

IN THE SUPREME COURT OF OHIO

09 - 1661

STATE OF OHIO

Appellee

-vs-

MAXWELL WHITE

Appellant

* ON APPEAL FROM THE ASHLAND
* COUNTY COURT OF APPEALS,
* FIFTH APPELLATE DISTRICT

*

* COURT OF APPEALS
* CASE NOS. 07 COA 037; 07 COA 038

*

*

MERIT BRIEF OF APPELLANT
MAXWELL WHITE

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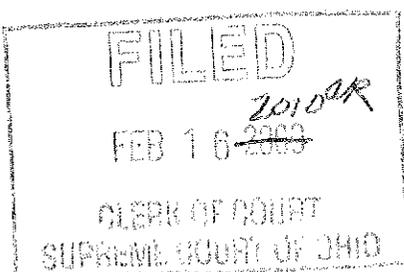


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STATEMENT OF THE FACTS

On January 25, 1996, Appellant, Maxwell White, was indicted by the Ashland County Grand Jury for offenses that occurred on January 19, 1996. Included in the indictment was a count of Aggravated Murder, which contained a death penalty specification. On June 10, 1996, the guilt/innocent phase of Mr. White's trial commenced. On June 19, 1996, the jury returned a verdict of guilty on all counts, including the death penalty specifications. On June 26, 1996, the penalty phase portion of the trial began. On June 29, 1996, the jury recommended a sentence of death for Mr. White. On July 12, 1996, the trial court adopted the jury's recommendation and imposed a sentence of death in this case. Mr. White appealed the conviction and sentence to the Fifth District Court of Appeals who dismissed the appeal for want of jurisdiction. Mr. White appealed that decision to this Court. This Court affirmed Mr. White's conviction and death sentence on May 20, 1998 [*State v. White*, 82 Ohio St.3d 16 (1998)]. Mr. White unsuccessfully sought post-conviction relief [*State v. White*, #97COA01229, 1998 WL 515944 (Ohio Ct. App. August 7, 1998), *State v. White*, 89 Ohio St.3d 1467 (2000)].

In November, 1999, Mr. White filed a petition for writ of habeas corpus in the United States District Court. On December 18, 2001, the district court denied Mr. White's petition in its entirety. The matter was then appealed to the Sixth Circuit Court of Appeals and on December 7, 2005, the Sixth Circuit Court of Appeals reversed the death sentence in Mr. White's based on error at the voir dire in his trial. [*White v. Mitchell*, 431 F.3d 517 (6th Cir. 2005)]. The case was remanded back to the state trial court for a new sentencing hearing. On February 17, 2006, the Sixth Circuit Court of Appeals denied rehearing and on April 21, 2006, the Sixth Circuit Court of Appeals denied rehearing and rehearing en banc.

At the time of the offense in this case Ohio Revised Code § 2929.06, Resentencing Hearing After Vacation Of Death Sentence, stated in part as follows:

“If the sentence of death that is imposed upon a defendant is vacated upon appeal . . . the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall sentence the offender to life imprisonment with parole eligibility after serving 20 full years of imprisonment or to life imprisonment with parole eligibility after serving 30 full years of imprisonment.”

The Ohio Legislature amended this statute in 1996. However it was not until March 23, 2005, that the legislature made the statute retroactive to the original enactment date, October 19, 1981. Specifically, the legislature amended 2929.06(B) in part as follows:

“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 this 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 empanel a new jury for the hearing . . . At the hearing, the court shall follow the procedures set forth in division (D) of section 2929.03 of the Revised Code in determining whether to impose upon the offender a sentence of death or a sentence of life imprisonment. If, pursuant to that procedure, the court determines that it will impose a sentence of life imprisonment, the sentences of life imprisonment that are available at the hearing, and from which the court shall impose a sentence, shall be the same sentences of life imprisonment that were available under division (D) of section 2929.03 or under section 2909.24 of the Revised Code at the time the offender committed the offense for which the sentence of death was imposed”

On March 13, 2007, defense counsel filed with the Ashland County Court of Common Pleas Motions A and B, both of which sought to prohibit the state from seeking the death penalty for Mr. White again. Both of the motions raised a number of issues, however, the trial court only ruled on one issue raised by Mr. White. In its ruling, the trial court found Ohio Revised Code § 2929.06 to be unconstitutional under Article II, Section 28 of the Ohio Constitution as it was to be applied retroactively to Mr. White.

The state appealed the decision of the trial court. On August 3, 2009, the Fifth District Court of Appeals reversed the decision of the trial court. On September 15, 2009, Mr. White filed his Notice of Appeal to this Court. On December 7, 2009, this Court accepted jurisdiction to hear the case and permitted the appeal.

ARGUMENT

PROPOSITION OF LAW NUMBER ONE

THE RETROACTIVE APPLICATION OF OHIO REVISED CODE § 2929.06 VIOLATES THE OHIO CONSTITUTION.

Ohio Revised Code § 2929.06 is the statute in Ohio which guides any resentencing in death penalty cases. While the statute has changed several times over the years since its original enactment, at the time of Mr. White's original offense, which was January 19, 1996, the only options for resentencing after the death sentence had been reversed and remanded on appeal was 20 or 30 full years to life imprisonment. It is Mr. White's position that the statute in effect at the time of the offense is controlling, and a retroactive application of an amended statute permitting the death sentence upon resentencing is unconstitutional.

Effective October 16, 1996, Revised Code § 2929.06 was amended. The statute was amended to permit the impaneling of a new jury upon remand when a reviewing court had reversed the death penalty. The jury could now also consider as a sentencing option the death penalty. The statute was silent as to its retroactive application. In *State v. Williams*, 103 Ohio St.3d 112, syllabus at 112, 814 N.E.2d 818, 2004-Ohio-4747, this court determined that "[b]ecause the Ohio 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."

Effective March 23, 2005, the Ohio Legislature once again amended R.C. § 2929.06. This time the Ohio Legislature made the statute retroactive to October 19, 1981, the date of the original enactment of the death penalty in Ohio. This amendment permitted the impaneling of a

jury to consider the death sentence as a sentencing alternative for any defendant whose death sentence had been vacated on appeal. This amendment included those defendants who, at the time of their original offense, death was not a possible sentence upon remand where the original death sentence had been vacated.

This court has found that statutes are presumed to apply prospectively unless expressly declared by the legislature to be retroactive. R.C. § 1.48; *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 105 522 N.E.2d 489. Further, Article II, Section 28 of the Ohio Constitution prohibits the retroactive impairment of vested substantive rights. *See, State v. LaSalle*, 96 Ohio St.3d 178, 772 N.E.2d 1172, 2002-Ohio-4009. When addressing the issue of whether legislation can be applied retroactively, this court has adopted a two-part analysis. “As noted in *Van Fossen* and *LaSalle*, we have distilled these principles into a two-part test for evaluating whether statutes may be applied retroactively. First, the reviewing court must determine as a threshold matter whether the statute is expressly made retroactive (citations omitted). The General Assembly’s failure to clearly enunciate retroactivity ends the analysis, and the relevant statute may be applied only prospectively . . . If a statute is clearly retroactive, though, the reviewing court must then determine whether it is substantive or remedial in nature.” *State v. Consilio*, 114 Ohio St.3d 295, 298, 871 N.E.2d 1167, 2007-Ohio-4163. In this case, the Ohio Legislature specifically made R.C. § 2929.06 retroactive. Specifically, the statute reads at section (E) “[t]his section, as amended by H.B. 184 of the 125th General Assembly, shall apply to all offenders who have been sentenced to death for an aggravated murder that was committed on or after October 19, 1981 . . .”.

With the question of the legislature’s intent clearly resolved by the language of the statute, this court’s analysis then goes to the second part. Specifically, whether an amendment

impairs a vested substantive right. *Consilio*, supra. If the statute is retrospective and impairs vested substantive rights, it is unconstitutional. *LaSalle*, supra. This Court has found a substantive right to be one which "...impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction". *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, 354 721 N.E.2d 28. See also, *Van Fossen*, supra at 106-107. If it is determined that the amendments are merely remedial in nature, they are not unconstitutional on retroactivity grounds. *Consilio*, supra. This court has defined remedial as those laws effecting merely "the methods and procedure[s] by which rights are recognized, protected and enforced, not . . . the rights themselves." *Bielat*, 87 Ohio St.3d at 354, quoting *Weil v. Taxicabs of Cincinnati, Inc.* (1942), 139 Ohio St. 198, 205.

