ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

MAXWELL WHITE,

Defendant-Appellant.

SUPREME COURT CASE NO. 2009-1661

FIFTH DISTRICT CASE Nos. 07-COA-037, 07-COA-038

ASHLAND COUNTY COMMON PLEAS CASE No. 96-CRI-07366

STATE'S RESPONSE TO APPELLANT'S MEMORANDUM IN SUPPORT OF JURISIDICTION

RAMONA FRANCESCONI ROGERS
#0031149
Ashland County Prosecuting Attorney
307 Orange Street Square
Ashland, Ohio 44805
(419) 289-8857
Fax No. (419) 281-3865

PAUL T. LANGE #0078466
Assistant Prosecuting Attorney

COUNSEL FOR PLAINTIFF-APPELLEE,
STATE OF OHIO

ATTORNEY NATHAN RAY
137 South Main Street, Suite 201
Akron, Ohio 44308

(COUNSEL FOR THE APPELLANT)

RECEIVED
SEP 25 2009
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
SEP 25 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

Table of Contents..... 1

Explanation of Why This Case is Not a Case of Great public Interest and Does Not Involve a Substantial Constitutional Question..... 2

Statement of Case and Facts..... 3

Law and Argument 4

Conclusion..... 12

Proof of Service..... 13

Appendix
Decision and Journal Entry of the Ashland County Court of Appeals

THIS IS NOT A CASE OF GREAT PUBLIC INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

The issues raised by the Appellant are not of great public interest and do not involve any substantial constitutional question. The General Assembly's purpose in amending R.C. 2929.06 was not punishment. The General Assembly carried out its purpose of punishment in 1981 when it passed a new death penalty statute. The purpose of the amendments to R.C. 2929.06 was to provide trial courts the procedural framework by which to re-sentence defendants in this type of situation where a defendant's underlying conviction along with the death penalty specifications have been upheld yet the death penalty has been set aside. As argued throughout this brief, there is no reason to treat these individuals differently than other similarly situated individuals. The purpose of the amendments was to provide equal treatment among those upon whom the punishment has already been imposed and to ensure public confidence in the justice system.

Merely because a change in a statute disadvantages a defendant, does not make that change unconstitutionally retroactive. Providing a right to a jury trial when none existed at the time of the crime and when that change allows a death penalty to be imposed on one whose conviction is reversed is more "substantive" than providing a procedure for re-sentencing when a defendant has had his jury trial and asked to be tried again by appealing and filing for a writ of habeas corpus. Yet the United States Supreme Court held the former change to be procedural.

This is, therefore, not a case of great public interest and does not involve a substantial question of constitutional law. This Court should, therefore, decline to accept jurisdiction.

STATEMENT OF THE CASE AND FACTS

On January 16, 1996, Maxwell White, instead of going to work, went drinking, argued with his sister and mother, and shot his mother in the leg. Then he fled. The Ohio State Highway Patrol received reports of a car driving erratically on interstate highway 71. Highway Patrol Trooper Gross stopped White's car. As Trooper Gross reached White's car, White shot and killed him.

In a jury trial, Appellee was convicted of, among other offenses, aggravated murder of a police officer. He received the death penalty. The Ohio Supreme Court affirmed and the United States Supreme Court declined review. Appellee filed two unsuccessful post-conviction petitions, and appeals from their denial. The federal district court denied his petition for a writ of habeas corpus.

Based on its decision that one of the jurors should not have served during the sentencing phase, the United States Sixth Circuit Court of Appeals in ***White v. Mitchell***, 431 F.3d 517(C.A. 6, 2005), granted a writ of habeas corpus, on December 7, 2005, and ordered the trial court to hold a resentencing hearing. Current R.C. 2929.06 requires a trial court, when a defendant's death sentence is vacated by any court, to empanel a new jury and hold a re-sentencing hearing, at which the death penalty is an option. Current R.C. 2929.06 states unequivocally that the General Assembly intended the amendment to apply retroactively.

The trial court ruled that applying current R.C. 2929.06, effective on March 23, 2005, to Appellee would violate Art. II, Section 28 of the Constitution of the State of Ohio. The trial court held the statute unconstitutional under the Ohio Constitution, and granted the state's motion to stay the re-sentencing hearing so that the state could appeal the court's decision to this court.

