ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellee,

v.

MAXWELL WHITE

Defendant-Appellant

Case No. 2009-1661

On Appeal from the Ashland County Court of Appeals, Fifth Appellate District

Court of Appeals Case Nos. 07-COA-037, 07-COA-038

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

STATEMENT OF THE CASE AND FACTS..... 1

ARGUMENT..... 3

Appellant's Proposition of Law No I: The Retroactive Application of Ohio Revised Code Section 2929.06 Violates the Ohio Constitution..... 3

Appellant's Claim that R.C. 2929.06 is Inapplicable to this Case..... 19

Appellant's Double Jeopardy Claim..... 21

CONCLUSION..... 23

PROOF OF SERVICE..... 25

TABLE OF AUTHORITIES

CASES

Bullington v. Missouri (1981), 451 U.S. 430..... 15, 21

Burgett v. Norris (1884) 25 Ohio St 308..... 3

***Cartwright v. Oklahoma* (1989),** 778 P.2d 479..... 17

Collins v. Youngblood, 497 U.S. 37 (1990)..... 5, 6, 7, 8, 9

Dobbert v. Florida, 432 U.S. 282 (1977).....9, 15

Kring v. Missouri, 107 U.S. 221 (1883)..... 8, 9

Poland v. Arizona, 476 U.S. 147 (1986)..... 21, 22

Ring v. Arizona (2002), 536 U.S. 584..... 14

Sattazahn v. Pennsylvania, 537 U.S. 101 (2005)..... 21

Schriro v. Summerlin, (2004), 542 U.S.348, 124 S. Ct. 2519..... 14

Spitzig v. State (1928), 119 Ohio St..... 17

State v. Cook (1998), 83 Ohio St.3d 404.....3, 4, 10, 11, 12, 13

State v. Dycus, 2005 Ohio 3990.....12, 13

State ex rel Dickman v. Defenbacher (1955) 164 Ohio St. 142.....3

State ex rel. Matz v. Brown, 37 Ohio St. 3d 279 (1988).....10, 11

State v. Ferguson, 120 Ohio St. 3d 7 (2008).....10, 17, 18

State v. Foster, (2006), 109 Ohio St.3d 1.....16

State v. Jackson, 107 Ohio St. 3d 53 (2005).....20

State v. Paynter, 2006 Ohio App. LEXIS 5522.....16

State v. Penix, 32 Ohio St. 3d 369 (1987).....6, 9, 16

State v. Ring 204 Ariz. 534, 65 P.3d 915.....14, 15

State v. Webb, (1994) 70 Ohio St. 3d 325.....13

State v. Walls, 96 Ohio St. 3d 437..... 5

State v. White, 82 Ohio St. 3d 16 (1998)..... 1

State v. White, 2009 Ohio 3869..... 2

State v. Williams (2004), 103 Ohio St.3d 112..... 16

Tateo v. United States (1964), 377 U.S. 463..... 15, 16

Turner v. Commonwealth of Virginia (1988), 234 Va. 543..... 17

United States v. Ball 163 U.S. 662.....15

Van Fossen v. Babcock & Wilcox Co. (1988), 36 Ohio St. 3d 100..... 4

White v. Mitchell, 431 F.3d 517(C.A. 6, 2005)..... 1, 5, 19, 23

OHIO CONSTIUTIONAL PROVISIONS

Article II, section 28 of the Ohio Constitution..... 3

OHIO REVISED CODE SECTIONS

R.C. 2929.06..... *passim*

STATEMENT OF THE CASE AND FACTS

On January 19, 1996, Maxwell White, a felon on probation for carrying concealed weapons, decided to go drinking rather than go to work. White later returned home, argued with his sister and mother, and after tying his mother to a pole in her basement, shot his mother in the leg. White then fled in an automobile. The Ohio State Highway Patrol of Ashland County received reports of erratic driving on interstate highway 71 by a driver that subsequently turned out to be White. Ohio State Highway Patrol Trooper James Gross stopped White's car and approached White's vehicle, having no knowledge that White had earlier shot his mother and fled Franklin County. As soon as Trooper Gross reached White's car, White shot and killed him.