This court has addressed the issue of the retroactive application of statutes in a number of cases. For example, in *State v. Cook*, 83 Ohio St.3d 404, 412, 700 N.E.2d 570, 1998-Ohio-291, this court addressed the issue of the retroactive application of the sexual registration statutes. Of importance in *Cook* to this court was the fact that the legislative intent was for the benefit of society and to protect society from sexual predators. This court found that "the registration and address verification procedures of R.C. Chapter 2950 are *de minimis* procedural requirements that are necessary to achieve the goals of R.C. Chapter 2950." The Court went on to note that "[t]he General Assembly drafted R.C. Chapter 2950 to provide the public with adequate notice and information about sex offenders so that communities can protect their children when sex offenders move into their neighborhoods." *Id.* at 413. In finding that the provisions of R.C. 2950 were not substantive in nature "[o]nly the frequency and duration of the registration requirements have changed." There was no change in the actual sentence itself.

In *State v. Walls*, 96 Ohio St.3d 437, 775 N.E.2d 829, 2002-Ohio-5059, this Court addressed the retroactive application of amendments to juvenile statutes. Walls' position was that even though he was 29 years old at the time of his indictment, that he had a right to juvenile treatment under the law as it existed at the time of the offense. It was further Mr. Walls' position that, without the retroactive application of the statutes, the common pleas court lacked jurisdiction to try him as an adult unless there was first a bindover proceeding in the juvenile court. *Walls*, at 440. This Court found that any changes in the statutes were remedial in nature. In making this finding this Court noted that "...under either the 1985 law or the 1997 law, Walls was on notice that the offense he allegedly committed could subject him to criminal prosecution as an adult in the general division of the court of common pleas. The 1997 law merely removed the procedural prerequisite of a juvenile-court proceeding. Even though they may have an occasional substantive effect on past conduct, 'it is generally true that laws that relate to procedures are ordinarily remedial in nature.'" *Id.* at 443, quoting *Cook*, *supra*, at 411. As such, the Court found that applying the laws in effect at the time of commencement of the criminal proceedings did not impair Walls' substantive rights.

What distinguishes both *Walls* and *Cook* from the current case is that in neither case was the sentence enhanced. Rather, it was merely an extension of the statutes that had been in effect at the time of the commission of the offense. This was noted in *State v. Ferguson*, 120 Ohio St.3d 7, 896 M.E.2d 110, 2008-Ohio-424. In *Ferguson*, the Court once again addressed the sexual offender registration and notification law. The Court noted that "[a]s an initial matter, we observe that an offender's classification as a sexual predator is a collateral consequence of the offender's criminal acts rather than a form of punishment per se." *Id.* at 15. The Court went on to note that "[s]imilarly, we believe that the General Assembly's findings also support the

conclusion that the more burdensome registration requirements and the collection and dissemination of additional information about the offender as part of the statute's community notification provisions were not borne of a desire to punish. Rather, we determine that legislative history supports a finding that it is a remedial, regulatory scheme designed to protect the public rather to punish the offender - a result reached by many other courts." (citations omitted). The court further noted in *Ferguson* that "Ohio retroactivity analysis does not prohibit all increased burdens; it prohibits only increased punishment." *Id.* at 16.

The United States Supreme Court, in determining whether a statute is unconstitutional pursuant to the *ex post facto* clause, has also looked to whether there has been a change in the punishment. For example, in *Hopt v. Utah*, 110 U.S. 574, 590 (1884), the Court found that there is no *ex post facto* violation if the change in the law is merely procedural and does "not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt." This determination was further reflected in *Lindsey v. Washington*, 301 U.S. 397, 401-402 (1937). Here, the law in effect at the time the crime was committed provided for a maximum sentence of 15 years, and a minimum sentence of not less than six months. At the time *Lindsey* was sentenced, the law had been changed to provide for a mandatory 15 year sentence. Finding the retrospective application of this change was *ex post facto*, the court determined that "we need not inquire whether this is technically an increase in the punishment annexed to the crime," because "[i]t is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term."

In *Dobbert v. Florida*, 432 U.S. 282 (1977), the petitioner was convicted of murder and sentenced to death. *Dobbert* had argued that there was no death penalty in effect in Florida at the

time he had murdered his children. The argument was based upon the fact that the earlier statute enacted by the legislature was, after the time he acted, found by the Supreme Court to be invalid under *Furman v. Georgia*, 408 U.S. 238 (1972). The Court, in finding that there was no violation of the *ex post facto* clause noted that “the existence of the statute served as an ‘operative fact’ to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first degree murder.” *Id.* Thus, as the Court noted, the death penalty was in effect at the time of the commission of the offense. The Court reasoned that “[i]t is axiomatic that for a law to be *ex post facto* it must be more onerous than the prior law.” *Id.* at 294.

In this case, Mr. White was aware of the potential penalties of which he could be punished for the commission of this crime. However, he was also aware that, at the time of commission of this offense, that if his case should be remanded back to the trial court for resentencing that the maximum possible sentence was either 25 or 30 full years to life in prison. The sentence upon remand is now much more onerous than at the time of the original offense. The amendment to R.C. § 2929.06 was not merely a procedural change but one which was a substantive change by increasing the punishment.

The court of appeals failed to recognize this distinction. In its decision, the court found that “[a]ppellee always had a right to have the death penalty determined by a jury and always had the obligation to defend against it. We do not believe the fact current R.C. § 2929.06 mandates the impaneling of a new jury renders substantive what is otherwise procedural.” (Fifth District Opinion, p.9). The court went on to find that R.C. § 2929.06 “. . . 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.” (Fifth District Opinion, p.10). The court’s analysis fails to take into consideration the most important aspect of the amendment to § 2929.06, which is the fact that the statute also increases the sentence or punishment which can be imposed on Mr. White.

As set forth above, an important consideration for both this Court and the United States Supreme Court is that the changes in the statutes, which were not unconstitutional pursuant to state or federal laws, did not increase the punishment. Here, if the state legislature had stopped with the addition of requiring a jury to determine whether a defendant is to receive 20 or 30 full years to life imprisonment, then Mr. White would agree that this was a procedural change which is remedial in nature. However, because of the fact that the Ohio Legislature did increase the potential punishment to a death penalty where one had not existed before, it is a substantive change and therefore the retroactive application is unconstitutional. Even *Ring v. Arizona* (2002), 536 U.S. 584, which the court of appeals relied upon to support its position that any change is remedial as opposed to substantive in nature, was only a procedural change. In *Ring*, the change as required by the Court was that a jury rather than a Judge must make essential findings of fact which determined the punishment. It did not in any way change the ultimate punishment which could be inflicted.

The court of appeals also determined that “[a]ppellee’s sentence was not vacated based upon the limited circumstances set forth in former R.C. § 2929.06”. (Fifth District Opinion p.9). The court further found that “[n]or did the Sixth Circuit vacate Appellee’s death sentence upon a finding the statutory procedure for imposition of such sentence pursuant to former R.C. § 2929.03, which addressed the proof of relevant factors and alternative sentences, or former R.C. § 2929.04, which listed the criteria for imposing death or imprisonment, were unconstitutional. Further, the Sixth Circuit did not vacate Appellee’s sentence pursuant to former R.C. §

2929.05(C), upon a finding he was not 18 years of age or older.” (Fifth District Opinion, p.9, footnote 2). What the Court failed to recognize was the basis for the Sixth Circuit’s reversal, which was a *voir dire* error, rendering R.C. § 2929.06 inapplicable to Mr. White. R.C. § 2929.06, as amended March 23, 2005, states that “[w]hensoever 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 at the sentencing phase of the trial. . .*” (Emphasis added). It is Mr. White’s position that the error as found by the Sixth Circuit Court of Appeals was a *voir dire* error and not a sentencing phase error, and that therefore amended 2929.06 is inapplicable to him. In *White v. Mitchell*, 431 F.3d 517, 542 (6th Cir. 2005), the Sixth Circuit stated specifically that “... [W]e conclude that nothing about Sheppard’s demeanor could cure the weighty concerns raised by her *voir dire* testimony. 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.”

