

IN THE SUPREME COURT OF OHIO

NANCY ROGERS,  
Ohio Attorney General,

Appellee,

v.

ROMAN CHOJNACKI

Appellant.

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Case No. 08-0991, 08-0992

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MERIT BRIEF OF THE APPELLEE

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For Nancy Rogers, Ohio Attorney General:

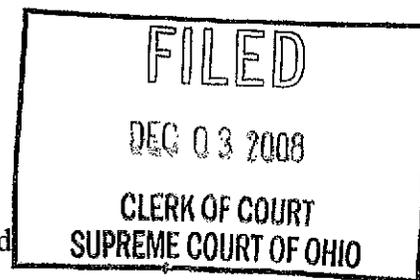
Mary K. Martin (0076298) – Counsel of Record  
Assistant Prosecuting Attorney  
WARREN COUNTY PROSECUTOR’S OFFICE  
500 Justice Drive  
Lebanon, Ohio 45036  
(513) 695-1325  
(513) 695 -2962 (Fax)

Attorney for the Appellee

For Roman Chojnacki:

Sarah M. Schregardus (0080932) – Counsel of Record  
Assistant State Public Defender  
OFFICE OF THE PUBLIC DEFENDER  
8 East Long Street – 11<sup>th</sup> Floor  
Columbus, Ohio 43215  
(614) 466-5394  
(614) 752-5167 (Fax)

Attorney for the Appellant



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## **STATEMENT OF THE FACTS**

The State stipulates to the statement of the case and facts as written in the Merit Brief written by the Appellant.

### **INTRODUCTION**

Appellee, Nancy Rogers, Ohio Attorney General, herein responds to Appellant, Roman Chojnacki, on the merits of the certified issue: whether the denial of a motion to appoint counsel in an automatic Senate Bill 10 sex offender reclassification proceeding constitutes a final appealable order. This Court should affirm the ruling of the Twelfth District that it does not constitute a final appealable order 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 in this case does not qualify under that standard. Second, 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.

### **ARGUMENT**

#### **APPELLEE'S RESPONSE TO APPELLANT'S PROPOSITION OF LAW**

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). In his brief, the Appellant asserts that this Court should not consider whether he is entitled to counsel in a reclassification hearing, and yet, argued that very contention in dealing with the “Substantial Right” portion of the statute. Indeed, this Court should examine whether there is a right to counsel in a reclassification proceeding. In fact, relevant case law indicates that such a right does not exist. *State v. King* (2008), 2<sup>nd</sup> Dist., 2008 Ohio App. Lexis 2174, 2008 Ohio 2594; *citing State v. Furlong* (2001), 10<sup>th</sup> Dist., 2001 Ohio App. Lexis 390, unreported.

**I. The denial of a motion to appoint counsel for an automatic Senate Bill 10 Reclassification hearing is not a final appealable order because it does not affect a substantial right under R.C. §2505.02 (B)(2).**

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. *King*,

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 *Furlong*, 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 or fundamental 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, 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).

In the Merit Brief of the Appellant, the main thrust of his argument is that *Bernbaum v. Silverstein* (1980), 62 Ohio St.2d 445 and *Russell v. Mercy Hosp.* (1984), 15 Ohio St.3d 37 are analogous to our case. (App. Br. 5-6). However, those cases are neither factually on point, nor helpful here. Both cases involve the disqualification of counsel in drawn out civil litigation matters, where the attorney was disqualified because of poor performance or a conflict of

interest. *Id.* Neither case is even close to factual context in our case: the simplistic and automatic nature of a Senate Bill 10 Reclassification Hearing.

Furthermore, none of the other cases cited by the Appellant for the proposition that the right to counsel is generally a substantial right involve proceedings similar to the one in the case at bar. Most of the examples cited dealt with criminal proceedings or domestic relations proceedings involving the determination of substantial rights. Moreover, in most of those hearings, the aid of counsel perhaps would be beneficial.

Contrary to those cases, a Senate Bill 10 Reclassification Hearing is virtually automatic and solely based upon the offense for which the individual was convicted. *State v. Williams* (2008), 2008 Ohio App. Lexis 5164, 2008 Ohio 6195, unreported. As no discretion is given to the Court, this hearing is merely a formality, and there is no benefit to the presence of Counsel.

The Appellant has incorrectly asserted in his Brief that “[a]ny misstep made when contesting a petitioner’s reclassification could forever waive further constitutional arguments.” (App. Br. 7) Two of the cases cited for this proposition, *State v. Longpre* (2008), 2008 Ohio App. Lexis 3252, 2008 Ohio 3832 and *State v. Byers* (2008), 2008 Ohio App. Lexis 4258, 2008 Ohio 5051, both recognize that the waiver doctrine is a discretionary standard. *See also State v. Williams* (2008), 2008 Ohio App. Lexis 5164, 2008 Ohio 6195 (Court used its discretion consider Constitutional arguments not objected to in the trial court). Furthermore, *pro se* litigants should given some leniency and not held to the same standard as attorneys during trial court proceedings. *Karmasu v. Tate* (1994), 1994 Ohio App. Lexis 4259. Thus, there is a reasonable probability that the appellate court would use its discretion to give a *pro se* Appellant an opportunity to raise these Constitutional claims, even if they had not been raised at the trial level.

For those reasons, this Court should find that the denial of the motion to appoint counsel is not a final appealable order, because the Appellant has failed to establish that a substantial right has been affected.

