offense listed in division (C)(1) or (2) of this

section;

(4) Any attempt to commit, conspiracy to commit, or complicity in committing any offense listed in division (C)(1), (2), or (3) of this section.

(D) "Child-victim offender" means a person who is convicted of, pleads guilty to, has been convicted of, has pleaded guilty to, is adjudicated a delinquent child for committing, or has been adjudicated a delinquent child for committing any child-victim oriented offense.

(E) "Tier I sex offender/child-victim offender" means any of the following:

(1) A sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any of the following sexually oriented offenses:

(a) A violation of section 2907.06, 2907.07, 2907.08, or 2907.32 of the Revised Code;

(b) A violation of section 2907.04 of the Revised Code when the offender is less than four years older than the other person with whom the offender engaged in sexual conduct, the other person did not consent to the sexual conduct, and the offender previously has not been convicted of or pleaded guilty to a violation of section 2907.02, 2907.03, or 2907.04 of the Revised Code or a violation of former section 2907.12 of the Revised Code;

(c) A violation of division (A)(1), (2), (3), or (5) of section 2907.05 of the Revised Code;

(d) A violation of division (A)(3) of section 2907.323 [2907.32.3] of the Revised Code;

(e) A violation of division (A)(3) of section 2903.211 [2903.21.1], of division (B) of section 2905.03, or of division (B) of section 2905.05 of the Revised Code;

(f) A violation of any former law of this state, any existing or former municipal ordinance or law of another state or the United States, any existing or former law applicable in a military court or in an Indian tribal court, or any existing or former law of any nation other than the United States, that is or was substantially equivalent to any offense listed in division (E)(1)(a), (b), (c), (d), or (e) of this section;

(g) Any attempt to commit, conspiracy to commit, or complicity in committing any offense listed in division (E)(1)(a), (b), (c), (d), (e), or (f) of this section.

(2) A child-victim offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to a child-victim oriented offense and who is not within either category of child-victim offender described in division (F)(2) or (G)(2) of this section.

~~(3) A sex offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any sexually oriented offense and who a juvenile court, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier I sex offender/child-victim offender relative to the offense.~~

(4) A child-victim offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any child-victim oriented offense and who a juvenile court, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier I sex offender/child-victim offender relative to the offense.

(F) "Tier II sex offender/child-victim offender" means any of the following:

(1) A sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any of the following sexually oriented offenses:

(a) A violation of section 2907.21, 2907.321 [2907.32.1], or 2907.322 [2907.32.2] of the Revised Code;

(b) A violation of section 2907.04 of the Revised Code when the offender is at least four years older than the other person with whom the offender engaged in sexual conduct, or when the offender is less than four years older than the other person with whom the offender engaged in sexual conduct and the offender previously has been convicted of or pleaded guilty to a violation of section 2907.02, 2907.03, or 2907.04 of the Revised Code or former section 2907.12 of the Revised Code;

(c) A violation of division (A)(4) of section 2907.05 or of division (A)(1) or (2) of section 2907.323 [2907.32.3] of the Revised Code;

(d) A violation of division (A)(1), (2), (3), or (5) of section 2905.01 of the Revised Code when the offense is committed with a sexual motivation;

(e) A violation of division (A)(4) of section 2905.01 of the Revised Code when the victim of the offense is eighteen years of age or older;

(f) A violation of division (B) of section 2905.02 or of division (B)(5) of section 2919.22 of the Revised Code;

(g) A violation of any former law of this state, any existing or former municipal ordinance or law of another state or the United States, any existing or former law applicable in a military court or in an Indian tribal court, or any existing or former law of any nation other than the United States that is or was substantially equivalent to any offense listed in division (F)(1)(a), (b), (c), (d), (e), or (f) of this section;

(h) Any attempt to commit, conspiracy to commit, or complicity in committing any offense listed in division (F)(1)(a), (b), (c), (d), (e), (f), or (g) of this section;

(i) Any sexually oriented offense that is committed after the sex offender previously has been convicted of, pleaded guilty to, or has been adjudicated a delinquent child for committing any sexually oriented offense or child-victim oriented offense for which the offender was classified a tier I sex offender/child-victim offender.

