

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,)	Case No. 09-1661
)	
Appellee,)	ON APPEAL FROM THE ASHLAND
)	COUNTY COURT OF APPEALS
v.)	FIFTH APPELLATE DISTRICT
)	
MAXWELL WHITE)	COURT OF APPEALS
)	CASE NOS. 07-COA-037, 07-COA-038
Appellante.)	
)	

**BRIEF OF AMICUS CURIAE
 AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION
 IN SUPPORT OF APPELLANT**

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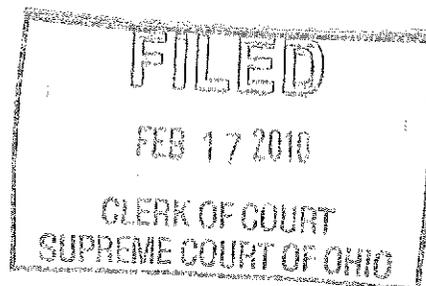


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INTEREST OF AMICUS CURIAE

Amicus Curiae, the American Civil Liberties Union of Ohio Foundation (ACLU of Ohio) is a non-profit, non-partisan membership organization devoted to protecting basic constitutional rights and civil liberties for all Americans. It is in defense of these basic liberties and for the reasons set out in the following Brief that amicus curiae, the ACLU of Ohio, urges the Court to recognize the substantial constitutional questions at issue in this case, and to hold that the version of Ohio Revised Code § 2929.06 ("R.C. 2929.06") in effect at the time of the offense should apply on remand.

STATEMENT OF THE CASE AND FACTS

Amicus adopts Appellant's statement of the case and facts.

SUMMARY OF ARGUMENT

The options for resentencing an offender whose original sentence of death was vacated due to penalty phase errors is spelled out in Ohio Revised Code Section 2929.06 (R.C. 2929.06). This statute has been changed numerous times since the date of Mr. White's January 1996 offense. The issue before this Court is which version applies to Mr. White, the version in effect at the time of the offense or the version in effect at the time of resentencing. At the time of White's offense, he could not be resentenced to death. Under the current statute, he can. Amicus proposes that sentencing White under the current law, that would allow him to be sentenced to death a second time, when that was not allowed at the date of his offense, would be to subject defendants like White to unconstitutional and illegal ex post facto and retroactive sentences. It would also throw the entire criminal sentencing scheme into constant turmoil and remove any finality to sentencing. Therefore, Amicus urges this Court to find for the Appellant, Mr. White.

ARGUMENT

Proposition of Law No. I: The date of the offense forever fixes the sentencing options available under Ohio Revised Code Section 2929.06, regardless of when a sentence is overturned or a new sentence imposed.¹

When Mr. White committed his offense in January 1996, Ohio law said that if his death sentence was later vacated due to penalty phase error, he could not be resentenced to death. He could only be resentenced to one of two possible life sentences. The legislature subsequently amended the statute to allow death as an option at resentencing. This Court pointed out that the legislature failed to make the amended statute expressly retroactive, so the legislature did so in 2005. While this Court has ruled that other sentencing statutes could not be retroactively applied, it has never decided whether this particular statutory provision – expressly allowing resentencing of death – may be applied retroactively.

Ohio law, in general, abhors retroactive penalties. Laws may not be applied retroactively if they burden substantive rights. This is especially true of criminal penalties, which are in essence policy judgments that provide disincentives for committing crimes. To apply increased penalties retroactively, after the fact, has nothing to do with disincentives. It is punitive pure and simple.

Current R.C. 2929.06 allows death as an option at resentencing, while the version of R.C. 2929.06 in effect on the date of White's offense did not. As will be discussed *infra*, this constitutes a retroactive increase in punishment in violation of the Ex Post Facto Clause of the United States Constitution, Article I, §9, it imposes new and additional burdens, and it takes away or impairs a vested right in violation of the Retroactivity Clause of the Ohio Constitution,

¹ The only exception would be that a sentence later declared unconstitutional could never again be an option.

Section 28, Article II. For these reasons, which will be discussed more fully below, Amicus urges this Court to find in favor of Mr. White.

A. Ohio Revised Code Section 2929.06 has been amended numerous times since the date of White’s offense, made significant changes to the available sentencing options, and which version should apply has never been conclusively decided.

