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Supreme Court Case No. 2015-1892

In the Supreme Court of Ohio

STATE OF OHIO,

Plaintiff-Appellee

V.

MALIK RAHAB,

Defendant-Appellant.

On Jurisdictional Appeal from the Court of Appeals, First District, Hamilton County, Ohio Case No.: C-1500186

MERIT BRIEF OF AMICUS CURIAE, THE OHIO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF DEFENDANT-APPELLEE RAHAB

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Ohio Association of Criminal Defense Lawyers is filing an amicus brief in this case to propose a more robust test for how Ohio courts should handle an allegation of a trial tax present in the sentencing of a criminal defendant. The record is clear that in the instant case a trial tax has been imposed upon defendant-appellant Malik Rahab for his choice to take his case to a jury trial. But the case law on this matter provides a flimsy and undeveloped trial-tax test: there is no constitutional violation for proceeding to a trial as long as the trial court unequivocally states that it did not consider that fact in fashioning its sentence. *State v. Scalf*, 126 Ohio App.3d 614, 621, 710 N.E.2d 1206 (1998). The First District opinion applied a different test that required that the trial judge had participated in the plea negotiations as a prerequisite to deciding if an unconstitutional trial tax was imposed. *State v. Rahab*, 1st Dist. Hamilton No. C-150186, p. 1-2 (1st Dist. 2015), citing *State v. Stafford*, 158 Ohio App.3d 509, 817 N.E.2d 411, ¶ 14 (1st Dist.). Accordingly, this issue is ripe for a test that provides clarity, protection of the 6th Amendment jury-trial right, and the consideration of countervailing interests.

The right to a jury trial is fundamental, and the United States Supreme Court has taken increased interest in the right in recent decisions. It is "no mere procedural formality," the Court held in *Blakely v. Washington*, "but a fundamental reservation of power in our constitutional structure." 542 U.S. 296, 306 (2004) (applying *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to federal sentencing). *See also Apprendi v. New Jersey* (holding that factual determinations made by a judge during sentencing violate a defendant's Sixth Amendment right to a jury trial). The Court has recognized, accordingly, that sentencing and the right to a jury trial are tied together.

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Further cementing the importance of this issue is the fact that a staggering ninety-five percent of criminal cases never go in front of a jury, instead being resolved during plea negotiations before trial. Even without explicit judicial imposition of a trial tax, scholars have recognized that one nonetheless exists. Defendants who elect to take their cases to trial face harsher sentences for doing so.[1] This makes it all the more important that a robust test be developed to deal with allegations of a trial tax; the possible imposition of a trial tax in one case threatens the right to a jury trial of every defendant in every county in the State.

However fundamental, though, the right to a jury trial is not absolute. It must be balanced against competing interests, such as a strong societal desire for guilty defendants to accept responsibility, a need to preserve scarce judicial resources, and a desire to safeguard victims of serious crimes from being further traumatized at trial. That so many cases are resolved before going in front of a jury could be seen as a signal that not every case requires a trial. And accepting responsibility is so important that, in federal sentencing, the United States Sentencing Commission guidelines instruct a judge to "decrease the offense level by [two] levels" if a defendant truly and clearly demonstrates repentance. United States Sentencing Commission, *Guidelines Manual*, §3E1.1 (Nov. 2015).

Defendants may nonetheless have valid reasons to take a case to trial instead of accepting a plea bargain. In a case where a defendant was subjected to an illegal search, with the evidence recovered in that search being the sole basis of the State's case, the defendant may want to take her case to trial to preserve the suppression issues, even

[1] *See, e.g.,* David A. Bowers, Jr., *Community and the Trial Penalty: An Analysis from 40 Jurisdictions*, 14 Justice Professional 67 2001; *see also* Candace McCoy, *Plea Bargaining as Coercion: The Trial Penalty and Plea Bargaining Reform*, 50 Crim. L.Q. 67 2005.

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though she is responsible for the criminal behavior. Also, and more frequently, trials turn on levels of culpability rather than absolute guilt or innocence. Homicides can be murder or manslaughter; assaults result in harm or serious physical harm, drug cases often turn on the weight of the contraband rather than its possession, etc. Here, the defendant was charged with burglary, a complicated statute with different degrees of culpability for facts like having a weapon, the likelihood that the victim is present, or whether the trespass was accompanied by force, stealth, or deception. It would be valid for a defendant to go to trial to challenge one of these sub-components of burglary on the basis that he is not as culpable as the State alleges.

Malik Rahab's case is a nice frame for the trial-tax issue. Rahab was offered a sentence of three years in prison in exchange for a guilty plea, and for various reasons declined to take the plea bargain, instead choosing to exercise his Sixth Amendment right to trial. The trial judge did not participate in plea negotiations, but she did warn Rahab that his decision to face a jury could end negatively. "[T]he Court does not look highly on cases where people don't take responsibility and accept that they did something wrong if they're found guilty," the trial judge said. "You understand that? Meaning it would probably be more." After Rahab was found guilty at trial, the trial judge made good her threat and sentenced Rahab to six years in prison, twice the amount he was offered in the plea deal he rejected. The record further demonstrates that the trial court judge, whose comments the First District opinion correctly categorized as "not necessary" and "inappropriate," was originally planning on sentencing Rahab to the maximum duration of eight years in prison. *Rahab*, p. 3; (Snt. Tr. 468:21-22.) But because the sentencing judge (i) did not participate in plea negotiations and (ii) gave reasons for the sentence

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beyond pure annoyance, the First District found no unconstitutional trial tax. Applying either *Stafford* or *Scalf* permitted this conclusion.

This is untenable to the jury-trial right. This Court should use this case to supply a better test. The OACDL offers one below.

