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**EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION**

This Court should accept jurisdiction in this case to resolve the confusion among lower courts regarding Ohio's version of the Adam Walsh Act codified in R.C. 2950 et seq., "Senate Bill 10." This case presents this Court with the opportunity to address whether the denial of the right to counsel in Senate Bill 10 reclassification hearings is a final appealable order. Justice requires that procedural rules promote equitable and foreseeable results. As written, Senate Bill 10, invites inconsistent jurisprudence in an area of the law that should remain, at all times, stable and fixed. To that end, this Court should exercise jurisdiction over this case in order to establish a bright-line rule governing the appeal of trial court decisions denying appointed counsel at Senate Bill 10 reclassification hearings.

Presently, lower courts are deeply divided over the question of the right to appointed counsel at S.B. 10 reclassification hearings. See e.g., *State v. Ehmer* (April 14, 2008), Logan County C.P. No. CV 08 01 0053 (granting court-appointed counsel because the hearing is a "stage of a proceeding in which an indigent defendant is charged with the commission of an offense..." and therefore entitled to counsel under R.C. 120.16); contra *Chojnacki v. Dann* (March 10, 2008), Warren County C.P. No. 08CV70822 (denying court-appointed counsel because a reclassification hearing "is not a proceeding at which the petitioner's liberty is at stake.") Given this division, it is especially disconcerting that appellate districts have also divided over the proper avenue to appeal the denial of a request for appointed counsel at reclassification hearings. See e.g., *King v. State of Ohio* (Mar. 19, 2008), 2nd Dist. No 2008-CA-2 (the trial court's order denying the appointment of counsel can be immediately appealed); contra *Chojnacki v. Dann* (April 3, 2008), 12th Dist. No. CA2008-03-040 (dismissing the appeal of the trial court's denial of court-appointed counsel because it was not a final appealable order).

Courts, attorneys and petitioners are unsure what recourse to seek when faced with the issue of appointing counsel in reclassification hearings. Petitioners who are denied counsel need to know how to proceed: should they immediately appeal, file a writ of mandamus, or wait until the proceedings are complete?

Senate Bill 10 went into effect in January of 2008. R.C. 2950 et seq. Prior to the enactment of Senate Bill 10, a defendant was entitled to counsel at the hearing that affected his or her classification as a sexual offender. Former R.C. 2950.09(B)(1); see also, *State v. Cook* (1998), 83 Ohio St.3d 404, 407, 700 N.E.2d 570. It logically follows that counsel is still available, especially after the requirements have become more onerous. However, because Senate Bill 10 has created a new type of hearing to “reclassify” those already classified, and failed to specifically address the issue of counsel, many courts have denied petitioners counsel. These petitioners need to know how to proceed from this denial. The confusion regarding the right to counsel among the trial courts has begun to progress to the courts of appeals in the form of whether the denial of a motion to appoint counsel constitutes a final appealable order.

The need for guidance from this Court as to the proper appellate procedure related to denial of counsel at S.B. 10 reclassification hearings is underscored by the Twelfth District’s certifying that its decision directly conflicts with the decision of the Second District. The Second District determined that the proper procedure after a denial of a motion to appoint counsel is to appeal, because the order denying counsel was a final appealable order under R.C. 2505.02. *King v. State of Ohio* (Mar. 19, 2008), 2nd Dist. No. 2008-CA-2. However, the Twelfth District sua sponte dismissed Mr. Chojnacki’s appeal because the order denying the appointment of counsel was not a final appealable order. *Chojnacki v. Dann* (April 3, 2008), 12th Dist. No. CA2008-03-040.

The exercise of a right as fundamental as the right to appointed counsel should not turn on the defendant's geographic location. Currently, offenders in the Second District are entitled to an immediate appeal of the trial court's denial of appointed counsel. By contrast, in the Twelfth District offenders are without any legal recourse if the trial court denies their request for appointed counsel. Such disparity cannot be tolerated in our constitutional framework. This Court should accept jurisdiction in this case to resolve the confusion surrounding the procedures associated with appointing counsel in Senate Bill 10 reclassification hearings.

### STATEMENT OF THE CASE AND FACTS

Mr. Chojnacki pleaded guilty to three counts of unlawful sexual activity with a minor in Cuyahoga County. The acts were alleged to have occurred between September 11, 2004 and August 31, 2005. Mr. Chojnacki was sentenced to four years in prison on each count, to be served consecutively. After a classification hearing pursuant to Chapter 2950, the trial court found that he was not likely to reoffend and classified him as a sexually oriented offender. *State v. Chojnacki*, Cuyahoga County Case No. CR-05-473492-A, May 5, 2006 Journal Entry. Mr. Chojnacki is currently incarcerated in Warren Correctional Institution in Warren County, Ohio.