After a jury trial, the Appellant, White, was convicted of, among other offenses, the Aggravated Murder of a police officer. The jury recommended the death penalty and the trial court accepted the jury's recommendation, sentencing the Appellant to death. This Court affirmed the Appellant's conviction and the United States Supreme Court declined review. ***State v. White***, 82 Ohio St. 3d 16 (1998), ***White v. Ohio***, 525 U.S. 1057 (1998). Appellant filed two unsuccessful post-conviction petitions and two appeals from their denials. The federal district court denied his petition for a writ of habeas corpus.

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

penalty is an option. Current R.C. 2929.06 states unequivocally that the General Assembly intended the amendment to apply retroactively.

On remand, the State once again sought to have the Appellant sentenced to death. The Appellant objected to the State seeking the death penalty on remand and filed Motions A and B with the trial court. In Motion A, the Appellant alleged that R.C. 2929.06 does not apply to this case because the error which caused the case to be remanded did not occur during the sentencing phase of the original proceedings. In Motion B, the Appellant alleged that since R.C. 2929.06 which was in effect at the time of the offense did not provide a procedure for the State to seek the death penalty on remand the application of amended R.C. 2929.06 violated the Ohio constitutional prohibition against retroactive legislation, the prohibition against *ex post facto* laws contained in the United States Constitution, the Appellant's right to Due Process, and the Double Jeopardy clause. The trial court found amended R.C. 2929.06 to be unconstitutional under the Ohio Constitution, and granted the state's motion to stay the re-sentencing hearing to enable the State to appeal the trial court's decision to the Fifth District Court of Appeals. The trial court opted not to issue a decision on any of the other grounds set forth in Appellant's Motions A and B.

On appeal, the Fifth District Court of Appeals reversed the decision of the trial court and found that amended R.C. 2929.06 does not violate the Ohio constitutional prohibition against retroactive legislation. ***State v. White***, 2009 Ohio 3869. The Fifth District Court of Appeals also chose not to rule on the remaining grounds for relief set forth in Appellant's Motions A and B.

The Appellant now appeals the decision of the Fifth District Court of Appeals.

ARGUMENT

APPELLANT'S PROPOSITION OF LAW NUMBER ONE

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

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

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

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

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

To determine whether a statute violates the Ohio Constitutional provision prohibiting retroactive laws, a court must first determine whether the General Assembly intended the law to be retroactive. If a court finds the General Assembly intended the

law to be retroactive, the court then considers whether the law is substantive or remedial. ***State v. Cook***, supra.; ***Van Fossen v. Babcock & Wilcox Co.*** (1988), 36 Ohio St. 3d 100.

It is undisputed that the General Assembly intended the 2005 amendment at issue to apply to all persons in Ohio who were ever sentenced to death under the new law that became effective in 1981. *see* R.C. 2929.06(E). The issue is whether the amendment, as applied to this defendant, is substantive or remedial. The trial court appeared to believe that because the right to a jury trial is a substantive right all issues are disposed of. However, the State submits that obvious pronouncement is not the end but the beginning of the discussion. The amendment provides for jury re-sentencing. This defendant exercised his right to a jury trial and his conviction was final before the statute changed.

The Appellant actually concedes that the statutory change which provides for a new jury to consider the sentencing options does not violate Ohio's prohibition against retroactive legislation. At page 10 of his Merit Brief, the Appellant states that:

> "...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."

In support of this contention, the Appellant compares Ohio's prohibition against retroactive legislation to the prohibition against *ex post facto* legislation contained in the United States Constitution. A review of the United States Supreme Court's decisions on this issue demonstrates that amended R.C. 2929.06 neither increases the potential

punishment that the Appellant faced when he committed the offense nor does it violate the federal constitutional prohibition against *ex post facto* legislation.

