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On Seeking Controlling Law and Re-Seeking Death under Section 2929.06 of the Ohio Revised Code

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ON SEEKING CONTROLLING LAW AND RE-SEEKING DEATH UNDER SECTION 2929.06 OF THE OHIO REVISED CODE

MARGERY B. KOOSED

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I. INTRODUCTION

Imagine yourself charged with a capital crime, on trial for your life. You have been convicted and the jury is now hearing evidence in the penalty phase to determine your fate. You are relying on your counsel, the judge, even the prosecutor, to assure you a fair trial. Now imagine that no one in the courtroom knows all of the correct sentencing options. Although the law allows the jury to sentence you to death or to one of several life terms, including life imprisonment without parole, no one knows that life without parole (hereinafter LWOP) is an option.

Although this scenario seems implausible, this is just the circumstance Charles Marshall faced in a Cleveland courtroom in the fall of 1997.2 When this fateful error was uncovered, the trial judge ordered an untested cure for this mistake: Charles Marshall would receive a new penalty phase trial before a new jury.3 A brand new amendment to Ohio Revised Code 2929.06,4 now allowed a different resentencing approach appeared in Ohio's initial capital punishment statutory scheme, effective October 1981.5

Ultimately Charles Marshall's case would not be the vehicle for testing this new provision. The original trial judge recused himself and the replacement judge granted a defense motion for an entirely new trial of guilt/innocence. Order of December 12,
This article explores and analyzes the two-pronged legal dilemma that confronted the Marshall court: in Ohio, finding the correct sentencing law is often difficult; and a recent amendment to the resentencing portion of that law, S.B. 258, destroys the efficiency that was characteristic of Ohio's previous resentencing framework. Consequently, Part II of this article examines the facts and holding of State v. Marshall and suggests that finding the applicable law must be simplified. Practitioner handbooks are often confusing and incomplete, in part as the Ohio legislature generates an ever-changing body of law. Justice and the lives of human beings demand remedial steps to avert this problem. Part III describes the evolution of Ohio's resentencing law and the recent adoption of Senate Bill 258, amending Ohio Revised Code section 2929.06. Following a brief description of Ohio's bifurcated capital litigation scheme, Part IV asserts that jury penalty retrials pursuant to Senate Bill 258 will lead to more challenges in the courts, may well waste limited judicial and criminal justice system resources, may prove unworkable in practice, and are not likely to serve the interests of justice. And after concluding with the assertion that Senate Bill 258 is unwise, unworkable, and better left alone, Part V highlights the quite illusory benefits of re-seeking death, while noting that vengeful actions often work against healing.

II. STATE v. MARSHALL: FINDING THE APPLICABLE LAW IS DIFFICULT

A. Facts and Holding

The robbery and slaying of pizza shop owner Rocco Buccieri on December 22, 1996 prompted the prosecution of Charles Marshall for aggravated murder with aggravating circumstances, a crime punishable by death in Ohio. On September 19, 1997, the jury found Marshall guilty of aggravated murder with

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1997, State v. Marshall, No. CR 349190 (Ohio C.P. 1997). The State appealed, but the appeal was dismissed. As of this writing, no trial date has been set.

6The United States Supreme Court requires that capital trials have two phases: the trial phase, where guilt or innocence is determined; and the penalty phase, where the sentence is determined (if one has been convicted of a capital crime). See e.g., Sumner v. Shuman, 483 U.S. 66 (1987) (noting that bifurcating a trial into a guilt-determination phase and a penalty phase tends to prevent the concerns relevant at one phase from infecting jury deliberations during the other).

7Charles Marshall was indicted March 31, 1997. State v. Marshall, No. CR 349190 (Ohio C.P. 1997). See Ohio REV. CODE ANN. § 2903.01(B) (Anderson 1997)(effective 1981)(defining, in pertinent part, aggravated murder as "purposely causing the death of another while committing or attempting to commit . . . aggravated robbery"). Section 2929.04(A) sets forth the statutory aggravating circumstances, one of which must be proven to make the death penalty an eligible sentencing option. See also §§ 2941.14(B) and 2929.03. The aggravating circumstance charged here was "the offense was committed while the offender was committing . . . aggravated robbery . . . , and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design." Section 2929.04(A)(7).
aggravating circumstances. His case then proceeded to a penalty phase before the same jury pursuant to section 2929.03 of the Ohio Revised Code. At the penalty phase, the trial judge instructed the jury that their sentencing options were life imprisonment with two different parole eligibility options or death. On October 9, 1997, the jury returned a death sentence recommendation. The following day, the trial judge sentenced Charles Marshall to death.

On October 11, 1997, it was discovered through an unusual chain of events that the judge had grievously erred in instructing the jury regarding the sentencing options. In fact, everyone—the prosecutors, defense counsel, and

8The penalty phase began on October 6, 1997. State v. Marshall, No. CR 349190 (Ohio C.P. 1997). Ohio law provides for a penalty trial before the trial jury and the trial judge, or before the three-judge panel that tried the defendant pursuant to a jury waiver. See OHIO REV. CODE ANN. § 2929.03(C)(2)(b) (Anderson 1997). See also section 2929.03(D)(directing the jury or panel of judges to weigh aggravating circumstances against mitigating factors).

9See Marshall, No. CR 349190. The judge outlined Marshall’s imprisonment options as: (1) life imprisonment with the possibility of parole after serving twenty full years; or (2) life imprisonment with parole eligibility after serving thirty full years.

10OHIO REV. CODE ANN. § 2929.03 (D)(2), (3) (Anderson 1997). Ohio trial juries may recommend the death sentence, but this is not binding. Id. The judge makes the ultimate determination of whether death will be imposed after an independent weighing of aggravating and mitigating circumstances. Id. However, if the jury recommends one of the life terms (or is unable to unanimously recommend a death sentence), the jury’s life recommendation is binding on the trial judge. Id. Ohio Revised Code § 2929.03(D)(3) requires an independent assessment of the evidence by the trial judge, before death can be imposed. Id. “If the court finds, by proof beyond a reasonable doubt . . . that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, it shall impose sentence of death on the offender . . . . absent such a finding by the court, the court shall impose one of the [life sentences].” Id.; see also § 2929.03(F) (requiring the trial court prepare a separate opinion identifying the reasons for the decision); but see State v. Fox, 631 N.E.2d 124 (1994) (finding trial court’s failure to specify reasons is not reversible error as this can be cured by the appellate court’s own independent review).

