

IN THE SUPREME COURT OF OHIO
2010

ORIGINAL

STATE OF OHIO,

Case No. 09-1661

Plaintiff-Appellee,

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

-vs-

MAXWELL WHITE,

Court of Appeals Nos.
07-COA-037 & -038

Defendant-Appellant.

**BRIEF OF AMICUS CURIAE FRANKLIN COUNTY PROSECUTOR RON
O'BRIEN IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO**

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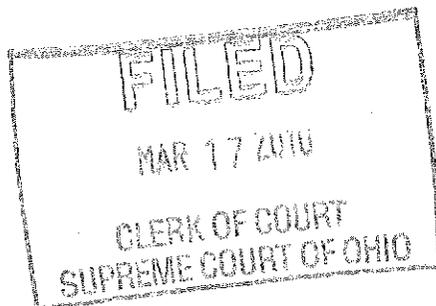


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STATEMENT OF AMICUS INTEREST

The Office of the Franklin County Prosecutor has prosecuted a large number of capital cases, and several of those cases have resulted in the imposition of the death penalty. Those cases have proceeded through various stages of appellate litigation and several are on federal habeas review at this time. Current Franklin County Prosecutor Ron O'Brien therefore has a strong interest in issues of death penalty practice in this state and a strong desire that such law be applied justly in all cases.

The issue currently before this Court is what happens when a death sentence is vacated based on reversible error in the penalty phase of the trial. This issue raises questions of fairness and justice in the dispensing of the death penalty in this state, and therefore, in the interest of aiding this Court's review, Franklin County Prosecutor Ron O'Brien offers the following amicus brief in support of the position of the State.

STATEMENT OF FACTS

Amicus Franklin County Prosecutor Ron O'Brien adopts by reference the statement of facts set forth in the brief of plaintiff-appellee State of Ohio.

ARGUMENT

PROPOSITION OF LAW

A STATUTE ADDRESSING THE METHOD OF CONDUCTING RESENTENCING PROCEEDINGS IS PROSPECTIVE IN RELATION TO SUCH PROCEEDINGS TO BE CONDUCTED AFTER THE STATUTE'S EFFECTIVE DATE. EVEN IF "RETROACTIVE" AS APPLIED TO CASES ARISING FROM CRIMES COMMITTED BEFORE SUCH EFFECTIVE DATE, SUCH "RETROACTIVITY" IS PERMISSIBLE, AS THE STATUTE IS PROCEDURAL AND AFFECTS NO VESTED RIGHT.

In *State v. Penix* (1987), 32 Ohio St.3d 369, this Court addressed the problem of what kind of proceedings can occur upon remand when the death penalty was vacated on appeal based on an error in the penalty phase of a jury-tried capital proceeding. Under such circumstances, this Court concluded that, when the case is to be remanded for a penalty-only hearing following vacation of the death penalty, the trial court is limited to resentencing the defendant to one of the life-sentence options. This Court concluded that a new jury could not be impaneled for another penalty-phase hearing and that the death penalty was not available on remand.

Subsequent events have not been kind to *Penix*. This Court has declined efforts to extend *Penix* to other contexts. The death penalty remains an option on remand for a new penalty-phase hearing before a three-judge panel. *State v. Davis* (1988), 38 Ohio St.3d 361, syllabus. In addition, *Penix* does not apply when the appellate court has granted a completely new trial based on error in both the guilt phase and the penalty phase; in that context, the death penalty is available on remand. *State v. Keenan* (1998), 81 Ohio St.3d 133, 140-41.

The General Assembly later amended R.C. 2929.06 *twice* in order to legislatively fix the *Penix* loophole. Effective in October 1996, S.B. 258 created former R.C. 2929.06(A)(2) (now R.C. 2929.06(B)) to specifically provide for the impaneling of a new penalty-phase jury on remand for resentencing. After this Court in *State v. Williams*, 103 Ohio St.3d 112, 2004-Ohio-4747, concluded that the October 1996 amendment had not been specifically made applicable to defendants whose offenses occurred before the October 1996 effective date, the General Assembly moved quickly via H.B. 184 (eff. 3-23-05) to provide for application to such offenders.

For several reasons, the arguments of defendant and his amici should be rejected.

A.

