

**IN THE SUPREME COURT OF OHIO**

**STATE OF OHIO**

Plaintiff-Appellee

vs.

**CLARENCE D. ROBERTS.**

Defendant-Appellant

CASE NO. 2011-1882

On Appeal From The Court of Appeals,  
Fifth Appellate District

Court of Appeals  
Case No. 10CA047

**MERIT BRIEF OF AMICUS CURIAE  
OHIO PROSECUTING ATTORNEY'S ASSOCIATION  
IN SUPPORT OF PLAINTIFF-APPELLEE STATE OF OHIO**

PAUL A. DOBSON (0064126)  
Wood County Prosecutor

DAVID E. ROMAKER JR.\* (0085683)  
\*Counsel of Record  
Assistant Prosecuting Attorney  
One Court House Square  
Bowling Green, OH 45402  
Phone (419) 354-9250  
Fax No. (419) 353-2904  
E-mail [dromaker@co.wood.oh.us](mailto:dromaker@co.wood.oh.us)

Counsel for Amicus Curiae  
Ohio Prosecuting Attorney's Association

KRISTOPHER HAINES\* (0080558)  
Office of the Ohio Public Defender  
\*Counsel of Record  
250 E. Broad St., Suite 1400  
Columbus, OH 43215

Counsel for Appellant  
Clarence D. Roberts

DANIEL G. PADDEN (0038781)  
Guernsey County Prosecuting  
Attorney\* Counsel of Record  
139 W. 8<sup>th</sup> St.  
Cambridge, OH 43725  
(740) 439-2082  
(740) 439-7161 Fax

Counsel for Appellee  
State of Ohio

**FILED**  
JUN 12 2012  
CLERK OF COURT  
SUPREME COURT OF OHIO

INTRODUCTION ..... 2

STATEMENT OF AMICUS INTEREST ..... 2

STATEMENT OF THE CASE AND FACTS ..... 3

ARGUMENT ..... 3

**Proposition of Law:** Prospective application of a new statute is presumed; retroactive application may only occur where the plain language of the statute is expressly stated to overcome the presumption of prospective application ..... 3

I. IT IS WELL SETTLED IN OHIO THAT STATUTORY INTERPRETATION IS LEFT TO THE PLAIN MEANING OF THE STATUTE ..... 4

A. The 5th District correctly denied Robert's DNA preservation request, because the evidence Robert's wished to preserve is dictated by R.C. 2933.82(B)(1) and his evidence was not "secured" after the effective date of July 6, 2010 ..... 4

B. R.C. 1.48 establishes that a statute must be applied prospectively only, unless an express indication in made within its wording ..... 5

C. Past tense wording found in R.C. 2933.82(B)(2) does not make it retroactive ..... 6

CONCLUSION ..... 9

CERTIFICATE OF SERVICE ..... 10

## **INTRODUCTION**

This case tests the established precedent regarding the interpretation of statutory construction. Moreover, this case has far reaching consequences for many levels of law enforcement agencies within our state. Determining that SB 77's was anything but prospective would derail the well held case law in Ohio that there must be a clear and express intent—through a statute's wording—to be retrospective. Further, the creation any new burden upon the state through the passage of a statute would evoke the retroactivity clause. No number of comments from legislators, governors, newspapers or other media can alter the standard under which this Court reviews the plain language of a statute. It is the wording of the statute that drives the bus of interpretation.

Amicus Curiae Ohio Prosecuting Attorney's Association respectfully requests that this Court affirm the Fifth District's judgment and uphold the long standing precedent defining the interpretation of statutory construction—one that assumes prospective application of a statute unless expressly defined within itself. Thus holding R.C. 2933.82 applies prospectively.

## **STATEMENT OF AMICUS INTEREST**

The Fifth District Court of Appeals decision in *State v. Roberts*, 5th Dist. No. 10CA000047, 2011-Ohio-4969, 2011 Ohio App. LEXIS 4086—which it held that R.C. 2933.82 did not apply retroactively to Robert's DNA preservation request—was proper given the express wording of R.C. 2933.82.