11Marshall, No. CR 349190. News reports relate that the trial judge had “already told jurors that he [would] impose their finding, whatever it might be.” James Ewinger, Pizza Shop Murder Jury Seeks Death Sentence, THE PLAIN DEALER, Oct. 10, 1997 at 1-B, available in 1997 WL 6618003. This is troubling, as the trial judge is supposed to make an independent determination. See § 2929.03(D)(3). Yet, this is not unusual. Ohio trial judges have over-riden jury death sentence recommendations only four times. See State v. Drewey Kiser, No. 82-CR-69 (Ross C.P. 1983); State v. Alonzo Wright, No. CR-211379 (Cuyahoga C.P. 1987); State v. Eddie Robertson, No. 88-CR-3179 (Montgomery Ct. C. Pl. 1989); State v. John Parsons, No. 88-CR-279 (Franklin Ct. C. Pl. 1990).

12James Ewinger & James F. McCarty, Judge Erred in Directions to Pizza-Shop Killing Jury, PLAIN DEALER, Oct. 11, 1997, at 1-A, available in 1997 WL 6618206. The judge’s error in instructing the jury was inadvertently discovered when a juror read the morning paper and found that the judge’s jury instructions were not accurately reported. Id. The article indicated that the jury had been given the option of sentencing Marshall to life without parole. Id. However, the judge never gave that instruction. Id. As the reporter was not in court when the instructions were given, he merely assumed, based on his knowledge of the applicable law, that the judge presented life without parole as an
the judge—failed to discover the correct penalties available to the jury.13 Although LWOP was a sentencing option which could have conceivably spared the life of Charles Marshall, no one knew it.

How could such a fundamental mistake occur? Didn’t anyone bother to look up the law? The answer to the latter question it appears is, yes.14 Everyone thought that the effective date of the LWOP amendment to section 2929.03 was January 1, 1997.15 Thus no one thought LWOP was a required option.16

B. Handbooks: Handy, but Often Dangerously Incomplete

State v. Marshall illustrates a current problem in administering justice in Ohio: determining the applicable law is often times difficult and confusing. The Ohio legislature has been churning out legislation in the criminal arena at what seems an unprecedented rate. Very few lawyers or judges study the actual bills which produce a given law. Most litigants tend to rely on standard reference manuals to conduct day-to-day litigation. Publications such as The Ohio Criminal Law Handbook purportedly provide all the relevant statutes and rules in one convenient volume.17 Litigators use these handbooks to find the applicable law. However, these publications offer limited guidance, because they generally fail to explain how a law was changed by a referenced bill. Consequently, the applicable law often remains a mystery.

The participants in State v. Marshall properly looked to section 2929.03 of the Ohio Revised Code to find the appropriate sentencing options, but they erroneously determined that those options were not available alternatives to the death sentence in this case.18 In perusing the legislative history contained available sentencing option. Id. When the juror called the reporter to tell him that the article was in error, the reporter checked his own references, and determined that life without parole was indeed an eligible punishment. Id. The reporter then contacted the trial judge. Id.

13 Id.


15 Id. See also supra note 12.

16 LWOP was added to the existing capital sentencing structure by Senate Bill 2 and Senate Bill 269. See Senate Bill 2, 1995 Ohio Laws 146; Senate Bill 269, 1995 Ohio Laws 146.

17 The Preface to the seventeenth edition of The Ohio Criminal Law Handbook states that it “collects in a compact format” the law for use by judges and attorneys and is “designed to be a basic guide to Ohio criminal law.” Preface to THE OHIO CRIMINAL LAW HANDBOOK (Amy B. Brann ed., Anderson 17th ed. 1997). The text also states that “more detailed treatment of criminal law issues can be found” in a volume devoted to practice and procedure by the same publisher. Id. The most recent edition likely available to the judge was the seventeenth, which included laws amended through November 4, 1996.

18 THE OHIO CRIMINAL LAW HANDBOOK, supra note 14, at 240 (listing the options as LWOP, a life sentence with thirty, or a life sentence with twenty-five years, before parole
in *The Criminal Law Handbook*, the participants in *State v. Marshall* found a string of numbers, dates and abbreviations followed by the cryptic statement "the effective date is set by section 3 of HB [House Bill] 180." Section 3 of House Bill 180 shows January 1, 1997, as the effective date for section 2929.03. Having no instruction specifying the changes made by the listed bills, the participants in *State v. Marshall* understandably believed that the LWOP sentencing option emerged from House Bill 180 and was not applicable to a crime which took place on December 22, 1996.

Unfortunately for Charles Marshall, the *Handbook* did not explain that House Bill 180, the most recent amendment of section 2929.03 applying to crimes committed after January 1, 1997, dealt only with sexual predator and sexual motivation crimes which were not at issue in this case. Moreover, the *Handbook* did not clearly explain that the life with no parole eligibility for twenty-five years provision was in Senate Bill 269, enacted much later than Senate Bill 2 but also effective on July 1, 1996. Because the crime was committed after July 1, 1996, the effective date of Senate Bill 2 and Senate Bill 269, the penalties actually available under section 2929.03 were life imprisonment with parole eligibility after serving twenty-five (not twenty) full years, life imprisonment with parole eligibility after serving thirty full years, LWOP, or death.

Interestingly, the *Handbook* publisher did try to give some guidance with respect to the new sentencing law. The publisher restated language from the concluding paragraphs of Senate Bill 2 and Senate Bill 269. Although the

19"History: 134 v 511 (Eff 1-1-74); 139 v S1 (Eff 10-19-81); 146 v S4 (Eff 9-21-95); 146 v 2 (Eff 7-1-96); 146 v S269 (Eff 7-1-96); 146 H180 (Eff 1-1-97)." *The Ohio Criminal Law Handbook*, supra note 14, at 241.

20Id.

21Id.

22See Senate Bill 2, 1995 Ohio Laws 146; Senate Bill 269, 1995 Ohio Laws 146.

23Id.

24Id. Marshall's lawyers requested that the judge provide an instruction regarding the no-parole option. Ewinger, supra note 12. Although the judge declined, no one knew that the old law—the law he applied to the case—had expired July 1, 1996, with the enactment of Senate Bill 2. Id. The request for the no-parole option apparently came about due to ongoing litigation over whether Ohio defendants were entitled to the beneficial changes brought about by the new sentencing laws if their crimes were committed before the effective date of July 1, 1996, but their sentencing occurred after the effective date of such statute(s). *State v. Marshall*, No. CR 349190 (Ohio C.P. 1997).