Defendant and his amici argue that R.C. 2929.06(B) is inapplicable because his death sentence was not vacated for penalty-phase error, but, rather, for jury-selection error. However, the Sixth Circuit itself characterized the error in allowing a death-prone juror to remain on the jury as an “issue of juror impartiality as to the sentencing phase of the trial.” *White v. Mitchell* (C.A. 6, 2005), 431 F.3d 517, 521. The Sixth Circuit also specifically rejected the argument that allowing the juror to participate in the guilt phase was error, finding that the juror had been “successfully rehabilitat[ed] * * * for the guilt phase of the trial.” *Id.* at 532. The Sixth Circuit emphasized that the juror’s ability to sit in the penalty phase was “independent” from her ability to impartially participate in the guilt phase. *Id.* at 532 n. 4. The Sixth Circuit specifically rejected defendant’s argument that the juror should not have been allowed to remain on the jury in the guilt phase. *Id.* at 537. Accordingly, as to the penalty phase, the Sixth Circuit found that “White is entitled to habeas relief with respect to the sentencing phase on this ground.” *Id.* at 542. Because

the grant of habeas relief was based on error in letting the juror participate in the penalty phase, the error that leads to the need for further penalty-phase proceedings is, per R.C. 2929.06(B), “error that occurred in the sentencing phase of the trial * * *.”

The defense attempt to draw a distinction between jury-selection error and penalty-phase error wrongly assumes that the two are mutually exclusive. An error in jury selection could *also* constitute error in the penalty phase, since the jury was being selected for both the guilt phase and the penalty phase. Viewed in this light, error in not dismissing the juror for cause during jury selection can also be seen as error in letting the juror participate in the penalty phase. The phrase in R.C. 2929.06(B) regarding “error that occurred in the sentencing phase of the trial” does not require that the error have exclusive relevance to the sentencing phase.

An irony of the defense argument is that, if it was not error in the penalty phase, then the holding of *Penix* itself would be inapplicable. *Penix* indicated that it applied to cases in which the death sentence had been vacated “due to error occurring at the penalty phase of the proceeding.” When the General Assembly set out to fix the *Penix* loophole, it naturally used the same concept of “error that occurred in the sentencing phase of the trial * * *.” To say that R.C. 2929.06(B) is inapplicable is to say that *Penix* itself is inapplicable. If *Penix* would apply, as the defense and its amici contend, then the legislative choice in R.C. 2929.06(B) to fix the *Penix* problem necessarily applies as well.

There is nothing left of *Penix* to apply, as *Penix* is a dead letter statutorily. Justice Resnick rightly observed in her *Williams* concurrence (joined in by Justice Lundberg Stratton) that “the holding of *Penix* was clearly abrogated” by the October 1996 amendments and that those amendments “now explicitly reflect[] the position of Justice

Holmes [in his *Penix* dissent] that the death penalty should be available in this situation.” *Williams*, at ¶¶ 17-18. With the March 2005 amendments coming into place after Justice Resnick’s comments, there is not a shred left of *Penix* to apply as a matter of statutory law. The trial court has the statutory power to seat a new penalty-phase jury to consider the death penalty in this case. The question resolves into a constitutional matter of whether this statutory power invades some constitutional right of defendant.

B.

For purposes of constitutional analysis of retroactivity and ex post facto issues, a threshold question is whether R.C. 2929.06(B), as amended in October 1996 and March 2005, is “retroactive” as applied to defendant’s case. The Fifth District accepted the premise that the application of these amendments to defendant is “retroactive” but then upheld the amendments as procedural. While undersigned counsel agrees that the amendments clearly apply to defendant, counsel respectfully submits that such application of such amendments to defendant is not truly “retroactive.”

Penix and the resulting legislative fixes address a procedural matter regarding resentencing proceedings when the only relief afforded in the appellate or habeas proceedings is the vacating of the death sentence. The event regulated by *Penix*, and thus by the legislative fixes, is the procedure to be observed in such resentencing proceedings. At the time the legislative fixes took effect in October 1996 and then in March 2005, the resentencing proceedings were still a future event that were yet to occur in the present case.

