

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,

APPELLEE,

v.

MAXWELL D. WHITE,

APPELLANT

:
:
:
:
:
:
:
:
:
:
:

CASE No. 2009-1661

ON APPEAL FROM THE
FIFTH DISTRICT COURT
OF APPEALS

**BRIEF OF AMICUS CURIAE
OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF APPELLANT, MAXWELL D. WHITE**

MICHAEL J. BENZA - 061454
Law Offices of Michael J. Benza
17850 Geauga Lake Road
Chagrin Falls, OH 44023
(216) 319-1247
(440) 708-2626 (fax)
Michael.Benza@case.edu
COUNSEL FOR AMICUS CURIAE
OHIO ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS

RAMONA J. ROGERS (31149)
PAUL T. LANGE (78466)
Ashland County Prosecutor's Office
110 Cottage St 3rd Flr
Ashland, OH 44805
(419)289-8857
COUNSEL FOR STATE OF OHIO

NATHAN A. RAY (415701)
Burdon & Merlitti
137 South Main St. , Suite 201
Akron, OH 44308
(330) 253-7171
COUNSEL FOR
MAXWELL WHITE

FILED
FEB 16 2010
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

Proposition of Law I: Retroactive Application of Ohio Rev. Code §
 2929.06 Is Unconstitutional

CONCLUSION 17

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

CASES

<i>Brecht v. Abrahamson</i> , 507 U.S. 619 (1993)	6
<i>Bullington v. Missouri</i> , 451 U.S. 430 (1981)	19
<i>Houk v. White</i> , 549 U.S. 1047 (2006)	1, 6
<i>Irvin v. Dowd</i> , 366 U.S. 717 (1961)	5
<i>Ring v. Arizona</i> , 536 U.S. 584 (2002)	7
<i>Schriro v. Summerlin</i> , 542 U.S. 348 (2004)	7
<i>State v. Brock</i> , 110 Ohio App.3d 656, 675 N.E.2d 18 (3d App. Dist 1996)	16
<i>State v. Brock</i> , 77 Ohio St.3d 1444, 671 N.E.2d 1283 (1996)	16
<i>State v. Davis</i> , 38 Ohio St.3d 361, 528 N.E.2d 925 (1988)	11, 13
<i>State v. Filiaggi</i> , 86 Ohio St.3d 230, 714 N.E.2d 867 (1999)	15
<i>State v. Jackson</i> , 107 Ohio St.3d 53, 836 N.E.2d 1173 (2005)	6
<i>State v. Cleveland Jackson</i> , Allen County Court of Common Pleas Case No. Cr 2002-0011 (2006)	6
<i>State v. Penix</i> , 32 Ohio St.3d 369, 513 N.E.2d 744 (1987)	<i>passim</i>
<i>State v. Pless</i> , 74 Ohio St.3d 333, 658 N.E.2d 766 (1996)	15
<i>State v. White</i> , 123 Ohio St.3d 1508, 917 N.E.2d 811 (2009)	2
<i>State v. White</i> , 2009-Ohio-3869, 2009 Ohio App. Lexis 3285 (Ohio App. 5th Dist, 2009)	2, 7, 8
<i>State v. Williams</i> , 103 Ohio St.3d 112, 814 N.E.2d (2004)	4, 11, 12, 14

White v. Mitchell, 431 F. 3d 517 (6th Cir. 2005)1, 6

CONSTITUTIONAL PROVISIONS

Fifth Amendment to the United States Constitution *passim*

Sixth Amendment to the United States Constitution *passim*

Eighth Amendment to the United States Constitution*passim*

Fourteenth Amendment to the United States Constitution *passim*

Art. I, § 2 of the Ohio Constitution*passim*

Art. I, § 9 of the Ohio Constitution*passim*

Art. I, § 10 of the Ohio Constitution*passim*

Art. I, § 16 of the Ohio Constitution*passim*

Art. II, §28 of the Ohio Constitution 1

STATUTES

Ohio Rev. Code § 2901.04(A) 3

Ohio Rev. Code § 2929.03 10, 17

Ohio Revised Code § 2929.06 *passim*

STATEMENT OF THE CASE AND FACTS

Maxwell White was convicted of aggravated murder and death penalty specifications for a murder that occurred on January 19, 1996. Following a jury trial, White was sentenced to death.