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(2) A child-victim offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any child-victim oriented offense when the child-victim oriented offense is committed after the child-victim offender previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for committing any sexually oriented offense or child-victim oriented offense for which the offender was classified a tier I sex offender/child-victim offender.

(3) A sex offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any sexually oriented offense and who a juvenile court, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier II sex offender/child-victim offender relative to the offense.

(4) A child-victim offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any child-victim oriented offense and whom a juvenile court, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier II sex offender/child-victim offender relative to the current offense.

(5) A sex offender or child-victim offender who is not in any category of tier II sex offender/child-victim offender set forth in division (F)(1), (2), (3), or (4) of this section, who prior to January 1, 2008, was adjudicated a delinquent child for committing a sexually oriented offense or child-victim oriented offense, and who prior to that date was determined to be a habitual sex offender or determined to be a habitual child-victim offender, unless either of the following applies:

(a) The sex offender or child-victim offender is reclassified pursuant to section 2950.031 [2950.03.1] or 2950.032 [2950.03.2] of the Revised Code as a tier I sex offender/child-victim offender or a tier III sex offender/child-victim offender relative to the offense.

(b) A juvenile court, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies the child a tier I sex offender/child-victim offender or a tier III sex offender/child-victim offender relative to the offense.

(G) "Tier III sex offender/child-victim offender" means any of the following:

(1) A sex offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any of the following sexually oriented offenses:

(a) A violation of section 2907.02 or 2907.03 of the Revised Code;

(b) A violation of division (B) of section 2907.05 of the Revised Code;

(c) A violation of section 2903.01, 2903.02, or 2903.11 of the Revised Code when the violation was committed with a sexual motivation;

(d) A violation of division (A) of section 2903.04 of the Revised Code when the offender committed or attempted to commit the felony that is the basis of the violation with a sexual

motivation;

(e) A violation of division (A)(4) of section 2905.01 of the Revised Code when the victim of the offense is under eighteen years of age;

(f) A violation of division (B) of section 2905.01 of the Revised Code when the victim of the offense is under eighteen years of age and the offender is not a parent of the victim of the offense;

(g) A violation of any former law of this state, any existing or former municipal ordinance or law of another state or the United States, any existing or former law applicable in a military court or in an Indian tribal court, or any existing or former law of any nation other than the United States that is or was substantially equivalent to any offense listed in division (G)(1)(a), (b), (c), (d), (e), or (f) of this section;

(h) Any attempt to commit, conspiracy to commit, or complicity in committing any offense listed in division (G)(1)(a), (b), (c), (d), (e), (f), or (g) of this section;

(i) Any sexually oriented offense that is committed after the sex offender previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for committing any sexually oriented offense or child-victim oriented offense for which the offender was classified a tier II sex offender/child-victim offender or a tier III sex offender/child-victim offender.

(2) A child-victim offender who is convicted of, pleads guilty to, has been convicted of, or has pleaded guilty to any child-victim oriented offense when the child-victim oriented offense is committed after the child-victim offender previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for committing any sexually oriented offense or child-victim oriented offense for which the offender was classified a tier II sex offender/child-victim offender or a tier III sex offender/child-victim offender.

(3) A sex offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any sexually oriented offense and who a juvenile court, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier III sex offender/child-victim offender relative to the offense.

(4) A child-victim offender who is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any child-victim oriented offense and whom a juvenile court, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies a tier III sex offender/child-victim offender relative to the current offense.