Great care must be used in assessing whether something is “retroactive.” As stated in *Landgraf v. USI Film Products* (1994), 511 U.S. 244, 269-70:

A statute does not operate “retrospectively” merely because it is applied in a case arising from conduct antedating the statute’s enactment, or upsets expectations based in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment. The conclusion that a particular rule operates “retroactively” comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event. Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity. However, retroactivity is a matter on which judges tend to have “sound . . . instinct[s],” and familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance. (Citations omitted)

The *Landgraf* Court cited examples of non-retroactive legislation. For example, “[w]hen the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.” *Landgraf*, 511 U.S. at 273.

Similarly, procedural changes are not deemed retroactive when applied to litigation in the future:

Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity. * * * Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.

Landgraf, 511 U.S. at 275 (citations and some text omitted). The Court added that, “[w]hile we have strictly construed the *Ex Post Facto* Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening

procedural changes even if application of the new rule operated to a defendant's disadvantage in the particular case.” *Id.* at 275 n. 28.

Application of a new procedural rule *could* become “retroactive” if it was applied to events that were already completed:

Of course, the mere fact that a new rule is procedural does not mean that it applies to every pending case. A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and the promulgation of a new rule of evidence would not require an appellate remand for a new trial. Our orders approving amendments to federal procedural rules reflect the commonsense notion that the applicability of such provisions ordinarily depends on the posture of the particular case.

Id. at 275 n. 29.

As Justice Scalia stated in his opinion concurring in the judgment:

The critical issue, I think, is not whether the rule affects “vested rights,” or governs substance or procedure, but rather what is the relevant activity that the rule regulates. Absent clear statement otherwise, only such relevant activity which occurs *after* the effective date of the statute is covered. Most statutes are meant to regulate primary conduct, and hence will not be applied in trials involving conduct that occurred before their effective date. But other statutes have a different purpose and therefore a different relevant retroactivity event. A new rule of evidence governing expert testimony, for example, is aimed at regulating the conduct of trial, and the event relevant to retroactivity of the rule is introduction of the testimony. Even though it is a procedural rule, it would unquestionably not be applied to *testimony already taken* – reversing a case on appeal, for example, because the new rule had not been applied at a trial which antedated the statute.

Landgraf, 511 U.S. at 291-92 (Scalia, J., concurring; emphasis *sic*). For example, when the new provision addresses the jurisdiction or power of a tribunal, “the relevant event for

retroactivity purposes is the moment at which that power is sought to be exercised.” Id. at 293. Applying the new provision to undo prior judicial action would be retroactive, “but applying it to prevent any judicial action after the statute takes effect is applying it prospectively.” Id. at 293.

In the present case, the grant of habeas relief on the ground of penalty-phase error, and the resulting resentencing proceedings that must occur, were not completed events at the time of the legislative amendments fixing the *Penix* problem. In the words of *Landgraf*, applying the legislative fixes in the present case would not attach new legal consequences to events already completed. Applying those fixes should not be deemed “retroactive” merely because they are “applied in a case arising from conduct antedating” those fixes. Because the fixes involve the regulation of “secondary rather than primary conduct,” and because they address the power of the court to impanel another jury, they are not “retroactive” as applied to would-be capital resentencing proceedings occurring after the effective date of the legislative fixes.

C.

In light of several statements in *Williams*, the defense and his amici will likely contend that the critical reference point in determining “retroactivity” in this context is the date of the offense. Statements in *Williams* do provide support for that argument. But this Court did not decide the constitutional questions in *Williams*, and “retroactivity” for purposes of R.C. 1.48 is not necessarily determinative of “retroactivity” for purposes of constitutional analysis, although the two are often treated as interchangeable.

For constitutional purposes, this amicus respectfully submits that using the date of offense as the reference point is flawed. The application of *Penix* is, by definition,

dependent on several secondary contingencies that are not determinable at the time of the offense.

At the time of offense, it cannot be determined whether the defendant will be tried by a jury or a three-judge panel; if the defendant is tried by a three-judge panel, then *Penix* is inapplicable. *Davis*, supra.

Also, at the time of the offense, it cannot be determined whether reversal will occur through penalty-phase error; if reversal results in a complete new trial because of error in the guilt phase as well as the penalty phase, then *Penix* is inapplicable. *Keenan*, supra. Notably, defendant White made several claims of guilt-phase error on direct appeal in this Court and on habeas review, and even his claim of error regarding the juror was a claim of error in *both* the guilt phase and penalty phase.

