

In the
Supreme Court of Ohio

ORIGINAL

STATE OF OHIO, : Case No. 2009-1661
: :
Plaintiff-Appellee, : :
: :
v. : On Appeal from the
: Ashland County Court of Appeals,
: Fifth Appellate District
MAXWELL WHITE, : :
: :
Defendant-Appellant. : Court of Appeals Case
: Nos. 07-COA-037, 07-COA-038
: :

MERIT BRIEF OF *AMICUS CURIAE*
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IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO

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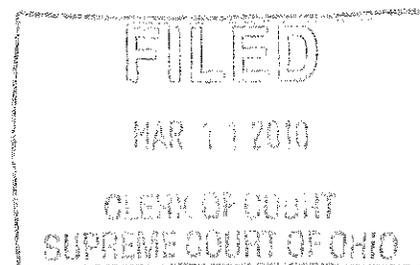


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INTRODUCTION

When Defendant-Appellant Maxwell White murdered an Ohio State Trooper in 1996, he was eligible for the death penalty, and a jury sentenced him to death. In 2005, the federal courts invalidated White's sentence for a procedural error at sentencing and sent the case back to the trial court for resentencing under R.C. 2929.06. Between White's 1996 crime and the federal court's 2005 decision vacating White's sentence, the General Assembly twice amended R.C. 2929.06—first by changing the applicable procedures, and second by expressly making the amendment retroactive to all Ohio death penalty cases. Because White was death-eligible for his crime both *before* and *after* those amendments, the retroactive application of amended R.C. 2929.06 to his case is not unconstitutional under Ohio or federal law.

At the time of White's crime, a loophole existed in Ohio's resentencing procedures under R.C. 2929.06. If a capital defendant was tried by a jury and his sentence was later vacated, no procedural mechanism existed to empanel a new, untainted jury at resentencing, and this Court refused to create one "out of whole cloth." *State v. Penix* (1987), 32 Ohio St. 3d 369, 373. Therefore, on resentencing, that capital defendant faced a maximum sentence of twenty or thirty years to life imprisonment only; death was not an option. *Id.*

In 1996, shortly after White was tried and sentenced to death, the General Assembly amended R.C. 2929.06 to create a procedural mechanism to empanel a *new*, untainted jury for resentencing. If the newly empanelled jury determined that the aggravating circumstances of defendant's case outweighed any mitigation evidence presented, it could elect to resentence the defendant to death. In 2005, the General Assembly expressly made the 1996 amendment retroactive to all death penalty cases.

White and his amici contend that the retroactive application of amended R.C. 2929.06 to him is unconstitutionally punitive because it allows White to be resentedenced to death even

though at the time of his 1996 crime and trial, he faced a maximum sentence of only life imprisonment on resentencing. But rather than impermissibly subjecting White to a harsher punishment, the amendments to R.C. 2929.06 actually created new statutory procedures to *protect* White's right to have his new sentence determined by a jury untainted by the procedural error that led the federal courts to reverse his first sentence. Such ameliorative procedural changes are remedial only and do not affect White's substantive rights. Thus, they are not unconstitutionally retroactive.

For these reasons and the reasons below, this Court should affirm the decision of the Fifth District and hold that amended R.C. 2929.06 does not violate the Retroactivity Clause of the Ohio Constitution, Ohio Const. Art. II § 28.

STATEMENT OF AMICUS INTEREST

Ohio Attorney General Richard Cordray acts as Ohio's chief law officer. R.C. 109.02. Accordingly, he has a strong interest in the correct interpretation of Ohio's criminal laws and procedure and in defending the legislative actions of the General Assembly from constitutional attack. The Attorney General supports the State of Ohio's position that amended R.C. 2929.06 does not violate the Retroactivity Clause of the Ohio Constitution, Ohio Const. Art. II § 28.

STATEMENT OF THE CASE AND FACTS

A. Maxwell White was convicted of aggravated murder and sentenced to death for the murder of an Ohio State Highway Patrolman.