Following a direct appeal to this Court and unsuccessful state post-conviction proceedings, White litigated a federal habeas corpus petition in the United States District Court for the Northern District of Ohio. On appeal from the denial of his Petition for Writ of Habeas Corpus, the United States Court of Appeals for the Sixth Circuit reversed the District Court and ordered that White's sentence of death be vacated. *White v. Mitchell*, 431 F. 3d 517, 542 (6th Cir. 2005), *cert. denied sub nom. Houk v. White*, 549 U.S. 1047 (2006).

On remand, in the Ashland County Court of Common Pleas White filed two motions to prohibit the Court from empaneling a new jury to again consider imposition of a sentence of death. The Court of Common Pleas found that the retroactive application of Ohio Rev. Code § 2929.06(B) to permit a jury to again consider a sentence of death for Maxwell White violated Art. II, § 28 of the Ohio Constitution. The Court of Common Pleas did not address White's second argument that Ohio Rev. Code § 2929.06(B) did not authorize the empaneling of a new jury in any event, because his sentence of death had not been vacated "because of error that occurred in the sentencing phase of the trial." White's sentence of

death was vacated because of error that occurred in the jury selection phase of the trial, not the sentencing phase.

The State appealed the ruling of the Court of Common Pleas to the Fifth District Court of Appeals. The Court of Appeals incorrectly concluded that White had never had the right not to be sentenced to death again and therefore that there was not retroactivity violation. *State v. White*, 2009-Ohio-3869, ¶24.

White's Memorandum in Support of Jurisdiction was granted by this Court, and briefing was ordered. *State v. White*, 123 Ohio St.3d 1508, 917 N.E.2d 811 (2009).

ARGUMENT

Proposition of Law I

Retroactive Application of Ohio Rev. Code § 2929.06 Is Unconstitutional

INTRODUCTION

The question of whether the amendments to Ohio Rev. Code § 2929.06(B) may be applied retroactively is not properly before this Court. The error for which the Sixth Circuit Court of Appeals ordered a new penalty phase hearing was simply not an “error that occurred in the sentencing phase” under § 2929.06(B). Rather, this was an error that occurred during the jury selection phase - not during the sentencing phase.

Interpreting the phrase “error that occurred in the sentencing phase of the trial” to include the failure to excuse a biased jury during the jury selection phase of the trial is contrary to the clear language of the statute. The requirement of Ohio Rev. Code § 2901.04(A)¹ that criminal law statutes be “strictly construed against the state, and liberally construed in favor of the accused” will be turned on its head. This Court would be fashioning a sentencing procedure out of whole cloth where the Legislature has not authorized such a procedure. Maxwell White is entitled to

¹ “Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.” Ohio Rev. Code § 2901.04(A). § 2929.06 is clearly a penalty provision that must be strictly construed against the State. See, *State v. Penix* 32 Ohio St.3d 369, 371 (1987).

the same treatment, i.e. the imposition of a life sentence as all other similarly situated capital defendants.(See discussion at fn 2, *infra*). Finding that Ohio Rev. Code § 2929.06(B) authorizes the empaneling of a new jury to consider a sentence of death under these circumstances will deny Maxwell White due process, a fair and reliable sentencing determination, and equal protection of the law under the Ohio Constitution, Art. 1, §§ 2, 9, 10, and 16 and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

A. THE ORIGINAL VERSION OF OHIO REV. CODE § 2929.06(B) THAT WAS IN EFFECT AT THE TIME OF THIS CRIME DID AUTHORIZE THE IMPANELING OF A NEW JURY TO AGAIN CONSIDER A SENTENCE OF DEATH IN THIS SITUATION.