Subsequently on or about December 28, 2007, Mr. Chojnacki received a letter from the Office of the Ohio Attorney General notifying him that he had been reclassified under Senate Bill 10, as a Tier II offender. On February 26, 2008, Mr. Chojnacki filed a Petition to Contest the Application of the Adam Walsh Act<sup>1</sup>. Because Mr. Chojnacki was incarcerated and indigent, he filed a Motion to Appoint Counsel concurrent with his Petition. On March 10,

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<sup>1</sup> Pursuant to the direction of the Warren County clerk of courts, all R.C. 2950.031 and R.C. 2950.032 petitions must be captioned as civil cases in order to be accepted for filing by the Warren County Clerk. The legal consequences of filing a civil petition rather than a criminal one are substantial. By filing the petition in compliance with local order, Appellant did not and does not concede that the issues raised herein or that such petitions in general, are "civil." Accordingly, Appellant objects to that requirement to preserve the record.

2008, the trial court denied his motion for appointment of counsel. Mr. Chojnacki appealed. On April 3, 2008, the Twelfth District Court of Appeal sua sponte dismissed his appeal because it found:

The entry denying petitioner's motion for appointment of counsel does not affect a substantial right in the action which in effect determines the action and prevents a judgment. R.C. 2505.02(B)(1). It is not an order made in a special proceeding (R.C. 2505.02(A)(2)), or a provisional remedy (R.C. 2505.02(A)(3)). This appeal is accordingly hereby DISMISSED...

On April 8, 2008, Mr. Chojnacki filed an Application for Reconsideration, or, in the alternative, Motion to Certify a Conflict in light of the Second District Court of Appeals decision in *King v. State of Ohio* (Mar. 19, 2008), 2nd Dist. No. 2008-CA-2 where the Second District found that a motion for appointment of counsel was an immediately appealable order under R.C. 2505.02(B)(2) and (B)(4), and that the right to counsel in Senate Bill 10 hearings is a "substantial right" under the appealable-order statute.

The Twelfth District denied the Application for Reconsideration but granted the Motion to Certify the Conflict. This memorandum in support of jurisdiction timely follows. Concurrent with this memorandum, Mr. Chojnacki files a Notice of Certified Conflict.

#### **PROPOSITION OF LAW**

An entry denying the appointment of counsel in Senate Bill 10 reclassification hearings is a final appealable order because a trial court affects a substantial right when it denies a petitioner the right to counsel.

An entry denying the appointment of counsel in reclassification hearings is a final appealable order. Revised Code Section 2505.02 dictates orders that are immediately appealable. Under R.C. 2505.02(B)(2), an "order that affects a substantial right made in a special proceeding" is immediately appealable. Mr. Chojnacki's petition under R.C. 2950.031(E) is a "special proceeding" because it is "an action or proceeding that is specially created by statute and that prior

to 1853 was not denoted as an action at law or a suit in equity.” R.C. 2505.02(A)(2). Further, Mr. Chojnacki seeks to protect a “substantial right” because the denial of counsel in a criminal case invokes the Sixth and Fourteenth Amendments to the United States Constitution. “‘Substantial right’ means a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect.” R.C. 2505.02(A)(1). Therefore, the denial of a motion to appoint counsel is a final appealable order under R.C. 2505.02(B)(2).

Additionally, under R.C. 2505.02(B)(4), an order granting or denying a “provisional remedy” can be immediately appealed if:

- (a) The order in effect determines the action with respect to the provisional remedy and prevents a judgment in the action in favor of the appealing party with respect to the provisional remedy.
- (b) The appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action. . . .

Noting the difficult procedural and substantive waters that litigants must traverse, this Court has held that an appeal at the end of a case is not an adequate remedy for having counsel to develop the record. *State ex rel. Asberry v. Payne* (1998), 82 Ohio St. 3d 44, 49. Thus, the denial of a motion to appoint counsel is a final appealable order under R.C. 2505.02(B)(4) as well.