On the evening of January 18, 1996, after hours of heavy drinking, White attacked his mother and sister in the condominium he shared with his mother. *White v. Mitchell* (6th Cir. 2005), 431 F.3d 517, 521. After his mother threatened to call the police, White pulled all of the phones off the wall. *Id.* at 522. White then held both his mother and sister at gunpoint and tied

them to a pole with a jump rope before shooting his mother in the ankle and fleeing in his car, heading north on I-71. *Id.*

Ohio State Highway Patrolman James Gross caught up to White, who was driving erratically. *Id.* Trooper Gross identified White's car and pulled behind it, following White for about five miles before activating his lights and signaling for White to pull over. *Id.* When White complied, Trooper Gross called White's license plate number into the dispatcher, who indicated that White had multiple DUI convictions and should not be driving. *Id.*

Trooper Gross approached White's car, and White shot him with a .45 caliber semi-automatic pistol loaded with hollow-point bullets, shattering the officer's left forearm. *Id.* When Trooper Gross attempted to escape, White fired two more shots, one of which struck the officer's back, entering beneath his bulletproof vest and killing him. *Id.*

White sped off, and motorists who witnessed the shooting followed his car and tried to force him off the road until the authorities could pursue him. *Id.* After a long high-speed chase, White lost control of his car on a slick exit ramp, and police officers from Medina County apprehended him and recovered his pistol. *Id.*

White was indicted for aggravated murder, possession of weapons while under disability, and abduction while possessing a firearm, with death penalty specifications. *Id.* Following trial, a jury convicted White of aggravated murder of a police officer and recommended a death sentence, which the trial court imposed. *Id.* at 523. The appellate court and this Court affirmed, and the United States Supreme Court declined review. See *State v. White* (1998), 82 Ohio St. 3d 16, 29; *White v. Ohio* (1998), 525 U.S. 1057. This Court then rejected White's motion to reopen his direct appeal. *State v. White* (2000), 89 Ohio St. 3d 1467 (Table). White also filed two

unsuccessful post-conviction petitions. See *State v. White* (5th Dist.), 1998 Ohio App. Lexis 4049, at *31; *State v. White* (5th Dist.), 2007-Ohio-3424, ¶ 52.

B. After White exhausted his appeals in state court, the federal court issued habeas relief and ordered resentencing.

White sought federal habeas relief, which the federal district court denied. Memorandum Opinion and Order, *White v. Mitchell*, No. 99-01565 (N.D. Ohio Dec. 18, 2001), Doc. No. 151. The Sixth Circuit Court of Appeals reversed, however, finding that one of the jurors was biased and should not have served on the jury at sentencing. *White*, 431 F.3d at 541-42. The Sixth Circuit accordingly granted White a conditional writ and ordered the trial court to hold a resentencing hearing. *Id.* at 542-43.

C. The General Assembly amended the procedural requirements set forth in R.C. 2929.06.

R.C. 2929.06 sets forth the procedures that apply to resentence a defendant after his previous sentence is “set aside, nullifie[d], or vacate[d].” R.C. 2929.06(B) specifically applies when resentencing is required “because of an error that occurred in the sentencing phase at trial” and requires “the trial court that sentenced the offender” to conduct a new resentencing hearing.

Before the General Assembly amended the statute in 1996, R.C. 2929.06 required the same jurors who had heard testimony at the guilt phase to resentence the defendant. *Pentix*, 32 Ohio St. 3d at 373 (holding that “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”) (emphasis added). In the case of capital defendants, death was not an option at resentencing. Because the same jury that originally sentenced the defendant to death would resentence him on remand, the jury was treated as tainted by its previous exposure to the proceedings below, and its only options were sentences of twenty or thirty years to life in prison. *Id.*

The General Assembly twice amended R.C. 2929.06 to address the *Penix* loophole. First, the 1996 amendment to R.C. 2929.06 created a statutory mechanism to empanel a *new* jury for resentencing. 147 Ohio Laws, Part IV, 7444 (eff. Jul. 29, 1998). Following the 1996 amendment, R.C. 2929.06(B) required that, on remand, the trial court empanel a new jury, conduct a new hearing to resentence the defendant, and consider all possible sentences, including death, life imprisonment without parole, and life imprisonment with parole eligibility. See, e.g., *State v. Hancock*, 108 Ohio St. 3d 57, 79, 2006-Ohio-160. Although this Court originally held that the 1996 amendment applied prospectively only, see *State v. Williams*, 103 Ohio St. 3d 112, 2004-Ohio-4747, ¶ 15, the General Assembly amended R.C. 2929.06 a second time in 2005 to make it expressly retroactive to all capital cases occurring after October 19, 1981, the date Ohio enacted the death penalty. Sub. H.B. No. 184 (eff. Mar. 23, 2005); R.C. 2929.06(E).