Marshall's counsel sought such retroactive application of Senate Bill 2, believing that January 1, 1997 was the effective date. Id. In *State v. Rush*, 697 N.E.2d 634 (1998), the Ohio Supreme Court ruled that Senate Bill 2's beneficial provisions would not apply to crimes committed before July 1, 1996.


26Id.
publisher failed to provide a detailed explanation of how these bills changed the law, a small clue at the very end of these technical paragraphs stated, "the number [of years for parole eligibility] changed from twenty to twenty-five years by SB 269, effective 7-1-96." 27 Despite this small tip, no reference told when life without parole took effect. 28

One imagines that the publishers of the Handbook hoped judges and lawyers would confirm the effective dates of changes in the law and would: (1) read the legislative bills as each comes out and track the bills to fruition with reference to bill numbers; 29 (2) become a member of a professional association which tracks legislation and sends out updates which will then be reviewed and retained; 30 (3) go to a law library and consult the session laws; 31 (4) go online to the Ohio law databases, such as Gongwer, or Hannah Online through OhioLINK; 32 (5) attend a continuing legal education session on each bill and review new materials to retrace the legislative history; 33 (6) purchase and consult an annotated code volume which provides an extensive legislative

27 Id.

28 Interestingly, the same Handbook edition made an error in the Table of Penalties at page A-1. THE OHIO CRIMINAL LAW HANDBOOK (Amy B. Brann ed., Anderson 17th ed. 1996). The Table lists the sentences for post-July 1, 1996 aggravated murder with specifications as death, LWOP, life with 30 or life with 20 years. Note, the new law changed "life with 20 years" to "life with 25." Id.

29 As co-chair of the legislative subcommittee of the Ohio State Bar Association's Criminal Justice Committee, the author reads every proposed bill relating to criminal law, at least in its as-initially-proposed stage. She then abstracts it and provides recommendations to the Committee, which then may be forwarded to the State Bar Government Affairs Office. Thus, the author has some rudimentary means to track possible changes in the law.

30 The Ohio Prosecuting Attorneys Association tracks legislation in its newsletter; the Ohio Association of Criminal Defense Lawyers occasionally covers some bills in its publication, The Vindicator; and the Ohio State Bar Association Report has a "Legis-letter" column which identifies bills by number and summarizes those proposed, passed, and/or signed by the Governor. The Report is available on-line to State Bar members at <http://www.ohiobar.org>

31 See Banks-Baldwin's Ohio Legislative Service.

32 Ohio legislation is available on-line at <http://www.state.oh.us>. Proposed legislation is also now available at <http://www.gongwer-oh.com>. Hannah Online is available through OhioLINK at <http://www.ohiolink.edu>. The law is also available on Westlaw or Lexis.

33 Only comprehensive bills tend to be the subject of a full-blown continuing legal education seminar (hereinafter CLE) in Ohio, although smaller amendments should make their way into larger overview-type CLE programs. Given the comprehensive nature of the changes in sentencing wrought by Senate Bill 2 and Senate Bill 269, there were day-long CLE's all around the state. The lectures and the materials did briefly allude to the changes made in capital sentencing. But their focus was the non-capital felony sentencing area, particularly the moves to "Truth-in-Sentencing," definite sentences, and sentencing guidelines. Obviously, these CLE's did little to improve Charles Marshall's plight.
history;34 or (7) consult another more particularized text on Ohio sentencing law.35 Realistically, however, few judges or practitioners have the time or energy to track all of the legislative changes they may encounter. Although judges and litigants have law clerks to assist in such efforts, follow-through is sometimes faulty. Thus, handbooks are relied upon, but this presents problems.

Although handbooks were developed to simplify the process of finding the law, these limited texts should not be so condensed that they fail to provide needed guidance. Publishers of handbooks need to be more attentive to the needs of their users. More comprehensive notes are needed to describe legislative changes. If this cannot be done without sacrificing the convenience of a single text, then there should be some prominent cross references, or clear directions, that another source should be consulted. Otherwise, tragic mistakes can and will be made.

C. Lawmakers Change the Law Too Often, with Too Little Explanation

Accessing the correct law is made more difficult because the Ohio General Assembly keeps changing it. Section 2929.03 of the Ohio Revised Code, for example, was changed four times within a sixteen-month period.36 The legislature appears to be changing the criminal law so quickly that publishers and litigants can not keep up. Further, the legislature is changing the law in piecemeal fashion.37 As legislative changes have become more frequent, the General Assembly's failure to provide sufficient legislative histories remains a serious problem.38 Although legislative history guides litigators in all fields of

34Banks-Baldwin publishes the Ohio Revised Code with extensive legislative histories. However, the legislative history provided in a recent version of Page's Ohio Revised Code Annotated for title 29 (November 1996) appears to be less comprehensive. These differences in coverage point to a known danger in finding Ohio law: tracking legislative changes is risky.

35See LEWIS KATZ & JUDGE BURT GRIFFIN, OHIO FELONY SENTENCING LAW (Banks-Baldwin 1997). This text does relate the proper sentencing provisions and their effective dates. Id. at 9.

36See supra note 19.

37Both the Ohio Sentencing Commission and the Ohio State Bar Association have urged the legislature to make revisions in a more comprehensive manner, and to allow the law to settle before further amendments are attempted. See letter from Kathleen B. Burke, then-President of the Ohio State Bar Association, to then-Senate President Stanley Aronoff (Feb. 22, 1994) (on file with the Cleveland State Law Review). See also Kathleen B. Burke, Ohio in Downhill Crime Race, PLAIN DEALER, Feb. 22, 1994, at 7-B, available in 1994 WL 7229151.

38Perhaps the legislature would be more sensitive to the litigator's need to find the correct law if there were more lawyers serving as legislators. For commentary suggesting that more lawyers are needed in the legislature as they know the areas where the law needs fixing and can capably draft such legislation, see Alan E. Norris, Bench Conference, 2 O.L.W. 843 (1998). However, the number of lawyer-legislators is dwindling. Of 132 legislators, there are but nine lawyers in the Ohio Senate and twenty-
law, the 1974 comprehensive Criminal Code Revision\textsuperscript{39} marked the last time the legislature made such an extended contribution to the operation of the criminal justice code.

