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IN THE SUPREME COURT OF OHIO

ROMAN CHOJNACKI,

Appellant,

v.

NANCY ROGERS, Ohio Atty. General,
in her Official Capacity,

Appellee.

Case Nos. 2008-0991 and 2008-0992

On Appeal from the Warren
County Court of Appeals
Twelfth Appellate District
Court of Appeals
Case No. CA200803040

REPLY BRIEF OF APPELLANT ROMAN CHOJNACKI

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STATEMENT OF THE FACTS

Mr. Chojnacki relies on the Statement of the Facts set forth in his Merit Brief.

APPELLANT'S PROPOSITION OF LAW

An entry denying the appointment of counsel in Senate Bill 10 reclassification hearings is a final appealable order. R.C. 2505.02(B)(2) and (B)(4).

This case presents a narrow procedural issue. Yet, the State misconstrues the proposition of law and certified question before this Court. The State's position is that Senate Bill 10 reclassification hearings are simple formalities that do not require counsel. While Mr. Chojnacki strongly disagrees with that characterization, this case is not the case to determine the legal significance of Senate Bill 10 reclassification hearings. This case presents a very narrow procedural question: is an order denying a motion to appoint counsel, a final appealable order?

I. An entry denying the appointment of counsel in Senate Bill 10 reclassification hearings is a final appealable order under R.C. 2505.02(B)(2) because it is made in a special proceeding and affects a substantial right.

Despite the State's arguments to the contrary, the entry denying Mr. Chojnacki appointed counsel affects his substantial right to counsel. The State argues that a reclassification hearing is "merely a formality," thus having counsel would provide no benefit. Merit Brief of the Appellee, p. 4. The State's mischaracterization of the hearing as a "formality" fails for two reasons. First, it is factually incorrect. If the hearing were indeed a mere formality, the statute would not give the State the right to have counsel at these hearings, as well as the right to appeal the trial court's decisions. R.C. 2950.031. Classifying Mr. Chojnacki as a Tier II offender gave rise to an array of complicated legal issues. See p. 8-10 of Appellant's Merit Brief. A mere formality would have no such effect. See also, *Mempa v. Rhay* (1967), 389 U.S. 128, 135 (rejecting the government's argument that a probation revocation hearing was a "mere formality" precluding the right to counsel for indigents).

Second, whether the hearing is a mere formality is irrelevant under this Court's precedent. The State asks this Court to recognize a new category of cases. Merit Brief of the Appellee, p. 4. In addition to "civil" cases or "criminal" cases, the Court should now create a new category to which different legal standard should apply: "mere formality" civil cases. Nothing in the law supports this argument. The order affected Mr. Chojnacki's substantial right to counsel, thus it is final and appealable.

Furthermore, legal counsel is necessary for a petitioner who is going to have to defend himself against the litigation strategies of the Attorney General's Office. Mr. Chojnacki's case is particularly telling, because the State initially filed a Motion to Dismiss under Civ.R. 12(B)(6) on the basis that the Ohio Attorney General was not a proper party. 3/17/07 Mot. To Dismiss and Reservation of Right to be Heard. The State argued that because the Prosecuting Attorney represents the interests of the State in the action, the Attorney General is not a party to these actions. Id. at p. 3. The State went on to note, "[i]t is possible that Petitioner has named Attorney General Dann as a party defendant in an effort to comply with the notice requirement of R.C. 2721.12(A) which provides that the Attorney General must be notified of a declaratory judgment action challenging the constitutionality of a state statute." Id.

While 12(B)(6) motions are common practice for attorneys, a lay person should not be expected to understand that motion practice is a litigation strategy, and will not necessarily result in a complete dismissal of his action. The fact that the Attorney General's Office moved to dismiss Mr. Chojnacki's case on a legal technicality is further evidence that these classification hearings are more than "mere formalities."

The State argues that *Bernbaum v. Silverstein* (1980), 62 Ohio St.2d 445, 406 N.E.2d 532, and *Russell v. Mercy Hosp.* (1984), 15 Ohio St.3d 37, 472 N.E.2d 695, "are neither factually

on point, nor helpful here.” Merit Brief of the Appellee, p. 3. Of course, the State is correct to the extent that it argues there is no precedent directly on point. There is no case from this Court directly on point because this is an issue of first impression and because *all* of the prior sex offender laws providing for hearings also provided for counsel. Thus, the lack of case law directly analogous to this issue is a logical result.