D. The trial court refused to retroactively apply the 1996 and 2005 amendments to R.C. 2929.06 at resentencing, and the Fifth District reversed.

On remand, White's counsel filed two motions with the trial court, arguing that the version of R.C. 2929.06 in effect at the time of his 1996 trial did not allow the State to seek the death penalty a second time, and that the application of amended R.C. 2929.06 to his case violated his constitutional right to due process and the prohibition against ex post facto laws. The trial court held that amended R.C. 2929.06 was unconstitutionally retroactive as to White. *State v. White* ("Trial Op."), No. 96-CRI-07366 (Ashland County Ct. of Com. Pleas Jul. 12, 2007). But on appeal by the State, the Fifth District reversed and remanded. *State v. White* (5th Dist.) ("App. Op."), 2009-Ohio-3869, ¶ 24. The Fifth District held that the State could seek the death penalty against White under amended R.C. 2929.06 without violating the Retroactivity Clause of the Ohio Constitution because the changes to the statute were procedural, not substantive. *Id.*

This Court granted jurisdiction to consider whether amended R.C. 2929.06 violates the Retroactivity Clause of the Ohio Constitution, Ohio Const. Art. II § 28. *State v. White*, 123 Ohio St. 3d 508, 2009-Ohio-6210.

ARGUMENT

Amicus Curiae Attorney General's Proposition of Law:

Amended R.C. 2929.06 does not violate the Retroactivity Clause of the Ohio Constitution, Ohio Const. Art. II § 28.

Statutes are presumed constitutional and are entitled to the benefit of every presumption in favor of their constitutionality. *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 147. This Court has held statutes to be constitutional unless they are “clearly unconstitutional beyond a reasonable doubt.” *Id.* Except for issues involving First Amendment rights, the constitutionality of statutes is judged as applied to the particular defendant. See *State v. Wetzel* (1962), 173 Ohio St. 16, 19. This Court should affirm the Fifth District’s decision that amended R.C. 2929.06 as applied to White does not violate the Retroactivity Clause of the Ohio Constitution because it is purely procedural and remedial and does not affect White’s substantive rights.

- A. R.C. 2929.06(B) applies to White because the Sixth Circuit reversed and remanded to the district court for purposes of granting a conditional writ of habeas corpus on the issue of juror impartiality as to the sentencing phase of the trial.**

As a threshold matter, the arguments by White and amicus curiae the Ohio Association of Criminal Defense Lawyers (“OACDL”) that R.C. 2929.06(B) does not apply to White are meritless.¹ Both White and the OACDL assert that R.C. 2929.06(B), which governs the resentencing of a defendant when procedural errors occurred at the “sentencing phase” of a trial, is irrelevant because the Sixth Circuit granted White a conditional habeas relief based on its

¹ White raised this argument before the trial court, but the court never reached the issue because it determined that amended R.C. 2929.06 was unconstitutionally retroactive. Trial Op. at 3, 17.

finding of a voir dire error. See Merit Brief of Appellant Maxwell White (“White Br.”) at 10-11; Brief of Amicus Curiae OACDL (“OACDL Br.”) at 3, 14-17. Specifically, White argues that “[s]ince 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.” White Br. at 11.

But the Sixth Circuit was clear that it granted White a conditional writ because it determined that there was “juror impartiality as to the *sentencing phase* of the trial.” *White*, 431 F.3d at 521 (emphasis added). White claimed that he was denied his constitutional right to a fair trial because the trial court allowed an allegedly biased juror to remain on the jury over defense counsel’s objection for cause. *Id.* at 537. Nonetheless, the Sixth Circuit clearly affirmed the denial of habeas “[w]ith respect to the voir dire conducted to determine the impartiality of jurors as to the *guilt* phase of trial,” *id.* at 538 (emphasis added), and granted White habeas only as to the *sentencing* phase of trial, *id.* at 539. The Sixth Circuit concluded that the juror’s answers during the pre-trial voir dire demonstrated that “she could set aside any previously formed opinion and decide the question of White’s guilt based on the evidence presented,” *id.*, but it held that her answers during her pre-sentencing reexamination “extended to an eagerness to impose the death penalty in this particular case,” *id.* The concurring opinion specifically noted that because the writ was “issued . . . as to the *sentencing* phase of the case,” there was no need to reach the other sentencing phase claims. *Id.* at 543 (Merritt, J., concurring) (emphasis added). Thus, because the Sixth Circuit limited its finding of prejudice to the juror’s participation on the jury at *sentencing*, the procedural error that led it to grant White habeas occurred “at sentencing” and triggered R.C. 2929.06(B).