The United States Supreme Court has found that the *ex post facto* clause itself implicates only certain types of legislation:

> "...1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. 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 offence, *in order to convict the offender*.' Calder v. Bull (1798), 3 U.S. (Dall.) 386, 390, 3 U.S. 386, 1 L. Ed. 648, 3 Dall. 386 (opinion of Chase, J.); see, also, *Carmell v. Texas* (2000), 529 U.S. 513, 521-522, 120 S. Ct. 1620, 146 L. Ed. 2d 577."

In 1990, the United States Supreme Court found this list to exclusively summarize potential *ex post facto* violations. ***Collins v. Youngblood***, 497 U.S. 37 (1990). This Court accepted this determination in ***State v. Walls***, 96 Ohio St. 3d 437, 444-445 (2002). In order for the Appellant to be successful on this claim he must, therefore, demonstrate that the statutory amendments at issue here fall into one of the four categories noted above.

As the Appellant seemingly concedes, neither the first two categories nor the fourth category are applicable to the instant case. All of these categories concern the underlying convictions of an offender. The Appellant's convictions have been affirmed by every court to review them. *see* ***White v. Mitchell***, 431 F.3d 517 (Sixth Circuit (2005).

In order to succeed on this claim, the Appellant must, therefore, demonstrate that the statutory amendments to Section 2929.06 of the Ohio Revised Code changed the

"...*punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed." *Id.* When the Appellant committed the offense of Aggravated Murder, in the manner and under the circumstances that he did, the maximum penalty for the offense was death. The death penalty is quite simply and obviously the maximum penalty that the law provides for. The challenged statutory amendments have not, and could not, increase the maximum penalty the Appellant faced at the time that he committed the offense.

The statutory amendments at issue here concern a procedural change in the law. In January of 1996, R.C. 2929.06 provided trial courts with the authority to re-sentence an offender whose death sentence had been overturned for one of the few reasons set forth in the statute, which included an appellate court's determination that the evidence did not support the imposition of the death penalty. The statute, however, did not specifically provide a basis for re-sentencing an offender whose death sentence was overturned for any reason beyond its limited scope. As Judge Holmes noted, in his dissent in ***State v. Penix***, 32 Ohio St. 3d 369 (1987), there was a gaping hole in the statutory scheme. *Id* at 376. In 1996, the legislature corrected this alleged oversight and, in 2005, made this correction retroactive to offenders who had committed the offense of Aggravated Murder after 1981 and who were being re-sentenced after their death sentence had been set aside on appeal.

While the issues raised by the Appellant may be of first impression in the State of Ohio, the United States Supreme Court resolved issues similar to the ones raised in this matter in the case of ***Collins v. Youngblood***, 497 U.S. 37 (1990). In that case, the appellant had previously been convicted of Aggravated Sexual Abuse and was sentenced

to life imprisonment along with a $10,000 fine. *Id* at 39. Texas's sentencing laws, however, did not permit the imposition of a fine along with a sentence of life imprisonment. *Id.* The remedy for the imposition of an improper sentence, at the time the appellant committed the underlying offense, was that he was permitted to have an entirely new trial. *Id.* While the case was on appeal, however, the Texas legislature amended the sentencing laws to permit trial courts to correct improper verdicts. *Id* at 39-40. Rather than permit the appellant to have a new trial, the trial court in that matter simply corrected the improper sentence by vacating the previously imposed fine. *Id* at 40. The appellant's request for a new trial was denied. *Id.*

The procedural posture of the instant matter is very similar to that of ***Collins, supra***. In both cases, the offender was convicted of an underlying offense; sentenced on the underlying offense; an appellate court later determined the sentence to be improper; and in both cases the offenders claimed that the sentencing error provided them with a quasi-defense which restricted how the case could proceed on remand. In ***Collins, supra***, the appellant believed that he was entitled to a new jury trial due to the sentencing error. In the present case, the Appellant is alleging that the State did not previously have the authority, under Section 2929.06 of the Ohio Revised Code, to seek the death penalty following a remand and, therefore, the State should not be permitted to do so now. The United States Supreme Court, however, rejected the argument that a procedural amendment constituted an *ex post facto* violation in ***Collins, supra***.