Ultimately, the responsibility for avoiding errors in finding the applicable law is a shared one. Litigators, judges, law publishers, and the Ohio legislature must devote their attention to this problem, as lives are at stake.

III. RESENTENCING RELIEF: REMEDYING PENALTY PHASE ERROR

What should happen when, as in Charles Marshall’s case, the penalty phase jury is grievously misled? Vacating or reversing the death sentence is a necessary response. But what then? Where do we go from there? The remainder of this article analyzes the concept of seeking death in Ohio following the reversal of a jury’s death-sentencing decision, as stated in new Ohio Revised Code section 2929.06. Ultimately this article concludes that this law is unwise, unworkable, and better left alone.

A. The Prior Law: No Resentencing to Death in Jury-Tried Cases

In 1987 and 1988, the Ohio Supreme Court construed section 2929.06 of the Ohio Revised Code which dealt with resentencing in capital cases. In \textit{State v. Penix},\textsuperscript{40} and a subsequent case, \textit{State v. Davis},\textsuperscript{41} the court concluded that two forms of resentencing relief existed when errors in the penalty phase were uncovered on appeal.\textsuperscript{42} The form of resentencing relief depended upon

\textsuperscript{39} \textit{See Ohio Criminal Sentencing Comm’n, A Plan for Felony Sentencing in Ohio} (1993). Guidance respecting the changes later made in Senate Bill 2 and Senate Bill 269 is helpful. But its authoritative value may be limited, for the legislature used it as a source of relevant proposals, rather than an explanation of changes made. The earlier 1974 Legislative Service Commission Notes do appear in the \textit{Ohio Criminal Law Handbook} for litigants and judges. Brann, \textit{supra} note 14. Indeed, the 1974 Committee Comments to House Bill 511 appear in the \textit{Ohio Criminal Law Handbook}. Id. While it is helpful to have this guidance into what the 1974 legislature tried to do, there is lingering uncertainty whether the Comments even pertain to the law now in effect. Some more current legislative memoranda can be obtained on-line or by phone request. Hannah Online, accessible through OhioLINK can be used to obtain recent bills. See <http://www.ohiolink.edu>. Or one can access the Ohio government website <http://www.state.oh.us> and/or the Legislative Service Committee directly for bill analyses of bills introduced in the current and last session of the General Assembly. See <http://www.lsc.state.oh.us/distribution/>. For analyses of older bills, or to get analyses of new bills without use of the web, call the Legislative Service Commission Library at (614) 466-2241.

\textsuperscript{40} \textit{State v. Penix}, 513 N.E.2d 744 (Ohio 1987).

\textsuperscript{41} \textit{State v. Davis}, 528 N.E.2d 925 (Ohio 1988).

\textsuperscript{42} \textit{Penix}, 513 N.E.2d at 744.
whether the defendant had been tried by a jury or a panel of three judges. The Penix court determined that, where a capital defendant had exercised his right to a trial by jury, a reversal of the penalty phase would lead to a resentencing hearing before the trial court judge because there was no statutory provision for a resentencing jury. The trial judge would be limited to resentencing on one of the life sentences. The court later held in Davis, where a capital defendant had waived his right to a trial in the trial phase and appeared before a three-judge court pursuant to section 2929.03 of the Ohio Revised Code, a resentencing hearing would be conducted before those judges where death would be an option. Thus, as interpreted in Penix, Ohio Revised Code section 2929.03 permitted the imposition of a death sentence only upon the recommendation of the same fact-finder that tried the defendant in the trial phase.

43Davis, 528 N.E.2d at 925.
44The right to jury sentencing is provided in Ohio Rev. Code Ann. § 2929.03 (Anderson 1997). The federal constitution does not guarantee such a right. See Spaziano v. Florida, 468 U.S. 447 (1984). But most states do provide for jury involvement in capital sentencing. See Stephen Gillers, Deciding Who Dies, 129 U. PA. L. Rev. 1 (1980). Ohio has often, but not always, involved the jury in capital sentencing. Death was a mandatory punishment for first degree murder from 1815 to 1898, then in 1898 the trial jury was given the discretion to accord mercy and a life sentence. See section 12400 of the General Code (1898). See also Hugo Adam Bedau, The Death Penalty in America 43 (1964). When discretionary sentencing was put into question by the United States Supreme Court in Furman v. Georgia, 408 U.S. 238 (1972), and Ohio's then sentencing practice was deemed unconstitutional, the 1974 legislature responded by writing a law to exclude the jury from sentencing. See § 2929.03. When the United States Supreme Court declared this judge-sentencing statute unconstitutional for failing to allow adequate consideration of mitigating circumstances, see Lockett v. Ohio, 438 U.S. 586 (1978), the Ohio legislature returned to jury involvement in capital sentencing with the current version of § 2929.03 (enacted in 1981). The jury now recommends a death sentence. A death sentence recommendation is subject to independent review by the trial judge and appellate judges. See §§ 2929.03(D), 2929.05(A). But a jury decision recommending life is final and binding on the trial judge. See § 2929.03(D)(2).
45Penix, 513 N.E.2d at 744. See also, Ohio Rev. Code Ann. § 2929.06(A) (Anderson 1997).
46Penix, 513 N.E.2d at 744. The options respecting possible life sentences vary depending on the date of the offense. Those who were tried by a jury for a capital crime committed before July 1, 1996 could receive a life imprisonment with parole eligibility after serving twenty full years or after serving thirty full years. By operation of Senate Bill 2 and Senate Bill 269, for capital crimes committed after July 1, 1996, the life terms could be life imprisonment, LWOP, life imprisonment with parole eligibility after serving thirty full years, or life imprisonment after serving twenty-five full years. By operation of House Bill 180, for capital crimes committed after January 1, 1997, if the offender was also convicted of or plead guilty to a sexual motivation specification and a sexually violent predator specification, only life imprisonment without parole would be available on remand.
48Penix, 513 N.E.2d at 744. The court found that Ohio Revised Code section 2929.06 made no provision for a second jury to make a recommendation on the death penalty.
B. The Impetus to Change the Resentencing Scheme

Pursuant to the law in place at the time Penix was decided, resentencing hearings conducted before the trial judge following the reversal of a jury death sentence were modest proceedings with predictable results. The defendant was present in most hearings. Little or no witness testimony was sought or heard regarding the matter of the sentence. Argument by counsel was permitted. At the conclusion of the hearing, the trial judge generally imposed the maximum of the life sentences available by law.