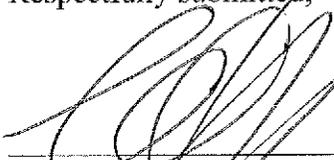
R.C. § 2929.06 limits itself to those errors that were remanded based upon errors that occurred at the sentencing phase of the trial. Here, the Sixth Circuit was very clear that the error that was the basis for the reversal of the death penalty occurred in *voir dire*. Since the legislature limited R.C. § 2929.06 only to errors occurring at the sentencing phase, and the error in Mr. White’s case occurred in *voir dire*, R.C. § 2929.06 is inapplicable to him. Mr. White must be resentenced pursuant to the statute in effect at the time of the original charge.

CONCLUSION

R.C. §2929.06, as retroactively applied to Mr. White, violates Ohio Constitution, Article II, Section 28. The change in the statute is substantive in nature. Specifically, it increases the possible sentence from 20 or 30 full years imprisonment to the death sentence. Further, R.C. § 2929.06 as written, is inapplicable to Mr. White. R.C. § 2929.06 limits itself to those cases reversed and remanded based upon errors at the sentencing phase of the trial. Here, the Sixth Circuit specifically found the error to have occurred at the voir dire portion of the trial.

Mr. White would respectfully request that this Court reverse the decision of the Fifth District Court of Appeals and find that R.C. § 2929.06, as applied retroactively to Mr. White, is unconstitutional pursuant to Article II, Section 28 of the Ohio Constitution.

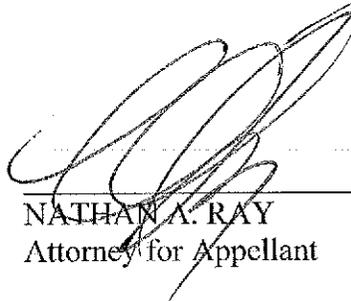
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PROOF OF SERVICE

I hereby certify that a copy of the foregoing has been mailed by regular U.S. Mail this 15th day of February, 2010, to Ramona Francesconi Rogers, Ashland County Prosecutor and Paul T. Lange, Assistant Prosecutor, 307 Orange Street, Ashland, Ohio 44805.



NATHAN A. RAY
Attorney for Appellant

APPENDIX

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellee

-vs-

MAXWELL WHITE

Appellant

* ON APPEAL FROM THE ASHLAND
* COUNTY COURT OF APPEALS,
* FIFTH APPELLATE DISTRICT

* 09-1661
* COURT OF APPEALS
* CASE NO. 07 COA 037
* 07 COA 038

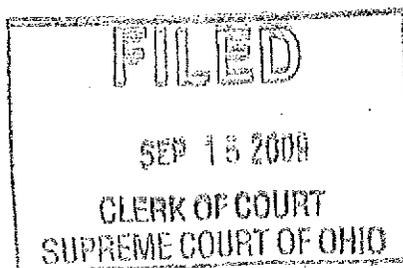
NOTICE OF APPEAL OF APPELLANT, MAXWELL WHITE

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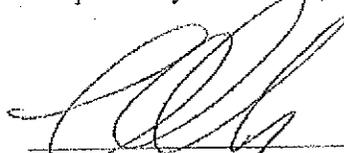
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NOTICE OF APPEAL OF APPELLANT, MAXWELL WHITE

Appellant, MAXWELL WHITE, hereby gives notice of appeal to the Supreme Court of Ohio from the Judgment of the Ashland County Court of Appeals, Fifth Appellate District, entered in Court of Appeals Case Nos. 07 COA 037 and 07 COA 308 on August 3, 2009.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,



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PROOF OF SERVICE

I certify that a copy of this Notice of Appeal was sent by regular U.S. Mail this 15^B day of September, 2009, to Ramona Francesconi Rogers, Ashland County Prosecutor, 307 Orange Street, Ashland, Ohio 44805.



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COURT OF APPEALS
ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

2009 AUG -3 AM 11:35

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STATE OF OHIO
Plaintiff-Appellant

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. W. Scott Gwin, J.
Hon. William B. Hoffman, J.

-vs-

MAXWELL D. WHITE, JR.
Defendant-Appellee

Case No. 07-COA-037;
07-COA-038

OPINION

CHARACTER OF PROCEEDING: Appeal from the Ashland County Court of
Common Pleas, Case No. 96-CRI-07366

JUDGMENT: Reversed and Remanded

DATE OF JUDGMENT ENTRY:

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ker

Hoffman, J.

{¶1} Plaintiff-appellant State of Ohio appeals the July 12, 2007 Judgment Entry entered by the Ashland County Court of Common Pleas, which found R.C. 2929.06, effective March 23, 2005, unconstitutional as applicable to defendant-appellee Maxwell D. White, Jr., and ordered Appellee be sentenced under the provisions of R.C. 2929.06, in effect as of January 19, 1996, the date of the offenses.

STATEMENT OF THE CASE¹

{¶2} On January 25, 1996, the Ashland County Grand Jury indicted Appellant on one count of aggravated murder with two death penalty specifications; one count of having weapons while under disability; and one count of abduction. Appellee appeared before the trial court on January 29, 1996, and entered a plea of not guilty to all counts and specifications contained within the Indictment. Following a jury trial, Appellee was convicted of all three counts and attendant specifications, and was sentenced to death. The Ohio Supreme Court affirmed Appellee's convictions and sentence. *State v. White*, 82 Ohio St.3d 16, 1998-Ohio-363. Appellee filed a petition for certiorari with the United States Supreme Court which was denied. *White v. Ohio* (1998) 525 U.S. 1057, 119 S.Ct. 623.

{¶3} On May 5, 1997, Appellee filed a petition for post-conviction relief pursuant to R.C. 2953.21. The trial court dismissed the petition via Judgment Entry filed August 18, 1997. Appellee appealed the dismissal to this Court which affirmed. *State*

¹ A thorough rendition of the facts underlying Appellee's conviction and sentence is set forth in *White v. Mitchell* (C.A. 6, 2005), 431 F3d 517.

v. White (August 7, 1998), Ashland App. No. 97COA01229. The Ohio Supreme Court denied jurisdiction. *State v. White* (1998) 84 Ohio St.3d 1445. Subsequently, Appellant filed an application to reopen his direct appeal with the Ohio Supreme Court. The Ohio Supreme Court denied the application on August 2, 2000. *State v. White* (2000) 89 Ohio St.3d 1467. After exhausting all of his State court remedies, Appellee filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Ohio. Following the denial of the petition by the District Court, Appellee filed an appeal in the United States Court of Appeals for the Sixth Circuit. The Sixth Circuit affirmed the District Court's denial of Appellee's petition with respect to the issues raised regarding his convictions, but reversed the decision and remanded the matter to the District Court with instructions to issue a writ of habeas corpus vacating Appellee's death sentence. *White v. Mitchell* (Sixth Circuit 2005), 431 F3d 517.

{¶4} After the District Court's granted Appellee's writ of habeas corpus which vacated his death sentence, the State filed a motion with the trial court requesting the matter be scheduled for a new penalty phase proceeding. Appellee filed a motion to prohibit the State from seeking the death penalty. Therein, Appellee asserted R.C. 2929.06, in effect at the time of the offense and his trial, did not permit the State to seek the death penalty a second time. Appellee further argued the application of current R.C. 2929.06 violated his constitutional right to due process and the constitutional prohibition against ex post facto laws. The State filed a memorandum in opposition thereto. On June 25, 2007, the trial court conducted a hearing on Appellee's motion. Via Judgment Entry filed July 12, 2007, the trial court sustained Appellee's motion, finding current R.C. 2929.06 was unconstitutional as applied to Appellee.