The Ohio Revised Code has a specific statutory provision that spells out the procedure for resentencing after a sentence of death has been set aside, nullified, or vacated: Ohio Revised Code Section 2929.06 (“R.C. 2929.06”). That statute has been amended seven times since Mr. White’s January 1996 offense.²

At the time of Mr. White’s January 1996 offense, the available resentencing options were life imprisonment with parole eligibility after twenty years or life imprisonment with parole eligibility after thirty years. See *State v. Williams*, 103 Ohio St.3d 112, 2004-Ohio-4747, ¶ 4, citing 146 Ohio Laws, Part IV, 7820; see also *State v. Penix* (1987), 32 Ohio St.3d 369.

However, after Mr. White’s January 1996 offense, R.C. 2929.06 underwent several substantive changes. S.B. 2, which took effect July 1, 1996, added life without parole as a sentencing option. S.B. 269, which also took effect July 1, 1996, eliminated life with parole eligibility after twenty years and replaced it with life with parole eligibility after twenty-five years. S.B. 258, which took effect October 16, 1996, added reimposition of the death sentence as an option. See *State v. Williams*, 103 Ohio St.3d 112, 2004-Ohio-4747, ¶ 4, citing 146 Ohio

² The following amendments to R.C. 2929.06 have been made since the date of White’s offense: 1995 Am.Sub.S.B. No. 2, 146 Ohio Laws, Part IV, 7136 (“S.B. 2”)(effective July 1, 1996); 1996 Am.Sub.S.B. No. 269, 146 Ohio Laws, Part IV, 10752 (“S.B. 269”) (effective July 1, 1996); 1996 Am.Sub.S.B. No. 258, 146 Ohio Laws, Part IV, 10539 (“S.B. 258”) (effective October 16, 1996); 1996 Am.Sub.H.B. No. 180, 146 Ohio Laws, Part __, ____ (“H.B. 180”) (effective January 1, 1997); 1998 Am.Sub.S.B. No. 107, 147 Ohio Laws, Part __, ____ (“S.B. 107”) (effective July 29, 1998); 2004 Am.Sub.H.B. No. 184, __ Ohio Laws, Part __, ____ (“H.B. 184”) (effective March 23, 2005); 2007 Am.Sub.S.B. No. 10, __ Ohio Laws, Part __, ____ (“S.B. 10”) (effective January 1, 2008).

Laws, Part VI, 10548. H.B. 184 clarified that on resentencing a sentence of death could be reimposed, that if a life sentence was imposed the range of life sentences available is based on the sentencing law as it existed at the date of the offense, and added a statement of legislative intent that the revisions to R.C. 2929.06 made by H.B. 184 be retroactively applicable; this provision took effect on March 23, 2005.

Under current R.C. 2929.06, the available resentencing options for White are death, life imprisonment with parole eligibility after twenty years and life imprisonment with parole eligibility after thirty years.

The instant issue, whether the current version of R.C. 2929.06 that allows resentencing to death may be retroactively applied, has been raised in this Court previously but not conclusively determined.

The Court in *State v. Gross* (2002), 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061, refused to discuss this same issue because it was not raised by the parties. As in the present case, Gross' death sentence had been vacated and was remanded for resentencing consistent with R.C. 2929.06. *Id.* In her dissent, Justice Resnick pointed out the potential retroactivity problems with resentencing a defendant to death under R.C. 2929.06(B), when that portion of the statute did not exist until after the date of the defendant's crime. *Id.* (Resnick, J., concurring in part and dissenting in part).

The issue was raised by the parties in *State v. Williams*, 103 Ohio St.3d 112, 2004-Ohio-4747, but decided without reaching the constitutional question before this Court in the instant action. The *Williams* Court held that the legislature had failed to expressly state its intention that the statutory amendment allowing a defendant to be resentedenced to death be applied retroactively. *Id.* at ¶ 9. Therefore, based on the rules of construction codified at Revised Code §

1.48, the then current version of R.C. 2929.06 could not be applied retroactively and Williams could not have a death sentence reimposed. Id. at ¶¶ 8, 9. Furthermore, the *Williams* Court observed:

[R]eimposition 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.

Id. at ¶ 14.

The General Assembly immediately moved to amend R.C. 2929.06 in response to the *Williams* decision. A provision was added to a pending sentencing bill, H.B. 184, to make clear the General Assembly's intent that the resentencing option of death was intended to be expressly retroactive. However, the option of death was the *only* resentencing option under R.C. 2929.06 that was made expressly retroactive by the legislature in H.B. 184.