The OACDL's argument that *State v. Jackson*, 107 Ohio St. 3d 53, 2005-Ohio-5981, renders R.C. 2929.06(B) inapplicable fares no better. See OACDL Br. at 6 n.2. In *Jackson*, this Court vacated the death sentence imposed on the defendant for aggravated murder upon concluding that the trial court abused its discretion by refusing to allow defense counsel to question the jury pool about whether one victim's young age would sway the jurors to apply the death penalty. 2005-Ohio-5981, at ¶¶ 60-62. On remand, the Court of Common Pleas determined that R.C. 2929.06(B) did not apply to Jackson because the error occurred during voir dire, *before* the sentencing phase, see *State v. Jackson* (Allen County Ct. of Com. Pleas 2006), No. Cr. 2002-0011, at 3, 5.

But *Jackson* is inapposite because the error there infected the *whole* trial. Unlike White, who appealed a juror's inclusion on the jury as to both the guilt and the trial phase, Jackson appealed an underlying defect in the voir dire *procedure*—the trial court's refusal to allow defense counsel to conduct pre-trial questioning of prospective jurors—and never separately appealed that refusal as to the sentencing phase. Thus, the conclusion by the *Jackson* trial court on remand that the voir dire error at issue was not a “procedural error during sentencing” encompassed by R.C. 2929.06(B) is correct, but wholly distinct from the Sixth Circuit's determination here that the trial court's error in allowing a biased juror to sentence White occurred at sentencing.

B. Amended R.C. 2929.06 does not violate the Retroactivity Clause of the Ohio Constitution.

White asserts that amended R.C. 2929.06 is unconstitutional because it allows him to be sentenced to death at resentencing when the version of the statute in effect at the time of White's offense and trial allowed only a maximum sentence of life in prison. White is wrong. Because amended R.C. 2929.06 does not take away or impair a defendant's vested right or attach a new

disability to transactions or considerations already past, it does not violate the Retroactivity Clause. The Fifth District correctly determined as much, and its decision should be affirmed.

The Retroactivity Clause of the Ohio Constitution provides that “[t]he general assembly shall have no power to pass retroactive laws.” Ohio Const., Art. II, § 28. “A statute runs afoul of this provision if it ‘takes away or impairs vested rights acquired under existing laws, or attaches a new disability, in respect to transactions or considerations already past.’” *State v. Walls*, 96 Ohio St. 3d 437, 2002-Ohio-5059, ¶ 9 (quoting *Van Fossen v. Babcock & Wilcox Co.* (1988), 36 Ohio St. 3d 100, 104). When analyzing a Retroactivity Clause claim, the Court first determines “whether the General Assembly expressly made the statute retroactive.” *Hyle v. Porter*, 117 Ohio St. 3d 165, 2008-Ohio-542, ¶ 8. If so, the Court then assesses “whether the challenged statute is substantive or remedial.” *Walls*, 2002-Ohio-5059, at ¶ 10. R.C. 2929.06 is constitutional under this two-prong test.

1. The General Assembly expressly intended the amendments to R.C. 2929.06(B) to apply retroactively.

First, as the Fifth Circuit correctly held—and as White concedes in his brief—R.C. 2929.06(E) indicates a clear legislative intent to make the current version of the statute retroactive. See App. Op. at ¶ 13; White Br. at 5-6. R.C. 2929.06(E) expressly states that the procedures set forth in the statute:

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 resentenced.

R.C. 2929.06(E) (emphasis added). And the General Assembly specified that it should apply retroactively to all capital cases occurring after October 19, 1981. Sub. H.B. No. 184 (eff. Mar.