Moreover, *Bernbaum* and *Russell* are useful because the issue of the right to counsel in civil proceedings was not heavily litigated because it was so obvious. *Bernbaum*, 62 Ohio St.2d at 446, fn 2, 406 N.E.2d 532 (observing “Appellees do not dispute the Court of Appeals finding that an order overruling a motion to disqualify counsel affects a ‘substantial right.’ Such a determination is clearly supportable.”) The fact that an order denying a motion to appoint counsel affects a substantial right is clearly supportable and renders the order final and appealable.

II. An entry denying the appointment of counsel in Senate Bill 10 reclassification hearing is a final appealable order under the provisional remedy section of R.C. 2505.02(B)(4).

The State concedes that Mr. Chojnacki has satisfied the second prong of the test under the provisional remedy section: that the order both determines the action with respect to the provision remedy and prevents a judgment in favor of Mr. Chojnacki with respect to the provisional remedy. Merit Brief of the Appellee, p. 6. The State takes issue with the first and third prongs, e.g., (1) whether a motion to appoint counsel is a provisional remedy, and (2) whether the appellant would be afford a meaningful and effective remedy through an appeal after the fact. *Id.* at 6-7. Although the State claims to take issue with the first prong, the State concedes that a motion to appoint counsel is ancillary. *Id.* at 6. Nevertheless, the State attempts to add an additional element by arguing that, although the reclassification hearing “might be

technically 'ancillary or subordinate,' it does not accomplish any practical benefits" and thus is not a provisional remedy. *Id.*

This Court recently addressed the provisional remedy subsection of the final appealable order statute in *In re: A.J.S.*, Sup. Ct. No. 2007-1451, 2008-Ohio-5307. This Court held that a hearing for mandatory transfer in juvenile delinquency proceedings is ancillary "because it aids the juvenile court in determining whether it has a duty to transfer jurisdiction to the general division for criminal proceedings[.]" *A.J.S.* at ¶23. This Court did not add any additional requirements to the definition of ancillary or provisional remedy. *Id.* Thus, the definition of "ancillary" turns simply on whether it aids the principal proceeding.

The determination of Mr. Chojnacki's motion to appoint counsel was ancillary to the Senate Bill 10 reclassification hearing because it aided the trial court in determining whether he was properly classified. Because reclassification proceedings raise complex issues regarding the nature of Senate Bill 10, its application, and its constitutionality, it is critical for the trial court to have counsel to explain the petitioner's arguments. The State's argument that counsel for petitioner would not be helpful to the proceedings is convenient and disingenuous because the State is *guaranteed* counsel at the hearing. R.C. 2950.031(E) ("The prosecutor shall represent the interests of the state in the hearing.") Furthermore, judges have the benefit of being provided explanatory information by other judges. See Ohio Judicial Conference webpage at <http://www.ohiojudges.org> ("AWA Bench Aid for 1-1-08 and after for Adults")¹

¹ The "simple" nature of reclassification hearings is further belied by the fact that even prosecutors sometimes need additional education about Senate Bill 10. See Ohio Prosecuting Attorneys Association webpage advertising CLE explaining "the ongoing saga that is the Adam Walsh Act", <http://www.ohiopa.org/fall08.txt>.

The value of counsel at reclassification hearings is indisputable. The usefulness of the State's attorney at the reclassification hearing is obvious: to ensure that the State's interests are protected. However, without counsel, the petitioner's interests are not similarly protected. The State should not get the benefit of having its interpretation of Senate Bill 10 presented at the hearing, whereas the petitioner, the one actually affected by the statute, must traverse these waters without learned counsel.

Finally, the third prong is also satisfied because Mr. Chojnacki would not be afforded a meaningful and effective remedy through an appeal after the fact. In *Mempa v. Rhay* (1967), 389 U.S. 128, the Supreme Court unanimously held that indigent defendants were entitled to counsel at probation revocation hearings. The Court observed the lasting consequences of not having counsel noting that, "certain legal rights may be lost if not exercised at this stage." *Id.* at 135. The Court went on, "[w]hile ordinarily appeals from a plea of guilty are less frequent than those following a trial on the merits, the incidence of improperly obtained guilty pleas is not so slight as to be capable of being characterized as *de minimis*." *Id.* at 136 (internal citations omitted). Similar lasting consequences await Mr. Chojnacki.