The state timely appealed the trial court's decision to the Fifth Appellate District. On August 3, 2009, the Fifth Appellate District reversed the decision of the trial court and found that the amendments to R.C. 2929.06 did not violate Ohio's constitutional prohibition against retroactive legislation. The defendant now seeks to appeal that decision.

LAW & ARGUMENT

APPELLANT'S PROPOSITION OF LAW I

RETROACTIVE APPLICATION OF O.R.C. 2929.06 IS UNCONSTITUTIONAL

In his sole proposition of law, the Appellant alleges that retroactive application of Section 2929.06 of the Ohio Revised Code is unconstitutional. Statutes though are presumed constitutional and before a court may declare a statute unconstitutional, the court must find that the legislation and the constitution are incompatible beyond a reasonable doubt. ***State ex rel Dickman v. Defenbacher*** (1955) 164 Ohio St. 142; ***State v. Cook***(1998), 83 Ohio St.3d 404, 409, 1998 Ohio 291. Except for issues involving First Amendment rights, the constitutionality of statutes is judged not on the face of the statute but as applied to the particular defendant.

In the case of ***State v. Penix*** (1987), 32 Ohio St.3d 369, this Court recognized that R.C. 2929.06 had failed to provide a procedure for trial courts to follow in this type of case. Former R.C. 2929.06 provided that if a death sentence was set aside because the defendant was not eighteen years old at the time of the offense, or the entire death sentencing procedure set forth in the Ohio Revised Code was found to be unconstitutional, or if the reviewing court found that the evidence did not support the imposition of the death penalty, then the trial court on remand would have the sentencing options of twenty years to life or thirty years to life. Under the former law, there would be no basis for imposition of a death sentence in those cases. Whereas in this case, the death specifications remained in place and none of the factors present in former R.C. 2929.06 apply to this case. By amending R.C. 2929.06, the Ohio legislature simply provided a procedure for trial courts to follow on remand in this type of case.

Article II, section 28 of the Ohio Constitution provides as follows:

> The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts, but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

In a civil matter encaptioned ***Burgett v. Norris*** (1884) 25 Ohio St 308, Para. 17, the Ohio Supreme Court said that a law is "curative" when the legislature "could cure and render valid, by remedial retrospective statutes, that which it could have authorized in the first instance by proper enactments."

There is no dispute that the General Assembly intended the amendment at issue to apply to all persons in Ohio who were ever sentenced to death under the new law that became effective in 1981. The issue is whether the amendment, as applied to this

defendant, is substantive or procedural. ***State v. Cook***, supra.; ***Van Fossen v. Babcock & Wilcox Co.*** (1988), 36 Ohio St. 3d 100. Although every amendment of a statute about criminal sentencing necessarily involves punishment, the subject matter fails to automatically render the amendment "substantive." Likewise, an amendment's having some effect on a substantive right does not automatically render the amendment substantive. ***State v. Cook***, supra at 411.

This Court recently addressed the issue of retroactive legislation in the case of ***State v. Ferguson***, Slip Opinion No. 2008-Ohio-4824. In ***Ferguson, supra***, this Court held that retroactive application of the amendments to the sexual predator specification and registration laws was constitutional. An earlier version of R.C. 2950.07(B)(1) "allowed for review of the predator classification by a judge and the possible removal of that classification." ***State v. Ferguson***, at 4, Par. 8. The defendant argued that removing that option, so that a sexual predator classification became permanent, deprived him of a right that he previously had. This Court rejected that argument and held that a defendant had no reasonable expectation of finality in someday being allowed to petition to change his status.

Likewise, a capital defendant whose death sentence was final because he had exhausted his state appeals but who might obtain collateral relief in federal habeas corpus had no reasonable expectation of assuming that the Ohio General Assembly would never act to correct the loophole in Ohio's death penalty statutes. The Appellant's conviction was final in the year 2000. Whatever "right" he had to a re-sentencing procedure or "duty" to defend against a re-sentencing procedure evaporated when his conviction

became final. Once a defendant's conviction is final, he has no expectation of finality in any procedures extant at the time of his offense or conviction.