This resentencing scheme functioned efficiently and effectively for nearly a decade. Then the scheme came under attack by Ohio Attorney General Betty Montgomery. Politics caused this turn-about. The Attorney General placed

49 A full mitigation hearing within the meaning of section 2929.03 of the Ohio Revised Code was not required. See State v. Denson, 586 N.E.2d 1125 (Ohio Ct. App. 1990); State v. Penix, 586 N.E.2d 127 (Ohio Ct. App. 1989). There have been six cases in which jury-recommended death sentences were reversed by the Ohio Supreme Court due to penalty phase error and the cause remanded for resentencing. See State v. Penix, 513 N.E.2d 744 (1987); State v. Zuranski, 513 N.E.2d 753 (1987); State v. Thompson, 514 N.E.2d 407 (1987); State v. Denson, 531 N.E.2d 674 (1988); State v. Huertas, 553 N.E.2d 1058 (1990); State v. Brooks, 661 N.E.2d 1030 (1996). In addition, there have been three cases where the death sentence was found inappropriate under § 2929.05(A), and the case remanded for imposition of one of the life terms. See State v. Lawrence, 541 N.E.2d 451 (Ohio 1989); State v. Watson, 572 N.E.2d 97 (Ohio 1991); State v. Claytor, 574 N.E.2d 472 (Ohio 1991). Interesting to note, from 1985 to October 26, 1997, the Ohio Supreme Court reviewed 151 capital sentence cases. In addition, the federal courts have reversed two Ohio jury death sentences. See Scott v. Anderson, 958 F.Supp. 330 (N.D. Ohio 1998); Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995). Another may soon be reversed. See Mapes v. Coyle, Nos. 96-4189, 96-4196, 1999 WL 155917 (6th Cir. March 24, 1999) (ordering an evidentiary hearing).

50 Penix, 586 N.E.2d at 127.

51 Anecdotal knowledge from conversations over the years with defense lawyers representing resentenced persons. See also State v. Penix, 586 N.E.2d 127 (Ohio Ct. App. 1989).

52 Penix, 586 N.E.2d at 127.

53 Even before a life without parole sentence became available for crimes committed after July 1, 1996, resentencing hearings yielded its functional equivalent. A sentence of life imprisonment without parole eligibility for twenty or thirty years, combined with the consecutive sentences imposed for accompanying crimes, and with the diminished life expectancy of those in prison, effectively ensured the defendant would die a natural death in prison.
significant emphasis on being tough on crime, and she revealed her support of
the death penalty during her campaign for that office. But after she was
elected, the United States Sixth Circuit Court of Appeals reversed the death
sentence in the first Ohio capital case to reach that court in federal habeas
proceedings.

In Glenn v. Tate the Sixth Circuit found that the defendant’s trial counsel
was ineffective in the penalty phase for failing to investigate and present
mitigating evidence of the defendant’s global brain damage and social
history. The court also criticized the defense for allowing prejudicial
information to reach the jury. As there was a reasonable probability that the
jury would have returned a life verdict had defense counsel performed
competently, the court granted relief to Glenn, who had killed a police officer.

The court’s decision tarnished the Attorney General’s "tough on crime"
stance. Setting out to mitigate the political damage, the Attorney General
focused her attention on overturning the Sixth Circuit decision. When that
failed, she set out to overturn the statute that precluded the State from seeking
death again. She successfully urged the legislature to rewrite Ohio Revised
Code section 2929.06, and this led eventually to the passing of Senate Bill 258.

C. The Change - Senate Bill 258 Rewrites Section 2929.06 of the
Ohio Revised Code

Senate Bill 258 rewrote section 2929.06 for crimes committed after its effective
date of October 16, 1996. The revision allows the prosecution to re-seek death
for resentencing proceedings "[where] the sentence of death that [was] imposed
upon an offender is vacated upon appeal because of error that occurred in the
sentencing phase of the trial."
Senate Bill 258 provides but a cursory description of the trier of fact in the resentencing proceedings it creates. "The trial court that sentenced the offender shall conduct a new hearing to resentence the offender. If the offender was tried by a jury, the trial court shall impanel a new jury for the hearing."  

Senate Bill 258 also codifies the practice that resentencings were available if the defendant had waived a jury and been tried by a three-judge panel: the "original panel, or if necessary, a new panel of three judges" conducts the resentencing. Senate Bill 258 simply directs the court to follow the procedure set forth in section 2929.03(D) as to the content of the resentencing proceeding.

D. Senate Bill 258 and the Marshall Case

State v. Marshall was to be the first Ohio case to test Senate Bill 258, but ultimately it failed to explore the inherent problems within the new law. Mr. Marshall's case never went to appeal. Rather, it was the trial judge who vacated the death sentence and ordered a new penalty phase pursuant to Senate Bill 258. Thereafter, the judge immediately recused himself from the case, as he had already announced a judgment of death on Mr. Marshall. Apparently, the judge was concerned about the appearance of partiality at the new proceeding. After the judge recused himself, the defense filed a motion for new trial based on various errors and on newly discovered evidence alleged

reasonable doubt, or if the statutory aggravating circumstances did not outweigh the mitigating factors by proof beyond a reasonable doubt, or if the sentence was excessive when compared to that imposed in similar cases, or if the defendant was not eighteen years of age at the time of the offense. See OHIO REV. CODE ANN. § 2929.05 (Anderson 1997). When the death sentence is reversed as inappropriate on any of these grounds, a life sentence is imposed on remand. That was the law and remains the law. Senate Bill 258 simply describes a new category of reversals of the death sentence, a category which allows death to be re-sought.

64 See State v. Davis, 528 N.E.2d 925 (Ohio 1988).
65 § 2929.06(A)(2).
66 Id. Again, that provision speaks to the "trial jury" and "trial judge." See § 2929.03(D). Thus, melding the two statutes may yet be awkward.
67 Indeed, there is no final judgment from which an appeal may be taken in a capital case until the trial judge has prepared and filed a sentencing opinion setting forth the reasons for his sentence. See § 2929.03(F). This had not been filed when the trial judge ordered a new penalty proceeding.
69 Id. at B-1.
70 Id.
71 Id. at B-4.
to affect the trial phase of the proceedings. The defense also filed objections to the state's ability to re-seek death at the resentencing proceeding. After a hearing, the newly assigned trial judge granted the motion for a new trial. While the Marshall case will not go forward as a penalty-only retrial, it still presents an opportunity to examine the operation of Senate Bill 258.