Jurisprudence in Ohio should not be put to the test for ulterior motives. Here, the facts of the case, after a review of the record, add clarity to the 5th District Court of Appeals opinion. While the court's statement "the state cannot do what it did not know it had to do" has become a

rallying cry for Robert's, it epitomizes sound logic, which is absent in his argument. The DNA Robert's request to be preserved, was not secured as described in 2933.82(B)(1), thus is could not ordered preserved under the new R.C. 2933.82. However, to apply the standards of R.C. 2933.82 to his particular request, in this manner, would place a undue burden upon the state to forego all of its retention schedules for evidence it may have retained or may have destroyed over the time prior to the effective date of July 6, 2010.

It should be decidedly affirmed by this Court in the best interest of stability through congruity of all Ohio's courts that the state must only do, what can only be reasonably deducted that it must do, by declaring that R.C. 2933.82 applies prospectively. As of now, law enforcement agencies and prosecutors have yet to acquire such talismanic powers as to foresee a change in the requirements of the law, which would allow them to avert any undue burden.

#### **STATEMENT OF THE CASE AND FACTS**

Amicus Curiae, the Ohio Prosecuting Attorney's Association, fully adopts the Statement of Case and Facts as contained in the Appellant State of Ohio's brief.

#### **ARGUMENT**

**Amicus Curiae O.P.A.A. Proposition of Law: Prospective application of a new statute is presumed; retroactive application may only occur where the plain language of the statute is expressly stated to overcome the presumption of prospective application.**

The interpretation of the 5th District's opinion in *State v. Roberts*,—insofar as Robert's claims it is a defective—is an incorrect characterization of the demands of R.C. 2933.82. The appellate court in fact came to the correct conclusion when it held, “for the statute to apply in *appellant's case*, it must be applied retrospectively.” However, Robert's now claims that the

issue is not one of retroactive application of R.C. 2933.82. The record reveals that Robert's crafted part of his argument on appeal within the context of retroactivity when he argued that the term "was" as used in R.C. 2933.82(B)(2), implies retroactive application. Not only was this an incorrect interpretation of the use of past tense wording, the appellate court opinion made the correct analysis because his request pertained to evidence not secured within the meaning of the statute and defined in R.C. 2933.82(B)(1). Because Robert's 1997 murder case evidence was not secured prior to the effective date of R.C. 2933.82, the state maintains no duty to preserve it.

**I. IT IS WELL SETTLED IN OHIO THAT STATUTORY INTERPRETATION IS LEFT TO THE PLAIN MEANING OF THE STATUTE.**

- A. The 5th District correctly denied Robert's DNA preservation request, because the evidence Robert's wished to preserve is dictated by R.C. 2933.82(B)(1) and his evidence was not "secured" after the effective date of July 6, 2010.**

The 5th District in *Roberts* held, "[b]ecause this item has not been preserved pursuant to the practices and protocols under the new task force, appellant cannot now benefit from retrospective application of the statute." *Roberts* at ¶ 18. Robert's case was done and over, it was appealed and affirmed, it was nothing more than a closed file for over a decade. The appellate court correctly noted that the only way Robert's could win was to apply R.C. 2933.82 retroactively, and hold that the new rules applied to the evidence collected and secured in 1997. *Roberts* at ¶ 13. However, this cannot be the case 15 years after the evidence was secured and where no duty stood for such preservation of evidence. At no time does Robert's claim that the evidence he sought to preserve was secured in relation to an investigation or prosecution after the effective date of R.C. 2933.82. Therefore, reading (B)(1) makes his request a legal impossibility.

“The doctrine of *in pari materia* is, of course, applicable only when the terms of the statute to be construed are ambiguous or their significance doubtful. It is not to be applied to effect a construction contrary to the clearly manifested intent of the General Assembly as expressed in the statute.” *In re Estate of Friedman*, 154 Ohio St. 1, 8, 93 N.E.2d 273, (1950). R.C. 2933.82(B)(2) states; “This section applies to evidence likely to contain biological material that was in the possession of any governmental evidence-retention entity during the investigation and prosecution of a criminal case.” (B)(2) must be read *in pari materia* with (B)(1), and by doing so together they clarify that evidence to be preserved was evidence *secured* after the effective date, that *was in the possession* of an evidence-retention entity. If Robert’s thought (B)(2) was ambiguous, the reading of both sections shall clarify why his request was in fact invalid and denied.