{¶5} It is from this judgment entry the State appeals, raising as its sole assignment of error:

{¶6} "I. THE TRIAL COURT ERRED IN HOLDING THE AMENDMENT TO OHIO REVISED CODE 2929.06 THAT WOULD ALLOW DEATH TO BE CONSIDERED AS A POSSIBLE PENALTY AT A RESENTENCING HEARING UNCONSTITUTIONAL AS APPLIED TO APPELLEE, UNDER THE OHIO CONSTITUTION ARTICLE II, SECTION 28."

{¶7} Herein, the State contends the trial court erred in finding the current version of R.C. 2929.06 to be unconstitutional as applied to Appellee, thereby prohibiting the State from seeking the death penalty again.

{¶8} Section 28, Article II of the Ohio Constitution prohibits the General Assembly from passing retroactive laws and protects vested rights from new legislative encroachments. *Vogel v. Wells* (1991), 57 Ohio St.3d 91, 99, 566 N.E.2d 154, 162. The retroactivity clause nullifies new laws which "reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time [the statute becomes effective]." *Miller v. Hixson* (1901), 64 Ohio St. 39, 51, 59 N.E. 749, 752.

{¶9} The Ohio Supreme Court has articulated the procedure this Court should follow in order to determine when a law is *unconstitutionally* retroactive. *State v. Cook* (1998), 83 Ohio St.3d 404, 410, 700 N.E.2d 570, 576, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 522 N.E.2d 489, paragraph one of the syllabus. We emphasize the phrase "*unconstitutionally* retroactive" to confirm that retroactivity itself is not always forbidden by Ohio law. Although the language of Section 28, Article II

of the Ohio Constitution provides the General Assembly "shall have no power to pass retroactive laws," Ohio courts have long recognized there is a crucial distinction between statutes which merely apply retroactively (or "retrospectively") and those that do so in a manner which offends our Constitution. See, e.g., *Rairden v. Holden* (1864), 15 Ohio St. 207, 210-211; *State v. Cook*, supra, at 410. We also note the words "retroactive" and "retrospective" have been used interchangeably in the constitutional analysis for more than a century. *Id.* Both terms describe a law which is "made to affect acts or facts occurring, or rights accruing, before it came into force." Black's Law Dictionary (6 Ed.1990) 1317.

{¶10} The test for unconstitutional retroactivity requires this Court first to determine whether the General Assembly expressly intended the statute to apply retroactively. R.C. 1.48; *State v. Cook*, supra at 410, citing *Van Fossen*, supra. If such intent is found, this Court then determines whether the statute is substantive, rendering it *unconstitutionally* retroactive, as opposed to merely remedial. *Cook* supra, at 410-411.

{¶11} The current version of R.C. 2929.06, which became effective March 23, 2005, provides, in pertinent part:

{¶12} "(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. * * * At the hearing, the court or panel shall follow the procedure set forth in division (D) of section 2929.03 of the Revised Code in

determining whether to impose upon the offender a sentence of death, a sentence of life imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment. * * *

{¶13} The trial court in the case sub judice found, and we agree, the current version of R.C. 2929.06 clearly expresses the Ohio Legislature's intent the statute be applied retroactively. See, R.C. 2929.06(E). Having found such intent, we must now determine whether R.C. 2929.06 is remedial or substantive.

{¶14} Remedial legislation affects "the methods and procedure by which rights are recognized, protected and enforced, not * * * the rights themselves." *Weil v. Taxicabs of Cincinnati, Inc.* (1942), 139 Ohio St. 198, 205. Furthermore, as stated in *Bielat v. Bielat*, 87 Ohio St.3d at 354, 2000-Ohio-451, remedial laws " 'merely substitute a new or more appropriate remedy for the enforcement of an existing right.' " *Id.*, quoting *Cook*, supra at 411. A purely remedial statute does not violate Section 28, Article II of the Ohio Constitution, even if applied retroactively. *Van Fossen*, supra at 107. And, while the retroactive application of a remedial statute may have the occasional substantive effect, generally laws which relate to procedures are ordinarily remedial in nature. *Id.*, supra at 107-108, citing *Wellston Iron Furnace Co. v. Rinchart* (1923), 108 Ohio St. 117, 140 N.E. 623, paragraph one of the syllabus.

{¶15} Conversely, 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. *Van Fossen*, supra at 107.

{¶16} In *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281, the Ohio Supreme Court explained "a 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, if it did not create a vested right, created at least a reasonable expectation of finality." *Id.* at 281.

{¶17} The trial court found current R.C. 2929.06 was unconstitutional as applied to Appellee because the statute created a right which did not exist under the version of R.C. 2929.06, in effect at the time Appellee committed the offenses. The trial court also found under former R.C. 2929.06 there was no existing right to impanel a new jury for death penalty resentencing. The trial court added the creation of that right resulted in a burden being placed upon Appellee to defend a second death penalty proceeding when no such obligation existed under the prior law. Having made such findings, the trial court ordered Appellee be sentenced under the provisions of R.C. 2929.06, in effect as of January 19, 1996, the date of the offenses, thereby, precluding the State from seeking the death penalty again. We respectfully disagree with the trial court's findings and order.

{¶18} R.C. 2929.06, in effect as of the date Appellee committed the offenses, provided:

{¶19} "If the sentence of death that is imposed upon an offender is vacated upon appeal because the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by section 2929.05 of the Revised

Ashtand County, Case No. 07-COA-037, 07-COA-038

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 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."

{¶20} Appellee argues, pursuant to R.C. 2929.06, in effect at the time he committed the offenses, the trial court's only options for resentencing are life imprisonment with parole eligibility after serving twenty full years of imprisonment, or life imprisonment with parole after serving thirty full years of imprisonment. Although R.C. 2929.06, in effect at the time Appellee committed the offenses, permitted a trial court to resentence an offender whose death sentence had been vacated to only life imprisonment, such sentence was not available to Appellee as his death sentence was not vacated under one of the three situations set forth in the statute. Under former R.C. 2929.06, a trial court resentencing an offender whose death sentence had been vacated was required to impose a life sentence if the death sentence was vacated because 1) the court of appeals or the supreme court could not affirm the death sentence under the standards imposed by R.C. 2929.05; or 2) the death sentence was vacated for the sole reason the statutory procedure for imposing the sentence was unconstitutional; or 3) the

death sentence was vacated pursuant to R.C. 2929.05(C). Appellee's sentence was not vacated based upon the limited circumstances set forth in former R.C. 2929.06.²

{¶21} Accordingly, we find Appellee did not have the right not to face the death penalty again under the former statute.

{¶22} Assuming, *arguendo*, such right does apply to Appellee, we find while the error causing the death penalty to be vacated occurred at trial, the right to resentencing did not vest until the Sixth Circuit Court of Appeals vacated his sentence in 2007. Thus, we do not find current R.C. 2929.06 to be a substantive law as it did not impair or deprive Appellee of a vested right at the time it was enacted. Nonetheless, current R.C. 2929.06 may be a substantive law if it creates a new right or imposes additional burdens. We believe current R.C. 2929.06 did not create a new right or impose a new burden upon Appellee. Appellee always had a right to have the death penalty determined by a jury and always had the obligation to defend against it. We do not believe the fact current R.C. 2929.06 mandates the impaneling of a new jury renders substantive what is otherwise procedural.

² The Sixth Circuit Court of Appeals did not vacate Appellee's sentence based upon former R.C. 2929.05, which required an appellate court or the supreme court to "review and independently weigh all of the facts and other evidence * * * in the record * * * and consider the offense and the offender to determine whether the aggravating circumstances * * * outweigh the mitigating factors in the case and whether the sentence of death is appropriate." Nor did the Sixth Circuit vacate Appellee's death sentence upon a finding the statutory procedure for imposition of such sentence pursuant to former R.C. 2929.03, which addressed the proof of relevant factors and alternative sentences, or former R.C. 2929.04, which listed the criteria for imposing death or imprisonment, were unconstitutional. Further, the Sixth Circuit did not vacate Appellee's sentence pursuant to former R.C. 2929.05(C), upon a finding he was not 18 years of age or older.