23, 2005). Thus, because White was initially tried and sentenced to death in 1997, the General Assembly intended that amended R.C. 2929.06 apply retroactively to his case.

2. Because amended R.C. 2929.06 is remedial, not substantive, its retroactive application to White does not violate the Ohio Constitution.

Because the legislature’s intent is clear from the text of R.C. 2929.06(E), the issue becomes whether amended R.C. 2929.06 is remedial or substantive. See *State v. Cook* (1998), 83 Ohio St. 3d 404, 410-11. The retroactive application of a *remedial* law does not violate the Retroactivity Clause, but the retroactive application of a *substantive* law does. *Id.* at 411. This Court has defined “remedial laws” as those that “merely substitute a new or more appropriate remedy for the enforcement of an existing right,” *id.*, and it has held that the test for a substantive law should focus on “the impairment or deprivation of rights, the creation of new obligations, or the impairment of new disabilities,” *Bielat v. Bielat* (2000), 87 Ohio St. 3d 350, 360 (citing *Rairden v. Holden* (1867), 15 Ohio St. 207, 210). Because amended R.C. 2929.06(B) does not impair a vested right, create a new obligation, or impose additional burdens, the Fifth District correctly determined that it is procedural and does not violate the Retroactivity Clause. See App. Op. at ¶¶ 22, 24.

a. Amended R.C. 2929.06 is procedural, and therefore remedial, because it does not impair or deprive existing rights.

White contends that amended R.C. 2929.06 is substantive because it retroactively increases his possible punishment from a maximum sentence of life imprisonment to death. See White Br. at 7-9. Not so. The changes to R.C. 2929.06 are purely procedural, and this Court has deemed such procedural changes “remedial in nature.” *Walls*, 2002-Ohio-5059, at ¶ 17 (quoting *Cook*, 83 Ohio St. 3d at 411).

When White murdered Trooper Gross in 1996, he was eligible for the death penalty. See R.C. 2903.01 (aggravated murder); 2929.04(A)(3) & (A)(6) (aggravated murder to escape

detection and aggravated murder of a law enforcement officer). But when the jury convicted him, a procedural loophole existed in the State's resentencing procedures. See *Penix*, 32 Ohio St. 3d at 373. If White was convicted and sentenced to death, but his death sentence was later reversed, no procedure was in place to allow a new jury to resentence him. *Id.* Thus, death was not an option on resentencing. *Id.* But the legislature has since corrected that loophole, and amended R.C. 2929.06 requires a defendant like White, who was originally sentenced by a jury, to be resentenced by a *new* jury, whose members are unaffected by whatever procedural problems occurred below. See R.C. 2929.06(B).

White had no "vested right" to avoid being resentenced to death simply because the law at the time he committed his crime was procedurally flawed. After all, "[n]o one has a vested right in having the law remain the same over time." *City of East Liverpool v. Columbiana County Budget Comm'n*, 114 Ohio St. 3d 133, 2007-Ohio-3759, ¶ 33; accord *Thompson v. Utah* (1898), 170 U.S. 343, 351 (explaining that "the accused is not entitled of right to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offence charged against him").

When White murdered Trooper Gross, he was eligible for either capital punishment or twenty or thirty years to life in prison. The amendments to R.C. 2929.06(B) did not change those two substantive options. White remains eligible for either death or twenty or thirty years to life imprisonment. All that is new is the protective *procedural* mechanism for imposing that sentence by allowing the empanelment of a new jury, whose members are untainted by exposure to the original proceedings, to evaluate and resentence the defendant. And such procedural changes are purely remedial. See *Walls*, 2002-Ohio-5059, at ¶ 17; *Cook*, 83 Ohio St. 3d at 411.