The original version of Ohio Revised Code § 2929.06(B) that was in effect on January 19, 1996 did not authorize the trial court to impanel a new jury to consider re-imposing a sentence of death where: 1) the offender had been originally tried by a jury; 2) the conviction for aggravated murder and specifications were upheld on appeal; and 3) the sentence of death was vacated on appeal for error at the sentencing phase or elsewhere. *State v. Penix*, 32 Ohio St.3d 369, 513 N.E.2d 744 (1987)(Syllabus); *State v. Williams*, 103 Ohio St.3d 112, 113, 814 N.E.2d 818, 819 (2004) (“At the time, . . . the then current version [of R.C. 2929.06] did not permit impaneling a new jury to reconsider imposing a death sentence after the original death sentence was vacated for penalty phase error. [citing *Penix*].”) § 2929.06 was amended effective October 16, 1996 to authorize the courts to impanel

a new jury to consider re-imposition of a sentence of death in limited circumstances. The statute was amended again effective in 2005 in an attempt to express the Legislature's intent to make that authorization retroactive to all cases since 1981. § 2929.06(E) (Anderson's 2009).

The reasoning and rule of *Penix* is as applicable to Maxwell White as it was to Billy Penix in 1987. Impaneling a new jury and imposing a new sentence of death would deny Maxwell White equal protection, due process, and a fair and reliable sentencing determination in violation of the Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution, as well as the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. THE HOLDING OF THE SIXTH CIRCUIT COURT OF APPEALS

The Sixth Circuit Court of Appeals vacated White's sentence of death because of error during the jury selection phase of the trial. The Court concluded that the trial court had failed to grant White's challenge for cause and dismiss a juror who was clearly biased on the question of sentence:

In light of these facts, we find that juror Sheppard was unable to "lay aside [her] impression or opinion and render a verdict based on the evidence presented in court." *Irvin [v. Dowd]*, 366 U.S. [717]at 723, 81 S.Ct. 1639.[(1961)]

* * *

Accordingly, we find that the trial judge's failure to excuse Sheppard and the Ohio Supreme Court's finding that the trial court did

not abuse its discretion in failing to strike Sheppard were contrary to or an unreasonable application of Supreme Court precedent.

In order to grant a writ of habeas corpus on this issue, we must finally consider whether the error resulting from Juror Sheppard's placement on the jury for the penalty phase of the trial resulted in "actual prejudice," in that it had "substantial and injurious effect or influence in determining the jury's verdict" pursuant to *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Because we find this standard is easily met on the facts of this case, we find that White is entitled to habeas relief with respect to the sentencing phase on this ground.(footnote omitted)

White v. Mitchell, 431 F. 3d 517, 542 (6th Cir. 2005), *cert. denied sub nom. Houk v. White*, 549 U.S. 1047 (2006).²

2

This Court has granted similar relief where it has found error in the jury selection phase of a capital case that deprived the defendant of due process and a fair trial:

{¶ 62} The trial court abused its discretion by refusing defense counsel's requests to advise prospective jurors that one of the murdered victims was a three-year-old child and by refusing to allow voir dire on that fact. Therefore, the death sentence imposed on appellant in Count I for the aggravated murder of Jayla Grant is vacated. The matter is remanded to the trial court for resentencing consistent with R.C. 2929.06.

State v. Jackson, 107 Ohio St.3d 53, 66, 836 N.E.2d 1173, 1192 (2005).

Upon remand, the trial court in *Jackson* concluded that Ohio Rev. Code § 2929.06 did not authorize it to impanel a new jury to consider re-imposition of a sentence of death because the error had not occurred at the sentencing phase of the trial: "Certainly, paragraph (B) does not clearly apply. Paragraph (B) applies when a sentence of death is set aside, nullified, or vacated "because of error that occurred in the sentencing phase of the trial and if division (A) of this section does not apply." If the error occurred during voir dire, which was before the sentencing phase, the error could not have occurred during the sentencing phase. . . . Therefore, under R.C. 2929.06(A), a resentencing hearing is necessary wherein the Court shall impose upon the offender one of the sentences of life imprisonment that are available under division (D) of section 2929.03 . . . at the time the offender committed the offense for which the sentence of death was imposed." *State v. Cleveland Jackson*, Allen County Court of Common Pleas Case No. Cr 2002-0011, at 3,5. (2006)

C. THE HOLDING OF THE ASHLAND COUNTY COURT OF COMMON PLEAS

The Ashland County Court of Common Pleas ruled that White could not be sentenced to death a second time, concluding that the 2005 amendments to Ohio Rev. Code § 2929.06 that purportedly authorized a new jury would constitute a violation of the constitutional prohibition against retroactive application of laws.