E. Senate Bill 258's Accrual Point

Section 2929.06(A)(2) of the Ohio Revised Code and indeed all of the statute appears to apply only "if the sentence of death that is imposed upon an offender is vacated upon appeal." Mr. Marshall's case had not proceeded to appeal. Rather, it was the trial judge who vacated the death sentence. An argument may well be made that without a reversal on appeal, there is no statutory authority to conduct a resentencing proceeding where death is an option. The defense may potently argue the absence of statutory authority prompts a re-invocation and re-application of the Penix rationale (that no resentencing structure exists in this context and one cannot create it from whole cloth), thus mandating a life sentence.

F. Double Jeopardy and Penalty Phase Mistrials

Furthermore, vacating Mr. Marshall's death sentence and ordering a new penalty phase where death was an option appears to raise double jeopardy concerns. The judge's actions may properly be viewed as akin to a mistrial after the penalty phase. If one approaches the situation as a mistrial, a question arises whether there was manifest necessity to dismiss the jury and order a new proceeding. If no manifest necessity is present, then double jeopardy would preclude seeking death in a further proceeding, as the defendant had a right to have his fate determined by that jury. If the jurors recommended a life sentence for Charles Marshall, this would have been bind-

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72 Order of December 12, 1997, Cuyahoga County Common Pleas Court, Case No. CR 349190. These motions were initially filed during trial.

73 Motions and briefs were filed on behalf of both parties in the month prior to the order that was dated December 12, 1997. See State v. Marshall, No. CR 349190 (Ohio C.P. 1997).

74 Id. The state appealed to the court of appeals, but the appeal was dismissed. As of this writing, the new trial has not yet begun.

75 See supra note 67.

76 Defendants may not be twice placed in jeopardy of life or limb. See U.S. CONST. amend. V; OHIO CONST. art. I, § 10.


78 Id.
ing on the trial judge, and a life sentence would have been imposed. There is a real likelihood in the Marshall case that, had the jurors been properly instructed on life without parole, a life sentence would have been the sentence recommended. The defense may argue, therefore, that this jury should have been allowed to reconsider the sentence with proper instructions and that a mistrial was not necessary.

Senate Bill 258's apparent limitation to sentences vacated on appeal may be a concern as other cases arise where penalty phase errors are quickly recognized and promptly addressed by trial judges. Litigants and judges should also be sensitive to the double jeopardy issues that may arise in trying to remedy these errors at the trial level.

IV. PROBLEMS AND COSTS GENERATED BY THE NEW RESENTENCING OPTION IN SENATE BILL 258

Following a brief description of Ohio's bifurcation scheme, the remainder of this article suggests that jury penalty retrials will lead to more challenges in the courts, may well waste limited judicial and criminal justice system resources, may prove unworkable in practice, and are not likely to serve the interests of

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79 See OHIO REV. CODE ANN. § 2929.03(D)(2) (Anderson 1997). "While a recommendation by the jury that the death penalty be imposed must be reviewed and re-weighed by the trial and appellate courts, a jury decision to impose life imprisonment is final." Penix, 513 N.E.2d 744.

80 See Ewinger, supra note 12. It appears the jurors discussed LWOP and some favored it, though the option was not given them. Id.

81 The fact that the trial judge had clearly approved the jury's death recommendation could be viewed as a possible taint on their reconsideration. But the defense was not given an opportunity to inquire whether the jurors could put this aside. In double jeopardy mistrial cases involving manifest necessity, prosecutors sometimes urge that the defense consented to a mistrial and double jeopardy concerns are waived. But, for consent to be found, defense counsel must have been provided the opportunity to "retain primary control over the course to be followed in the event of error." United States v. Dinitz, 424 U.S. 600, 609 (1976). Courts expect "the circumstances [to] positively indicate a willingness to acquiesce in the mistrial order." Weston v. Kernan, 50 F.3d 633, 637 (9th Cir. 1995). Courts will consider whether some mechanism should have been used to allow the first jury the opportunity to stay on the case. See, e.g., United States v. Gaytan, 115 F.3d 737 (7th Cir. 1997). Whether the defense was provided an opportunity to explore returning the original jury to a position where it could deliberate on LWOP and whether this could have resulted in a fair sentencing decision are lingering issues in this case. It should be noted that the defense motion to preclude death on double jeopardy grounds was denied at the same time the new trial motion was granted on December 12, 1997. Under present Ohio law, the defense can not pursue an interlocutory appeal of the denial of a double jeopardy motion to dismiss. Wenzel v. Enright, 623 N.E.2d 69 (Ohio 1993). It may be possible to pursue federal habeas corpus relief in the pre-trial period to protect the interest in not being re-tried that is the core nature of the double jeopardy protection. See Gilliam v. Foster, 75 F.3d 881 (4th Cir. 1996). As of this writing, federal habeas review has not been sought in Charles Marshall's case. If the new trial should proceed with death as an option, and if death is ultimately imposed, the double jeopardy issue may well be raised in appellate and/or later federal habeas proceedings.
justice. A prosecutor attempting to assure justice and make efficient use of judicial resources would be well-advised to simply decline the legislature’s recent invitation to seek death again.

A. Ohio’s Bifurcation Scheme

Unlike other states which conduct resentencing proceedings, Ohio has a legislative framework that requires all aggravating circumstances or factors be pled and proven at the trial phase of the case. These aggravating factors are later weighed against mitigating factors at the time of sentencing in the penalty phase. In other words, Ohio bifurcates the finding and weighing of aggravating circumstances. These are found in the trial phase, but used in the penalty phase.

Ohio’s bifurcation scheme has many advantages. Ohio’s system is simple, as the death-eligibility issue(s) and the aggravating circumstance(s) needed for sentence determinations are the same and need only be proven once. State witnesses need not testify again at the penalty phase, as is true in other jurisdictions where no findings of aggravation are made until the penalty phase.


83 Ohio REV. CODE ANN. § 2941.14 (Anderson 1997); § 2929.03(C)(2)(a).

84 § 2929.03(D).