United States Supreme Court precedent confirms that granting additional powers to the jury in recommending a death sentence is a *procedural* change. In *Schriro v. Summerlin* (2004), 542 U.S. 348, 353, the Supreme Court held that *Ring v. Arizona* (2002), 536 U.S. 584—one of the many cases following *Apprendi*—is not retroactive on collateral review. *Ring* held that defendants are entitled to a jury trial on all aggravating factors possibly leading to the imposition of the death penalty. 536 U.S. at 609. The *Summerlin* Court determined that *Ring* did not “alter[] the range of conduct or the class of persons that the law punishes,” and thus was not a “substantive” rule. 542 U.S. at 353. Instead, *Ring* merely “allocate[d] decisionmaking authority” by requiring that a jury, rather than a judge, find the facts essential to punishment and thus was a “prototypical procedural rule[.]” *Id.* This logic equally applies to R.C. 2929.06, so the changes to Ohio’s resentencing procedure, like the rule announced in *Ring*, were procedural. Because of the post-*Penix* procedural changes, White’s right to a fair trial is *enhanced*—not diminished. The new statutory provisions give White the opportunity to have a jury make the “crucial determinations” about the appropriate sentence to apply under R.C. 2929.03(D). See *id.*

Moreover, White does not have a vested right to a life sentence simply because an error occurred during his original trial. If White had been tried by a three-judge panel and only his sentence was reversed on appeal, the three-judge panel could still resentence him to death. *State v. Davis* (1988), 38 Ohio St. 3d 361, 373 (remanding to the three-judge panel for a resentencing hearing at which the state “may seek whatever punishment is lawful, including, but not limited to, the death sentence”). And White would have no right to a life sentence if both his conviction and sentence were reversed either. *State v. Keenan*, 81 Ohio St. 3d 133, 141, 1998-Ohio-459 (noting that double jeopardy does not bar the resentencing of a criminal defendant to death if his original jury recommended capital punishment); accord *Bullington v. Missouri* (1981), 451 U.S.

430, 443 (holding that when a sentence is reversed on appeal and remanded to the sentencing court, the Constitution permits the State to seek whatever sentence could have been imposed originally, including the death penalty in capital cases).

Finally, even if White could have obtained a vested right to avoid capital punishment on resentencing under the pre-amendment version of R.C. 2929.06 (and for the reasons set forth above, he could not), such a right would not have vested until 2007, when the Sixth Circuit Court of Appeals granted his conditional writ. App. Op. at ¶ 22. At that time, amended R.C. 2929.06 was already firmly in place, and its procedures applied to White on resentencing.

b. Amended R.C. 2929.06 is procedural because it does not create new burdens or impose new obligations.

As explained above, the Ohio Constitution also bars any law that retroactively “creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.” *Williams*, 2004-Ohio-4747, at ¶ 7 (quotations and citations omitted). Although neither White nor his amici argue that amended R.C. 2929.06 impermissibly imposes new duties or attaches new disabilities to past transactions, such an argument necessarily fails.

This Court has held that “past felonious conduct” does not qualify as a past transaction or consideration for purposes of this constitutional requirement. *State ex rel. Matz v. Brown* (1988), 37 Ohio St. 3d 279, 282 (holding that statute prohibiting felons from collecting a Victims of Crime Compensation Award was not unconstitutionally retroactive where plaintiff had no reasonable expectation of finality in his right to the award). “[A] law that attaches a new disability to a past transaction or consideration is not a prohibited retroactive law unless the past transaction or consideration created at least a reasonable expectation of finality. Past felonious conduct is not such a transaction or consideration.” *Id.* When White committed the “felonious

conduct” in question—the aggravated murder of Trooper Gross—the death penalty was an available and lawful punishment for his crime, just as it is today. And White cannot now rely on that aggravated murder as a “past transaction” on which to base a Retroactivity Clause claim.

c. Courts analyzing similar provisions under the Ex Post Facto Clause of the United States Constitution have found the laws to be procedural rather than substantive.

According to White and amicus the American Civil Liberties Union (“ACLU”) of Ohio Foundation, the application of amended R.C. 2929.06 to White at resentencing retroactively increases punishment in violation of White’s constitutional rights under the Retroactivity Clause and the United State’s Constitution’s Ex Post Facto Clause, U.S. Const. Art. I, § 9, cl. 3, by allowing White to be resentenced to death when death was not a resentencing option at the time White murdered Trooper Gross. White Br. at 8-10; see also Br. of Amicus Curiae ACLU of Ohio Foundation (“ACLU Br.”) at 11, 14-16. But a review of similar provisions analyzed under the Ex Post Facto Clause buttresses the conclusion that the changes to R.C. 2929.06 are purely procedural and, therefore, remedial. These cases foreclose the unsupported assertions of White and his amici that “[t]here 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.” ACLU Br. at 15.

