No. 18-7209 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DANIEL OBERACKER — PETITIONER
(Your Name)

vs.

JEFFREY B. NOBLE — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

SIXTH CIRCUIT COURT OF APPEALS
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Daniel Oberacker (inmate #387343)
(Your Name)

1851 St. Rt. #56
(Address)

London, OH, 43140
(City, State, Zip Code)

NONE- INCARCERATED
(Phone Number)

QUESTIONS PRESENTED FOR REVIEW

I. Whether a parallel civil proceeding may be merged and transformed into a criminal charge/issue at the appellate level.

II. Whether a federal court may use a parallel civil sex offender classification, which imposed no 'in-custody' sentence, to start the clock under U.S.C. § 2244(d)(1)(A) one-year limitation for a U.S.C. § 2254 habeas petition.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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Appendix D - Decision of the Eighth District Court of Appeals, Cuyahoga County, Ohio, denial of App. R.26(B) application to re-open direct appeal.

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STATUTES AND RULES

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at Case No.: 18-3589; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.
[X] is unknown whether it is designated for publication

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at Case No.: 1:17cv-02547 (ND Ohio, 2018); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.
[X] is unknown whether it is designated for publication

[ ] For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the Eighth District Court of Appeals, Cuyahoga County, Ohio court appears at Appendix D to the petition and is

[ ] reported at State v. Oberacker, 2017 Ohio 5741 (Ohio 8th dist. 2017); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from federal courts:

The date on which the United States Court of Appeals decided my case was September 24, 2018.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[ ] For cases from state courts:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

XI. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amendments:

- VI: provides in part: " * * * to have the assistance of counsel for his defense"
- XIV: provides in part: " * * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S. § 2244(d)(1) - "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action

Ohio Constitution, Article IV, § 3(2): Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district.

- O.R.C. 2505.03 (03/17/1987) provides: "(A) Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction.
- O.R.C. 2950.09(B)(3) (eff. 01/01/1997; 03/01/1997) provides: The offender and the prosecutor who prosecuted the offender for the sexually oriented offense in question may appeal as a matter of right the judge's determination under this division as to whether the offender is, or is not, a sexual predator.

STATEMENT OF THE CASE

In 1997, Ohio enacted two different statutes concerning sex offender classification. The statutes were separated within the Ohio Revised Code (O.R.C.) under different chapters; (1) 2971 and; (2) 2950.

Chapter 2971 was intended to be 'criminal in nature' and as such, carried all the necessary requirements to meet due process standards of a criminal prosecution including 'charging by indictment' and the 'right to a jury trial' for the classification. The classification under this criminal statute did not include a separate right to appeal the classification from the 'other' criminal offenses named in the indictment.

Chapter 2950 was different. Chapter 2950 was intended to be a 'civil in nature' 'collateral consequence' of the underlying criminal offense. As such, this statute did not include all the requirements to meet due process standards of a criminal prosecution. A classification under O.R.C. 2950.09(B) did not require a criminal charge by indictment, it did not provide for the right to a jury for the classification and the classification hearing, though mandatory by law was automatic after a criminal rule 11 guilty plea, was not required to be made part of the criminal rule 11 advisements. Because this chapter was intended to be a 'collateral civil proceeding', but required to be conducted before sentencing of the underlying criminal charge, the statute specifically included the ability to appeal the judge's determination 'as a matter of right.' The Ohio general assembly knew that a civil classification appeal under chapter's §2950 statute would be parallel to the criminal appeal of right provided in O.R.C. 2505.03 due to its requirement that the civil proceeding be conducted before criminal sentencing. Had the general assembly intended for the two proceedings to 'melt or transform into one', the statute would not

have included an appeal 'as a matter of right', naming the offender as one of two parties the appeal could be taken.

Respondent has never disputed that Petitioner was classified under the civil statute of O.R.C. §2950.09(B) and the records and timeline show this is an indisputable fact. Respondent has also never disputed that Ohio's appeal, as a matter of right, from a criminal prosecution has been codified under O.R.C. 2505.03 and the Ohio Constitution, article IV, section 6. Additionally, Respondent has never disputed that the civil classification O.R.C. § 2950.09(B)(eff. 1/1/97) specifically authorized an appeal, as a matter of right, from the classification. Lastly, Respondent has never disputed that Petitioner filed a timely notice to appeal both the criminal conviction and the civil classification and the records show this is an indisputable fact.