{¶23} In *Ring v. Arizona* (2002), 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed. 2nd 556, the United States Supreme Court held a sentencing judge sitting without a jury, could not find an aggravating circumstance necessary to impose the death penalty because the Sixth Amendment to the U.S. Constitution required aggravated circumstances be found by a jury. *Id.* at 609. Subsequently, the United States Supreme Court explained the holding in *Ring* “did not alter the range of conduct Arizona law subjected to the death penalty”, but rather “altered the range of permissible methods for determining whether a defendant’s conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment.” *Schriro v. Summerlin* (2004) 542 U.S. 348, 353, 124 S.Ct. 2519, 159 L.Ed. 2nd 442. The *Schriro* Court noted “*Ring*’s holding is properly classified as procedural.” *Id.*

{¶24} 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.* 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.

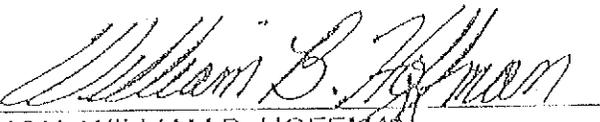
{¶25} The State's sole assignment of error is sustained.

{¶26} The judgment of the Ashland County Court of Common Pleas is reversed and the matter remanded for further proceedings consistent with this opinion and the law.

By: Hoffman, J.

Farmer, P.J. and

Gwin, J. concur


HON. WILLIAM B. HOFFMAN


HON. SHEILA G. FARMER


HON. W. SCOTT GWIN

IN THE COURT OF APPEALS FOR ASHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

APPEALS COURT
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APPELLATE CLERK OF COURTS
ASHLAND, OHIO

STATE OF OHIO

Plaintiff-Appellant

-vs-

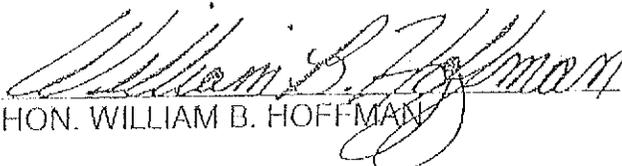
MAXWELL D. WHITE, JR.

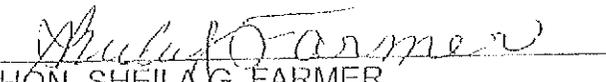
Defendant-Appellee

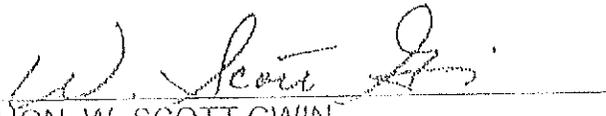
JUDGMENT ENTRY

Case No. 07-COA-037;
07-COA-038

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Ashland County Court of Common Pleas is reversed and the matter remanded for further proceedings consistent with our opinion and the law. Costs assessed to Appellee.


HON. WILLIAM B. HOFFMAN


HON. SHEILA G. FARMER


HON. W. SCOTT GWIN

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IN

2007 JUL 12 PM 3:42

IN THE COURT OF COMMON PLEAS
ASHLAND COUNTY, OHIO

CLERK OF COURTS
ASHLAND, OHIO

STATE OF OHIO,

Case No. 96-CRI-07366

Plaintiff,

vs.

MAXWELL D. WHITE, JR.,

Defendant.

**JUDGMENT ENTRY ON DEFENSE
MOTIONS A and B**

This case is before the Court on Defendant's Motions A and B. The Court conducted a hearing on the Motions on June 25, 2007. The State of Ohio was represented by Prosecuting Attorney Ramona Francesconi Rogers and Assistant Prosecuting Attorney Paul Lange. The Defendant was present and he was represented by Attorney Richard Ketcham and Attorney Andrew Hyde.

PROCEDURAL HISTORY OF THE CASE

On January 19, 1996, the Defendant fatally shot Trooper James Gross of the Ohio State Highway Patrol on Interstate 71 in Ashland County, Ohio. The Defendant was indicted by the Ashland County Grand Jury on January 25, 1996 for: (1) Aggravated Murder of Trooper Gross, with a specification pursuant to Ohio Revised Code Section 2929.04(A)(3) for acting with the purpose of escaping detection, apprehension, trial or punishment for another offense, and one specification pursuant to Ohio Revised Code Section 2929.041(A)(6) for committing murder against a peace officer whom White knew or had reasonable cause to know was engaged in his duties; (2) Possession of Weapons While Under Disability; and (3) Abduction of Jean White with one

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specification for possessing a firearm on or about his person while committing the offense of abduction. The specifications to the Aggravated Murder charge rendered the Defendant eligible for the death penalty.

On June 10, 1996, the guilt phase of the Defendant's trial commenced. He was found guilty by the jury on June 19, 1996 of all charges. The Court commenced the mitigation phase of the Defendant's death penalty proceedings on June 26, 1996. On June 29, 1996, the jury returned a recommendation of death sentence on the Aggravated Murder charge. On July 12, 1996, the Court journalized an entry accepting the jury's recommendation and sentencing the Defendant to death on the Aggravated Murder charge. The Defendant was also sentenced to eighteen (18) months on the Weapons Under Disability charge and five (5) to ten (10) years on the Abduction charge. Those sentences were ordered to be served consecutively to the death sentence.

On August 14, 1996, the Defendant filed an appeal with the Fifth District Court of Appeals. That appeal was dismissed for lack of jurisdiction on September 24, 1996. The Defendant then appealed his case to the Ohio Supreme Court on November 14, 1996 and that Court affirmed his conviction and death sentence on May 20, 1998. *State v. White* (1998), 82 Ohio St. 3d 16. Various motions for reconsideration and post-conviction relief were unsuccessfully pursued by the Defendant thereafter.

In November of 1999¹, the Defendant filed a petition for writ of habeas corpus in federal district court. On December 18, 2001, the district court denied the petition, but the court granted a certificate of appealability on two claims. The Defendant then pursued an appeal of the denial of his petition for writ of habeas corpus in the Sixth Circuit Court of Appeals. The Defendant's

¹The following facts are taken from the Sixth Circuit Court of Appeals decision.

appeal was not argued in the Sixth Circuit Court of Appeals until March 24, 2005. On December 7, 2005, the panel of three judges who heard the appeal rendered a decision reversing the district court decision. The Court remanded the case to the district court with instructions to issue a writ of habeas corpus vacating the Defendant's death sentence unless the State conducts a new penalty phase proceeding. *White v. Mitchell* (2005), 431 F.3d 517. The appellee requested a hearing *en banc* before the Sixth Circuit Court of Appeals and that request was denied. *White v. Mitchell*, 2006 U.S. App. LEXIS 10605 (6th Cir., Apr. 21, 2006), cert. den. *White v. Houk* (Nov. 13, 2006), 127 S. Ct. 581. On December 28, 2006, the District Court complied with the decision of the Sixth Circuit Court of Appeals and issued a conditional writ of habeas corpus vacating the Defendant's death sentence. This case is therefore pending before this Court for new sentencing proceedings. The writ of habeas corpus instructs this Court to resolve, if raised by the Defendant, whether the provisions of Ohio Revised Code Section 2929.06 which allow the empaneling of a new jury for death penalty resentencing are retroactive.

LEGAL ISSUE

In both motions, the Defendant seeks an order of this Court prohibiting death penalty resentencing. The legal issue raised by Defense Motion A is whether the error in the jury selection process found by the federal court is an error in the sentencing phase of the original proceedings such that the Defendant is subject to jury death penalty resentencing under Ohio Revised Code Section 2929.06(B). The legal issue raised by Defense Motion B is whether the death penalty resentencing of the Defendant pursuant to Ohio Revised Code Section 2929.06 is barred by the *ex post facto*/retroactive, due process or double jeopardy provisions of the United States or Ohio Constitutions. In Defense Motion B, the Defendant has raised the issue of retroactivity of Ohio

Revised Code Section 2929.06, and thus this Court is under a mandate from the federal court to first resolve that issue before proceeding with resentencing. Given that the issue of retroactivity could be dispositive of all legal issues, the Court addresses that issue first.