D. THE RULING OF THE FIFTH DISTRICT COURT OF APPEALS

On the state's appeal, the Fifth District Court of Appeals reversed the trial court authorizing the impaneling of a new jury to consider the re-imposition of a sentence of death for White. *State v. White*, 2009-Ohio-3869, 2009 Ohio App. Lexis 3285 (Ohio App. 5th Dist, 2009). The Court of Appeals incorrectly concluded that "we find Appellee did not have the right not to face the death penalty again under the former statute." *State v. White*, 2009-Ohio-3869, {¶21}. Based on that incorrect conclusion, the Court then relied solely on federal law and analogized White's case to *Ring v. Arizona*, 536 U.S. 584 (2002), and *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004), concluding:

We find the situation herein is similar to the situation in *Ring*. The amendment to R.C. 2929.06, mandating the impaneling of a new jury for death penalty resentencing does not alter the range of conduct Ohio law subjects to the death penalty, but instead alters the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring a new jury rather than the original jury

make the determination of whether a defendant should be resentenced to death. “Rules that allocate decision making authority in this fashion are prototypical procedural rules. *Id.* [*Schriro v. Summerlin*, at 353]. Because we find current R.C. 2929.06 to be procedural, we conclude it does not violate the Ohio Constitution against retroactive application of laws. We further find the State may seek the death penalty again during the resentencing of Appellee.

State v. White, 2009-Ohio-3869, {¶24}.

E. § 2929.06 HAS NEVER AUTHORIZED THE RE-IMPOSITION OF A SENTENCE OF DEATH IN THESE CIRCUMSTANCES. *STATE V. PENIX*, 32 OHIO ST.3D 369, 513 N.E.2d 744 (1987) SYLLABUS.

The Court of Appeals correctly concluded that White’s sentence of death had not been vacated for any of the reasons set forth in Ohio Rev. Code § 2929.06 at the time this crime was committed on January 19, 1996. The Court of Appeals, however, did not even mention the controlling case law from this Court on the application of the § 2929.06(B) that has always prohibited impaneling a new jury to consider re-imposition of a sentence of death *in any case* where the offender had been tried by a jury and on appeal the conviction was upheld but where the sentence was vacated:

When an accused is tried by jury and convicted of aggravated murder with specification, a death sentence may be imposed by the trial judge only upon recommendation of *the same jury* that tried the guilt phase of the proceedings, pursuant to the criteria set forth in R.C. 2929.03. Thus, when a case is remanded to the trial court following vacation of the death sentence due to error occurring at the penalty phase of the proceeding, the trial court, in resentencing the offender, is limited to the sentences of life imprisonment with parole eligibility after serving twenty full years of imprisonment or life imprisonment with parole

eligibility after serving thirty full years of imprisonment. (emphasis supplied)

State v. Penix, 32 Ohio St.3d 369, 513 N.E. 2d 744 (1987)(Syllabus). The Court of Appeals did not discuss the reasoning or the holding of *Penix* or the limitations on death penalty sentencing contained therein.

Billy Penix had been tried and sentenced to death. On appeal, this Court agreed with the Court of Appeals' conclusion that because of erroneous jury instructions at the sentencing phase, the sentence of death had to be vacated although the convictions for aggravated murder and other charges were affirmed:

As stated, we must agree with the court of appeals that the improper jury instructions constituted prejudicial error which could not simply be corrected in the appellate review process pursuant to R.C. 2929.05. Consequently, we affirm the vacation of appellee's sentence by the court of appeals and remand the cause to the trial court for resentencing.

State v. Penix, 32 Ohio St.3d at 372. The result in *Penix* is similar to the situation here in that the convictions were left in tact, but the sentence of death was vacated. The difference is that *Penix* was reversed for sentencing phase error and White was vacated for jury selection phase error.