85 Other states have both the aggravating and mitigating factors to be weighed and proven at the trial phase. While two other states allow aggravating or special circumstances to be proven at the trial phase, both of these states allow additional factors or circumstances in aggravation to be proven and weighed at the penalty phase. See ALA. CODE § 13A-5-40 (1995); CAL. PENAL CODE § 190.2 (West 1997). See also Lindsey v. Smith, 820 F.2d 1137 (11th Cir. 1987), cert. den. 489 U.S. 1059 (1989) (allowing judge to consider non-statutory aggravating factors); CAL. PENAL CODE § 190.3 (West 1997) (allowing sentence to consider any matter in aggravation).

86 Thomas M. Flemming, Annotation, Sufficiency of Evidence, for Purposes of Death Penalty, to Establish Statutory Aggravating Circumstance That Defendant Was Previously Convicted of or Committed Other Violent Offense, Had History of Violent Conduct, Posed Threat to Society, and the Like—Post-Gregg Cases, 66 A.L.R. 4TH 838 (1989); Thomas M. Flemming, Annotation, Sufficiency of Evidence, for Purposes of Death Penalty, to Establish Statutory
distinct. The Ohio procedure facilitates reliability in the determination of the aggravating factors, as the resources and adversarial tools utilized are the same as those used at trial on other issues. Aggravating factors are subject to the standard notice, discovery, disclosure, submission of evidence, jury instructions, deliberation and verdict practice. Furthermore, appellate review is more effective and efficient, because the determination of specific aggravating factors narrows the issues. Therefore, in Ohio aggravating factors are more reliably determined and the penalty phase is simplified and stream-lined.

Ohio's bifurcation scheme provides substantial benefits in every capital prosecution, and the 1981 legislature was wise to adopt it. The General Assembly wisely refrained from attempting to establish a jury penalty retrial practice to deal with the rare incidents of penalty phase errors, as the benefits Ohio regularly receives from its bifurcation scheme outweigh the desire to recapture the rare penalty reversal case. But the recent adoption of Senate Bill 258 threatens the reliability and efficient operation of this framework and must be carefully assessed.

B. Problems with the New Resentencing Statute

Jury penalty retrials may well jeopardize the constitutional framework so carefully crafted by the 1981 legislature. The Eighth Amendment and Fourteenth Amendments to the federal constitution, and comparable provisions under Article I, Sections 9, 10 and 16 of the Ohio constitution, protect Ohio citizens from cruel and unusual punishments and ensure that the State

Aggravating Circumstance That Murder Was Committed to Avoid Arrest or Prosecution, to Effect Escape From Custody, to Hinder Governmental Function or Enforcement of Law, and the Like—Post-Gregg Cases, 64 A.L.R. 4TH 755 (1989); Thomas M. Flemming, Annotation, Sufficiency of Evidence, for Purposes of Death Penalty, to Establish Statutory Aggravating Circumstance That in Committing Murder, Defendant Created Risk of Death or Injury to More Than One Person, Many Persons, and the Like—Post-Gregg Cases, 64 A.L.R. 4TH 837 (1989). The state often calls no witnesses at the penalty phase in Ohio, as their side of the case is already proven. The state may call witnesses to rebut the defense claim that a mitigating factor is present, State v. DePew, 528 N.E.2d 542 (Ohio 1989), but even this is uncommon.

87The parties have a clearer understanding of what the penalty phase will entail as there has been early disclosure of aggravating factors and these have been proven.

88The indictment in an Ohio capital murder case must contain at least one of the specified aggravating circumstances contained in section 2929.04 (A)(1-9) of the Ohio Revised Code or the case will not proceed as a capital case. See § 2941.14. The aggravating factors are subject to bills of particulars and discovery provisions in rule 7(E) and 16 of the Ohio Rules of Criminal Procedure. For an example of the difficulties that can be presented in jurisdictions which do not abide by notice requirements respecting the intent to seek death, see Lankford v. Idaho, 500 U.S. 110 (1991).
must adhere to the mandates of due process and equal protection when engaged in the taking of human life. As demonstrated below, Senate Bill 258 may fail these constitutional requirements.

1. Due Process and Aggravating Factors

Because Senate Bill 258 permits a new sentencing jury to determine the defendant's sentence during a penalty retrial, and because the new jury must determine the significance or weight to be accorded aggravating factors that were found at trial, a penalty retrial under Senate Bill 258 creates constitutional questions. The death penalty process must be reliable and fair,

89 See Gregg v. Georgia, 428 U.S. 153 (1976); State v. Jenkins, 473 N.E.2d 264 (Ohio 1984). To comport with the Eighth and Fourteenth Amendments, there must be "a measured, consistent application" of the death penalty assuring "fairness to the accused." Eddings v. Oklahoma, 455 U.S. 104, 111 (1982). Death sentences which are arbitrarily or capriciously imposed, due to freakish or infrequent imposition, bias, or discriminatory application, cannot be upheld under the Eighth and Fourteenth Amendments. See Furman v. Georgia, 408 U.S. 238, 309-10 (1976). Appellate review is expected to "serve as a check against the random and arbitrary imposition of the death penalty," as a "sentence which is imposed under the influence of passion, prejudice, or any other arbitrary factor" cannot be tolerated. Gregg, 428 U.S. at 204, 206. The requirement of aggravating factors is another check on arbitrariness. "To avoid [the] constitutional flaw of [vagueness and overbreadth under the Eighth Amendment], a jurisdiction must specify aggravating factors which "genuinely narrow the class of persons eligible for the death penalty" and "reasonably justify the imposition of a more severe sentence on a defendant as compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1980). Aggravating factors serve as eligibility criteria for the death sentence, channel discretion, and are a means of rationally distinguishing those cases in which life is imposed and those in which the death sentence may be imposed. Godfrey v. Georgia, 446 U.S. 420, 433 (1980). Furthermore, individualized sentencing is required. "In a separate penalty proceeding, the sentencer must be permitted to consider as a mitigating factor any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978). Mandatory death sentencing, which automatically imposes the death penalty for commission of a particular crime, is unconstitutional as it fails to look to the individual offender and offense. Woodson v. North Carolina, 428 U.S. 280, 304 n.7 (1976). The nature and circumstances of the offense, or simply the inadequacy of the crime or the evidence to call for death, are relevant in mitigation. A sentence's opposition to a particular aggravating circumstance is also a legitimate consideration for imposing a life sentence, as it represents "factors which may call for a less severe penalty." Lockett, 438 U.S. at 605. Further, a "qualitative difference" exists between death and other forms of punishment, as death is unique in its severity and irrevocability." Woodson, 428 U.S. at 305. This quality of irrevocability has meant more process is due the capital defendant, and the system requires a correspondingly "greater degree of reliability in the determination of guilt or innocence and in the determination of the appropriate punishment." Lockett, 438 U.S. at 604-5; Beck v. Alabama, 447 U.S. 625, 638 (1980).