This Court has never conclusively ruled on whether retroactive application of the sentencing provisions in the current version of R.C. 2929.06 to defendants whose crimes occurred before the effective date of the relevant statutory amendments is permissible under the state and federal constitutions.

However, because the resentencing option of death has been made expressly retroactive by the legislature, Ohio courts are now forced to resolve whether the law violates the Retroactivity Clause of the Ohio Constitution and/or the Ex Post Facto Clause of the United States Constitution.

B. Retroactive application of criminal laws is generally prohibited under the U.S. Constitution, Ohio Constitution, and rules of construction.

Both the United States Constitution and the Ohio Constitution restrict retroactive application of the law. United States Constitution, Section 9, Article I (Ex Post Facto Clause); Ohio Constitution, Section 28, Article II (Retroactivity Clause). Ohio Rules of Construction further specify that a law will only be applied retroactively if the General Assembly expressly makes the law retroactively applicable. R.C. 1.48. However, even if a law is made expressly retroactive, such a retroactive application is not permitted if it affects substantive rather than procedural rights, as will be discussed in Section I.C., *infra*.

States are forbidden to pass any ex post facto law by Article One, Section Nine, of the U.S. Constitution. A law violates the ex post facto prohibition if it is retrospective and disadvantages those it affects. *Miller v. Florida* (1987), 482 U.S. 423, 430. A retrospective law “changes the legal consequences of acts completed before its effective date.” *Id.* at 431, citing *Weaver v. Graham* (1981), 450 U.S. 24, 31. A law disadvantages the offender when it is “more onerous than the prior law.” *Id.* “[T]he Clause is aimed at laws that ‘retroactively alter the definition of crimes or increase the punishment for criminal acts.’” *State v. Rush* (1998), 183 Ohio St.3d 53, 59, 697 N.E.2d 634, quoting *CA Dept. of Corrections v. Morales* (1995), 514 U.S. 499, 504, 115 S.Ct. 1597, 1601, 131 L.Ed.2d 588, 594, quoting *Collins v. Youngblood* (1990), 497 U.S. 37, 41-43, 110 S.Ct. 2715, 2718-2719, 111 L.Ed.2d 30, 39; *Beazell v. OH* (1925), 269 U.S. 167, 169-170, 46 S.Ct. 68, 68-69, 70 L.Ed. 216, 217. Thus, the U.S. Constitution places a restriction on legislation that retroactively increases punishment.

Ohio law similarly restricts retroactivity. Section 28, Article Two, of the Ohio Constitution states that “[t]he General Assembly shall have no power to pass retroactive laws.” *See Van. Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 106 (Ohio Constitution

Section 28, Article II forbids retroactive laws). “A statute is retroactive if it penalizes conduct that occurred before its enactment.” *State v. Williams*, 2004-Ohio-4747 ¶ 7. Retroactive application is also limited. “[T]he issue of whether a statute may constitutionally be applied retrospectively does not arise unless the General Assembly has specified that the statute so apply.” *State v. Rush* (1998), 183 Ohio St.3d 53, 60, 697 N.E.2d 634, quoting *Sturm v. Sturm* (1992), 63 Ohio St.3d 671, 673, 590 N.E.2d 1214, 1215, fn. 2, citing *Van Fossen*, 36 Ohio St.3d at 106. This principle is also codified in the Ohio Rules of Construction, which state that “[a] statute is presumed to be prospective in its operation unless expressly made retrospective.” Ohio R.C. 1.48.

These laws recognize that increasing penalties after the fact imposes significant and substantive burdens on criminal defendants. Indeed, the mere existence of the Retroactivity Clause and R.C. 1.48 demonstrates that Ohio recognizes the significance of those burdens.