This Court then analyzed Ohio's statutory scheme for the imposition of the death penalty to determine whether there existed any authorization for impaneling a new jury to consider re-imposing a new sentence of death where the underlying

conviction had been affirmed. Analyzing Ohio Rev. Code § 2929.03(D)(2) and § 2929.06 (Anderson's 1981), this Court concluded:

The decisions leading to a death sentence must be made by the same jury that convicted the offender in the guilt phase. *There are simply no statutory provisions for another jury to make these crucial determinations.* [footnote omitted]

Since there is *no statutory authority* allowing the imposition of the death penalty upon resentencing, we may not create such a procedure out of whole cloth. Therefore, we hold that when an accused is tried by jury, and convicted of aggravated murder with death specification, a death sentence may be imposed by the trial judge only upon recommendation *of the same jury* that tried the guilt phase of the proceedings, pursuant to the criteria set forth in R. C. 2929.03. Thus when a case is remanded to the trial court following vacation of the death sentence due to error occurring at the penalty phase of the proceeding, the trial court, in resentencing the offender, is limited to the sentences of life imprisonment with parole eligibility after serving twenty full years of imprisonment or life imprisonment with parole eligibility after serving thirty full years of imprisonment. (R.C. 2929.06). (emphasis supplied)

Penix, 32 Ohio St.3d at 373. The original 1981 version of Ohio Rev. Code § 2929.06³ interpreted in *Penix* read in its entirety:

If a sentence of death that is imposed upon an offender is vacated upon appeal because the court of appeals or the Supreme Court could not affirm the sentence of death upon the standards imposed by Section 2929.05 of the Revised Code, is vacated upon appeal for the sole reason that the statutory procedure for imposing the sentence of death that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, or is vacated pursuant to division (C) of section 2929.05 of the Revised Code, the trial court that sentenced the offender shall conduct a hearing to resentence the

³ Section 2929.06 was enacted as part of the 1981 re-enactment of the death penalty statutes in Ohio in Senate Bill 1, effective October 19, 1981. (Anderson's 1981)

offender. At the resentencing hearing, the court shall sentence the offender to life imprisonment with parole eligibility after serving twenty full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

Ohio Rev. Code § 2929.06 (Anderson's 1981) *Penix* was decided by this Court in 1987. *State v. Davis*, 38 Ohio St.3d 361, 528 N.E.2d 925, interpreting and applying *Penix*, was decided in 1988.⁴ This Court reaffirmed the holding of *Penix* in 2004 in *State v. Williams*, 103 Ohio St.3d 112 (2004):

{¶ 4} At the time Williams raped and murdered Gregory, however, this version of R.C. 2929.06 was not yet in effect, and *the then current version did not permit impaneling a new jury to reconsider imposing a death sentence after the original death sentence was vacated for penalty-phase error*. See 146 Ohio Laws, Part IV, 7820; *State v. Penix* (1987), 32 Ohio St.3d 369, 513 N.E.2d 744. (emphasis supplied)

Williams, 103 Ohio St.3d at 113.⁵

⁴ The only amendment to Section 2929.06 prior to 1996 was an amendment in 1995 to reflect the change in the Ohio Constitution that eliminated appellate review by the Courts of Appeals in death penalty cases and required direct review by this Court. 1995 Senate Bill 4 inserted: ", in a case in which a sentence of death was imposed for an offense committed before January 1, 1995 [.]"

⁵

Williams further found that the amendments to Ohio Rev. Code § 2929.06 that purported to authorize imposition of a new death sentence on resentencing were not intended by the Legislature to be retroactive. Therefore those amendments did not apply to Williams whose December 1995 crime had been committed prior to the enactment of the amendments to Ohio Rev. Code § 2929.06 in October 1996.

{¶ 9} Because the Revised Code is silent as to whether current R.C. 2929.06(B) applies retroactively, it applies only prospectively. Therefore, current R.C. 2929.06 is inapplicable for resentencing an offender whose offenses occurred prior to the statute's effective date of October 16, 1996. Rather, the law in effect at the time of the offenses applies.