The United States Constitution’s prohibition of retroactive laws is contained exclusively in the Ex Post Facto Clause, U.S. Const. Art. I, § 9, cl. 3, which prohibits the enactment of “[a]ny statute which punishes as a crime an act previously committed.” See *Cook*, 83 Ohio St. 3d at 414 (citation omitted); see also *Lindsey v. Washington* (1937), 301 U.S. 397, 401 (holding that retroactive changes in the measure of punishment are impermissibly ex post facto if they subject a defendant to a more severe sentence than was available at the time of the offense). “No ex post facto violation occurs if the change in the law is merely procedural and does ‘not increase the punishment, nor change the ingredients of the offence or the ultimate facts necessary

to establish guilt.” *Miller v. Florida* (1987), 482 U.S. 423, 433 (quoting *Hopt v. Utah* (1884), 110 U.S. 574, 590). The critical inquiry is whether the defendant had “fair warning as to the degree of culpability which the state ascribed to the act of murder.” *Dobbert v. Florida* (1977), 432 U.S. 382, 297.

White contends that because amended R.C. 2929.06’s provision of a new jury increased the available maximum punishment on resentencing from life in prison to death, the statute unfairly subjects him to a more severe sentence. White Br. at 8. In short, he claims that because a death sentence is “unique” and “irrevocable,” it has a clear and obvious punitive effect that makes its retroactive application impermissible. *Id.*; see also ACLU Br. at 14-15. But the United States Supreme Court has held that defendants cannot complain of procedural changes, including the provision of a jury, that are intended to provide them with additional protections, even if those changes may effectively make them eligible for capital punishment. See *Dobbert*, 432 U.S. at 292-93.

In *Dobbert*, 432 U.S. at 282, a capital sentencing statute in effect when defendant Dobbert committed murder was later held to be invalid, and the Florida legislature enacted new death penalty procedures changing “the role of the judge and jury in the imposition of the death sentence,” *id.* at 292, to allow the jury to give an advisory sentence at the penalty phase. When Dobbert was sentenced to death under Florida’s new procedures, he brought suit, arguing that the application of the new law to his case violated his substantial rights. *Id.* at 284. But the Court rejected his claim and concluded that the new law was not ex post facto because Dobbert always had fair warning of the penalty Florida prescribed for first-degree murder. *Id.* at 297-98. The Court explained that the test of whether a change in law ran afoul of the Ex Post Facto Clause was not whether it worked to the detriment of a particular defendant. Rather, it was whether the

changes “‘made criminal a theretofore innocent act,’ [or] ‘aggravated a crime previously committed,’ [or] ‘provided greater punishment,’ [or] ‘changed the proof necessary to convict.’” *Id.* at 298 (quoting *Hopt*, 110 U.S. at 584). As in *Dobbert*, the Ohio amendments did not change the punishment attached to the crime, alter the ingredients of White’s offense, or change the ultimate facts necessary to establish White’s guilt. Thus, the death penalty was always an available sentence for White’s aggravated murder of Trooper Gross; the changes to R.C. 2929.06 only affected the procedures used to impose that sentence.

Moreover, the Virginia Supreme Court held an identical amendment to its own sentencing scheme to be a purely procedural change that was not unconstitutionally ex post facto. See *Evans v. Commonwealth* (Va. 1984), 323 S.E.2d 114, 118-19; see also *Evans v. Thompson* (4th Cir. 1989), 881 F.2d 117, 121 (affirming the denial of habeas relief to defendant). Like Ohio, Virginia used to limit a jury resentencing a defendant to sentences of life imprisonment, because it required resentencing by the same tainted jury that heard the case at trial. See *Evans*, 323 S.E.2d at 117 (citing Va. Code. § 19.2-264.3(C)); see *Patterson v. Commonwealth* (Va. 1981), 283 S.E.2d 212, 216 (concluding that as a practical matter, a vacated death sentence from a jury trial would result in an automatic life sentence). But in 1983, Virginia approved emergency legislation amending the relevant death penalty statutes to require a *new* jury to be empanelled on resentencing. *Evans*, 323 S.E.2d at 117. The defendant there, whose pre-amendment death sentence was vacated for a procedural error, appealed the imposition of capital punishment on resentencing, arguing that because death was not an available punishment under the law at the time he committed his crime, the application of the amended statute violated the Ex Post Facto Clause. *Id.* at 114-15. The Virginia Supreme Court, and later the Fourth Circuit, rejected

defendant's argument, determining that because the law was purely procedural, defendant was not deprived of a "substantial right." *Id.* at 118-19; *Evans*, 881 F.2d at 121.