HISTORY OF DEATH PENALTY RESENTENCING IN OHIO

Ohio Revised Code Section 2929.06 is the statute in the State of Ohio which mandates the resentencing procedure in death penalty cases. Ohio criminal law is statutory and the Ohio legislature defines what constitutes criminal offenses and the penalties and procedures for criminal actions. Ohio Revised Code Section 2929.06 was in effect on the date the Defendant committed the murder offense in this case and it continues to be in effect. It has been modified on several occasions by the Ohio legislature and it is those modifications, and Ohio Supreme Court rulings interpreting the statute, which create the retroactivity issue in this case.

As of the date of the offense in this case, January 19, 1996, Ohio Revised Code Section 2929.06 allowed for the resentencing of the defendant for certain specified reasons. The statute stated:



If the sentence of death that is imposed upon an offender is vacated upon appeal because the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under 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 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.

(Emphasis added). This law contained no provision permitting the empaneling of a new and different jury to conduct death penalty resentencing proceedings, if an offender's death sentence was vacated on appeal.

In 1987, the Ohio Supreme Court specifically considered whether an offender can be resentenced to death when the offender's original death sentence is vacated on appeal. *State v.*

Penix (1987), 32 Ohio St.3d 369. The Court held in its syllabus of that case as follows:

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. (R.C. 2929.06, applied and construed.)**

As of the date of his offense and the date of his conviction, under the *Penix* decision and O.R.C. Section 2929.06 in effect as of the date of the Defendant's offense in this case, Defendant White could not be resentenced to death, if his original death sentence was vacated by a court of law.

Effective October 16, 1996, after the Defendant's offense and conviction, the Ohio General Assembly amended Ohio Revised Code Section 2929.06. The statute was changed to allow for the empaneling of a new jury to conduct a new resentencing hearing at which a death sentence could again be considered, under certain circumstances. The amended statute stated:

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If the sentence of death that is imposed upon an offender is vacated upon appeal because of error that occurred in the sentencing phase of the trial and if division (A)(1) 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. At the hearing, the court shall follow the procedure set forth in division (D) of section 2929.03 of the Revised Code in determining whether to impose upon the offender a sentence of death, life imprisonment without parole, 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 added). This statutory change was not made retroactive by the Ohio legislature.

In 2004, the Ohio Supreme Court considered whether the October 16, 1996 amendment permitting the empaneling of a new death penalty sentencing jury applied to persons whose crime was committed before October 16, 1996. In *State v. Williams* (2004), 103 Ohio St.3d 112, the Ohio Supreme Court held that the jury death penalty resentencing provision of Ohio Revised Code Section 2929.06, effective October 16, 1996, was not retroactive. The Court affirmed its prior decision in *Penix* and held that an offender must be resentedenced under the version of Ohio Revised Code Section 2929.06 which was in effect at the time of the commission of the murder offense. In its syllabus, the Court held:

[C]urrent 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.

Thus, under Ohio law, as of September 22, 2004, Defendant White, being an offender whose murder offense occurred prior to October 16, 1996, could not be resentenced to death in the State of Ohio.

The Ohio Supreme Court decided the *Williams* case while House Bill 184 was pending in the Senate. House Bill 184, as originally introduced, only amended the penalties for murder in the State of Ohio. It did not contain any provisions amending Ohio Revised Code Section 2929.06. The Senate Judiciary Committee issued Sub. House Bill 184 on November 29, 2004. A major change made by the Senate Judiciary Committee was specifically in response to the Supreme Court's decision in *State v. Williams*. See Comment 7, Bill Analysis, Sub. H.B. 184, 125th General Assembly, (as reported by S. Judiciary). Sub. H.B. 184 was approved by the Senate on November 30, 2004 and approved by the House on December 1, 2004. The bill was signed by the Governor on December 22, 2004. The effective date of the law was March 23, 2005.

In *Williams*, the Ohio Supreme Court held that the jury death penalty resentencing provisions of Ohio Revised Code Section 2929.06 were prospective only and applied only in cases where the offense was committed on or after October 16, 1996. In Sub. H.B. 184, the legislature amended Ohio Revised Code Section 2929.06 and added the following language:

This section, as amended by H.B. 184 of the 125th General Assembly, **shall apply to all offenders who have been sentenced to death for an aggravated murder that was committed on or after October 19, 1981, or for terrorism that was committed on or after May 15, 2002. This section, as amended by H.B. 184 of the 125th general assembly, shall apply equally to all such offenders sentenced to death prior to, on, or after the effective date of that act, including offenders who, on the effective date of that act, are challenging their sentence of death and offenders whose sentence of death has been set aside, nullified, or vacated by any court of this state or any federal**

court but who, as of the effective date of that act, have not yet been resentenced.

The jury death penalty resentencing provisions of Ohio Revised Code Section 2929.06 already applied to offenders whose crimes were committed on or after October 16, 1996. The 2005 amendment of the statute made those provisions applicable to offenders whose murder offense was committed approximately nine (9) to twenty-four (24) years prior to the effective date of the law, or between October 19, 1981 and October 16, 1996. The Defendant falls within the category of offenders affected by the 2005 amendment of Ohio Revised Code Section 2929.06.

ANALYSIS OF O.R.C. SECTION 2929.06 UNDER THE OHIO CONSTITUTION

The Defendant argues that the provisions of O.R.C. Section 2929.06(E) requiring jury death penalty resentencing for the Defendant, an offender whose offense was committed prior to October 16, 1996, are unconstitutional under Article II, §28 of the Ohio Constitution. That constitutional provision states, in pertinent part, that:

The general assembly shall have no power to pass retroactive laws.

The State of Ohio argues that O.R.C. Section 2929.06, effective March 23, 2005, is not unconstitutionally retroactive under Article II, §28 of the Ohio Constitution. Both parties have articulately briefed and orally argued the issues to the Court.

The power to establish crimes, punishments and criminal procedures rests with the Ohio General Assembly. *State v. Young* (1980), 62 Ohio St. 2d 370, 392 and *State v. Morris* (1978), 55 Ohio St. 2d 101, 112. "It is the General Assembly, of course, that possesses authority to determine the effective dates of enactments passed pursuant to its legislative powers." *State v. Rush* (1998), 83 Ohio St. 3d 53, 57. However, the Constitution of Ohio prohibits the legislature

from adopting laws which are unconstitutionally retroactive. "The prohibition against retroactive laws is not a form of words; it is a bar against the state's imposing new duties and obligations upon a person's past conduct and transactions, and it is a protection for the individual who is assured that he may rely upon the law as it is written and not later be subject to new obligations thereby."

Lakengren, Inc. v. Kosydar (1975), 44 Ohio St. 2d 199, 201. "The General Assembly having the power to enact laws, and * * * having enacted laws with certain limitations, and persons having conformed their conduct and affairs to such state of the law, the General Assembly is prohibited, estopped, from passing new laws to reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time." **Miller v. Hixson** (1901), 64 Ohio St. 39, 51.

There is some overlap in the parties' arguments between the *ex post facto* clause of the United States Constitution and the retroactive prohibition in the Ohio Constitution. The Court begins its analysis of this issue by noting that the Ohio and United States constitutional provisions against retrospective laws differ from one another. "Retroactive laws are . . . a larger category than *ex post facto* laws, and comprise statutes imposing 'disabilities' as well as those imposing 'punishments'." **State ex rel. Corrigan v. Barnes** (1982), 3 Ohio App. 3d 40, 44. Further, *ex post facto* prohibitions apply to criminal or penal laws, while retroactive provisions apply to both civil and criminal laws. An examination of the case law interpreting these constitutional provisions establishes that there is a different analysis for the determination of what constitutes an *ex post facto* law under the United States Constitution, as opposed to a retroactive law under the Ohio Constitution. Since the scope of retroactive laws exceeds that of *ex post facto* laws, it is possible

for a law to be unconstitutional under Article II, §28 of the Ohio Constitution, but constitutional under the *ex post facto* clause of the United States Constitution.

Both the State and Defense correctly point out that *Calder v. Bull* (1798), 3 U.S. 386, contains what is still recognized under law as the seminal definition of an "*ex post facto*" law under Article I, §10 of the United States Constitution. *Collins v. Youngblood* (1990), 497 U.S. 37.