Finally, at the time of the offense, it cannot be determined whether any reversal will occur because penalty-phase error. Timely objection is needed to preserve the issue, and the raising of the penalty-phase error is necessary to obtain relief in the appellate and habeas courts. Timely filing of a habeas petition is also necessary to obtain habeas relief, as is exhaustion of state remedies. And, for purposes of this Court's direct review, many penalty-phase errors are curable through this Court's independent sentencing review. See, e.g., *State v. Landrum* (1990), 53 Ohio St.3d 107, 115.

Given these many contingencies that are unascertainable at the time of the offense, it is erroneous to use the date of the offense as the critical date of reference. Consistent with *Landgraf*, the pertinent reference point should be the time when reversal or habeas relief is granted and would-be resentencing proceedings are about to occur, as, only then, can it be determined whether the *Penix* problem exists. In the present case,

the applicability of *Penix* could not have been determined at the time of the offense and was not in fact determinable until the Sixth Circuit panel issued its decision in December 2005, until the panel denied *defendant's* petition for rehearing in February 2006, and until the panel denied the warden's motion for rehearing en banc in April 2006.¹ All of these events post-dated the effective date of the October 1996 and March 2005 amendments fixing the *Penix* problem.

D.

Even if characterized as “retroactive,” the legislative fixes were permissibly retroactive in fixing the procedures pertinent to resentencing proceedings. In *Dobbert v. Florida* (1977), 432 U.S. 282, the law was changed after the crime but before the defendant's trial. At the time of the crime, a jury's recommendation of mercy would have been binding on the sentencing judge. Subsequent amendments, however, installed a new death penalty sentencing scheme and made the jury's decision advisory in nature. When the defendant was tried under the new scheme, the jury recommended a life sentence by a vote of 10-2, but the trial court overruled the recommendation and imposed a death sentence.

The United States Supreme Court decided that the changes were “procedural” and therefore not violative of *ex post facto* principles. “The inhibition upon the passage of *ex post facto* laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed.” *Id.* at 293 (quoting another case). “Even

¹ By order filed on May 4, 2006, the Sixth Circuit panel stayed its mandate pending review by the United States Supreme Court, which denied the warden's petition for writ of certiorari on November 13, 2006. The district court did not formally grant the conditional writ returning the case to state court until December 28, 2006.

though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*.” Id. at 293. The court concluded that “the change in the statute was clearly procedural. The new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime.” Id. at 293-94.

The defense argued in *Dobbert* that the changes were *ex post facto* because they provided a constitutional procedure for imposing the death penalty, while the prior statutory scheme had been unconstitutional in that respect and therefore there was no death penalty “in effect” at the time of the offense. The Court rejected that argument. “[T]his sophistic argument mocks the substance of the *Ex Post Facto* Clause. Whether or not the old statute would, in the future, withstand constitutional attack, it clearly indicated Florida’s view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State ascribed to the act of murder.” Id. at 297. “[T]he existence of the statute served as an ‘operative fact’ to warn the petitioner of the penalty which Florida would seek to impose on him if he were convicted of first-degree murder. This was sufficient compliance with the *ex post facto* provision of the United States Constitution.” Id. at 298.

The changes made in the law in *Dobbert* are equivalent to the legislative fixes in defendant’s case. In *Dobbert* and the present case, there was no change in the quantum of punishment, since both allowed for the death penalty at the time of the offense. In both *Dobbert* and the present case, the changes address a future event; in *Dobbert*, the change

involved whether the jury recommendation would be binding or advisory; in the present case, the change involves procedures in resentencing proceedings. Just as the statutory changes survived *ex post facto* scrutiny in *Dobbert*, the legislative fixes implemented before this Court's review on direct appeal and before the Sixth Circuit acted should survive such scrutiny.²

E.

Courts in other states have upheld similar legislative fixes from constitutional challenge. Highly relevant are the decisions in *Evans v. Commonwealth* (1984), 228 Va. 468, 323 S.E.2d 114, and *Evans v. Thompson* (C.A. 4, 1989), 881 F.2d 117. Under remarkably similar circumstances, a cop killer had been sentenced to death at a time when Virginia law did not provide for the death penalty in a resentencing hearing. The Virginia Supreme Court had concluded at the time, like *Penix*, that a remand for a penalty-only hearing could not result in another jury determining whether death should be imposed.