The trial court appeared to believe that a jury trial being a substantive right was dispositive. However, that obvious pronouncement is not the end but the beginning of the discussion. The amendment provides for jury re-sentencing. This defendant exercised his right to a jury trial and his conviction was final before the statute changed. In ***State v. Cook***, supra at 411, this Court stated that:

> A statute is 'substantive' if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligation or liabilities as to a past transaction, or creates a new right. Conversely, remedial laws are those affecting only the remedy provided and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right.

The court in **State v. Cook**, continued at 412, as follows: "this court has held that where no vested right has been created, 'later enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, unless the past transaction or consideration created at least a reasonable expectation of finality[,]" quoting ***State ex rel Matz v. Brown*** (1988), 37 Ohio St.3d 279. The statute in **Matz** prohibited those who had been convicted of a felony within ten years from collecting a Victims of Crime Compensation award. Matz was a crime victim who would have been eligible to receive compensation, had he not been convicted of a crime before the General Assembly passed the statute prohibiting felons from collecting an award. The court held that the statute did not attach a new liability to the crime, because Matz had no reasonable expectation of finality in his right to the reward.

The Appellant in the instant case had no reasonable expectation of finality in his right to a re-sentencing hearing that would exclude the death penalty for two reasons: at the time of the offense, he had a right to jury sentencing but the possibility of re-sentencing, with or without a jury, was too inchoate to create an expectation and, because his death penalty was final in the year 2000. The Appellant could have had no expectation of re-sentencing until after the federal court granted the writ.

One of several factors to distinguish between substantive and procedural amendments is the purpose of the General Assembly. ***State v. Cook***, supra at 417. Appellee suggests that the purpose of the amendment of March 23, 2005 was to insure that every person sentenced to death in Ohio is treated equally. Unequal application of the law fosters mistrust of the law. No logical reasons exists to distinguish among those sentenced to death who appeal or file collateral relief and 1)have both their guilt and their sentences affirmed, 2) have both their guilt and sentences reversed on legal grounds that permit retrial and 3) have their guilt affirmed but their penalty reversed. Assuming that the penalty in the third category was reversed for a reason other than sufficiency of the evidence or proportionality, no logical reason exists for treating those in the third category differently.

The United States Supreme Court also disagrees with the trial court's proposition that the addition of jury re-sentencing is a substantive change in the law. In ***Ring v. Arizona*** (2002), 536 U.S. 584, the Court held Arizona's death penalty statutes, which provided that a jury would determine whether the defendant was guilty of first degree murder and the trial court would determine whether the state had proved aggravating circumstances, unconstitutional. The United States Supreme Court in ***Ring v. Arizona***

(2002), 536 U.S. 584 vacated Ring's death penalty because the Arizona statute in effect at the time of Ring's trial was inconsistent with ***Apprendi v. New Jersey*** (2000), 530 U.S. 466, and deprived him of his Sixth Amendment right to have every factor necessary to increase the penalty, except for a prior conviction, proved to a jury. The United States Supreme Court in ***Schriro v. Summerlin***, (2004), 542 U.S.348, 124 S. Ct. 2519 held that its holding in ***Ring*** announced a new procedural, rather than a substantive rule. "Rules that allocate decision-making authority in this fashion are prototypical procedural rules." Id at 353.

The Governor of Arizona called a special legislative session to revise Arizona's capital sentencing provisions. On August 1, 2002, the Governor signed a bill altering Arizona's statute to provide that the penalty phase and guilt phases would both be held before the jury and that the jury would find and consider the effect of aggravating and mitigating circumstances and decide whether the defendant should receive a sentence of death. At the time of the Ring decision in the United States Supreme Court, thirty-one defendants sentenced to death had cases pending on direct appeal to the Arizona Supreme Court. On June 27, 2002, the court consolidated all cases to decide on remand in ***State v. Ring*** 204 Ariz. 534, 65 P.3d 915, whether applying the new statute to those convicted before its effective date violated the ex post facto clauses of the federal and state constitutions. The Arizona Supreme Court held that the change of providing for a jury to find aggravated circumstances instead of a judge was not substantive but procedural and, therefore, the new sentencing statutes violated neither the federal nor the state's ex post facto clause.