Specifically, the Virginia Supreme Court concluded that the changes were "ameliorative" and that they simply "insure[d] that an accused, who has been fairly tried and convicted of capital murder, also receives a fair and impartial trial on the issue of punishment." *Evans*, 323 S.E.2d at 119. And the Fourth Circuit explained that the amendment "represent[ed] a continuing effort by the Virginia Supreme Court and the Virginia legislature to balance a defendant's right to fair sentencing with society's interest in not alleviating the consequences of criminal acts when a sentencing error occurs," thereby "promot[ing] the basic aspiration of criminal justice to achieve results that are error-free." *Evans*, 881 F.2d at 121 (internal citations omitted). This is exactly the conclusion that this Court should reach here.

The Sixth Circuit vacated and remanded White's death sentence because the trial court seated a biased juror during sentencing. See *White*, 431 F.3d at 521. And under amended R.C. 2929.06(B), White has the opportunity to have his sentence evaluated by a new, unbiased jury to determine whether the State proved beyond a reasonable doubt that these two aggravating factors outweighed any mitigation evidence presented. R.C. 2929.03(D)(1). He should not now "be heard to complain that a change in the law which protects that right is not wholly beneficial to him." *Evans*, 323 S.E.2d at 119.

C. The application of amended R.C. 2929.06(B) does not violate the Double Jeopardy Clause.

Although this Court did not grant review of the issue, amicus the OACDL contends that the application of amended 2929.06(B) also violates the Double Jeopardy Clause. OACDL Br. at 17-19. The argument is a non-starter.

“The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal.” *Arizona v. Washington* (1978), 434 U.S. 497, 503. But the United States Supreme Court has specifically held that double jeopardy does not bar resentencing a criminal defendant to death if the jury recommended a death sentence at the original trial or was hung. *Sattazahn v. Pennsylvania* (2003), 537 U.S. 101, 109-10; *Poland v. Arizona* (1986), 476 U.S. 147, 156-57. In fact, this Court rejected this exact claim by another defendant in *State v. Hancock*, which held that the trial court’s declaration of a mistrial on a procedural error invalidated the jury’s death verdict, but did not amount to an acquittal, making double jeopardy inapplicable. 108 Ohio St. 3d at 62; accord *Evans*, 323 S.E.2d at 121 (finding no double jeopardy violation where the sentence was “set aside upon the ground of trial error and not evidentiary insufficiency”).

Moreover, even if White could make a viable double jeopardy argument (and he cannot), he has waived that right by appealing his conviction and sentence in federal court two separate times. See *United States v. Ball* (1896), 163 U.S. 662, 671 (holding that a defendant who appeals his conviction waives his right to claim double jeopardy on remand).

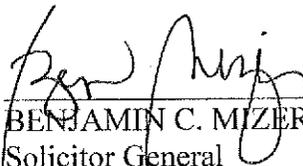
Accordingly, to the extent that this Court decides to reach the OACDL’s double jeopardy argument, the United States Supreme Court’s precedent demonstrates that such a claim must fail.

CONCLUSION

For the foregoing reasons, the Attorney General respectfully asks this Court to affirm the Fifth District's decision and hold that amended R.C. 2929.06 does not violate the Retroactivity Clause of the Ohio Constitution.

Respectfully submitted,

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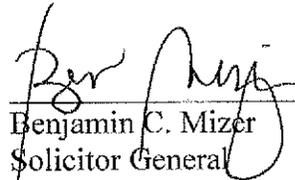
I certify that a copy of the foregoing Merit Brief of *Amicus Curiae* Ohio Attorney General Richard Cordray in Support of Plaintiff-Appellee State of Ohio was served by U.S. mail this 11th day of March, 2010, upon the following counsel:

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