In rejecting arguments that *Penix* be overruled, this Court reaffirmed *Penix* and concluded:

{¶ 14} Even were we persuaded that the *Penix* rule is unsound, the decision does not defy practical workability. *Penix* has created no confusion in the courts of Ohio, we fully explained our rationale, and it did not depart from precedent. Cf. *Galatis [Westfield Ins. Co. v. Galatis]*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶ 51. Neither has *Penix* spawned a complex body of law characterized by “a patchwork of exceptions and limitations.” *Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, at ¶ 57. Its application is straightforward and its scope is clear: reimposition of the death penalty on remand is precluded in capital cases in which the defendant's aggravated-murder conviction has been affirmed, but the death sentence has been vacated on the ground of penalty-phase error. This simple rule applies to all cases in which the capital crime was committed before October 16, 1996, the effective date of the amendment to R.C. 2929.06 that permitted the death sentence to be reimposed on remand.

{¶ 15} We reaffirm *Penix*, and we hold that current R.C. 2929.06(B) may be applied prospectively only. Further, we remand this cause to the trial court for resentencing pursuant to the law that existed at the time of Williams's offenses. Accordingly, on remand the trial court shall, pursuant to former R.C. 2929.06(B), conduct a new sentencing hearing and choose from the life-sentencing options available in December 1995: life with parole eligibility after 20 full years or life with parole eligibility after 30 full years.

State v. Williams, 103 Ohio St.3d at 114-15.

Penix, as reaffirmed by *Williams*, was the controlling law in Ohio on January 19, 1996, the date on which this crime was committed. The law under

Id. at 113-114.

Penix is clear: a capital defendant such as White who had elected to be tried by a jury could only be sentenced to death upon the verdict of the jury that had convicted him of the aggravated murder charges at trial.⁶ If on appeal or on federal court review, his conviction was upheld, but the sentence of death was vacated, *Penix* is clear that no statute authorized the impaneling of a new jury to again consider sentencing an offender to death. Absent clear and specific statutory authorization, this Court could not create a new sentencing procedure “out of whole cloth.” *Penix*, at 373. Because there was no such authorization, resentencing to one of the two available life sentences was mandated under Ohio Rev. Code § 2929.06 and *Penix*.

Absent any further relevant amendment to the Ohio Rev. Code § 2929.06, there was no question that *Penix* mandated the imposition of a life sentence on resentencing for White, as there was no statutory authorization to do otherwise.

⁶

Capitally charged inmates who had elected to be tried by a three judge panel were, however, subject to being resentenced to death by the same three judge panel:

When a reviewing court vacates the death sentence of a defendant imposed by a three-judge panel due to error occurring at the penalty phase, not otherwise covered by R.C. 2929.06, and the reviewing court does not find the evidence to be legally insufficient to justify imposition of the death sentence, such reviewing court may remand the action to that trial court for a resentencing hearing at which the state may seek whatever punishment is lawful, including, but not limited to, the death sentence.

State v. Davis, 38 Ohio St.3d 361 (1988). This Court recognized the significance of the role of the jury in capital sentencing. This Court in *Davis* concluded that the same three judge panel could conduct a new penalty phase hearing with death as an option.

F. 2005 AMENDMENTS TO § 2929.06

The Ohio General Assembly first amended § 2929.06 in 1996. This Court found that the Legislature had not clearly expressed its intent that the statute be applied retroactively and therefore found that the statute could not be applied retroactively. amendment was held not to be retroactive as the statute was silent as to retroactive application. *Williams*, 103 Ohio St.3d at 113-14. Because of this holding the Court did not address whether the statute would be unconstitutionally retroactive.

The General Assembly again amended § 2929.06 and added paragraph (E) applying the statute to “all such offenders sentenced to death prior to, on, or after March 23, 2005.” It is this 2005 amended statute the state seeks to retroactively apply to permit the impaneling of a new jury to consider the re-imposition of death in White’s 1996 capital case.

G. § 2929.06 AS AMENDED DOES NOT AUTHORIZE IMPANELING A NEW JURY TO CONSIDER RE-IMPOSITION OF A SENTENCE OF DEATH ON MAXWELL WHITE.

Under the clear mandate of *Penix*, as reaffirmed by *Williams*, there must be clear statutory authority to impanel a new jury to again consider re-imposition of a sentence of death. § 2929.06 as amended in 2005 (even if applied retroactively) still does not authorize the trial court to impanel a new jury to consider re-imposition of a new sentence of death, under the circumstances of White’s case.

