

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 09-1661
 :
 v. : Death Penalty Case
 :
 MAXWELL WHITE, :
 :
 Defendant-Appellant. :

APPELLANT MAXWELL WHITE'S
MOTION FOR RECONSIDERATION

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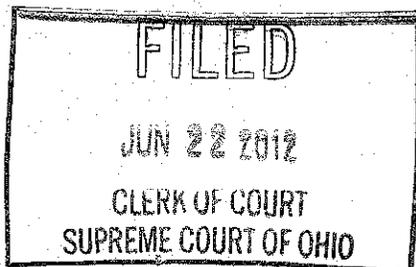
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Appellant Maxwell White pursuant to S. Ct. Prac. R. 11.2 moves this Court to rehear this case. Appellant requests reconsideration on the limited issue of whether given the facts that are unique to this case, R.C 2929.06(B) is applicable. Appellant has attached a memorandum of law that he incorporates in this motion.

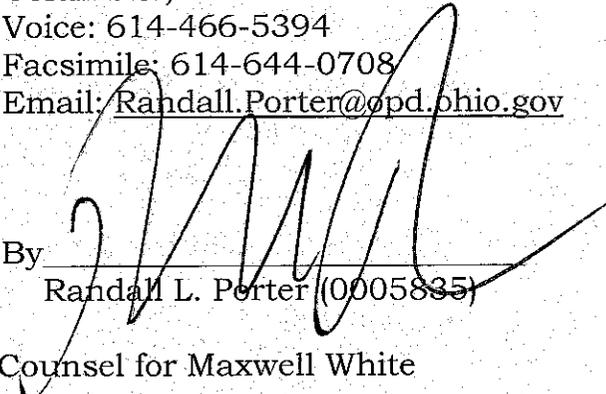
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MEMORANDUM IN SUPPORT

On June 14, 2012, the Court issued its decision in this case. *State v. White*, __ Ohio St.3d __, 2012-Ohio-2583. While the Court's opinion focused exclusively on R.C. 2929.06(B), it addressed a number of issues, including which cases came within the confines of the statute and whether the statute violated the retroactivity, ex post facto, and double jeopardy constitutional provisions. Appellant requests the Court reconsider only the first issue, whether an individual's whose death sentence is vacated on appeal because of an error in voir dire can again receive the death penalty at resentencing.

Appellant premises his request on two considerations, the Court's prior holdings interpreting R.C. 2929.06(B) and the language of the statute. The Court's broad interpretation of the statute, which could be read to render all defendants death eligible after their sentences have been vacated, paints with too broad of a brush, given the number of possibilities that could be the basis for the vacating a death sentence.

I. The Court has consistently narrowly construed the reach of R.C. 2929.06(B).

Both the majority and dissenting opinions in their analyses cite to the Court's prior decisions interpreting R.C. 2929.06(B). *Id.* at ¶¶ 22, 77-78. The Court's prior decisions share one overriding principle. The Court has narrowly construed the statute and left to the General Assembly the task of correcting any perceived oversights or flaws in it.

The Court first addressed the statute in *State v. Penix*, 32 Ohio St.3d 369 (1987). The issue involved the sentencing options that were available when a defendant's death sentence had been vacated on appeal, but his conviction for capital murder affirmed. The Court held that the statute was silent as to whether a sentence of death could be re-imposed. *Id.* at 373. Rather than create a procedure out of "whole cloth" for re-imposing a sentence of death, the Court held that it was limited by the plain language of the statute. *Id.* In reaching this conclusion the Court rejected the position of the dissent that because there was a "gaping hole in the statute" the Court should fill the gap and create a procedure for conducting a sentencing hearing at which death could be re-imposed after the defendant's death sentence was vacated on appeal.

The Court revisited the statute in *State v. Harwell*, 102 Ohio St.3d 128, 2004-Ohio-2149. The Court therein had to decide what constituted a capital offense. The Court held once again that it was bound by the plain wording of the statute, that a capital offense is one in which the defendant was charged

with one or more death penalty specifications, regardless of whether he was death eligible. *Id.* at ¶ 9. The Court rejected the analysis of the dissent which argued that the Court, instead of interpreting the statute literally, should apply the definition most commonly used.

The Court again interpreted the statute in *State v. Williams*, 103 Ohio St.3d 112, 2004-Ohio-4747. The issue in that case was whether the amendments to R.C. 2929.06(B) that the Legislature enacted in response to the Court's decision in *Penix* were to be retroactively applied. The Court held that because the statute was silent with respect to its application, the statute could not be retroactively applied. *Id.* at ¶ 9. Again, the Court refused to go beyond the plain meaning of the words in the statute.

Thus, the Court's jurisprudence was clear prior to the *White* decision. The Court would apply the statute as it was literally written. The Court would not stray from that principle regardless of whether there were gaps in the statute or a more practical interpretation could be warranted. It is also clear that the General Assembly has felt free to amend the statute when it either disagreed with the Court's analysis or desired the statute to have a different effect. The General Assembly retained the same option in this case; if it did not appreciate the literal wording of the statute which it had enacted, it was free to amend the statute.

II. The plain reading of the statute dictates that Appellant's case does not fall within the ambit of the statute.

The legislature, when it enacted the most recent version of the statute, limited the application of the statute to:

[w]henever any court of this state or any federal court sets aside, nullifies, or vacates a sentence of death imposed upon an offender because *of error that occurred in the sentencing phase* of the trial and if division (A) . . .”