R.C. 2933.82 defines the practices for DNA retention in the State of Ohio as of July 6, 2010. Robert’s request for evidence secured in 1997 can only be upheld if the statute is applied retrospectively. However, there is no express within R.C. 2933.82’s wording to justify doing so.

**B. R.C. 1.48 establishes that a statute must be applied prospectively only, unless an express indication is made within its wording.**

This Court has consistently held that R.C. 1.48 establishes “[a] statute is presumed to be prospective in its operation unless expressly made retrospective.” Section 28, Article II of the Ohio Constitution prohibits the General Assembly from passing retroactive laws. See *State v. Adkins*, 129 Ohio St. 3d 287, 289-290, 2011 Ohio 3141, 951 N.E.2d 766, 2011 Ohio LEXIS 1683 (Ohio 2011). Despite Robert’s contention otherwise, R.C. 2933.82—and its application in this case—do not offend either R.C. 1.48 or the Ohio Constitution.

In the words of Henry David Thoreau: “Books must be read as deliberately and reservedly as they were written.” R.C. 2933.82 must be read in this same manner, seeking out only *express* wording to overcome the presumption of prospective application. Nowhere in the text of R.C. 2933.82 will such wording be found, rather, direction for the preservation of evidence secured—*then in existence*—starts on the effective date of the statute, July 6, 2010.

This court in *State v. Adkins*, 129 Ohio St. 3d 287, 290, 951 N.E.2d 766, 2011-Ohio-3141 unanimously reiterated the Ohio rule of law, now over 100 years old, when it stated, “[t]he retroactivity clause nullifies those new laws that ‘reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time [the statute becomes effective].’ Citing *Miller v. Hixson* (1901), 64 Ohio St. 39, 51, 59 N.E. 749.” *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, 352-353, 2000 Ohio 451, 721 N.E.2d 28. Here, to go back before the effective date of R.C. 2933.82, on July 6, 2010, and require that the state had a duty to preserve Robert’s DNA would be such a burden that no evidence-retention agency could meet. Law enforcement agencies follow evidence retention guidelines as defined by statute. To tell them—as Robert’s insists—to follow guidelines not in place at the time they secured evidence is a burden that has far reaching consequences for each entity.

Retroactive application of R.C. 2933.82 would be against the plain meaning of the statute and create an undue burden on evidence-retention entities within this state.

**C. Past tense wording found within R.C. 2933.82 does not make it retroactive.**

Roberts argued in his 2011 appeal that the word “was” in R.C. 2933.82(B)(2) implies retroactivity. *Roberts* at ¶ 14. This argument of word tense, as related to retroactive application has been before this court many times. Recently, this court has examined the necessary wording

to allow for a statute to apply retroactively.

In *Hyle v. Porter*, 117 Ohio St. 3d 165, 168, 2008-Ohio-542, 882 N.E.2d 899, this court explained:

Two previous cases serve as examples of clear expressions of retroactivity and underscore the absence of a comparable declaration in former R.C. 2950.031. In *Van Fossen [v. Babcock & Wilcox, Co.]*, 36 Ohio St.3d 100, 522 N.E.2d 489], we based our finding of a clearly expressed legislative intent for former R.C. 4121.80 to apply retroactively on the following passage: "This section applies to and governs any action \* \* \* pending in any court on the effective date of this section \* \* \* notwithstanding any provisions of any prior statute or rule of law of this state." Former R.C. 4121.80(H), 141 Ohio Laws, Part I, 736-737. *Van Fossen*, 36 Ohio St.3d at 106, 522 N.E.2d 489. In *State v. Cook* (1998), 83 Ohio St.3d 404, 1998 Ohio 291, 700 N.E.2d 570, our finding that the General Assembly specifically made R.C. 2950.09 retroactive was based in part on an express provision making the statute applicable to anyone who "was convicted of or pleaded guilty to a sexually oriented offense prior to the effective date of this section, if the person was not sentenced for the offense on or after" that date. Former R.C. 2950.09(C)(1), 146 Ohio Laws, Part II, 2620. *Id.* at 410, 700 N.E.2d 570. Both former R.C. 4121.80(H) and former 2950.09(C)(1) expressly make their provisions applicable to acts committed or facts in existence prior to their effective dates. In addition, R.C. 4121.80(H) expressly proclaimed its applicability in spite of contrary preexisting law by including the phrase