The United States Supreme Court in ***Collins, supra***, focused its analysis on the time of the commission of the offense. The United States Supreme Court held that the offender was aware that his conduct was criminal; of the severity of the offense; and was

permitted to take advantage of any defenses available to him at the time of the offense. *Id* at 52. The situation in ***Collins, supra***, did not fall within one of the four categories set forth in ***Calder, supra***, and, therefore, the United States Supreme Court held that there was no *ex post facto* violation. *Id.*

In rendering its decision, the United States Supreme Court in ***Collins, supra***, further overruled the case of ***Kring v. Missouri***, 107 U.S. 221 (1883). ***Collins v. Youngblood***, 497 U.S. 37, 50. In ***Kring, supra***, the defendant was charged with first degree murder. *Id* at 48. During the course of the case, the defendant entered a guilty plea to the lesser included charge of second degree murder. *Id.* Both the prosecutor and the trial court accepted the guilty plea. *Id.* At the time that the defendant committed the murder, Missouri law provided that when both a prosecutor and a trial court accepted a defendant's guilty plea to second degree murder, the guilty plea served as an acquittal of first degree murder. *Id.* The defendant in ***Kring, supra***, however, filed an appeal because he received a prison term greater than the agreed upon term. *Id.* On remand, the defendant refused to withdraw his former guilty plea to second degree murder. *Id.* The trial court entered a not guilty plea on the defendant's behalf. *Id.* A change in Missouri law, after the offense was committed, permitted the state to pursue the first degree murder charge despite the defendant's earlier plea of guilty to second degree murder. *Id.* When the case proceeded to trial, the state convicted the defendant of first degree murder and he was ultimately received a death sentence. *Id.* The United State's Supreme Court, in 1883, found this to be an *ex post facto* violation. *Id.* In 1990, however, the United States Supreme Court overruled this decision in ***Collins, supra***. *Id* at 50. The United States Supreme Court found that the facts of ***Kring, supra***, did not fall within the narrow scope

of the *ex post facto* prohibition. *Id.* Because of the procedural change in the law, the United States Supreme Court would now permit the State of Missouri to seek the death penalty on remand when it previously could not do so under the law in effect at the time the defendant committed the offense. *Id.*

All of the cases cited by the Appellant, in which a court found a sentencing statute to be an *ex post facto* violation, involve offenders who faced *actual* increases in their sentences, be it solitary confinement or increased prison time. The change in the law here was a procedural change intended to remedy the issues raised by Judge Holmes in his dissenting opinion in ***Penix, supra***. The Appellant was on notice at the time of the offense that he could face the death penalty if convicted. The statutory amendments here in no way change the maximum punishment the Appellant was subject to at the time he committed the offenses. Based upon the precedents of the United States Supreme Court, a procedural change in the law can deny an offender a technical acquittal, the right to a new jury trial under certain circumstances, and even permit the state to seek the death penalty on remand when it previously was not permitted to do so. ***Collins v. Youngblood***, 497 U.S. 37 (1990) and ***Dobbert v. Florida***, 432 U.S. 282 (1977). The prohibitions against *ex post facto* legislation are, therefore, not violated by the statutory amendments upon which the State is seeking the death penalty on remand in this matter. More importantly, per the precedents of the United States Supreme Court the amendment to R.C. 2929.06 does not constitute an increase in the potential punishment that the Appellant now faces. At the time of the offense, the maximum potential penalty was a death sentence. This remains the maximum potential sentence.

An important issue in this case concerns the extent to which Ohio's prohibition against retroactive legislation provides greater protections than the *ex post facto* clause contained in the United State's Constitution in the context of a criminal case. Recent decisions of this Court indicate that, in the context of a criminal case, Ohio law provides no greater protection than the United States Constitution in this regard. In the case of ***State v. Ferguson***, 120 Ohio St. 3d 7 (2008), this Court stated that: "Ohio retroactivity analysis does not prohibit increased burdens; it only prohibits increased punishment." Further, in the case of ***State v. Cook***, 83 Ohio St. 3d 404 (1998), this Court found that "...except with regard to constitutional protections against *ex post facto laws*, felons have no reasonable right to expect that their conduct will never thereafter be made the subject of legislation." Id at 412, quoting ***State ex rel. Matz v. Brown***, 37 Ohio St. 3d 279, 281-282 (1988). The State submits that absent a finding amended R.C. 2929.06 increases the potential punishment, the statute should be found to be constitutional.