The trial court proceedings in this case are the constitutional equivalent to the continuation of Mr. Chojnacki’s original sentencing proceedings. Mr. Chojnacki has the right to appointed counsel because the imposition of a new criminal penalty is a “critical stage” of the ongoing felony proceedings against him. *United States v. Cronin* (1984), 466 U.S. 648, 654 (denial of counsel at a critical stage violates the Sixth and Fourteenth Amendments to the United States Constitution); *Griffin v. Illinois* (1956), 351 U.S. 12 (right of counsel at state expense for indigent

defendants). Although a trial court petition might not generally be a “critical stage,” see, e.g., *Murray v. Giarratano* (1989), 492 U.S. 1, 7, quoting *Ross v. Moffitt* (1974), 417 U.S. 610, 610-611 (discretionary appeal is not a critical stage), it is a critical stage in this case because the petition is Mr. Chojnacki’s only defense against the State’s attempt to impose additional criminal sanctions against him. Accordingly, he needs an attorney “as a shield to protect him against being haled into court by the State. . . .” *Murray* at 7, internal citation and quotation marks omitted.

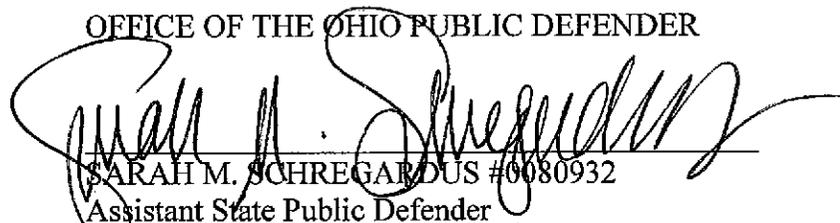
Mr. Chojnacki should be allowed to immediately appeal the denial of the appointment of counsel to the court of appeals.

### CONCLUSION

This Court should accept jurisdiction to resolve the conflict among the lower courts surrounding the proper procedure to address the right to counsel in Senate Bill 10 reclassification hearings.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER

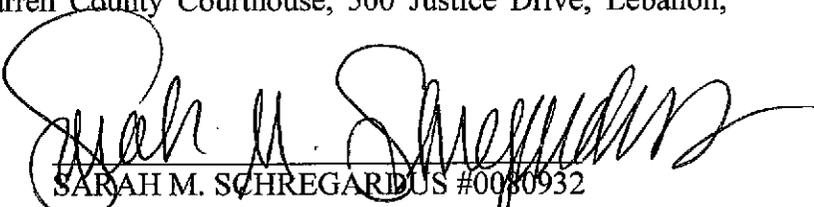


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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT ROMAN CHOJNACKI has been served upon Rachel Hutzel, Warren County Prosecutor, Warren County Courthouse, 500 Justice Drive, Lebanon, Ohio, 45036 this 19th day of May, 2008.



SARAH M. SCHREGARDUS #0080932  
Assistant State Public Defender

COUNSEL FOR ROMAN CHOJNACKI

#278344

IN THE SUPREME COURT OF OHIO

ROMAN CHOJNACKI,	:	
	:	Case No. _____
Petitioner-Appellant,	:	
	:	On Appeal from the Warren
vs.	:	County Court of Appeals
	:	Twelfth Appellate District
MARC DANN, Ohio Attorney General,	:	
In his Official Capacity	:	Case No. CA2008-03-040
	:	
Respondent-Appellee.	:	

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**APPENDIX TO MEMORANDUM IN SUPPORT OF JURISDICTION  
OF APPELLANT ROMAN CHOJNACKI**

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COURT OF APPEALS  
WARREN COUNTY  
FILED  
IN THE COURT OF WARREN COUNTY, OHIO

APR 3 2008

ROMAN CHOJNACKI,

Petitioner/Appellant,

vs.

MARC DANN, Ohio Attorney General,  
in his Official Capacity,

Respondent/Appellee.

*James L. Spaeth, Clerk*  
LEBANON OHIO

CASE NO. CA2008-03-040

ENTRY OF DISMISSAL

The above cause is before the court pursuant to a notice of appeal filed by petitioner/appellant, Roman Chojnacki, on March 13, 2008. The appeal is taken from an entry filed in the Warren County Court of Common Pleas on March 10, 2008 denying a motion for appointment of counsel.

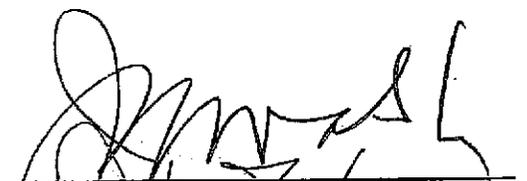
Appellant is an inmate incarcerated at Lebanon Correctional Institution. He was found guilty of three counts of unlawful sexual conduct with a minor in 2006 and sentenced to 12 years in prison.