Instead, Respondent claims that appellate counsel had an independent choice as to which appeal of right he would choose to file. In this case, counsel 'chose' to appeal the civil classification alone and in Respondent's opinion, that 'choice' was a permissible 'strategic' choice.

In *Jones v. Barnes*, 463 U.S. 745 (1983), this Court recognized that " * * * the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Id.* at 751. However, the Court held that appellate counsel is not bound to raise every non-frivolous argument on appeal.

In *Anders v. California*, 386 U.S. 738 (1967), this Court mandates that appellate counsel may request to withdraw but "That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be

furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* at 744. This Court held that indigent defendants do not have equal access to direct review when an appellate attorney is permitted to independently declare an appeal meritless with a one-line statement.

Here, appellate counsel did not request to withdraw from representing the criminal proceedings on appeal, nor did counsel file and *Anders* brief. In order for Respondent's argument to have any merit, the civil classification, which has different rules, procedures and standard of review from that of criminal, would have had to transform into a criminal charge or criminal issue in which gave counsel authority under *Barnes* to 'choose' which arguments would be raised in [one] appeal of right.

Transforming a civil action into a criminal charge was not authorized by Ohio law, it has never been done in any case, and it has not been reviewed or authorized by this Court as permissible.

This case involves two parallel actions, one criminal and one civil. Both parallel proceedings provided by law, an appeal as a matter of right, codified in separate Ohio statutes. *Barnes* did not authorize an appellate attorney to forfeit an appeal of right. It was just the opposite and clearly recognized that 'the accused has the ultimate authority to make the fundamental decision regarding whether to take an appeal.' *Id.*

The only appeal that has ever been filed in this case was the parallel civil classification appeal and it is that civil appeal's 'date of conclusion' that the lower federal court has used to start the clock under U.S.C. § 2244(d)(1)(A) to dismiss the instant habeas petition as time barred.

Petitioner's timely filed notice of appeal from the criminal conviction as provided for by the Ohio Constitution and O.R.C. 2505.03 remained, under dust, untouched for nearly sixteen (16) years at the time of discovering the critical forfeiture and filing of the Ohio App. R.26(B).

Procedural History

On 04/06/2017 an Ohio App. R.26(B) application was filed and on 07/05/17, the application was denied as 'un-timely.' (See *State v. Oberacker*, 2017 Ohio 5741 (Ohio, 8th App. Dist. 2017). A timely notice of appeal from the App. R.26(B) denial was filed and the Ohio Supreme Court declined jurisdiction to review on November 1, 2017 (See State v. Oberacker, 151 Ohio St. 3d 1427 (Ohio Supreme Court 2017). A habeas order was issued on December 18, 2017 that the court "could not determine from the face of the petition that Petitioner is not entitled to relief." On May 16, 2018, the federal magistrate judge issued his report and recommendation (R&R) that the petition be dismissed as time-barred. Objections to the R&R were filed timely, and on June 11, 2018, the district court for the Eastern division of Ohio issued its option and order, dismissing the petition as time-barred and did not issue a certificate of appealability. Petitioner timely filed a notice of appeal to the Sixth Circuit Court of Appeals and requested a certificate of appealability to address the questions presented. On September 24, 2018, the Sixth Circuit Court of Appeals denied issuing a certification of appealability and dismissed the petition as time-barred.

Petitioner's timely filed notice of appeal from the criminal conviction as provided for by the Ohio Constitution and O.R.C. 2505.03 remains, now for nearly nineteen (19) years, under dust, untouched as 'un-timely.'

I. WHETHER A PARALLEL CIVIL PROCEEDING MAY BE MERGED AND TRANSFORMED INTO A CRIMINAL CHARGE/ISSUE AT THE APPELLATE LEVEL

In *United States v. Kordel*, 397 U.S. 1 (1970), this Court was asked to determine if the Government's invocation of parallel civil and criminal proceedings were permissible. Petitioner now respectfully seeks this Court to determine whether a state is permitted to transform a civil action into a criminal one at the appellate level.