After the cop killer's death sentence was affirmed on direct review, he filed a state habeas petition alleging error in the use of certain prior convictions in the penalty phase of his trial. While the petition was pending, Virginia enacted legislation allowing for the impaneling of a new jury for a penalty-phase resentencing hearing. Shortly thereafter, the

² *Dobbert* went on to say that the statutory changes as a whole were ameliorative. But this alternative basis for decision does not detract from the "procedural" holding already discussed. When a court states two grounds for its decision, *both* grounds constitute a holding of the court. *Massachusetts v. United States* (1948), 333 U.S. 611, 622-23; *United States v. Title Ins. & Trust Co.* (1924), 265 U.S. 472, 486. The *Dobbert* Court emphasized that the "procedural" and "ameliorative" grounds for its decision were "independent bases for our decision." *Dobbert*, 432 U.S. at 292 n. 6. "[A] procedural change [is] not *ex post facto* even though the change was by no means ameliorative." *Id.*

state habeas court granted relief in the form of a new resentencing hearing. In that new hearing, the new jury imposed death, and the defendant appealed.

The Virginia Supreme Court, and later the federal Fourth Circuit, both rejected the defendant's *ex post facto* challenge to the change in resentencing procedure allowing for a jury resentencing. "Manifestly, Evans had 'fair notice' and 'fair warning' at the time of his 1981 offense that the capital murder of a law-enforcement officer was a crime for which the death penalty could be imposed. * * * Virginia's view of the severity of capital murder and of the degree of punishment which the General Assembly wished to impose upon capital murderers had been clearly announced before Evans' criminal conduct occurred." 323 S.E.2d at 118.

The Virginia court rejected the argument that the defendant would have also had "fair warning" of then-existing Virginia law, under which a resentencing could only result in a life sentence. "[A]ccording to *Dobbert*, the *ex post facto* inquiry focuses on 'the quantum of punishment attached to the crime,' 432 U.S. at 294, of which the defendant had notice at the time of the offense, and not on adjustments in the method of administering that punishment that are collateral to the penalty itself." 323 S.E.2d at 119.

In addition, the change was ameliorative because "the new law provides for impaneling a new jury, free of any taint arising from errors during the first trial, to redetermine the defendant's punishment. A defendant convicted of capital murder is entitled to a fair and impartial determination of his punishment; he will not be heard to complain that a change in the law which protects that right is not wholly beneficial to him." *Id.* at 119.

The Fourth Circuit similarly rejected the defendant's *ex post facto* contentions.

“The 1983 amendment does no more than change the procedures surrounding the imposition of the death penalty.” 881 F.2d at 120. The defendant had fair warning at the time of his offense that he could face the death penalty; providing for a jury resentencing was merely an adjustment to the method of administering the penalty. *Id.* “The Virginia amendment neither increased the punishment attached to petitioner’s crime, nor altered the ingredients of the offense, nor changed the ultimate facts necessary to establish petitioner’s guilt. It thus survives petitioner’s *ex post facto* challenge.” *Id.*

The Fourth Circuit also viewed the Virginia statutory change as ameliorative and as something to be encouraged.

The Virginia amendment represents 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. *See Burks v. United States*, 437 U.S. 1, 15 (1978). It promotes the basic aspiration of criminal justice to achieve results that are error-free. The Virginia Supreme Court has recognized the ameliorative purposes of the enactment:

the new law provides for impanelling a new jury, free of any taint arising from errors during the first trial, to redetermine the defendant's punishment. A defendant convicted of capital murder is entitled to a fair and impartial determination of his punishment: he will not 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.

The *Ex Post Facto* Clause does not confer upon this defendant an unalterable right to be sentenced by the jury which found his guilt or never to be resentenced in any fashion. To confer such a right would have serious implications for the workings of our federal system. That system presupposes that states will routinely undertake to

improve their methods of jury selection, their rules of evidence, the availability of appeals and post-conviction proceedings, and other procedures of their criminal justice systems. To hold that every change with an arguable adverse impact upon the outcome of a criminal case has *ex post facto* implications would seriously inhibit this process of reform, because legislation generally has an effective date of enactment independent of the date of the commission of an act. The elusive nature of the *ex post facto* prohibition derives from the fact that law does and should evolve. The Supreme Court has long emphasized 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.” *Thompson v. Utah*, 170 U.S. 343, 351 (1898). We reject petitioner’s attempt to create such a right in this instance.