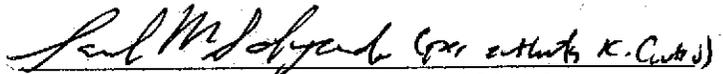
The State argues that Mr. Chojnacki could have an effective remedy by way of an appeal after the fact because the court of appeals could overlook any failures to object. Merit Brief of Appellee, p. 4. Despite the State's argument that courts of appeals *could* exercise discretion and overlook any waiver arguments, Merit Brief of Appellee, p. 4, as evidenced by the courts of appeals that have already refused to exercise that discretion, the incidence of waived constitutional error is not *de minimis*. The third prong is satisfied because without counsel to protect his interests, Mr. Chojnacki would not be afforded a meaningful or effective remedy by an appeal following final judgment.

CONCLUSION

Whether this Court determines that the trial court's order denying Mr. Chojnacki court-appointed counsel affects a substantial right and occurred in a special proceeding, or denies a provisional remedy and that Mr. Chojnacki would not be afforded meaningful appellate review, the conclusion is the same: it is a final appealable order.

Respectfully submitted,

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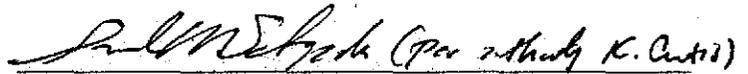
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing REPLY BRIEF OF APPELLANT ROMAN CHOJNACKI was forwarded by regular U.S. Mail, postage prepaid to Mary Martin, Warren County Assistant Prosecutor, Warren County Courthouse, 500 Justice Drive, Lebanon, Ohio, 45036 this 22nd day of December, 2008.

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APPENDIX TO REPLY BRIEF OF APPELLANT ROMAN CHOJNACKI

LEXSTAT ORC 2721.12

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED
WITH THE SECRETARY OF STATE THROUGH DECEMBER 9, 2008 ***

*** ANNOTATIONS CURRENT THROUGH SEPTEMBER 1, 2008 ***

*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH NOVEMBER 11, 2008 ***

TITLE 27. COURTS -- GENERAL PROVISIONS -- SPECIAL REMEDIES
CHAPTER 2721. DECLARATORY JUDGMENTS

Go to the Ohio Code Archive Directory

ORC Ann. 2721.12 (2008)

§ 2721.12. Declaratory relief; parties; binding legal effect of judgment between insurer and insured

(A) Subject to division (B) of this section, when declaratory relief is sought under this chapter in an action or proceeding, all persons who have or claim any interest that would be affected by the declaration shall be made parties to the action or proceeding. Except as provided in division (B) of this section, a declaration shall not prejudice the rights of persons who are not made parties to the action or proceeding. In any action or proceeding that involves the validity of a municipal ordinance or franchise, the municipal corporation shall be made a party and shall be heard, and, if any statute or the ordinance or franchise is alleged to be unconstitutional, the attorney general also shall be served with a copy of the complaint in the action or proceeding and shall be heard. In any action or proceeding that involves the validity of a township resolution, the township shall be made a party and shall be heard.

(B) A declaratory judgment or decree that a court of record enters in an action or proceeding under this chapter between an insurer and a holder of a policy of liability insurance issued by the insurer and that resolves an issue as to whether the policy's coverage provisions extend to an injury, death, or loss to person or property that an insured under the policy allegedly tortiously caused shall be deemed to have the binding legal effect described in division (C)(2) of *section 3929.06 of the Revised Code* and to also have binding legal effect upon any person who seeks coverage as an assignee of the insured's rights under the policy in relation to the injury, death, or loss involved. This division applies whether or not an assignee is made a party to the action or proceeding for declaratory relief and notwithstanding any contrary common law principles of *res judicata* or adjunct principles of collateral estoppel.

HISTORY:

GC § 12102-11; 115 v 497, § 11; Bureau of Code Revision, 10-1-53; 144 v H 77 (Eff 9-17-91); 148 v H 58. Eff 9-24-99.