In *Kordel*, civil actions were brought against two owners of a food corporation as well as the corporation itself for violating a provision(s) of the FDA act. After interrogatories were drafted by the FDA, the official who drafted the interrogatories recommended that notice be sent to all parties involved, that the FDA was considering criminal charges. As a result of the notice, Respondents filed a motion asking the court to stay the civil action, or alternatively, not be required to answer the interrogatories until after the criminal proceedings concluded. The stay was denied for the civil action and the defendants were ultimately convicted in the criminal proceedings. The Sixth Circuit reversed the convictions and this Court granted *Certiorari*.

This Court noted that " * * * in such a case [as this] the appropriate remedy would be a protective order under Rule 30(b), postponing civil discovery until termination of the criminal action. But we need not decide this troublesome question." *Id.* at 9 and that was because this Court found that the defendants never invoked their Fifth Amendment privilege with respect to answering the interrogatories in the civil action. The Court explained:

> "We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution; nor with a case where the defendant is without counsel or reasonably fears prejudice from adverse pretrial publicity or other

unfair injury; nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution ." *Id.* at 11,12

The Court ultimately reversed the Sixth Circuit's ruling reasoning that "It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial." *Id.* at 11.

Therefore, this Court held in *Kordel* that simultaneous, parallel civil and criminal proceedings are permissible as long as neither party is prejudiced and the Court found no prejudice or injury to the defendant's in *Kordel* because the defendants never asserted their Fifth Amendment right.

Like in *Kordel*, this case involves a state's simultaneous actions, one civil and one criminal, but with notable differences. In *Kordel*, the civil proceeding was not dependent on the criminal proceedings outcome, nor was the civil action a 'collateral consequence' of the underlying criminal conviction. Here, in order for the civil sex offender proceeding to commence, there first had to be a guilty verdict or guilty plea of the criminal charge. One can not be classified as a sex offender without a 'qualifying criminal conviction.' So the order is reversed from *Kordel*, where here, the criminal proceedings were first, which then *triggered* the civil proceeding. However, unlike *Kordel*, where the criminal proceedings were simply being 'contemplated' when notice was provided for 'possible criminal charges,' here, the civil action was, by law, mandatory once triggered, yet no notice of an additional mandatory civil hearing was given prior to the criminal rule 11 plea colloquy. Nor was there notice that the civil proceeding, would 'merge, melt or transform' into a criminal charge at the appellate level, transferring the authority to take an appeal from the criminal proceedings from the accused to the hands of appointed counsel.

It is clear that parallel proceedings are permissible, but only if neither party is prejudiced or suffers unfair injury. This case started out as permissible parallel proceedings, but evolved into merging and transforming the civil proceeding, into a criminal one. In doing so, 'one party' is highly prejudiced because that transformation strips defendants of fundamental rights, equal protection of the law and shifts the attorney's role from 'advisor' to 'ultimate decision maker of fundamental decisions regarding the case, such as whether an appeal will be taken. And unlike *Kordel*, who never invoked his Fifth amendment privilege against self-incrimination, Petitioner did invoke his right to take an appeal from the conviction. The transforming of a civil action into a criminal one only occurs where the accused is indigent and, for the state's economic interest, appoints one counsel to represent both the civil and criminal proceedings. Non-indigent defendants are in the financial position to hire two attorney's, one to represent each legal proceeding. Likewise, when the prosecutor, instead of the defendant appealed a classification under O.R.C. §2950.09(B)(3), defendants retained their right to appeal the criminal proceedings and the same one attorney that was appointed could not ignore a defendants decision to take an appeal from the criminal proceedings.

The merging of civil and criminal proceedings is quite different than the permissible 'simultaneous', running parallel to one another, proceedings authorized by this Court. Allowing a collateral consequence's civil proceeding to merge with the criminal proceeding at the appellate level, for a states economic interest at the expense of defendants fundamental rights undermines important holdings of this Court:

> *Griffin v. Illinois*, 351 U. S. 12 (1956) held that when a state provides for an appeal of right from a criminal prosecution, it may not do so in a way that discriminates against 'certain defendants' based on their indigent status.