If the General Assembly does instruct that a statute is to be applied retroactively, which the General Assembly did with the resentencing to death option of R.C. 2929.06 in 2005, the question becomes whether it affects substantive rather than procedural rights. *State v. Cook* (1998), 83 Ohio St.3d 404, 410-411, 700 N.E.2d 570; *Kunkler v. Goodyear Tire & Rubber Co.* (1988), 36 Ohio St.3d 135, 137. A retroactively applied statute is unconstitutional if it “ ‘takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.’ ” *State v. Williams*, 2004-Ohio-4747 ¶ 7, citing *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St.3d 100, 106, 522 N.E.2d 489, quoting *Cincinnati v. Seansongood* (1889), 46 Ohio St. 296, 303, 21 N.E. 630. In *Cook*, this Court explained that a law will not impose new and additional

burdens “unless the past transaction or consideration...created at least a reasonable expectation of finality.” *Cook*, 83 Ohio St.3d at 412, quoting *State v. Matz* (1988), 37 Ohio St.3d 279, 281.

Current R.C. 2929.06 allows death as an option at resentencing, while the version of R.C. 2929.06 in effect on the date of White’s offense did not. As will be discussed *infra*, this constitutes a retroactive increase in punishment in violation of the Ex Post Facto Clause of the United States Constitution, it imposes new and additional burdens, and it takes away or impairs a vested right in violation of the Retroactivity Clause of the Ohio Constitution.

C. This Court has consistently held that sections of Ohio Revised Code Chapter 29 that affect substantive rights may not be applied retroactively and are applicable only to offenses that occur after the effective date of the amendments.

This Court has consistently ruled that amended sentencing provisions in Chapter 29 of the Revised Code apply only to defendants whose crimes were committed on or after the effective date of the amendment, regardless of when sentencing occurs. Furthermore, this Court has also consistently held that sections of the criminal code in Chapter 29 of the Revised Code may not be applied retroactively if they affect substantive legal rights, such as imposing more punitive sentences, for acts that preceded the statute. The application of current R.C. 2929.06 violates both those tenets, as it expressly seeks to retroactively change and increase the available sentencing options above and beyond what they were at the date of White’s offense.

i. Amended sentencing provisions of Revised Code Chapter 29 are prospective.

This Court has determined that application of a sentencing statute is governed by the effective date of the new or amended statute. See *State v. Raglin* (1998), 83 Ohio St.3d 253, 260, 699 N.E.2d 482 (“the sentencing provisions of Am.Sub.S.B. No. 2 apply only to those crimes committed on or after July 1, 1996”); *State v. Rush* (1998), 83 Ohio St.3d 53, 61 at fn. 4, 697 N.E.2d 634 (“[t]he provisions of the Revised Code in existence prior to July 1, 1996, shall

apply... to a person upon whom a court, on or after that date and in accordance with the law in existence prior to that date, imposed a term of imprisonment for an offense that was committed prior to that date”); *State v. Madrigal* (2000), 87 Ohio St.3d 378, 399, 721 N.E.2d 52, 71-72, citing *Raglin* and *Rush, supra* (“the sentencing provisions of Am.Sub.S.B. No. 2 apply only to those crimes committed on or after July 1, 1996”); *State v. Gross* (May 24, 1999), Ohio App. 5 Dist. No. CT 96-055 (“the amended sentencing provisions are applicable only to crimes committed on or after the effective date, and *not to crimes committed before the effective date even if sentencing occurs afterward* [emphasis added]”), aff’d in part and reversed in part by *State v. Gross* (2002), 97 Ohio St.3d 121, 2002-Ohio-5524, 776 N.E.2d 1061. See also *State v. Palmer* (Oct. 20, 1999), Ohio App. 7 Dist. No. 96 BA 70 (defendant not entitled to additional sentencing options in amended R.C. 2929.03(C)(2), because sentencing provisions modified by Am.Sub.S.B. No. 2 only apply to crimes committed on or after July 1, 1996); *State v. Dennis* (Nov. 19, 1997), Ohio App. 9 Dist. No. 18410. (life without parole sentencing option added by Am.Sub.S.B. No. 2 not available to defendant whose crime predated July 1, 1996 enactment).

Notably, Mr. White’s trial counsel asked for an instruction that life without parole was an available sentencing option and was denied on the same basis as the litany of decisions above. Appellant Memorandum in Support of Jurisdiction ¶ 8.