White's sentence of death was vacated for error that occurred in the jury selection phase of the trial. (See discussion *supra* at Section B) White's sentence was not vacated for "error that occurred at the sentencing phase of the trial." § 2929.06(B) authorizes the impaneling of a new jury to consider the re-imposition of a sentence of death only if the sentence is vacated "because of error that occurred in the sentencing phase of the trial." Because § 2929.06(B) recognizes vacation of a sentence of death "because of error occurring at the sentencing phase" as the sole reason for permitting the impaneling of a new jury and the re-imposition of a sentence of death, there is still no statutory authorization for impaneling a new jury in this situation. This is no different from the situation in *Penix*. Absent clear statutory authority, this Court may not create a re-sentencing procedure "out of whole cloth." *Penix*, at 373.

This Court has "consistently required strict compliance with Ohio statutes when reviewing the procedures in capital cases." *State v. Filiaggi*, 86 Ohio St.3d 230, 240, 714 N.E.2d 867, 877 (1999), citing *State v. Pless*, 74 Ohio St.3d 333, 658 N.E.2d 766, paragraph one of the syllabus (1996).

The United States Supreme Court and the Supreme Court of Ohio have both required strict adherence to the precise legislatively defined procedures to prevent the arbitrary and capricious imposition of the death penalty. *State v. Penix* (1987), 32 Ohio St. 3d 369, 513 N.E. 2d 744.

State v. Brock, 110 Ohio App.3d 656, 675 N.E.2d 18 (3d App. Dist 1996), appeal not allowed *State v. Brock*, 77 Ohio St.3d 1444, 671 N.E.2d 1283 (1996).

As the Court of Appeals correctly observed, none of the provisions of present § 2929.06(A) apply here. Nothing in present § 2929.06(A) authorizes the reimposition of a sentence of death in any event.

Present § 2929.06(B)⁷ authorizes the impaneling of a new jury and the consideration of the re-imposition of death, only in very limited circumstances, specifically prescribed in the statute:

(B) Whenever any court of this state or any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender *because of error that occurred in the sentencing phase of the trial* and if division (A) of this section does not apply, the trial court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing. If the offender was tried by a panel of three judges, that panel or, if necessary, a new panel of three judges shall conduct the hearing. . . .

§ 2929.06(B). Thus *only* if the sentence of death was vacated “because of error that occurred in the sentencing phase of the trial” and “if division (A) of this section does not apply” may a new jury be impaneled to consider the re-imposition of a

⁷ Sections (C), (D), (E) of present § 2929.06 address re-sentencing in cases where a sentence of life imprisonment without parole was imposed and vacated, the right of a state to appeal and order vacating a sentence, and the Legislature’s intent that the statute apply retroactively. None of these sections authorize any procedure for the re-imposition of a sentence of death.

sentence of death. Max White's sentence was not vacated "because of error that occurred in the sentencing phase of the trial." (See Section B, *supra*)

§ 2929.06 as it existed in 1996 did not authorize the impaneling of a new jury or the re-imposition of a sentence of death for error that occurred during the jury selection process or any other time. *Penix*. § 2929.06(B) as it exists today likewise does not authorize the impaneling of a new jury and the re-imposition of a sentence of death for error that occurred during the jury selection process. Because no statutory authorization exists to permit the trial court to impanel a jury to consider re-imposition of a sentence of death where the conviction was upheld but the sentence of death was vacated for error that occurred during the jury selection process, *Penix* requires that the trial court impose one of the life sentences that were available in 1996, i.e., life imprisonment without any possibility of parole, life imprisonment with no possibility of parole for thirty full years, or life imprisonment with no possibility of parole for twenty-five full years. Ohio Rev. Code § 2929.03(D) (Anderson's 1996). To create a new procedure not authorized by statute would deny White due process, equal protection of the law, and a fair and reliable sentencing determination in violation of the Ohio Constitution, Art. I, §§ 2, 9, 10, and 16 and the Fifth, Sixth, Eighth and Fourteenth Amendments.