Because both the civil and criminal appeals were due, by law, at the same time, Petitioner's indigent status and the fact that the *defendant*, instead of the *prosecutor* appealed the classification, the state merged the two parallel appeals into one criminal proceeding, appointing one counsel to represent both and giving counsel the authority to make the decision of which appeal of right he will choose to represent. This procedure leaves indigent defendant's with 'certain offenses' at the mercy of counsel and nothing more than 'bare hope' that counsel will 'choose' to represent the legal proceeding in which the conviction and sentence is based.

> *Penson v. Ohio*, 488 U.S. 75 (1988) held that the right to effective assistance of counsel extends to the right to effective assistance of counsel on a first appeal of right.

Under the procedure used in this case, counsel does not have to do anything with the *criminal* appeal, if he 'chooses not to,' and in the district court's view, appointed counsel was/is not ineffective because a [civil] appeal was done.

> *Roe v. Flores-Ortega*, 528 US 470 (2000) held that where appellate counsel forfeits an appeal of right, counsel is ineffective if the defendant can show he would have appealed if not for counsel's deficient performance.

It is indisputable that Petitioner wanted to take an appeal from the judgment of conviction and sentence and timely filed the notice to do so. Instead of this Court's precedence being upheld by the lower courts in that there is a 'presumption of prejudice' when a proceeding has been forfeited due to counsel's failure to file an appeal, the blame has been put on Petitioner for 'not knowing' counsel forfeited the criminal appeal, in spite of counsel deliberately misleading Petitioner to believe both appeals were in fact, filed properly. Additionally, the lower federal court did not agree appellate counsel forfeited an appeal, because a civil appeal was filed.

> *Anders v. California*, 386 US 738 (1967) held that indigent defendant's can not have equal access to direct review of a criminal conviction as the wealthy, when counsel can independently claim an appeal is meritless with a one-line statement.

Under the procedure used here, appointed counsel does not even have to acknowledge a defendant's expressed written desire to take an appeal from a criminal conviction, let alone submit a one line statement that was condemned in *Anders*. Instead, a defendant's wish to appeal a criminal conviction can be completely ignored, without notice of any kind by counsel or the court, where there is a parallel civil proceeding, and later transformed into a criminal 'issue' at the appellate level. The lower federal court has authorized this procedure that allows states to bypass the very basic mandates outlined in *Anders*, with this case's ruling as presumably an 'acceptable alternative method' to *Anders*, without this Court's authorization. (See R&R, p.21, fn5).

> This Court has also long recognized that the decision to exercise an appeal of right is a fundamental decision that belongs solely to the defendant. *Wainwright v. Sykes*, 433 U.S. 72, 92 (1977) (Justice Burger, concurring), referencing *Fay v. Noia*, 372 U.S. 391 (1963); *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000).

Under the procedure used in this case of transforming a civil proceeding into a criminal charge at the appellate level, the civil proceeding melts into a 'criminal action' in which the classification becomes one 'issue' counsel can 'choose, or not choose' to raise on appeal, under the authority of *Barnes, supra*. In this case, the civil classification was the only 'criminal issue' counsel 'chose' to raise and counsel, not the accused, had the ultimate authority to decide whether the fundamental decision to appeal the criminal matters would be raised. Counsel 'chose' not to raise a single aspect of the criminal proceedings. This was addressed in the lower court, but neither the district or circuit court ruled on the merits of this (or any other) argument. Instead, this

fundamental right established by this Court was bypassed by the state, and overlooked in the lower federal courts because of the merging and transformation of a civil proceeding into a criminal charge at the appellate level, and thus, dismissed the habeas petition as 'time-barred.'

II. WHETHER A FEDERAL COURT MAY USE A PARALLEL CIVIL SEX OFFENDER CLASSIFICATION, WHICH IMPOSED NO 'IN-CUSTODY' SENTENCE, TO START THE CLOCK UNDER U.S.C. § 2244(d)(1)(A) ONE-YEAR LIMITATION FOR A U.S.C. §2254 HABEAS PETITION.