Even if this Court finds that the Ohio prohibition against retroactive legislation provides greater protection than the *ex post facto* clause, the amendment to R.C. 2929.06 is still a procedural change to the law and not substantive. Although every amendment of a statute about criminal sentencing necessarily involves punishment, the subject matter fails to automatically render the amendment "substantive." Likewise, because an amendment has some effect on a substantive right does not automatically render the amendment substantive. ***State v. Cook***, supra at 411.

In the case of ***State v. Cook***, supra, this Court stated as follows at 411,

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

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

The Appellant in the instant case had no reasonable expectation of finality in his right to a re-sentencing hearing that would exclude the death penalty for two reasons: at the time of the offense, he had a right to jury sentencing but the possibility of re-sentencing, with or without a jury, was too inchoate to create an expectation. Further, because his death penalty was final in the year 2000, the Appellant could have had no expectation of re-sentencing until after the federal court granted the writ. By that time, amended R.C. 2929.06 had been in effect for over eight months.

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

After this Court held that the first amendment to R.C. 2929.06 providing for jury re-sentencing was not retroactive because the General Assembly had failed to clearly indicate its intent to make it so, the General Assembly immediately amended the statute again to make its intent pellucid.

When the legislature amended R.C. 2929.06 in March of 2005, the Appellant's death sentence was still in place. It was not until December of 2005 that the Sixth Circuit set aside the Appellant's death sentence. The Appellant never had a vested interest in a re-sentencing hearing until December of 2005.

In the case of ***State v. Dycus***, 2005 Ohio 3990, the Tenth District Court of Appeals recognized that the legislature can retroactively apply an extension of the statute of limitations to crimes for which the original statute of limitations period had not yet expired. Despite the fact that when Dycus committed the offenses of Rape and

Kidnapping the statute of limitations was six years, the Tenth District held that the defendant did not have a vested right to a pre-existing statute of limitations that had not yet expired because the "...defendant had not been free from the possibility of prosecution when the amendment took effect." Id at 7-8. The change in the law was found to be remedial in nature. Id.

The trial court based its decision, in part, upon its finding that depriving a defendant of a "vested" right is not the only test. "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." (Trial Court's Opinion, 16). The trial court focused primarily on the defendant's "burden to defend a second death penalty proceeding where no such obligation existed under the prior law." (Opinion, p.15). However, this Court has said in ***State v. Cook***, supra and other cases, that a "right" and a "disability" are interdependent. see ***Cook***, at 412, see also ***State v. Webb***, (1994) 70 Ohio St. 3d 325, cert. denied ***Webb v. Ohio*** (1994), 514 U.S. 1023 (changing the quantum of proof necessary to convict may be applied retroactively.)

At the time of the offense, the Appellant had a right to a jury trial and jury sentencing. That he received. He had no right to re-sentencing until the federal circuit court granted his writ of habeas corpus. Thus he had no burden to defend against a second death penalty until after the General Assembly provided a procedure for re-sentencing by jury.