Also notable is this Court’s 2006 decision in *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160. In that case, Hancock was convicted of a November 2000 offense and his death sentence was later vacated due to penalty phase errors. *Id.* This Court held that upon remand for resentencing, Hancock should be resentenced pursuant to the version of R.C. 2929.06 that was in effect at the date of his 2000 offense. *Id.* at ¶¶134-136. The Court noted that the statute had been amended after the date of Hancock’s offense and before his resentencing, but that the November

2000 version should nonetheless apply. *Id.* at p.31 fn.5. Specifically, the Court found that R.C. 2929.06 “was amended by Sub.H.B. No. 184, effective March 23, 2005. The 2005 amendments do not affect our disposition of this case.” *Id.* However, death had been an available resentencing option in November 2000, so the *Hancock* decision did not address the constitutional question at issue in the present case.

Amendments made by S.B. 2 and S.B. 269 to other sections of Chapter 29 of the Revised Code, namely the section pertaining to parole, have likewise been ruled not applicable to crimes that occurred before July 1, 1996. See *State v. Rowan*, Cuyahoga App. No. 80540, 2003-Ohio-2458 (where parolee was imprisoned before July 1, 1996, he was excluded from crime of escape for failure to report to his parole officer which was added as part of Am.Sub.S.B. No. 2); *State v. Seymour* (Oct. 29, 1997), Ohio App. 4 Dist. No. 96 CA 41 (noting the specific intent of the General Assembly that Am.Sub.S.B. Nos. 2 and 269 not be retroactive, the appellate court concluded that conditions for parole under the amended statute were not applicable to an appellant imprisoned before July 1, 1996).

The above cases instruct that, in general, changes in sentencing law apply prospectively to crimes committed on or after the effective date of a new or amended statute. The controlling date is the date of offense, regardless of when the trial or sentencing occurs, or when there is an attempt to amend the sentence.

ii. Amendments to the Ohio criminal code embodied in Revised Code Chapter 29 cannot be applied retroactively if they affect substantive legal rights and are punitive rather than remedial in nature.

This Court has confronted retroactivity and ex post facto issues before and articulated clear standards for when statutes may and may not be applied retroactively. Statutes with a

remedial purpose are acceptable, while laws that evince punitive intent or effect are not. *State v. Cook* (1998), 83 Ohio St.3d 404; *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824.

When evaluating punitive intent, a formal declaration of intent is not necessary, and courts may also look to other aspects of a legislative enactment such as manner of codification and method of enforcement. *Smith v. Doe* (2003), 538 U.S. 84, 94. The Ohio General Assembly chose to make the resentencing option of death expressly retroactive immediately after this Court's ruling in *Williams, supra*, that it was not retroactive absent express intent. Furthermore, the General Assembly chose to *only* make the new resentencing option of death expressly retroactive and chose *not* to make any of the newer life sentencing options retroactive.³ This evinces a clear punitive intent.

Retroactively imposing a resentencing option of death that was not previously available also has a clear, and obvious, punitive effect. Either the state can kill a man or it cannot. It is not a mere inconvenience or de minimis administrative requirement. See *Cook, supra* at 418. It furthers the traditional aims of punishment: retribution and specific deterrence. *Smith, supra* at 102. And it is firmly established that a death sentence is the ultimate punishment. "There is no question that death as a punishment is unique in its severity and irrevocability." *Gregg v. Georgia* (1976), 428 U.S. 153, 187, 96 S.Ct. 2909, citing *Furman v. Georgia* (1972), 408 U.S. 238, at 286-291, 92 S.Ct. 2726 (Brennan, J., concurring); *Id.*, at 306, 92 S.Ct., at 2760 (Stewart, J., concurring). See also *Zant v. Stephens* (1983), 462 U.S. 862, 884-885, 103 S.Ct. 2733 (noting "there is a qualitative difference between death and any other permissible form of punishment" and that "the severity of the sentence mandates careful scrutiny").

³ A copy of 2004 Am.Sub.H.B. 184 can be found in Appendix A. The portion amended to allow retroactive application of a death sentence but not of the lesser life sentences may be found under R.C. 2929.06(B) on page 8.

iii. The amendments to Revised Code Section 2929.06 have affected Mr. White's substantive rights and allowing him to be resentenced to death under the harsher new law would violate his rights under the Constitutions of the United States and State of Ohio.

There can be no doubt that changing the law to allow a person to be put to death who could not be resentenced to die before, does in fact affect a substantive right, the most precious substantive right – life. Furthermore, White had a substantive right to be resentenced according to the law at the time of his offense. *See State v. Penix* (1987), 32 Ohio St.3d 369 (for the proposition that a capital defendant had a substantive right to have a death sentence determined by the jury that found him guilty, and R.C. 2929.06 as amended and applied to a person whose offense occurred before the amendment divests the defendant of that substantive right).