Evans, 881 F.2d at 121 (one citation and parallel citations omitted).

Oklahoma faced the same issue when its legislature amended its capital sentencing scheme to allow for penalty-only trials on resentencing. Although the Oklahoma Court of Criminal Appeals had initially found an *ex post facto* problem in the statutory change, that court later overruled the prior decision and held that the statutory amendment posed no *ex post facto* problem.

We find that the amended statute allowing for resentencing does not violate the prohibition of *ex post facto*. As applied to the petitioner, the crime for which he was charged, the punishment prescribed therefor, and the quantity or degree of proof necessary to establish guilt, all remain unaffected by the amended statute. See *Miller v. Florida*, 482 U.S. 423 (1987). Even on remand, petitioner faces the same possible punishment as before: life imprisonment or death. We therefore find the new sentencing amendment to be a procedural change in the law, and not prohibited by the *ex post facto* prohibition.

Cartwright v. State (Ok. Crim. App. 1989), 778 P.2d 479, 482 (parallel citations omitted). The court rejected as “inaccurate” the contention that the defendant “had a

'right' to a mandatory sentence of life imprisonment if error was found in the sentencing stage of trial * * *." Id. at 482. "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." Id. at 482 (citation omitted).

The Oklahoma court also rejected the contention that application of the resentencing amendment would violate the statutory presumption of non-retroactivity. "[P]rocedural remedial statutes [can] apply to pending actions." Id. at 482. "[T]he resentencing amendment is procedural, as it has no substantive effect on petitioner's crime. The amendment may or may not affect the outcome when petitioner is resentedenced, depending upon the sentencer's determination after properly weighing the mitigating and aggravating circumstances." Id. at 482-83.

Less on point but still relevant is *State v. Cropper* (Ariz. 2010), 2010 Ariz. Lexis 16. In *Cropper*, the defendant received a death sentence for the 1997 murder of a corrections officer at a time when the trial judge determined the aggravating factors. After the judicial determination of aggravating factors was later found to be unconstitutional, the defendant's death sentence was vacated and the case was remanded for resentencing. In the resentencing, the trial court used the newly-adopted sentencing procedure allowing the jury to determine the aggravating factors and to determine the sentence. The first jury found two aggravating factors but deadlocked on the third factor and deadlocked on the appropriate punishment. A second jury was impaneled and found the third factor and agreed that the punishment should be death.

Relying on *Dobbert*, the Arizona Supreme Court rejected the defendant's *ex post*

facto challenge to the new provision allowing the impaneling of a second jury. “[T]he change to jury sentencing made no change in punishment and added no new element to the crime of first-degree murder.” *Id.* at *7. “In the context of a capital resentencing after a change in sentencing procedure, *Dobbert* explained that no ex post facto claim arises when ‘[t]he new statute simply alter[s] the methods employed in determining whether the death penalty was to be imposed,’ and not ‘the quantum of punishment attached to the crime.’” *Id.* at *7. See, also, *State v. Lovelace* (2004), 140 Idaho 73, 90 P.3d 298 (also rejecting ex post facto challenge to amendments requiring jury-based capital sentencing).

In the final analysis, the legislative fixes adopted in October 1996 and March 2005 merely have worked a permissible procedural change. No vested right has been taken away from defendant. Ex post facto and retroactivity challenges should be rejected. Any double jeopardy claim should also be rejected for the reasons stated in the Attorney General’s March 11th brief.

CONCLUSION

For the foregoing reasons, amicus curiae Franklin County Prosecutor Ron O'Brien supports plaintiff-appellee State of Ohio and urges this Court to affirm the judgment of the Fifth District Court of Appeals and to remand the case for resentencing proceedings pursuant to R.C. 2929.06(B).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was mailed by regular U.S. mail on this 17th day of Mar., 2010, to the following known counsel of record:

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