**II. The denial of a motion to appoint counsel for an automatic Senate Bill 10 Reclassification hearing is not a final appealable order because it does not satisfy the requirements as a qualifying provisional remedy under R.C. §2505.02 (B)(4).**

A more strenuous standard for a final appealable order 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.

In *State v. Muncie* (2001), 91 Ohio St.3d 440, 446, this Court established a three part test for determining whether R.C. §2505.02 (B)(4) could be applied to establish a final appealable order. First, “the order must either grant or deny relief sought in a certain type of proceeding – a proceeding that the General Assembly calls a “provisional remedy.” *Id.* Second, “the order must both determine the action with respect to the provisional remedy and prevent a judgment in favor of the appealing party with respect to the provisional remedy.” *Id.* Third, the “reviewing court must decide that the party appealing from the order 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.” *Id.*

In this case, the Appellant has failed to show the first and third parts of the test, and therefore cannot equate the denial of the motion to appoint counsel in his Senate Bill 10 Reclassification Hearing with a final appealable order.

The first part of the *Muncie* Test is not established because the Appellant has failed to show that the Motion to Appoint Counsel is a “Provisional Remedy.” The Statutory definition of “Provisional Remedy” is “a proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, discovery of privileged matter, or suppression of evidence.” *Muncie*, 91 Ohio St.3d at 447; *citing* R.C. 2505.02(A)(3). This Court has determined that this list of examples in the statute is nonexhaustive. *Id.* at 448. Further, an “ancillary proceeding is one that is attendant upon or aids another proceeding.” *Id.*; *citing* *Bishop v. Dresser Ind.* (1999), 134 Ohio App.3d 321, 324.

In *Muncie, supra*, this Court disagreed with the narrow application sought by the State. *Muncie*, 91 Ohio St.3d at 448. In its analysis, this Court heavily emphasized the importance of the practicality of the ancillary proceeding, and how that proceeding would “aid” the principle action. *Id.* at 450. In that case, it was critical for the court to rule on the ancillary motion to give forced medication to a legally incompetent criminal to protect his due process rights. *Id.*

Contrary to the practical nature of the “Provisional Remedy” in *Muncie*, the Appellant in this case, does not have any practical benefits at stake. As previously mentioned, the Senate Bill 10 Reclassification Hearing is an automatic system of classification based on the prior offense. Thus, although such a hearing might be technically “ancillary” or “subordinate,” it does not accomplish any practical benefits, and therefore does not qualify as a “Provisional Remedy.”

Further, the third Part of the *Muncie* Test was not established by the Appellant, because he would be afforded a meaningful and effective remedy through an appeal after the reclassification is final. In *Muncie, supra*, this Court found that the administration of psychotropic medication to the appellant in that case, was a “proverbial bell” that could not be unrung because of the painful and severe side effects the appellant would have to endure. *Muncie*, 91 Ohio St.3d at 451-452. Unlike *Muncie*, in our case, the Appellant has a meaningful remedy, because he could appeal the reclassification proceeding after it is finalized, and this appeal could include a claim that the trial Court violated his Constitutional right to counsel. Unlike in *Muncie*, the Appellant’s reclassification is not a bell that could not be unrung through such an appeal. In fact, the Appellant has already been classified as a sex offender, and a reclassification is only tweaking his current status to meet the requirements of the new law.

To the extent the Appellant argued that his Constitutional arguments would be lost under the waiver doctrine if Counsel was not appointed, it is critical to point out, that the waiver doctrine is discretionary. *Byers*, 2008 Ohio App. Lexis 4258, 2008 Ohio 5051, unreported.

Moreover, any assertion that an interlocutory appeal of the denial of the appointment of counsel would increase judicial economy is misplaced. The Appellant cites *Russell* for that contention, and it has previously been discussed how that case involved complicated civil litigation. *Russell*, 15 Ohio St.3d 37. In fact, the litigation of a sex offender reclassification would be further encumbered, and judicial economy would be burdened by allowing an interlocutory appeal during a proceeding that should require little of the Court’s resources and time.

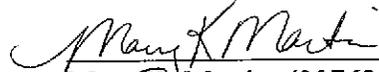
For those reasons, this Court should find that the denial of the motion to appoint counsel is not a final appealable order, because the Appellant has failed to establish that a motion to

appoint counsel is a provisional remedy within the statutory definition, or that he will not have a meaningful remedy on a subsequent appeal.

### CONCLUSION

For the foregoing reasons, this Court should rule that the Trial Court's denial of the Motion to Appoint Counsel was not a final appealable order within the definition provided by R.C. § 2505.02 (B)(2) &(4). The denial of counsel in a Senate Bill 10 Reclassification hearing does not affect a substantial right because of the simple and automatic nature of said hearing. Further, the ruling on a motion to appoint counsel in our context is not a provisional remedy, and the Appellant has a meaningful alternative through his opportunity for a direct appeal after the reclassification proceeding is complete.

Respectfully Submitted,



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Mary K. Martin (0076298)  
Assistant Prosecuting Attorney  
500 Justice Drive  
Lebanon, Ohio 45036  
(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 4<sup>th</sup> day of December, 2008 by ordinary U.S. mail.



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Mary K. Martin (0076298)  
Assistant Prosecuting Attorney  
500 Justice Drive  
Lebanon, Ohio 45036  
(513)695-1325