Under that case, an *ex post facto* law is:

1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
2. Every law that aggravates a crime, or makes it greater than it was, when committed.
3. Every law that changes the punishment, and inflicts greater punishment, than the law annexed to the crime when committed.
4. Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender.

The parties disagree whether Ohio Revised Code Section 2929.06, as amended effective March 23, 2005, falls within any of the *Calder* categories above. However, the parties do not dispute that it must fall within one of those categories to constitute an *ex post facto* law under Article I, §10 of the United States Constitution.

The test for constitutionality of a retroactive law under the Ohio Constitution is entirely different from the test of constitutionality under the federal constitution because that test does not involve any consideration of the *Calder* categories. The Ohio Supreme Court has, in several clearly

written decisions, established the test for the constitutionality of a retroactive law for purposes of the Ohio Constitution.

The analysis of whether a statute is unconstitutionally retroactive under the Ohio Constitution begins with a determination of whether or not the statute is retroactive, because Ohio Revised Code Section 1.48 establishes a presumption that statutes operate prospectively only. If there "is no clear indication of retroactive application, then the statute may only apply to cases arising after its enactment." *VanFossen v. Babcock & Wilson Co.* (1988), 36 Ohio St.3d 100, paragraph 1, syllabus. Indeed, this is the reason that the Ohio Supreme Court held in *State v. Williams*, supra, that Ohio Revised Code Section 2929.06 was prospective only.

In this particular case, the Ohio legislature has, in House Bill 184, clearly expressed in Division (E), an intent that the jury death penalty resentencing provisions of Ohio Revised Code Section 2929.06 apply retroactively. Further support for that intention is evident in the legislative notes for the bill indicating that Division (E) was added as a direct result of the Supreme Court's decision in *State v. Williams*, supra. This Court therefore finds that Ohio Revised Code Section 2929.06, effective March 23, 2005, is a retroactive law within the meaning of Article II, §28. When the legislature clearly expresses an intent that the statute apply retroactively, then a court examining the constitutionality of the statute must go on to analyze whether the statute is remedial or substantive. *State v. Cook* (1998), 83 Ohio St.3d 404, 410 and *VanFossen*, supra, paragraph 2 of syllabus.

Not all retroactive laws violate Article II, §28 of the Ohio Constitution. A purely remedial statute does not violate the Ohio Constitution. *VanFossen* at 107. Remedial laws have been equated with laws that just affect procedures regarding existing rights or obligations. *Id.* In

enacting the 2005 amendment to Ohio Revised Code Section 2929.06, the Ohio General Assembly specifically stated that it was clarifying and revising "the procedures that govern the resentencing of a person sentenced to death whose sentence is set aside, nullified, or vacated." Synopsis of SB 184. "By simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto Clause*. Subtle *ex post facto* violations are no more permissible than overt ones." *Collins*, supra, 497 U.S. at 46. Similarly, the Court finds that it is not bound by the General Assembly's characterization of Sub. H.B. 184 as procedural. See *Rubbermaid, Inc. v. Wayne County Auditor* (2002), 95 Ohio St. 3d 358, 360.

In order to determine whether Ohio Revised Code Section 2929.06, effective March 23, 2005, is remedial or substantive, one must look to the case law of the State of Ohio. The Ohio Supreme Court has defined a substantive law as one which:

- (1) impairs or takes away vested rights;
- (2) affects an accrued substantive right;
- (3) imposes new or additional burdens, duties, obligations or liabilities as to a past transaction;
- (4) creates a new right out of an act which gave no right and imposed no obligation when it occurred;
- (5) creates a new right; or
- (6) gives rise to or takes away the right to sue or defend actions at law.

VanFossen at 106-107 (citations omitted). The Supreme Court has also held that in order to constitute a substantive law, there must be a showing of some impairment, burden, deprivation or new obligation which accompanies the new right. *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, paragraph 2 of syllabus. Remedial laws are "those affecting only the remedy provided. These

include laws which merely substitute a new or more appropriate remedy for the enforcement of an existing right." *Van Fossen* at 107. A remedial law does not establish a new right, obligation or duty. The case law of the Ohio Supreme Court clarifies the distinction.

In *State ex rel. Crotty v. Zangerle* (1938), 133 Ohio St. 532, the Ohio Supreme Court nullified a statute that allowed for the refunding of tax penalties legally paid in prior years. Based upon *Hamilton Cty. Commrs. v. Rosche Bros.* (1893), 50 Ohio St. 103, the *Crotty* court concluded that the statute created a new right by providing a new legal avenue to recover penalties, but that it was unconstitutionally retroactive because it imposed an obligation on the county officials to refund taxes "that did not attach to the transaction when it occurred." *Id.* at 113.

In *Cincinnati School District Bd. of Ed. v. Hamilton* (2001), 91 Ohio St.3d 308, the Ohio Supreme Court analyzed whether a new law which permitted the re-filing of a once dismissed complaint regarding real estate valuation was a remedial or a substantive law. On its face, the law appeared to be merely procedural; i.e., it merely allowed the re-filing of a once dismissed complaint. The Ohio Supreme Court held, however, that the law was substantive and that retroactive application of the law violated Article II, §28 of the Ohio Constitution. The Court noted that the law created a new right; i.e., the right in a property owner to re-file a once dismissed complaint, when that right did not exist under the prior law. The Court also noted that the new law impaired the previously existing right of county officials to have re-filed complaints dismissed and the law imposed new burdens on county officials. Specifically, county officials were required to defend valuation a second time and to possibly have to refund taxes to the property owner in the new valuation action. The law thus met the test for being substantive because it created new

rights and imposed new obligations and burdens. The Court reached a similar conclusion on a different issue involving the same law in *Rubbermaid, Inc. v. Wayne County Auditor* (2002), 95 Ohio St. 3d 358.

In *Kneisley v. Lattimer-Stevens Co.* (1988), 40 Ohio St. 3d 354, the Ohio Supreme Court held that a new law which eliminated the right to a jury trial in a workers' compensation case could not be constitutionally applied retroactively under Article II, §28. The Court specifically held that "the right to a jury trial . . . is substantive, not procedural." *Kneisley* at 356, citing *Cleveland Railway Co. v. Halliday* (1933), 127 Ohio St. 278, paragraph one of the syllabus.

In *State v. Walls* (2002), 96 Ohio St.3d 437, the Ohio Supreme Court analyzed whether a 1997 amendment which eliminated bindover proceedings for juvenile murder offenders, and which provided for automatic prosecution of those offenders in Common Pleas Court, was unconstitutionally retroactive. The Court held that the change in the law was remedial and that it could be applied constitutionally to the offender. The Court noted that under both laws, the State of Ohio had the existing right to pursue prosecution of the juvenile as an adult. The Court further noted that the Defendant was under notice, at the time of the offense, that he could be prosecuted as an adult in the general division of the court of common pleas. The Court held that the law merely changed a procedure regarding how prosecution as an adult would occur, by eliminating the bindover proceeding, and therefore the new law was remedial.

In *State v. Cook* (1998), 83 Ohio St.3d 404, the Ohio Supreme Court considered whether changes to the sex offender registration law were unconstitutionally retroactive. The Ohio Supreme Court held in that case that additional registration and verification requirements placed upon sexual offenders was procedural and remedial for purposes of Article II, §28. In reaching

that holding, the Court noted that Ohio law already placed registration requirements on sexual offenders and that the new law merely changed the frequency and duration of registration requirements and increased the number of classifications.

The *Walls* and *Cook* cases are distinguishable from the facts of this case. In those cases, there was an existing law which permitted the State of Ohio to take some action. In *Walls*, the State of Ohio was already permitted under Ohio law to seek prosecution of a juvenile murder offender as an adult. The new law merely changed the procedures by which that could be done. In *Cook*, the State of Ohio was already permitted to classify and register sex offenders under law. The new law merely changed the registration procedures and classifications of offenders for registration purposes.