(5) A sex offender or child-victim offender who is not in any category of tier III sex offender/child-victim offender set forth in division (G)(1), (2), (3), or (4) of this section, who prior to January 1, 2008, was convicted of or pleaded guilty to a sexually oriented offense or child-victim oriented offense or was adjudicated a delinquent child for committing a sexually oriented offense or child-victim oriented offense and classified a juvenile offender registrant, and

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who prior to that date was adjudicated a sexual predator or adjudicated a child-victim predator, unless either of the following applies:

(a) The sex offender or child-victim offender is reclassified pursuant to section 2950.031 [2950.03.1] or 2950.032 [2950.03.2] of the Revised Code as a tier I sex offender/child-victim offender or a tier II sex offender/child-victim offender relative to the offense.

(b) The sex offender or child-victim offender is a delinquent child, and a juvenile court, pursuant to section 2152.82, 2152.83, 2152.84, or 2152.85 of the Revised Code, classifies the child a tier I sex offender/child-victim offender or a tier II sex offender/child-victim offender relative to the offense.

(6) A sex offender who is convicted of, pleads guilty to, was convicted of, or pleaded guilty to a sexually oriented offense, if the sexually oriented offense and the circumstances in which it was committed are such that division (F) of section 2971.03 of the Revised Code automatically classifies the offender as a tier III sex offender/child-victim offender;

(7) A sex offender or child-victim offender who is convicted of, pleads guilty to, was convicted of, pleaded guilty to, is adjudicated a delinquent child for committing, or was adjudicated a delinquent child for committing a sexually oriented offense or child-victim offense in another state, in a federal court, military court, or Indian tribal court, or in a court in any nation other than the United States if both of the following apply:

(a) Under the law of the jurisdiction in which the offender was convicted or pleaded guilty or the delinquent child was adjudicated, the offender or delinquent child is in a category substantially equivalent to a category of tier III sex offender/child-victim offender described in division (G)(1), (2), (3), (4), (5), or (6) of this section.

(b) Subsequent to the conviction, plea of guilty, or adjudication in the other jurisdiction, the offender or delinquent child resides, has temporary domicile, attends school or an institution of higher education, is employed, or intends to reside in this state in any manner and for any period of time that subjects the offender or delinquent child to a duty to register or provide notice of intent to reside under section 2950.04 or 2950.041 [2950.04.1] of the Revised Code.

(H) "Confinement" includes, but is not limited to, a community residential sanction imposed pursuant to section 2929.16 or 2929.26 of the Revised Code.

(I) "Prosecutor" has the same meaning as in section 2935.01 of the Revised Code.

(J) "Supervised release" means a release of an offender from a prison term, a term of imprisonment, or another type of confinement that satisfies either of the following conditions:

(1) The release is on parole, a conditional pardon, under a community control sanction, under transitional control, or under a post-release control sanction, and it requires the person to report to or be supervised by a parole officer, probation officer, field officer, or another type of

supervising officer.

(2) The release is any type of release that is not described in division (J)(1) of this section and that requires the person to report to or be supervised by a probation officer, a parole officer, a field officer, or another type of supervising officer.

(K) "Sexually violent predator specification," "sexually violent predator," "sexually violent offense," "sexual motivation specification," "designated homicide, assault, or kidnapping offense," and "violent sex offense" have the same meanings as in section 2971.01 of the Revised Code.

(L) "Post-release control sanction" and "transitional control" have the same meanings as in section 2967.01 of the Revised Code.

(M) "Juvenile offender registrant" means a person who is adjudicated a delinquent child for committing on or after January 1, 2002, a sexually oriented offense or a child-victim oriented offense, who is fourteen years of age or older at the time of committing the offense, and who a juvenile court judge, pursuant to an order issued under section 2152.82, 2152.83, 2152.84, 2152.85, or 2152.86 of the Revised Code, classifies a juvenile offender registrant and specifies has a duty to comply with sections 2950.04, 2950.041 [2950.04.1], 2950.05, and 2950.06 of the Revised Code. "Juvenile offender registrant" includes a person who prior to January 1, 2008, was a "juvenile offender registrant" under the definition of the term in existence prior to January 1, 2008, and a person who prior to July 31, 2003, was a "juvenile sex offender registrant" under the former definition of that former term.

