

IN THE SUPREME COURT OF OHIO

MARC DANN, Ohio Attorney General,

Appellee,

v.

ROMAN CHOJNACKI

Appellant.

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\* Case No. 08-0992  
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MEMORANDUM IN RESPONSE ON JURISDICTION

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For Mark Dann, Ohio Attorney General:

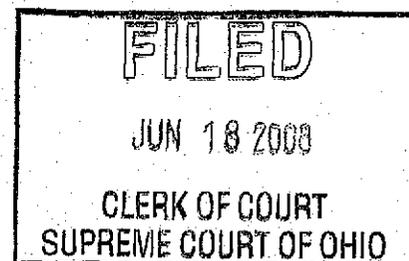
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Attorney for the Appellee

For Roman Chojnacki:

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Attorney for the Appellant



## STATEMENT OF THE APPELLEE'S POSITION

Appellee, Marc Dann, Ohio Attorney General, herein responds to Appellant, Roman Chojnacki, on the issue of jurisdiction. This Court should not accept jurisdiction over this appeal because the Appellant has not presented a substantial Constitutional question, nor an issue of public or great general interest, for the following reasons. First, the General Assembly has provided a clear and unambiguous standard for a final appealable order under R.C. §2505.02, and the denial of the Appellant's Motion for Appointment of Counsel does not qualify under that standard. Moreover, relevant case law in Ohio indicates that this denial by the trial court is not a final appealable order.

In fact, despite the Appellant's allegations, the dispute in this case does not involve an enforceable right to counsel. Here, the Appellant sought to enforce his Right to Counsel during an automatic re-classification hearing mandated by Senate Bill 10, Ohio's version of the Federal Adam Walsh Act. Ohio case law precedent clearly indicates that the Appellant has no right to Counsel in a reclassification hearing.

## STATEMENT OF THE CASE AND FACTS

The State stipulates to the statement of the case and facts as written in the Memorandum in Support of Jurisdiction written by the Appellant.

## ARGUMENT

The Warren County Court of Common Pleas did not issue a final appealable order when it denied the Appellant's Motion for Appointed Counsel on March 10, 2008. Ohio Revised Code §2505.02 provides the standard for a final appealable order. In this case, neither the "Substantial Right," nor the "Provisional Remedy" forms of appealable orders are applicable. R.C. §2505.02 (B)(2) & (4). Furthermore, the allegation by the Appellant, that a right to counsel in a re-

classification hearing even existed, is not supported by relevant case law. *State v. King*, 2<sup>nd</sup> Dist., 2008 Ohio App. LEXIS 2174, 2008-Ohio-2594; citing *State v. Furlong*, 10<sup>th</sup> Dist., 2001 Ohio App. LEXIS 390, unreported.

### “Substantial Right” Analysis

The Ohio Legislature has enacted a simple, two step analysis to determine whether a decision involving a “substantial right” will constitute a final appealable order.

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following. . . . (2) An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment. R.C. §2505.02(B)(2)

First, this Court must determine whether a special proceeding is involved. *State v. Saadey* (2000), 2000 Ohio App. LEXIS 3552, unreported. The Ohio Revised Code §2505.02(A)(2) defines a “special proceeding” as “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.” Second, the Court must find that a substantial right was affected by the order given by the Court. *Russell v. Mercy Hospital* (1984), 15 Ohio St.3d 37, 38. A “substantial right” is defined by R.C. §2505.02 (A)(1) as “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.”

Recently, the Second District has ruled that a convicted sex offender has no right to counsel in a civil re-classification hearing under the new Senate Bill 10 requirements. *State v. King* (2008), 2008 Ohio App. LEXIS 2174, 2008-Ohio-2594. This is because there is no Sixth Amendment right to counsel in a civil proceeding. *Id*; see also, *State v. Furlong* (2001), 2001 Ohio App. LEXIS 390, unreported.

In this case, this Court must evaluate both of the required elements of a “substantial right” final appealable order. First, the State does not dispute that a Senate Bill 10 reclassification hearing qualifies as a “special proceeding” as defined by the statute. The reclassification hearings have been mandated by statute and fall within the timeframe indicated in the statute.