This case is analogous to the new rights and new obligations considered and determined substantive by the Supreme Court in *State ex rel. Crotty v. Zangerle, supra, Cincinnati School District Bd. of Ed. v. Hamilton, supra* and *Rubbermaid, Inc. v. Wayne County Auditor, supra*. In this case, there was no existing right under Ohio Revised Code Section 2929.06, as of January 19, 1996, to empanel a new jury for death penalty resentencing. While one might argue that there was an existing right, duty or obligation to seek resentencing, and that the change from a judge resentencing to a jury resentencing was a "procedural" change, this Court rejects that argument because the right to a jury trial is a substantive right under law. The creation of a substantive jury trial right where none existed before, is not remedial in the Court's opinion. Further, the creation of that right was accompanied by some burden. Specifically, the burden to defend a second death penalty proceeding where no such obligation existed under the prior law.

There has been some argument that the law is not substantive because the Defendant did not have a "vested right" to be resentenced to a life sentence under the prior law. First, it is important to note that deprivation of a vested right is only one hallmark of a substantive retroactive law under Ohio constitutional analysis. There need not be a deprivation of a vested right in order for the law to be deemed a substantive retroactive law. It is sufficient that the law creates a new right and imposes corresponding burdens. See *VanFossen, supra* and *Bielat, supra*.

In applying the above case law to Ohio Revised Code Section 2929.06, as amended in 2005, the Court finds the following:

1. Ohio Revised Code Section 2929.06, effective March 23, 2005, creates a new right, duty or obligation for jury death penalty resentencing when that right, duty or obligation did not exist under the prior law. Further, the law imposes burdens and obligations on the State of Ohio and the Defendant when those obligations did not exist under the prior law.²
2. The law does not merely affect "the methods and procedures by which rights are recognized and protected" because there was no right, duty or obligation of jury death penalty resentencing under the former law.

Based upon these findings and the law set forth above, the Court concludes that Ohio Revised Code Section 2929.06, effective March 23, 2005, is unconstitutional under Article II, §28 of the

²The Defendant argues that the State of Ohio should be prohibited from seeking the death penalty in this case on resentencing. The law states that: "If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing." Accordingly, the law does not seem to give the State of Ohio a choice about pursuing death penalty resentencing. This raises an interesting issue concerning whose right to jury trial is created (i.e., the State of Ohio's or the Defendant's) and who is burdened by that right. The law undoubtedly creates burdens upon the State of Ohio financially (i.e., expenses for indigent attorney fees, prosecution costs, court/jury costs) and it could create evidentiary burdens on the State depending upon the availability of evidence after a potentially long expanse of time between the original and resentencing hearings. The law also creates burdens upon the Defendant, notably the obligation to re-defend against the death penalty when that obligation did not exist under the previous law.

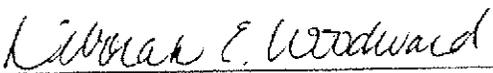
Ohio Constitution, as it applies to the Defendant, whose crime was committed prior to October 19, 2006.

A jury has already found the Defendant guilty of fatally shooting a State Highway Patrol Trooper in cold blood. Given the gravity of the Defendant's offense, the conclusion in this case is not reached lightly by the Court and it is not reached out of any sympathy for the Defendant or consideration which is not based in law. It is the Court's sworn duty to uphold the laws of the State of Ohio and the Constitution of the State of Ohio. It would be contrary to that oath of office and sworn duty to put any person in jeopardy of death in violation of the Constitution, regardless of the nature of the crime or the identity of the victim.

For the foregoing reasons, the Court SUSTAINS Defense Motion B with regard to the constitutionality of Ohio Revised Code Section 2929.06, effective March 23, 2005, under Article II, §28 of the Ohio Constitution, as it applies to the Defendant. Given the dispositive nature of finding of unconstitutionality on that prong of the motion, the Court does not address the remaining portions of Defense Motions A or B.

Its is ORDERED that the Defendant be sentenced in this case under the provisions of Ohio Revised Code 2929.06 in effect as of January 19, 1996, the date of the offense.

It is so ORDERED.



Judge Deborah E. Woodward
Ashland County Court of Common Pleas

cc: Prosecutor
Defense Attorneys

O Const II Sec. 28 Retroactive laws; laws impairing obligation of contracts

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.

(1851 constitutional convention, adopted eff. 9-1-1851)

1.48 Statutes presumed prospective

A statute is presumed to be prospective in its operation unless expressly made retrospective.

(1971 H 607, eff. 1-3-72)

§ 2929.06 Resentencing hearing after vacation of death sentence.

If the sentence of death that is imposed upon an offender is vacated upon appeal because the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under 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 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.

HISTORY: 139 v S 1 (Eff 10-19-81); 146 v S 4. Eff 9-21-95.

2929.06 Resentencing hearing.

(A) If a sentence of death imposed upon an offender is set aside, nullified, or vacated because the court of appeals, in a case in which a sentence of death was imposed for an offense committed before January 1, 1995, or the supreme court, in cases in which the supreme court reviews the sentence upon appeal, could not affirm the sentence of death under the standards imposed by section 2929.05 of the Revised Code, is set aside, nullified, or vacated 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, is set aside, nullified, or vacated pursuant to division (C) of section 2929.05 of the Revised Code, or is set aside, nullified, or vacated because a court has determined that the offender is mentally retarded under standards set forth in decisions of the supreme court of this state or the United States supreme court, the trial court that sentenced the offender shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall impose upon the offender a sentence of life imprisonment or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If division (D) of section 2929.03 of the Revised Code, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section, the court shall impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of section 2929.03 or under section 2909.24 of the Revised Code at the time the offender committed the offense for which the sentence of death was imposed. Nothing in this division regarding the resentencing of an offender shall affect the operation of section 2971.03 of the Revised Code.

(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. At the hearing, the court or panel shall follow the procedure set forth in division (D) of section 2929.03 of the Revised Code in determining whether to impose upon the offender a sentence of death, a sentence of life imprisonment, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment. If, pursuant to that procedure, the court or panel determines that it will impose a sentence other than a sentence of death, the court or panel shall impose upon the offender one of the sentences of life imprisonment that could have been imposed at the time the offender committed the offense for which the sentence of death was imposed, determined as specified in this division, or an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment that is determined as specified in this division. If division (D) of section 2929.03 of the Revised Code, at the time the offender committed the aggravated murder for which the sentence of death was imposed, required the imposition when a sentence of death was not imposed of a sentence of life imprisonment without parole or a sentence of an indefinite term consisting of a minimum term of thirty years and a maximum term of life imprisonment to be imposed pursuant to division (A) or (B)(3) of section 2971.03 of the Revised Code and served pursuant to that section, the court or panel shall

impose the sentence so required. In all other cases, the sentences of life imprisonment that are available at the hearing, and from which the court or panel shall impose sentence, shall be the same sentences of life imprisonment that were available under division (D) of section 2929.03 or under section 2909.24 of the Revised Code at the time the offender committed the offense for which the sentence of death was imposed.

(C) If a sentence of life imprisonment without parole imposed upon an offender pursuant to section 2929.021 or 2929.03 of the Revised Code is set aside, nullified, or vacated for the sole reason that the statutory procedure for imposing the sentence of life imprisonment without parole that is set forth in sections 2929.03 and 2929.04 of the Revised Code is unconstitutional, the trial court that sentenced the offender shall conduct a hearing to resentence the offender to life imprisonment with parole eligibility after serving twenty-five full years of imprisonment or to life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(D) Nothing in this section limits or restricts the rights of the state to appeal any order setting aside, nullifying, or vacating a conviction or sentence of death, when an appeal of that nature otherwise would be available.

(E) This section, as amended by H.B. 184 of the 125th general assembly, shall apply to all offenders who have been sentenced to death for an aggravated murder that was committed on or after October 19, 1981, or for terrorism that was committed on or after May 15, 2002. This section, as amended by H.B. 184 of the 125th general assembly, shall apply equally to all such offenders sentenced to death prior to, on, or after March 23, 2005, including offenders who, on March 23, 2005, are challenging their sentence of death and offenders whose sentence of death has been set aside, nullified, or vacated by any court of this state or any federal court but who, as of March 23, 2005, have not yet been resentedenced.

Effective Date: 07-29-1998; 03-23-2005; 2007 SB10 01-01-2008

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