(N) "Public registry-qualified juvenile offender registrant" means a person who is adjudicated a delinquent child and on whom a juvenile court has imposed a serious youthful offender dispositional sentence under section 2152.13 of the Revised Code before, on, or after January 1, 2008, and to whom all of the following apply:

(1) The person is adjudicated a delinquent child for committing, attempting to commit, conspiring to commit, or complicity in committing one of the following acts:

(a) A violation of section 2907.02 of the Revised Code, division (B) of section 2907.05 of the Revised Code, or section 2907.03 of the Revised Code if the victim of the violation was less than twelve years of age;

(b) A violation of section 2903.01, 2903.02, or 2905.01 of the Revised Code that was committed with a purpose to gratify the sexual needs or desires of the child.

(2) The person was fourteen, fifteen, sixteen, or seventeen years of age at the time of committing the act.

(3) A juvenile court judge, pursuant to an order issued under section 2152.86 of the Revised Code, classifies the person a juvenile offender registrant, specifies the person has a duty to

comply with sections 2950.04, 2950.05, and 2950.06 of the Revised Code, and classifies the person a public registry-qualified juvenile offender registrant, and the classification of the person as a public registry-qualified juvenile offender registrant has not been terminated pursuant to division (D) of section 2152.86 of the Revised Code.

(O) "Secure facility" means any facility that is designed and operated to ensure that all of its entrances and exits are locked and under the exclusive control of its staff and to ensure that, because of that exclusive control, no person who is institutionalized or confined in the facility may leave the facility without permission or supervision.

(P) "Out-of-state juvenile offender registrant" means a person who is adjudicated a delinquent child in a court in another state, in a federal court, military court, or Indian tribal court, or in a court in any nation other than the United States for committing a sexually oriented offense or a child-victim oriented offense, who on or after January 1, 2002, moves to and resides in this state or temporarily is domiciled in this state for more than five days, and who has a duty under section 2950.04 or 2950.041 [2950.04.1] of the Revised Code to register in this state and the duty to otherwise comply with that applicable section and sections 2950.05 and 2950.06 of the Revised Code. "Out-of-state juvenile offender registrant" includes a person who prior to January 1, 2008, was an "out-of-state juvenile offender registrant" under the definition of the term in existence prior to January 1, 2008, and a person who prior to July 31, 2003, was an "out-of-state juvenile sex offender registrant" under the former definition of that former term.

(Q) "Juvenile court judge" includes a magistrate to whom the juvenile court judge confers duties pursuant to division (A)(15) of section 2151.23 of the Revised Code.

(R) "Adjudicated a delinquent child for committing a sexually oriented offense" includes a child who receives a serious youthful offender dispositional sentence under section 2152.13 of the Revised Code for committing a sexually oriented offense.

(S) "School" and "school premises" have the same meanings as in section 2925.01 of the Revised Code.

(T) "Residential premises" means the building in which a residential unit is located and the grounds upon which that building stands, extending to the perimeter of the property. "Residential premises" includes any type of structure in which a residential unit is located, including, but not limited to, multi-unit buildings and mobile and manufactured homes.

(U) "Residential unit" means a dwelling unit for residential use and occupancy, and includes the structure or part of a structure that is used as a home, residence, or sleeping place by one person who maintains a household or two or more persons who maintain a common household. ~~"Residential unit" does not include a halfway house or a community-based correctional facility.~~

(V) "Multi-unit building" means a building in which is located more than twelve residential units that have entry doors that open directly into the unit from a hallway that is shared with one

or more other units. A residential unit is not considered located in a multi-unit building if the unit does not have an entry door that opens directly into the unit from a hallway that is shared with one or more other units or if the unit is in a building that is not a multi-unit building as described in this division.