28 U.S.C. §2244(d)(1)(A) states: "A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person *in custody pursuant to the judgment of a State court*. The limitation period shall run from the latest of — (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (emphasis added).

A civil classification imposes no 'in custody' sentence in which gives federal courts jurisdiction to hear in a § 2254 petition. In the context of sex offender classification and registration issues, the Ninth Circuit upheld the district court's dismissal of a 28 U.S.C. § 2254 habeas corpus petition as not meeting the 'in custody' meaning within section 2254(a) in *McNab v. Kok*, 170 F. 3d 1246 (9th Cir. 1999). There, the court held that " * * * because Oregon's sex offender registration requirements place no greater restraint on personal liberty than those of California and Washington, the Oregon law does not place McNab in custody within the meaning of section 2254(a)." *McNab* at 1247.

In a Sixth Circuit case, *Leslie v. Randle*, 296 F. 3d 518 (6th Cir. 2002), the district court magistrate noted that:

> neither the Supreme Court nor the Sixth Circuit has confronted the question of "whether or not a sex offender's subjection to state statutory classification, registration and community notification provisions is merely a collateral consequence of his conviction or, conversely, constitutes a severe and immediate restraint on his liberty sufficient to satisfy the `in custody' prerequisite for federal habeas corpus review. *Id.* at 522

The Sixth Circuit's response was that the Ninth Circuit had indeed addressed the very question posed; and because sex offender classification under chapter §2950 were held by the Ohio Supreme Court to be 'civil, remedial, collateral consequences', (as did the California, Oregon and Washington statutes addressed by the Ninth Circuit), the Sixth Circuit agreed with the Ninth Circuit's holding that sex offender classification, registration and other requirements do not meet the 'in custody' prerequisite for federal habeas corpus review. Taking *Leslie's* habeas petition one step further, securing a dismissal on the ground the federal court did not have jurisdiction to hear the habeas petition, the Sixth Circuit pointed out that "Although Leslie is currently incarcerated, he is not seeking relief from the conviction or sentence upon which his confinement is based. He claims instead that, as it applies to him, Ohio's sexual-predator statute is unconstitutional." *Leslie* at 522.

In a Seventh Circuit case, *Virsnieks v. Smith*, 521 F. 3d 707 (7th Cir. 2008), the court said "Indeed, given the habeas statute's "in custody" requirement, courts have rejected uniformly the argument that a challenge to a sentence of registration under a sexual offender statute is cognizable in habeas." *Id.* at 718.

In the instant case, the Petitioner is currently 'in custody' and sought relief through a U.S. § 2254 habeas petition from his conviction and sentence upon which his confinement is based and did not challenge the parallel civil sex offender classification, registration or community notification in anyway. However, in contrast to *McNab* and *Leslie*, the Sixth Circuit has dismissed *this*

petition as time-barred using a date from a parallel proceeding with a subject matter already held by at least two other circuit courts (as well as its own) that sex offender issues are not cognizable in a habeas petition. The ruling in this case has created conflicting rulings of whether federal courts have jurisdiction over sex offender issues in a habeas petition. The Sixth, Seventh and Ninth Circuits have all held federal courts lack jurisdiction to hear sex offender subject matter in a federal habeas petition. Now, the Sixth Circuit has used that very subject matter's final date of conclusion on direct review to use as starting the clock under §2244(d)(1)(A) in order to dismiss a habeas petition. The record shows this case falls squarely within U.S. §2244(d)(1)(A)'s two requirements. Petitioner met (1) the 'time to seek review' with twelve (12) days remaining before expiration of the time to do so and (2) there is no date of conclusion for the only state court judgment which imposed the 'in-custody' sentence challenged in the habeas petition. Congress did not include a third prong of 'expiration' when the first two prongs have been met and this Court has not authorized a third prong.

Furthermore, Ohio has firmly upheld that chapter §2950 is a civil proceeding. "Since there are two separate classes of individuals under R.C. Chapter 2950 and R.C. 2971.01(I)—one class subject to civil law and the other subject to criminal a rational basis exists to apply two different standards of review." *State v. Williams*, 88 Ohio St. 3d 513 (Ohio supreme court 2000) at 532.