Sadly, this Court is being asked to decide the seemingly obvious question of whether allowing someone to once again face a potential death sentence, when one was not allowed in January 1996, affects a substantive right. It does.

The resentencing statute, R.C. 2929.06, has undergone great changes in the last fifteen years, as discussed *supra* in Section A. The life without parole and life with parole eligibility after 25 years sentences did not exist prior to S.B. 2 and S.B. 269, and they could not apply to Mr. White under this Court's holdings in *Raglin* and *Rush*. *State v. Raglin* (1998), 83 Ohio St.3d 253, 699 N.E.2d 482; *State v. Rush* (1998), 83 Ohio St.3d 53, 697 N.E.2d 634. And in fact, the trial court recognized as much when it refused to allow jury instructions on life with parole in White's original sentencing phase. Appellant Memorandum in Support of Jurisdiction ¶ 9. Furthermore, this Court recognized in *State v. Hancock* that a defendant should be resentenced based on the law in effect at the date of his offense, not based on the amended statute at the time of his resentencing. *Hancock*, 2006-Ohio-160 at ¶134. This demonstrates a recognition that

revisions to R.C. 2929.06 should apply only to those cases in which the date of crime is after the effective date of the revision.

If the General Assembly had wanted all of the provisions amended into the new R.C. 2929.06 to apply retroactively it would have said so. For example, the legislature could have included the life without parole or life with parole eligibility after 25 years options for those offenses occurring prior to July 1, 1996. But it did not do so. Instead, the General Assembly in H.B. 184 chose only to state an express intention of retroactivity for the increased punishment of allowing a person to be resentenced to death. By doing so, the law clearly constitutes increased punishment, both in intent and effect, in violation of the Ex Post Facto Clause of the U.S. Constitution and Retroactivity Clause of the Ohio Constitution.

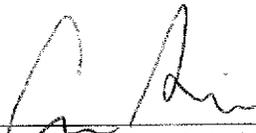
There can be no doubt that changing the law to allow a person to be put to death who could not be before does in fact affect a substantive right. Moreover, the legislature's act in retroactively applying only death but not the lesser life sentences demonstrates a punitive intent and has a clear punitive effect.

State and federal constitutional law thus should and do prohibit retroactive application of R.C. 2929.06. This matter must be remanded to the trial court with an order to sentence Mr. White in accordance with the version of R.C. 2929.06 in effect at the time of offense.

CONCLUSION

For the foregoing reasons, this Court must instruct the trial court to sentence Mr. White under the version of R.C. 2929.06 in effect at the time of his offense. The current version of R.C. 2929.06, which would permit a death sentence on remand, cannot be retroactively applied to defendants such as Mr. White whose crimes were committed prior to the amendment's effective date. The date of the offense forever fixes the sentencing options available, regardless of when

the sentencing occurs. Therefore, Mr. White must be sentenced according to the sentencing statute as it existed in January 1996.



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CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing was served by regular U.S. Mail, postage prepaid, this 17th day of February, 2010, upon the following:

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Foundation, Inc.

(125th General Assembly)
(Substitute House Bill Number 184)

AN ACT

To amend sections 2929.03 and 2929.06 of the Revised Code to permit the imposition of a sentence of life imprisonment without parole, life imprisonment with parole eligibility after serving 25 full years of imprisonment, or life imprisonment with parole eligibility after serving 30 full years of imprisonment when an offender is convicted of or pleads guilty to aggravated murder and is not charged with or convicted of an aggravating circumstance and to clarify and revise the procedures that govern the resentencing of a person sentenced to death whose sentence is set aside, nullified, or vacated.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 2929.03 and 2929.06 of the Revised Code be amended to read as follows:

Sec. 2929.03. (A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose sentence on the offender as follows:

(1) Except as provided in division (A)(2) of this section, the trial court shall impose ~~a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment~~ one of the following sentences on the offender:

(a) Life imprisonment without parole;

(b) Life imprisonment with parole eligibility after serving twenty years of imprisonment;