(W) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(X) "Halfway house" and "community-based correctional facility" have the same meanings as in section 2929.01 of the Revised Code.

HISTORY: 146 v H 180 (Eff 1-1-97); 147 v S 111 (Eff 3-17-98); 147 v H 565 (Eff 3-30-99); 148 v H 502 (Eff 3-15-2001); 149 v S 3 (Eff 1-1-2002); 149 v S 175 (Eff 5-7-2002); 149 v H 485 (Eff 6-13-2002); 149 v H 393. Eff 7-5-2002; 149 v H 490, § 1, eff. 1-1-04; 150 v S 5, § 1, eff. 7-31-03; 150 v S 5, § 3, eff. 1-1-04; 150 v S 57, § 1, eff. 1-1-04; 150 v H 473, § 1, eff. 4-29-05; 151 v S 260, § 1, eff. 1-2-07; 152 v S 10, § 1, eff. 1-1-08.

[§ 2950.04.3] § 2950.043. Sheriff to notify attorney general of registration on or after 12-1-07.

If an offender or delinquent child registers with a sheriff pursuant to section 2950.04 or 2950.041 [2950.04.1] of the Revised Code on or after December 1, 2007, if the offender or delinquent child previously has not registered under either section with that sheriff or any other sheriff, and if the offender or delinquent child was convicted of, pleaded guilty to, or was classified a juvenile offender registrant relative to the sexually oriented offense or child-victim oriented offense upon which the registration was based prior to December 1, 2007, as soon as practicable after the registration, the sheriff shall contact the attorney general, inform the attorney general of the registration, and forward to the attorney general in the manner specified in division (D) of section 2950.04 of the Revised Code all of the information and material specified in that division. Upon being informed of the registration and receiving the information and material, the attorney general shall comply with division (B) of section 2950.031 [2950.03.1] of the Revised Code.

HISTORY: 152 v S 10, § 1, eff. 7-1-07.

§ 16913. Registry requirements for sex offenders

(a) In general. A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration. The sex offender shall initially register--

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current. A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b). The Attorney General shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act [enacted July 27, 2006] or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

(e) State penalty for failure to comply. Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this title.

History:

(July 27, 2006, P.L. 109-248, Title I, Subtitle A, § 113, 120 Stat. 593.)

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> **§ 72.3 Applicability of the Sex Offender Registration and Notification Act.**

Citation: **28 C.F.R. 72.3**

28 CFR 72.3

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TITLE 28 -- JUDICIAL ADMINISTRATION
CHAPTER I -- DEPARTMENT OF JUSTICE
PART 72 -- SEX OFFENDER REGISTRATION AND NOTIFICATION

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§ 72.3 Applicability of the Sex Offender Registration and Notification Act.

The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

Example 1. A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student.

Example 2. A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required, but disappears after a couple of years and does not register in any other jurisdiction. Following the enactment of the Sex Offender Registration and Notification Act, the sex offender is found to be living in another state and is arrested there. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in each state in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

HISTORY:

[72 FR 8894, 8897, Feb. 28, 2007, as confirmed and amended at 75 FR 81849, 81853, Dec. 29, 2010]

AUTHORITY:

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

Pub. L. 109-248, 120 Stat. 587.

NOTES:

[EFFECTIVE DATE NOTE: 75 FR 81849, 81853, Dec. 29, 2010, revised Example 2, effective Jan. 28, 2011.]

NOTES APPLICABLE TO ENTIRE CHAPTER:

CROSS REFERENCES: Customs Service, Department of the Treasury: See Customs Duties, 19 CFR chapter I.

Internal Revenue Service, Department of the Treasury: See Internal Revenue Service, 26 CFR chapter I.

Employees' Benefits: See title 20.

Federal Trade Commission: See Commercial Practices, 16 CFR chapter I.

Other regulations issued by the Department of Justice appear in title 4; title 8; title 21; title 45; title 48.

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