H. DOUBLE JEOPARDY PRECLUDES THE STATE OF OHIO FROM ATTEMPTING TO SENTENCE MAXWELL WHITE TO DEATH A SECOND TIME.

As a general rule, subjecting a defendant to the same punishment on re-trial that was available at the original trial, after a reversal on appeal, does not implicate double jeopardy restrictions. However, this case does not fall within the general rule. Prior to the amendments to Ohio Rev. Code § 2929.06 in 1996 and 2005, Ohio law guaranteed to a capitally charged defendant that if he elected to be tried by a jury, he could only once be put in jeopardy for his life under specific circumstances: 1. he was tried and convicted and sentenced to death following a trial by jury; 2. his convictions were upheld on appeal; and 3. the sentence of death was vacated on appeal, regardless of where the error occurred.

Maxwell White's life was put in jeopardy once at a jury trial in 1996. He has now met the legal standards in place at the time he went to trial to prohibit the state from again seeking a sentence of death under the law applicable on January 19, 1996: 1. he was tried and convicted and sentenced to death following a trial by jury; 2. his convictions were upheld on appeal; and 3. the sentence of death was vacated on appeal, based on error occurring at the jury selection phase of the trial. Requiring Maxwell White to again defend against imposition of the death penalty violates the protections against double jeopardy contained in both the Ohio Constitution, §§ 2, 9, 10, and 16 and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Former Ohio Rev. Code § 2929.06 was based on fairness and common sense. In effect, former Ohio Rev. Code § 2929.06 created an irrebuttable presumption that the first jury, in the absence of the biased juror, would not have recommended death and therefore a life sentence must be imposed. This is the equivalent of an acquittal of the death penalty that precludes reinstatement of that punishment. *Bullington v. Missouri*, 451 U.S. 430, 446 (1981).

I. CONCLUSION

No court in Ohio has been granted the statutory authorization to impanel a new jury to consider re-imposition of a new sentence of death for Maxwell White. Where a capitally charged defendant had elected to be tried by a jury, former § 2929.06 did not authorize a new sentence of death in any situation where the underlying conviction had been upheld, but the sentence of death had been vacated. Regardless of whether it can be applied retroactively to White's case or not, the current version of § 2929.06(B) only authorizes the impaneling of a new jury to consider re-imposition of a sentence of death, if the sentence was vacated "because of error that occurred at the sentencing phase of the trial." White's sentence of death was vacated for error that occurred at the jury selection phase of the trial, not at the sentencing phase of the trial. Therefore the 2005 amendment of §2929.06 does not apply to Maxwell White..

Strict construction of sentencing statutes such as § 2929.06 prohibits this Court from creating a procedure to authorize the impaneling of a new jury “out of whole cloth.” *Penix*.

Subjecting Maxwell White to run the gauntlet of defending himself against the death penalty a second time, under these circumstances, would deny White due process, a fair and reliable sentencing determination, equal protection of the law, the effective assistance of counsel, and the right not to be twice put in jeopardy for his life under Ohio Rev. Code § 2929.06, Art. I, §§ 2, 9, 10, and 16 of the Ohio Constitution, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

This Court should reverse the Fifth District Court of Appeals and order re-sentencing pursuant to Ohio Rev. Code § 2929.06 be limited to considering imposition of one of the available life sentences pursuant to Ohio Rev. Code §2929.03.

Respectfully submitted,


MICHAEL J. BENZA (061454) 0005839
Law Offices of Michael J. Benza
17850 Geauga Lake Road
Chagrin Falls, OH 44023
(216) 319-1247
(440) 708-2626 (fax)
Michael.Benza@case.edu
COUNSEL FOR AMICUS CURIAE OHIO
ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Foregoing Motion For Appointment of Investigator was forwarded by regular U.S. Mail to Nathan Ray, 137 South Main Street, #201, Akron, Ohio 44308, George Pappas, 1002 Key Building 159 S. Main Street Akron, OH 44308 Ramona Francesconi Rogers, Ashland County Prosecuting Attorney, Suite 307, Orange Street, Ashland, OH 44805, on this 16th day of February, 2010.


Michael J. Benza (061454) 0005839
Counsel for Ohio Association of
Criminal Defense Lawyers