(c) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

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(d) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender was eighteen years of age or older at the time of the commission of the offense, if the matter of age was raised by the offender pursuant to section 2929.023 of the Revised Code, and whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard. The instruction to the jury shall include an instruction that a specification shall be proved beyond a reasonable doubt in order to support a guilty verdict on the specification, but the instruction shall not mention the penalty that may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C)(1) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, and regardless of whether the offender raised the matter of age pursuant to section 2929.023 of the Revised Code, the trial court shall impose sentence on the offender as follows:

(a) Except as provided in division (C)(1)(b) of this section, the trial court shall impose ~~a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment~~ one of the following sentences on the offender:

(i) Life imprisonment without parole;

(ii) Life imprisonment with parole eligibility after serving twenty years of imprisonment;

(iii) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iv) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

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(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the trial court shall impose upon the offender a sentence of life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(2)(a) If the indictment or count in the indictment contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code and if the offender is found guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be one of the following:

(i) Except as provided in division (C)(2)(a)(ii) of this section, the penalty to be imposed on the offender shall be death, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(ii) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, the penalty to be imposed on the offender shall be death or life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(b) A penalty imposed pursuant to division (C)(2)(a)(i) or (ii) of this section shall be determined pursuant to divisions (D) and (E) of this section and shall be determined by one of the following:

(i) By the panel of three judges that tried the offender upon the offender's waiver of the right to trial by jury;

(ii) By the trial jury and the trial judge, if the offender was tried by jury.

(D)(1) Death may not be imposed as a penalty for aggravated murder if the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense. When death may be imposed as a penalty for aggravated murder, the court shall proceed under this division. When death may be imposed as a penalty, the court, upon the request of the defendant, shall require a pre-sentence investigation to be made and, upon the request of the defendant, shall require a mental examination to be made, and shall require reports of the investigation and of any mental examination submitted to the court, pursuant to section 2947.06 of the Revised Code. No statement made or information provided by a defendant in a mental examination or proceeding conducted pursuant to this

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division shall be disclosed to any person, except as provided in this division, or be used in evidence against the defendant on the issue of guilt in any retrial. A pre-sentence investigation or mental examination shall not be made except upon request of the defendant. Copies of any reports prepared under this division shall be furnished to the court, to the trial jury if the offender was tried by a jury, to the prosecutor, and to the offender or the offender's counsel for use under this division. The court, and the trial jury if the offender was tried by a jury, shall consider any report prepared pursuant to this division and furnished to it and any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing or to any factors in mitigation of the imposition of the sentence of death, shall hear testimony and other evidence that is relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing, the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, and any other factors in mitigation of the imposition of the sentence of death, and shall hear the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, that are relevant to the penalty that should be imposed on the offender. The defendant shall be given great latitude in the presentation of evidence of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code and of any other factors in mitigation of the imposition of the sentence of death. If the offender chooses to make a statement, the offender is subject to cross-examination only if the offender consents to make the statement under oath or affirmation.

The defendant shall have the burden of going forward with the evidence of any factors in mitigation of the imposition of the sentence of death. The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the sentence of death.

(2) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted pursuant to division (D)(1) of this section, the trial jury, if the offender was tried by a jury, shall determine whether the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the mitigating factors present in the case. If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent

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such a finding, the jury shall recommend that the offender be sentenced to one of the following:

(a) Except as provided in division (D)(2)(b) of this section, to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, to life imprisonment without parole.

If the trial jury recommends that the offender be sentenced to life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment, the court shall impose the sentence recommended by the jury upon the offender. If the sentence is a sentence of life imprisonment without parole imposed under division (D)(2)(b) of this section, the sentence shall be served pursuant to section 2971.03 of the Revised Code. If the trial jury recommends that the sentence of death be imposed upon the offender, the court shall proceed to impose sentence pursuant to division (D)(3) of this section.

(3) Upon consideration of the relevant evidence raised at trial, the testimony, other evidence, statement of the offender, arguments of counsel, and, if applicable, the reports submitted to the court pursuant to division (D)(1) of this section, if, after receiving pursuant to division (D)(2) of this section the trial jury's recommendation that the sentence of death be imposed, the court finds, by proof beyond a reasonable doubt, or if the panel of three judges unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender. Absent such a finding by the court or panel, the court or the panel shall impose one of the following sentences on the offender:

(a) Except as provided in division (D)(3)(b) of this section, one of the following:

(i) Life imprisonment without parole;

(ii) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;

(iii) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(b) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that

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are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(E) If the offender raised the matter of age at trial pursuant to section 2929.023 of the Revised Code, was convicted of aggravated murder and one or more specifications of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, and was not found at trial to have been eighteen years of age or older at the time of the commission of the offense, the court or the panel of three judges shall not impose a sentence of death on the offender. Instead, the court or panel shall impose one of the following sentences on the offender:

(1) Except as provided in division (E)(2) of this section, one of the following:

- (a) Life imprisonment without parole;
- (b) Life imprisonment with parole eligibility after serving twenty-five full years of imprisonment;
- (c) Life imprisonment with parole eligibility after serving thirty full years of imprisonment.