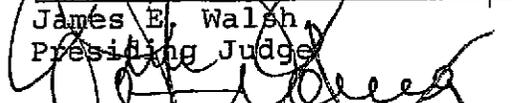
On February 26, 2008, petitioner filed a "petition to contest reclassification" which challenges the application of Ohio's version of the Adam Walsh Act re-classifying him as a Tier II offender. On the same date, petitioner filed a motion for appointment of the Office of the Ohio Public Defender as counsel. The motion was denied on March 10, 2008 and this appeal follows.

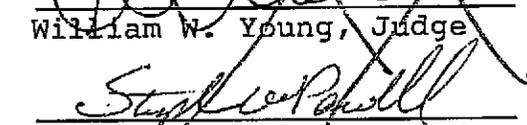
Upon consideration, the court finds that this appeal is not taken from a final appealable order. The entry denying petitioner's motion for appointment of counsel does not affect a substantial right in the action which in effect determines the action and prevents a judgment. R.C. 2505.02(B)(1). It is not an order made in a special proceeding (R.C. 2505.02(A)(2)), or a provisional remedy (R.C. 2505.02(A)(3)).

This appeal is accordingly hereby DISMISSED, costs to petitioner.

IT IS SO ORDERED.

  
James E. Walsh,  
Presiding Judge

  
William W. Young, Judge

  
Stephen W. Powell, Judge

COURT OF APPEALS  
IN THE COURT OF APPEALS OF WARREN COUNTY, OHIO

MAY 5 2008

ROMAN CHOJNACKI,

Petitioner/Appellant,

vs.

MARC DANN, Ohio Atty. General,  
in his Official Capacity,

Respondent/Appellee,

CASE NO. CA2008-03-040

*James L. Spaeth*, Clerk  
LEBANON OHIO

ENTRY DENYING APPLICATION  
FOR RECONSIDERATION AND  
GRANTING MOTION TO CERTIFY  
CONFLICT

The above cause is before the court pursuant to an application for reconsideration or, in the alternative, motion to certify conflict filed by counsel for appellant, Roman Chojnacki, on April 8, 2008. No response has been filed on behalf of appellee, Marc Dann, Ohio Attorney General.

On February 26, 2008, appellant filed a "petition to contest reclassification" which challenges the application of Ohio's version of the Adam Walsh Act reclassifying him as a Tier II offender. On the same date, petitioner filed a motion for appointment of the office of the Ohio Public Defender as counsel. The motion was denied, and appellant filed this appeal. In an entry of dismissal filed on April 3, 2008, this court dismissed the appeal for the reason that it is not taken from a final appealable order. Thereafter, appellant timely filed the above application for reconsideration, or in the alternative, motion to certify conflict.

The test generally used when ruling on an application for reconsideration is whether the application calls the court's attention to an obvious error in its decision, or raises an issue which was improperly or not fully considered, or was not considered at all by the court. *State v. Black* (1991), 78 Ohio App.3d 130. In his application for reconsideration, appellant disagrees with this court's decision finding the entry appealed from



Warren CA2008-03-040

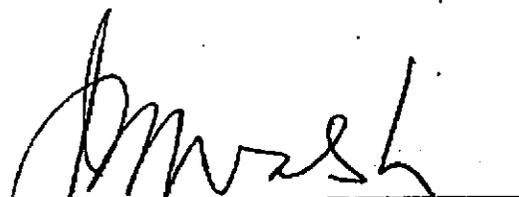
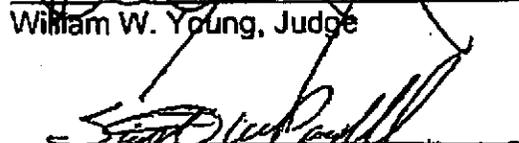
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not to be a final appealable, but raises no issues which were not fully considered by the court. The application for reconsideration is accordingly DENIED.

Under the Ohio Constitution, a court of appeals is required to certify the record of a case to the Supreme Court of Ohio if it finds that its decision is in conflict with the judgment of another court of appeals on the same question. O.Constitution Art. IV, Section 3(B)(4). Appellant contends that this court's decision is in conflict with a decision by the Second District Court of Appeals, *King v. State of Ohio* (Mar. 19, 2008), Miami App. No. 2008-CA-2.

Upon review, the court finds that its decision is in conflict with the *King* decision. Accordingly, the motion to certify is GRANTED. The issue for certification is whether a decision denying a request for appointment of counsel in a reclassification hearing held pursuant to Ohio's version of the Adam Walsh Act, Senate Bill 10, is a final appealable order.

IT IS SO ORDERED.

  
James E. Walsh, Presiding Judge  
William W. Young, Judge  
Stephen W. Powell, Judge