The trial court said that creating a right to a jury is substantive. As noted above, the Appellant disagrees with the trial court on this point. The United States Supreme

Court also disagrees. In ***Ring v. Arizona*** (2002), 536 U.S. 584, the Court held Arizona's death penalty statutes, which provided that a jury would determine whether the defendant was guilty of first degree murder and the trial court would determine whether the state had proved aggravating circumstances, unconstitutional. The United States Supreme Court in ***Ring v. Arizona*** (2002), 536 U.S. 584 vacated Ring's death penalty because the Arizona statute in effect at the time of Ring's trial was inconsistent with ***Ring v. Arizona*** (2002), 536 U.S. 584, and deprived him of his sixth amendment right to have every factor necessary to increase the penalty, except for a prior conviction, proved to a jury. The United States Supreme Court in ***Schriro v. Summerlin***, (2004), 542 U.S.348, 124 S. Ct. 2519 held that its holding in ***Ring*** announced a new procedural, rather than a substantive rule. "Rules that allocate decision-making authority in this fashion are prototypical procedural rules." Id. at 353

The Governor of Arizona called a special legislative session to revise Arizona's capital sentencing provisions. On August 1, 2002, the governor signed a bill altering Arizona's statute to provide that the penalty phase and guilt phases would both be held before the jury and that the jury would find and consider the effect of aggravating and mitigating circumstances and decide whether the defendant should receive a sentence of death. At the time of the Ring decision in the United States Supreme Court, thirty-one defendants sentenced to death had cases pending on direct appeal to the Arizona Supreme Court. On June 27, 2002, the court consolidated all cases to decide on remand, in ***State v. Ring*** 204 Ariz. 534, 65 P.3d 915, whether applying the new statute to those convicted before its effective date violated the *ex post facto* clauses of the federal and state constitutions. The Arizona Supreme Court held that the change of providing for a jury to

find aggravated circumstances instead of a judge was not substantive but procedural and, therefore, the new sentencing statutes violated neither the federal nor the state's *ex post facto* clause.

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

The concept of a defendant having a right to avoid the burdens of a second defense is borrowed from the law interpreting the Double Jeopardy Clause. Because a death penalty is like a trial [***Bullington v. Missouri*** (1981), 451 U.S. 430], the law of double jeopardy applies to a sentencing hearing also. However, it was long ago recognized that a defendant who appeals his conviction waives his right to claim double jeopardy on remand. ***United States v. Ball*** 163 U.S. 662,671. See also ***Tateo v. United***

States (1964), 377 U.S. 463 (Defendant who requests mistrial cannot claim he had a right to have his case decided by the first jury). A defendant who asks for a new trial on appeal is asking to be allowed to defend against the charges again and have a new jury decide his fate. The defendant in the instant case twice asked the Federal Court to reconsider and vacate his conviction as well as his sentence.

The issue of waiver was not addressed and apparently not raised in either ***State v. Penix*** (1987), 32 Ohio St.3d 369, or ***State v. Williams*** (2004), 103 Ohio St.3d 112. In ***Penix***, there was no procedure, the court held, at the time the conviction was reversed, for empanelling a second jury. In ***Williams***, after the General Assembly provided a procedure for empanelling a second jury, the court held that the new law was not meant to be applied retroactively.

Moreover, the Appellant's conviction was final in 2000. Whatever "right" the Appellant had to a re-sentencing procedure or "duty" to defend against a re-sentencing procedure evaporated when White's conviction became final. Once a defendant's conviction is final, he has no expectation of finality in any procedures extant at the time of his offense or conviction. When this Court decided ***State v. Foster***, (2006), 109 Ohio St.3d 1, it held that the case applied to all defendants whose cases were pending on appeal. However, other defendants argued that they too should be allowed to raise the issue in habeas corpus petitions because the new law applied to past conduct and changed the sentences they would have received. The Fifth District Court of Appeals rejected that argument in ***State v. Paynte***r, 2006 Ohio App. LEXIS 5522.

The trial court below also seemed to rely on additional duties imposed upon the state. However, a state is free to impose duties upon itself. ***Spitzig v. State*** (1928), 119 Ohio St. 117.

In a nearly identical case, the Supreme Court of Virginia held that the change in the law was procedural and not substantive. ***Turner v. Commonwealth of Virginia*** (1988), 234 Va. 543, 549-551. As in this case, the defendant's death sentence was set aside and the case was remanded for re-sentencing. Id. At the time that the defendant committed the underlying murder offense, the statute did not provide for a new jury to be seated on remand to consider the death penalty. Id. Following the commission of the offense, the legislature amended the sentencing statutes to provide for a new jury to consider the death penalty on remand. Id. The Supreme Court of Virginia found the change to be a procedural and not a substantive change in the law. Id.