(2) If the offender also is convicted of or pleads guilty to a sexual motivation specification and a sexually violent predator specification that are included in the indictment, count in the indictment, or information that charged the aggravated murder, life imprisonment without parole that shall be served pursuant to section 2971.03 of the Revised Code.

(F) The court or the panel of three judges, when it imposes sentence of death, shall state in a separate opinion its specific findings as to the existence of any of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code, the existence of any other mitigating factors, the aggravating circumstances the offender was found guilty of committing, and the reasons why the aggravating circumstances the offender was found guilty of committing were sufficient to outweigh the mitigating factors. The court or panel, when it imposes life imprisonment under division (D) of this section, shall state in a separate opinion its specific findings of which of the mitigating factors set forth in division (B) of section 2929.04 of the Revised Code it found to exist, what other mitigating factors it found to exist, what aggravating circumstances the offender was found guilty of committing, and why it could not find that these aggravating circumstances were sufficient to outweigh the mitigating factors. For cases in which a sentence of death is imposed for an offense committed before January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the appropriate court of appeals and with the clerk of the supreme court

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within fifteen days after the court or panel imposes sentence. For cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995, the court or panel shall file the opinion required to be prepared by this division with the clerk of the supreme court within fifteen days after the court or panel imposes sentence. The judgment in a case in which a sentencing hearing is held pursuant to this section is not final until the opinion is filed.

(G)(1) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed before January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the appellate court.

(2) Whenever the court or a panel of three judges imposes a sentence of death for an offense committed on or after January 1, 1995, the clerk of the court in which the judgment is rendered shall deliver the entire record in the case to the supreme court.

Sec. 2929.06. (A) If ~~the a~~ sentence of death ~~that is~~ imposed upon an offender is set aside, nullified, or 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 set aside, nullified, or 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 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 ~~one of the following sentences upon the offender:~~

~~(1) Except as provided in division (A)(2) of this section, life imprisonment without parole, life imprisonment with parole eligibility after serving twenty five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of imprisonment;~~

~~(2) If the sentence of death was imposed for an aggravated murder committed on or after January 1, 1997, and if the offender also was convicted of or pleaded guilty to a sexual motivation specification and a sexually violent predator specification that were included in the indictment, count in the indictment, or information that charged the aggravated murder,~~

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life imprisonment without parole that shall be served pursuant to upon the offender a sentence of life imprisonment that is determined as specified in this division. 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) If the Whenever any court of this state or any federal court sets aside, nullifies, or vacates a 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) 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; or a sentence of life imprisonment without parole, life imprisonment with parole eligibility after serving twenty-five full years of imprisonment, or life imprisonment with parole eligibility after serving thirty full years of 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 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 the a sentence of life imprisonment without parole that is imposed upon an offender pursuant to section 2929.021 or 2929.03 of the Revised Code is set aside, nullified, or vacated upon appeal 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.

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(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 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.

SECTION 2. That existing sections 2929.03 and 2929.06 of the Revised Code are hereby repealed.

SECTION 3. Section 2929.03 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. H.B. 180 and Am. Sub. S.B. 269 of the 121st General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

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SECTION 4. If any provision of this act, any provision of any section in this act, or the application of any such provision to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of other provisions of this act, other sections in this act, other applications of the provision in question, or related sections that can be given effect without the invalid provision or section, and to this end the provisions are severable.

Speaker _____ *of the House of Representatives.*

President _____ *of the Senate.*

Passed _____, 20____

Approved _____, 20____

Governor.

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The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

Director, Legislative Service Commission...

Filed in the office of the Secretary of State at Columbus, Ohio, on the
____ day of _____, A. D. 20 ____.

Secretary of State.

File No. _____ Effective Date _____