However, the second required element is clearly not satisfied, because a substantial right is not affected by the denial of counsel in a reclassification hearing. The Right to Counsel is not an absolute right provided by the United States Constitution. *King*, 2008 Ohio App. LEXIS 217, 2008-Ohio-2594. The Sixth Amendment right to counsel is only afforded if the proceeding is a criminal or punitive one. *Id.* Furthermore, even under the Fourteenth Amendment, in the context of reclassification of sex offenders, the Second District has ruled that there is no right to counsel because a change in the terms of classification does not constitute a deprivation of a liberty interest. *Id.* Therefore, because there is no right to counsel in these proceedings, there also is no substantial right affected by these proceedings. Thus, the Appellant has failed to meet the second requirement for a final appealable order under R.C. § 2505.02 (B)(2).

#### **“Provisional Remedy” Analysis**

A more strenuous standard is provided under the “Provisional Remedy” section of the final appealable order statute, R.C. §2505.02 (B)(4).

(B) An order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following. . . .

(4) An order that grants or denies a provisional remedy and to which both of the following apply:

(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.

The requirements under this section are not met by the Appellant, because of the nature of Senate Bill 10 reclassification hearing. The classification procedures under Senate Bill 10 are automatic, and the presence of Counsel would not affect the outcome of the classification in any way. Therefore, it would be impossible for denial of appointed counsel by the trial court to “prevent a judgment in the action in favor of the appealing party.” Because the first requirement is not met, the order by the trial court is not a final appealable order under the “Provisional Remedy” section of the statute. Even if the Court finds that the second requirement is met, it is immaterial, because both elements must be satisfied to amount to qualify a final appealable order.

**Senate Bill 10 Reclassification Hearing is Not Punitive**

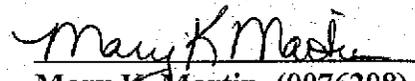
Most importantly, the Appellant contends that this is a critical stage of the litigation against him, because the reclassification under Senate Bill 10 imposes a new criminal penalty. This allegation cannot prevail here, because, in fact, the procedures under Senate Bill 10 have conclusively been found to be civil and non-punitive in nature. The Ohio Legislature explicitly intended Senate Bill 10 to help assure public protection, and not to punish the sex offender. R.C. 2950.02 (B). Moreover, this Court, along with other Districts in Ohio, agree with that principle. *Hayden*, 96 Ohio St.3d at 214; citing *State v. Eppinger* (2001), 91 Ohio St.3d 158, 165; *State v. Williams* (2000), 88 Ohio St.3d 513, 527; see also *State v. Clark*, 2006 Ohio App. LEXIS 4138, 2006-Ohio-4212; *State v. Brown*, 1998 Ohio App. LEXIS 4904, unreported; *Ohio v. King* (2008), 2008 Ohio App. LEXIS 2174, 2008 Ohio 2594; *State v. Cook* (1998), 83 Ohio St.3d 404, 417. In fact, the Ohio Supreme Court has found that “the registration and address verification

provisions of R.C. Chapter 2950 are *de minimis* procedural requirements that are necessary to achieve the goals of R.C. Chapter 2950.” *Cook*, 83 Ohio St.3d at 412.

### CONCLUSION

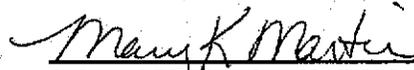
For the foregoing reasons, this Court should affirm the decision of the Twelfth District to not accept jurisdiction in the appeal of the denial of the appointment of Counsel during the Appellant’s Senate Bill 10 re-classification hearing, because it does not qualify as a final appealable order. This Court should not accept jurisdiction over this appeal because the Appellant has not presented a substantial Constitutional question, nor an issue of public or great general interest, for the following reasons.

Respectfully Submitted,

  
Mary K. Martin (0076298)  
Assistant Prosecuting Attorney  
500 Justice Drive  
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(513) 695-1325

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was delivered upon Sarah M. Schregardus, at 8 East Long Street – 11<sup>th</sup> Floor, Columbus, Ohio 43215, on this 17<sup>th</sup> day of June, 2008 by ordinary U.S. mail.

  
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