Further, a court in Oklahoma also dealt with an almost identical case. The Oklahoma Court held, in regards to the change in the sentencing laws and the defendant's claim that he had a right to a life sentence on remand, that: "Defendants may have had expectations that their sentences would automatically be modified to life imprisonment, but the *ex post facto* clause does not prevent the State from depriving a criminal defendant of an expectation as to a procedure that has not yet accrued to his benefit." ***Cartwright v. Oklahoma*** **(1989),** 778 P.2d 479, 482.

Similarly, on October 1, 2008, this Court in ***State v. Ferguson***, 120 Ohio St. 3d 7, held that retroactive application of the amendments to the sexual predator specification and registration laws was constitutional. An earlier version of R.C. 2950.07(B)(1) "allowed for review of the predator classification by a judge and the possible removal of

that classification." Id at 13. The defendant argued that removing that option, so that a sexual predator classification became permanent, deprived him of a right that he previously had. Id. This Court rejected that argument. This Court held that a defendant had no reasonable expectation of finality in someday being allowed to petition to change his status. Id at 14.

Likewise, a capital defendant whose death sentence was final because he had exhausted his state appeals but who might obtain collateral relief in federal habeas corpus had no reasonable expectation of assuming that the Ohio General Assembly would never act to correct the loophole in Ohio's death penalty statutes.

In ***Ferguson, supra***, this Court also stated that: "Ohio retroactivity analysis does not prohibit increased burdens; it only prohibits increased punishment." Id at 16. As set forth above, the amendment to R.C. 2929.06 does not increase the maximum potential punishment that the Appellant faced when he committed the offense of Aggravated Murder.

The amendment to R.C. 2929.06 protects the public by providing a mechanism to make a punishment that a jury has already deemed appropriate available on remand if a defendant persuades a court to vacate his sentence. A defendant who is entitled to less relief on collateral review should not be granted greater relief on remand than a defendant who persuades a court that his entire trial was unfair. The Appellant in the instant case knew at the time of his offense that he was eligible for the death penalty. That never changed. Only after Appellant's conviction was final in state court did any question of a re-sentencing hearing arise. Even then, Appellant had no right to be re-sentenced until the circuit court granted his writ of habeas corpus.

APPELLANT'S CLAIM THAT R.C. 2929.06 IS INAPPLICABLE TO THIS CASE

Despite the fact that neither the trial court nor the Fifth District Court of Appeals ruled on this issue, the Appellant further alleges that R.C. 2929.06 is inapplicable to this case because the error which caused the case to be remanded did not occur during the sentencing phase. A review of the Sixth Circuit Court of Appeal's decision, however, demonstrates otherwise.

The error that led the Sixth Circuit Court of Appeals to remand this matter for a re-sentencing hearing was the seating of an allegedly biased juror on the jury for the sentencing phase of the original proceedings in this matter. ***White v. Mitchell***, 431 F.3d 517, 542 (C.A. 6, 2005). The Sixth Circuit specifically found, in its concluding paragraph on this issue, that:

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

While the Sixth Circuit supported its decision to remand the case upon evidence derived from the jury selection proceedings, the Sixth Circuit specifically found that the error that led to the remand was the placement of a particular juror on the jury for the penalty phase. *Id.*

Further, the Sixth Circuit specifically found that it could not grant the Defendant's petition for habeas corpus due to the trial court's decision to permit this juror to sit on the jury during the guilt phase of the proceedings. *Id* at 539. By making this determination, the Sixth Circuit has ruled out any error in her seating until the sentencing phase. Only

once the jury found the Defendant guilty and the sentencing phase began did the seating of this particular juror become an issue.