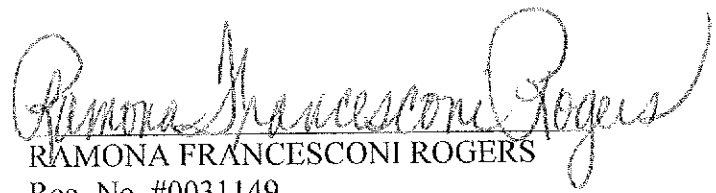
The defendants in ***Ring*** argued that because the statute under which they were sentenced to death was unconstitutional, the highest penalty which could have been imposed on them at the time was life. Therefore, they argued, subjecting them to a jury hearing to determine aggravating circumstances subjected them to a higher penalty than existed at the time. The defendants relied on some cases in which, after penalties had been reversed, trial courts ordered a new jury to convene. An Arizona appellate court held that because the first judge dismissed the jury without a finding on aggravated circumstances, the new sentencing hearing exposed the defendant to double jeopardy. The Arizona Supreme Court, however, relying on ***Dobbert v. Florida***, (1977), 432 U.S. 282, said that the Arizona appellate court in the case upon which the defendants relied had been incorrect. (See ***State v. Ring*** 204 Ariz. 534, 65 P.3d 915, paragraphs 30 and 31). The ***Dobbert*** court held, the Arizona court noted, that the Florida sentencing policy provided a death sentence even though the procedures for imposing that sentence later were found unconstitutional. The Arizona Supreme Court reached the same conclusion in ***State v. Andriano*** (2007) 161 P. 3d 540 and the United States Supreme court declined the defendant's petition for certiorari in ***Andriano v. Arizona*** (2007), 2007 U.S. LEXIS 10610, 76 U.S.L.W. 3165.

A similar case with a similar result is ***Evans v. Commonwealth***, (1984), 228 Va. 468. After the defendant murdered a police officer, but before the Virginia court reversed his death penalty and remanded for resentencing, the Virginia legislature provided for empanelling a second jury to re-sentence defendants whose death sentences are vacated. Both the state and federal courts held that the new procedure was constitutionally applied to the defendant. See ***Evans v. Thompson***, (C.A.; 4 1989) 881 F. 2d 117.

The concept of a defendant's having a right to avoid the burdens of a second defense is borrowed from the law interpreting the Double Jeopardy Clause. Because a death penalty is like a trial [***Bullington v. Missouri*** (1981), 451 U.S. 430], the law of double jeopardy applies to a sentencing hearing also. However, it was long ago recognized that a defendant who appeals his conviction waives his right to claim double jeopardy on remand. ***United States v. Ball*** 163 U.S. 662,671. See also ***Tateo v. United States*** (1964), 377 U.S. 463 (Defendant who requests mistrial cannot claim he had a right to have his case decided by the first jury). A defendant who asks for a new trial on appeal is asking to be allowed to defend against the charges again and have a new jury decide his fate. A defendant who has been sentenced to death faces no double jeopardy on retrial though he faces the death penalty a second time. ***Sattazahn v. Pennsylvania*** (2003), 537 U.S. 101. The defendant in the instant case twice asked the Federal Court to reconsider and vacate his conviction as well as his sentence and cannot now be heard to complain that his request was granted.

CONCLUSION

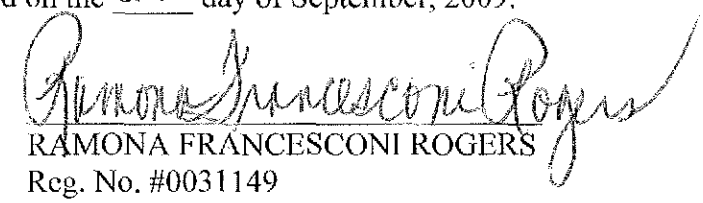
This is not a case of great public interest and does not involve a substantial question of constitutional law. Based upon the foregoing arguments and law the State of Ohio requests this Honorable Court decline to accept jurisdiction.



RAMONA FRANCESCONI ROGERS
Reg. No. #0031149
Prosecuting Attorney
307 Orange Street
Ashland, Ohio 44805
(419) 289-8857

PROOF OF SERVICE

I hereby certify that a true and correct copy of the foregoing State's Response to Appellant's Memorandum in Support of Jurisdiction was served on Attorney Nathan A. Ray, legal counsel for the Appellant, 137 South Main Street, Suite 201, Akron, Ohio 44308, by regular U.S. mail postage prepaid on the 24th day of September, 2009.



RAMONA FRANCESCONI ROGERS
Reg. No. #0031149
Prosecuting Attorney