Moreover, the statute itself has built right in it that the offender has a right to appeal. "The offender and the prosecutor who prosecuted the offender for the sexually oriented offense in question may appeal *as a matter of right the judge's determination under this division* as to whether the offender is, or is not, a sexual predator." § 2950.09(B)(3). (emphasis added). The law did not make a 'bifurcated' appeal process when a prosecutor appealed a civil classification and a

'non-bifurcated' appeal process when an offender appealed the civil classification. When a prosecutor appealed under this division of the statute, the defendant did not lose the right to take an appeal from the criminal conviction under O.R.C. 2505.03. Despite the plain language in the statute O.R.C. 2950.09(B) that the civil classification must be conducted before sentencing of the criminal conviction; Despite the plain language in §2950.09(B)(3) that specifically grants an appeal of right to the offender or prosecutor of the judges determination under this civil statute; Despite Ohio's holding that chapter 2950 is subject to civil law and; Despite at no time has any civil proceeding merged into a criminal proceeding, the district court said "Oberacker has cited no authority that Ohio's sexual classification statute gives rise to a bifurcated appeal process where, as here, a criminal defendant's sentence and sexual predator classification determination were conducted contemporaneously and as part of the same underlying criminal proceedings. (R&R, p.20).

This Court has held that "A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous." *Mitchell v. Esparza*, 540 US 12 (2003).

Ohio held in *State v. Cook*, 83 Ohio St. 3d 404 (1998), that sex offender classification under O.R.C. § 2950 is a 'civil' statute subject to civil law and civil standard of review. However, the federal district court agreed with the Respondent's argument that the *conviction and sentence* became final on August 14, 2003, the date in which the *civil classification became final.*

Thus, in-spite of Ohio's holding that classification under chapter 2950 is a 'civil proceeding' and subject to civil law, and has its own, independent right of appeal within the civil statute itself, the federal court has independently decided that the civil classification was really a criminal

proceeding. The U.S. Supreme Court has not addressed the question whether the classification proceedings of a 'civil collateral consequence' is 'civil or criminal' but Ohio has. The Sixth Circuit has "overrule[d] a state court for simply holding a view different from its own", *Id.* "and the precedent from this Court is, at best ambiguous." *Id.*

This Court has recognized that "It is clear, not only from the language of §§ 2241 (c) (3) and 2254 (a), but also from the common-law history of the writ, that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 US 475, 484 (1973). A collateral civil sex offender classification in which carried, nor imposed any sentence that meets the 'in-custody' requirement for a habeas corpus petition and is not the state court judgment that imposed the 'in-custody' sentence, has never been used to dismiss a habeas petition as time-barred, nor has Congress or this Court given authorization to do so.

It is understood that the U.S. Constitution does not contain a right to an appeal, "But that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. *Griffin*, at 18. Sixty-two (62) years later, an additional 'element' of whether a state may discriminate against certain defendants based on a charge that carries a 'collateral civil consequence' has not been addressed by this Court, nor has the procedure of transforming a parallel civil action into a criminal one been reviewed or authorized by this Court. And if this Court determines transforming a civil action into a criminal one at the appellate level is permissible, does that transformation also permit a guilty plea to stand as 'knowingly, and voluntary' when there was no notice whatsoever that the civil law even existed, let alone notice that it would be transformed to a criminal action at the appellate level.

Petitioner requests to proceed in *forma pauperis* and has included the necessary forms requesting permission and respectfully requests counsel be appointed to represent the important issues involved.

CONCLUSION AND PRAYER FOR RELIEF

This case involves fundamental rights that if allowed to stand, allows states to bypass and undermine decades of precedence established by this Honorable Court. In addition, the procedure used in this case, has been declared as an 'acceptable alternative method' to the mandates established by this Court in *Anders*, without review or authorization from this Honorable Court.

For the foregoing reasons, Petitioner Daniel Oberacker respectfully requests this Court grant the petition for a writ of certiorari, reverse the lower court's ruling and remand with an order for a conditional writ be ordered for the immediate release and reversal of the conviction unless the state court allows the direct review of the criminal conviction , and any other relief this Honorable Court deems just.

Respectfully Submitted,

Daniel Oberacker #387343

Daniel Oberacker #387343