LAW AND ARGUMENT

PROPOSED PROPOSITION OF LAW

When a sentence given at trial is harsher than the sentence a defendant would have been given had he accepted a plea bargain, the presumption of a trial tax exists. The presumption can be overcome based on a totality of the circumstances test that demonstrates by clear-and-convincing evidence that the sentencing judge had objective evidence to justify the increased sentence.

Federal courts have noted (and lamented) a dearth of case law regarding trial taxes. "[F]ederal courts have examined this issue but seldom," one court wrote, "perhaps because trial judges rarely announce a reliance upon this consideration." *Scott v. United States*, 491 F.2d 264, 267 (D.C. Dist. 1969). The *Scott* court also importantly noted that a trial is a "fact-finding engine, not a drama of contrition in which a prejudged defendant is expected to knit up his lacerated bonds to society." *Id.* at 270. To rely upon a defendant's refusal of a plea deal or refusal to confess is inappropriate, federal courts have held in the few cases that have touched on this issue. *See, e.g., United States v. Luca*, 499 F.2d 922, 927 (5th Cir. 1974) ("the court erred by predicating the length of these sentences on whether the defendants had confessed their crimes."); *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960) ("we reject the theory that a person may be punished because in good faith he defends himself when charged with a crime, even though his effort proves unsuccessful."). In fact, only the Tenth Circuit has deviated from this, stating that "[w]hile the court's action in denying probation because of the defendant's continued

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assertion of his innocence may seem severe, the matter is one entirely for the trial court." *Williams v. United States*, 273 F.2d 469, 470 (10th Cir. 1959).

But case law is ample and developed about vindictive sentencing. The United States Supreme Court addressed the issue in *Alabama v. Smith*, holding that when a sentence is harsher after an appeal, there is a presumption of vindictiveness that must be rebutted by "objective information . . . justifying the increased sentence." 490 U.S. 794, 798 (1989) (internal citations and quotations omitted). Ohio courts have also addressed this similarly, holding that a presumption of vindictiveness arises upon resentencing that must be "overcome by a satisfactory explanation for the harsher sentence." *State v. Bradley*, 184 Ohio App.3d 443, 445, 921 N.E.2d 304 (2009). That explanation must be objective and provide sufficient justification for the harsher sentence beyond a simple statement that a harsher sentence is merited. *Id.* If no such explanation is given, the sentence is presumed to be vindictive and is a violation of the defendant's rights. *Id.*

I. This Court should look to case law about vindictive sentencing as a guide in developing a test for how to address an allegation of a trial tax.

Because the law surrounding vindictive sentencing is more developed, it serves as a useful guide in creating a stronger test for how to address an allegation of a trial tax. Both issues, at their core, are about ensuring that defendants are unencumbered in exercising their rights to trial or appeal.

Thus, this Court should adopt a test that creates a presumption of a trial tax when the sentence is greater than the terms of a plea bargain. That presumption can be overcome where the totality of the circumstances establishes, by clear-and-convincing evidence, that the trial court relied upon objective evidence to support the harsher sentence. That objective evidence could include the lack of any colorable defense or

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tactic combined with a reluctance to accept responsibility, new evidence, unknown at plea bargaining, that makes the offense more culpable, or a gratuitous and unnecessary traumatization of the victim. Again, this evidence must be specific to the case and not generalized, and must be clearly and convincingly present in the record.

II. Sentencing defendants more harshly for exercising their Sixth Amendment right to trial runs contrary to public policy set forth in H.B. 86, 129th Gen. Assembl. (Ohio 2011).

On a very practical level, trial taxes put more people in jail for longer periods of time. This goes entirely against the legislative intent behind House Bill 86, passed by the General Assembly and signed into law by Governor Kasich in 2011. Ohio's prison population is too high, and as a result of this the legislature passed a law to attempt to reduce that population. With that law, modest reductions have been made. In 2011, when the law was passed, Ohio's prison population was over 50,000 people—thirty-one percent over the capacity for which the prisons were designed.[2] The goal in passing the law was to reduce the population of Ohio's prisons to 46,925 by 2014.[3] But it's not working: the prison population is set to hit a record high as soon as July of this year.[4] Viewed from afar, there is a definite attempt to reduce the prison population, which must necessarily be accomplished by not meting out excessive sentences. But this macro-level attempt at reform is undone at the local level when individual judges hand out sentences that go too far and that are therefore contrary to this public policy.

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[2] Alan Johnson, *Sentencing-overhaul law to reduce Ohio's prison population*, COLUMBUS DISPATCH, June 30, 2011, accessed at http://www.dispatch.com/content/stories/local/2011/06/30/sentencing-overhaul-to-reduce-prison-population.html#

[3] *Id.*

[4] Alan Johnson, *Ohio prison population could hit record high this summer*, COLUMBUS DISPATCH, May 7, 2016, accessed at http://www.dispatch.com/content/stories/local/2016/05/06/ohio-prison-population-could-hit-record-high-this-summer.html

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Applying said public policy to the instant case, placing Rahab behind bars for three additional years because he refused to accept a plea bargain and annoyed the sentencing judge in doing so will cost Ohio taxpayers an additional $66,000. The added cost of his extended incarceration outweighs any additional cost incurred by presenting his case to a jury, and sending another person to prison for more time is an example of a local impediment to the legislature's prerogative to make statewide public policy.

CONCLUSION

The allegation of a trial tax should be met with a presumption that the sentence imposed is unconstitutional. Overcoming the presumption of unconstitutionality must be possible, but it must not be as facile as the First District has proposed in its judgement entry. There are many legal and policy reasons for this, as explained in detail above. The opinion below should be reversed and remanded to apply the OACDL's proposed test.

To the Court, the instant Amicus Brief is

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