"notwithstanding any provisions of any prior statute or rule of law of this state."

Thus, both statutes include strong and unmistakable declarations of retroactivity.

The text of R.C. 2933.82, by contrast, does not feature a clear declaration of retroactivity in either its description of applicable code sections or its description of likely evidence. The statute does not proclaim its applicability to evidence not in existence or secured prior to the effective date of the statute or otherwise expressly declare its retroactive application. In Robert's case, the absence of a clear declaration comparable to the two excerpted above precludes the retrospective application of R.C. 2933.82.

A further analysis of R.C. 2933.82(B)(2) reveals the use of the word "was" within the text. This court held in *Hyde* that there was "no indication that two statutes were intended to have retroactive application, despite the fact that both used a form of the past tense." In particular, R.C. 5313.08, considered in *Kiser*, includes the following language: "If the contract *has been* in effect for less than five years, \* \* \* the vendor may bring an action for forfeiture." (Emphasis added.) In addition, R.C. 5313.07, also considered in *Kiser*, includes the following language: "If the vendee of a land installment contract *has paid* \* \* \* for a period of five years or more \* \* \*, the vendor may recover possession of his property only by use of a proceeding for foreclosure." (Emphasis added.) *Hyde, supra*, citing *Kiser v. Coleman*, 28 Ohio St.3d 259, 261-62, 503 N.E.2d 753 (1986). The *Hyde* court held "our decision in *Kiser* thus demonstrates that we have previously found similar language insufficient to overcome the presumption of prospective application." The "was" wording within R.C. 2933.82(B)(2) should also be determined to lack the necessary express language to make it retroactive.

This case can make the statement: If You Don't See It, Then It Applies Prospectively, by this court concluding that nothing short of clear, unambiguous and express wording—obvious to all in an objective sense—can lead to retrospective application.

**CONCLUSION**

The O.P.A.A. asks this Court to decidedly restate that newly enacted statutes such as R.C. 2933.82 are deemed prospective unless express wording found within clearly state an intent to apply retroactively.

Respectfully submitted,

David E. Romaker Jr.

*Per authority  
M.D. [Signature]  
0097065*

David E. Romaker Jr., 0085683  
\*Counsel of Record  
Assistant Prosecuting Attorney  
One Court House Square  
Bowling Green, Ohio 45402  
Phone (419) 354-9250;  
Fax No. (419) 353-2904  
E-mail [dromaker@co.wood.oh.us](mailto:dromaker@co.wood.oh.us)  
Counsel for Amicus Curiae O.P.A.A.

**PROOF OF SERVICE**

I hereby certify that on this 12<sup>th</sup> day of June, 2012, I have sent a copy of the foregoing Merit Brief of Amicus Ohio Prosecuting Attorney's Association, by regular United States mail, addressed to the following: Kristopher A. Hines, Asst. St. Public Defender, 250 E. Broad St., Suite 1400, Columbus, OH 43215, Sharon Katz, c/o Davis/Polk/Wardwell LLP, 450 Lexington Ave., New York, New York, 10017, Daniel Padden, 139 W. 8<sup>th</sup> St., Cambridge, OH 43725.

*David E. Romaker Jr.*

David E. Romaker Jr, 0085683  
Assistant Prosecuting Attorney  
Wood County, Ohio

*Per authority  
MAD 1/1/12  
0087165*