R.C. 2929.06(B) (emphasis added).

It must be assumed that the Legislature had some purpose for including the phrase “error that occurred in the sentencing phase.” The majority opinion found that “there is no reason why the General Assembly would want to treat resentenced capital offenders differently based on *when* the error that invalidated the death sentence occurred.” *Id.* at ¶ 24. However, it is a basic principle of statutory construction that when interpreting a court must afford some meaning to all portions of the statute. R.C. 1.47(B). The majority’s conclusion ignores that portion of the statute and literally nullifies or revokes that portion of the statute. *In re Andrew*, 119 Ohio St.3d 466, 2008-Ohio-4791, ¶ 6 (“if possible the court should give meaning to every word in every act”) (quoting *State ex . rel. Mitman v. Greene Cty. Bd. of Commrs.* 94 Ohio St. 296, 308 (1916); *E. Ohio Gas Co. v. Pub. Util. Comm.* 39 Ohio St.3d 295, 299 (1988) (“a basic rule of statutory construction [is] that words in statutes should not be read to be redundant, nor should any words be ignored”).

Assuming that the phrase is to be given some effect, then the issue becomes the manner in which the phrase “sentencing phase” should be

interpreted. This Court in its opinions has treated voir dire as a separate part of the trial. *See i.e., State v. Jackson* 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 26. The Court's prior use of the term "voir dire" is consistent with the manner in which it is understood in the capital litigation community. Similarly, as the dissent aptly pointed out, there was no need to look to the legislative intent because the meaning of the term sentencing phase is unambiguous and definite. *Id.* at ¶79.

Even assuming that the phrase "sentencing phase" is ambiguous and indefinite, the Court's conclusion that the General Assembly meant to include all cases in which the death sentence was vacated is incorrect. As the Court aptly noted, the present form of the statute was enacted in response to the Court's decision in *Penix*. *Id.* at ¶ 12. The error that resulted in the decision being vacated in *Penix* was an instructional error in the sentencing phase. *Penix* 32 Ohio St.3d at 371-72. Thus, if the General Assembly's intent in enacting R.C. 2929.06(B), was in response to *Penix* in which there was an error in the sentencing phase as the term is commonly understood, a more restrictive reading of the statute is warranted than the Court adopted. Again, the legislative history must be interpreted in the context of the phrase "*error that occurred in the sentencing phase.*"

In actuality what most likely occurred is that the General Assembly did not contemplate, when enacting, R.C. 2929.06(B), the factual scenario that is present in this case. Because that is most likely the case, the Court should have applied the rule of lenity. As the dissent argues, if there were an

ambiguity, meaning two reasonable ways of reading the statute the statute must be read in the favor of the accused.” *Id.* at ¶ 81. The majority holds that the rule should not be applied in such a manner “that would defeat the legislative intent.” *Id.* at ¶ 20. But as previously discussed it is not necessary to reach the legislative intent issue and even if necessary, it does not support a broad reading of the statute.

Finally, the majority opinion holds that Appellant’s proposed reading of the statute would create an odd dichotomy and an arbitrary distinction between who is and who is not eligible to be re-sentenced to death after the death sentence has been vacated on appeal. However, the General Assembly can, if it chooses, once again modify the statute if in fact it feels that the distinction is arbitrary or that the Court’s narrow reading of the statute does not reflect its intent.

CONCLUSION

Appellant respectfully requests the Court grant this motion and rehear this case to re-determine the scope of R.C. 2929.06(B). Both this Court’s prior decisions and the rules of statutory construction support the granting of this motion.

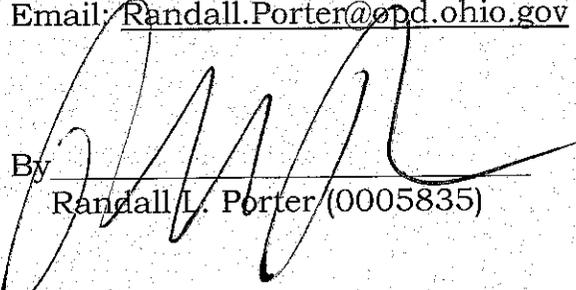
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By 
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Certificate of Service

I hereby certify that a true copy of the foregoing *Appellant Maxwell White's Motion For Reconsideration* was forwarded on this the 22nd day of June, 2012 by regular U.S. mail to:

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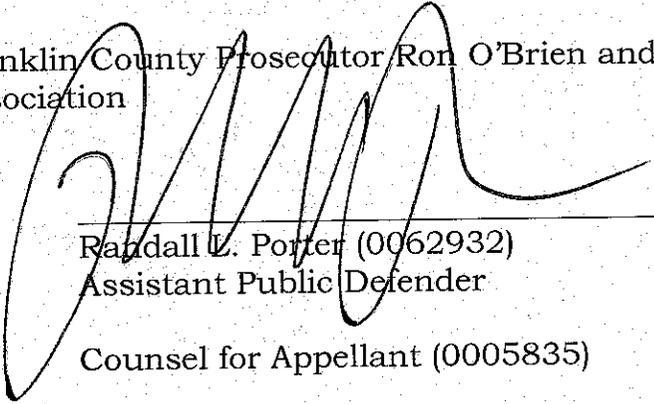
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