The Appellant cites the case of ***State v. Jackson***, 107 Ohio St. 3d 53 (2005) and Allen County Case No. CR 2002 0011, as authority for his contention that the error in this case occurred during *voir dire*. ***Jackson, supra***, however, is clearly distinguishable from the instant matter. The error that occurred in ***Jackson, supra***, was the trial court's decision to prohibit defense counsel from notifying the *venire* that the offense involved the murder of a three year old child. Id at 61-62. This Court found that this prohibition prevented defense counsel from having the opportunity to determine if any of the seated jurors were predisposed to imposing the death penalty for the murder of a young child. Id at 65. The error was not the seating of these jurors, but the trial court's refusal to permit defense counsel to attempt to determine if any of the potential jurors were unable or unwilling to fulfill their duties due to the age of the victim. For all anyone involved in the case knew, all twelve of the seated jurors in that case were predisposed to imposing the death penalty simply because the offender murdered a three year old child.

The Sixth Circuit upheld the Appellant's convictions and specifically found that the error which caused the case to be remanded was the seating of an allegedly biased juror on the jury during the sentencing phase of the original proceedings.

APPELLANT'S DOUBLE JEOPARDY CLAIM

The Appellant finally claims that the State seeking the death penalty once again is a violation of the Double Jeopardy Clauses of the Constitutions of the United States and the State of Ohio. The Double Jeopardy Clause though is a prohibition against the State prosecuting offenders or seeking to punish offenders on multiple occasions for a single offense. Typically, the double jeopardy clause does not apply to a sentencing hearing. In fact, the United States Supreme Court has specifically held that a State's attempt to seek the death penalty on remand, following the vacation of a death sentence on appeal, does not violate the Double Jeopardy Clause. *see* ***Poland v. Arizona***, 476 U.S. 147 (1986) and ***Sattazahn v. Pennsylvania***, 537 U.S. 101 (2005).

The Appellant contends that the State should not be permitted to seek the death penalty on remand in this matter because it was not permitted to do so on a remand at the time he committed the offense of Aggravated Murder. Neither the trial court nor the Fifth District Court of Appeals ruled on this issue. Further, this is simply not an issue that falls within the scope of the Double Jeopardy Clauses of the Constitutions of the United States or the State of Ohio. In ***Bullington v. Missouri***, 451 U.S. 430 (1981), the United States Supreme Court expressed its hesitance in extending the double jeopardy clause to sentencing. The one notable exception being cases in which an offender receives the sentencing equivalent of an acquittal as to the death penalty. *Id.* In ***Poland, supra*** at 154, the United States Supreme Court noted that when an offender obtains an acquittal, i.e. a jury determines based upon the merits of the case to not recommend the death penalty, the State is barred from again seeking the death penalty if the case is remanded following a successful appeal by the offender. The Appellant did not obtain an

"acquittal" on the merits in this matter. *Id.* Following the jury's recommendation, the trial judge in this case imposed the death penalty and, therefore, this exception is not applicable to the present case. The case is being remanded for a re-sentencing hearing not because an appellate court found that the State did not meet its burden during the penalty phase, but due to an alleged error in regards to the seating of a juror for the penalty phase of the original proceedings. The Double Jeopardy Clause does not apply to this situation. *Id.*

CONCLUSION

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

Despite the Appellant's claims to the contrary, R.C. 2929.06 does apply to this case because the Sixth Circuit Court of Appeals specifically found that the error which caused the case to be remanded occurred during the penalty phase of the original proceedings. ***White v. Mitchell***, 431 F.3d 517, 542 (C.A. 6, 2005).

Finally, the Double Jeopardy Clause does not apply to this case.

Appellant respectfully requests that this Court affirm the Fifth District Court of Appeals' decision finding the amendments to R.C. 2929.06 to be constitutional.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served a true and correct copy of the foregoing Merit Brief of the State of Ohio upon the following by regular U.S. mail postage prepaid on the 17th day of March, 2010.

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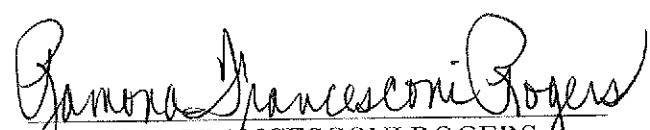

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