90 Ohio Revised Code section 2929.03(D)(1) states "[t]he prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing are sufficient to outweigh the factors in mitigation of the imposition of the death sentence."
Section 2929.06 of the Ohio Revised Code

and it must yield consistent results. Reliability and fairness cannot be achieved, however, if the new jury is left to speculate about the aggravating factors and the weight to be accorded them. Thus, because the evidence supporting the aggravating factors is not before the new jury, it is not in a position to fairly weigh the previously determined aggravating factors against the about-to-be presented mitigating circumstances. One side of the scale is missing. And to make matters worse, the possible solutions to this problem are not trouble-free.

In order to come close to a fair and reliable proceeding, the state would have to present the aggravating factors by re-introducing evidence. But introducing impermissible evidence could spoil the new penalty phase. By law, the Ohio jury’s consideration of evidence is strictly limited. Aggravating factors must be specified in the indictment, proven beyond a reasonable doubt, and non-duplicative of one another. Facts beyond the proven statutory aggravating circumstance, including the nature and circumstances of the crime, are not properly part of the evidence in aggravation.

91 Tuilaepa v. California, 512 U.S. 967, 973 (1994) (noting that procedures must “minimize the risk of wholly arbitrary and capricious action”).

92 It is not enough that a different jury previously determined that an aggravating factor existed. This does not answer whether the aggravating factors are sufficient to call for the death sentence, or sufficient to outweigh the particular mitigating circumstances presented in a given case. For example, in State v. Lawrence, 541 N.E.2d 451 (Ohio 1989), the Ohio Supreme Court found the death sentence was inappropriate where a commonly-charged aggravating circumstance that had been proven at the trial phase was found to be outweighed by the mitigating factors in the case. See Lockett v. Ohio, 438 U.S. 586, 605 (1978).

93 The prosecutor in the Charles Marshall case recognized this, and announced his intent to re-call each of the twenty witnesses who had testified in the trial phase of the case for the then-expected jury penalty retrial. See James Ewinger, New Jury Ordered to Decide Sentence Pizzeria Murder Conviction Stands, PLAIN DEALER, Oct. 15, 1997, at B-4, available in 1997 WL 6619045. As the Marshall jury penalty retrial was to follow on the heels of the initial trial, the Marshall prosecutor could at least expect his witnesses to be available.

94 The Ohio Supreme Court has made it clear that consideration must attend only the aggravating factors identified in section 2929.04(A) of the Ohio Revised Code. See State v. Johnson, 494 N.E.2d 1061 (Ohio 1986). Section 2929.03(D)(1) of the Ohio Revised Code limits the sentencer’s consideration of aggravating circumstances to "any evidence raised at trial that is relevant to the aggravating circumstances the offender was found guilty of committing" and the presentation of testimony and other evidence to that which is “relevant to the nature and circumstances of the aggravating circumstances the offender was found guilty of committing.” Id.


96 Consideration of non-statutory aggravating circumstances is not permitted in Ohio. See State v. Johnson, 494 N.E.2d 1061 (Ohio 1986); State v. Jenkins, 473 N.E.2d 264 (Ohio 1984); State v. Cooey, 544 N.E.2d 895 (Ohio 1989); c.f., Barclay v. Florida, 463 U.S. 939 (1983). The crime of aggravated murder itself, for example, is not an aggravating circumstance, and is not to be weighed. State v. Henderson, 528 N.E.2d 1237 (Ohio 1989). Only the accompanying features of the aggravated murder, as stated in section...
argument on impermissible matter would risk a reversal of the penalty phase.97 A prosecutor would therefore have to tip-toe with extreme caution in trying to present information to a new sentencing jury.

Furthermore as the state would have to re-introduce much, if not all, of the evidence respecting aggravating factors, the defense would be entitled to cross-examine the state's witnesses.98 Thus, a new penalty retrial would not only demand testimony from witnesses speaking to the issue of mitigation. It would also demand the re-introduction of trial evidence to allow the new jury to weigh aggravating factors against all mitigating circumstance evidence presented.

2. Lack of Timeliness: Justice Delayed Is Justice Denied

In addition to the problems outlined above, another potential problem emerges. When penalty reversals are declared on appeal (the accrual point of Senate Bill 258), the jury penalty retrial takes place years later. The lapse of time between the trial and the resentencing, and the possibility of loss of witnesses to both sides, presents significant questions about the fairness and reliability of this effort.

2929.04(A) of the Ohio Revised Code, are to be weighed in determining sentence. The Henderson court explained, "[t]he balance is not between the mitigating factors and the intentional killing of an innocent person. What the jury is balancing are any mitigating factors present in the case against the separate and distinct factors, termed 'aggravating circumstances,' enumerated in R.C. 2929.04(A)(1) through [(9)]." Henderson, 528 N.E.2d at 1237. Further, the nature and circumstances of the crime "may only enter into the statutory weighing process on the side of mitigation." State v. Wogensahl, 662 N.E.2d 311 (Ohio 1996).

97 All death sentences obtained by jury re-sentencing are reviewed in the Ohio Supreme Court, pursuant to Ohio Revised Code section 2929.05. The intermediate appellate courts have no jurisdiction to hear death-sentence cases on direct appeal if the crime was committed after January 1, 1995. See § 2929.05; see also State v. Smith, 684 N.E.2d 688 (Ohio 1997). If the death sentence is upheld in the Ohio Supreme Court, review would be pursued in the United States Supreme Court on certiorari, in the state courts through state post-conviction relief pursuant to Ohio Revised Code section 2953.21, and in the federal courts through federal habeas relief pursuant to 28 U.S.C. §§ 2241-2254.

98 Due process requires that the defendant have an opportunity to deny, rebut, or explain the state's presentation of evidence respecting aggravating circumstances. See Gardner v. Florida, 430 U.S. 349 (1977); Skipper v. South Carolina, 476 U.S. 1 (1986). The defense has a right to cross-examine witnesses and present rebuttal respecting the presence and weight to be given aggravating factor, just as had been their right at the trial phase. See Simmons v. South Carolina, 512 U.S. 154 (1994). First-time penalty phases have not generally engaged this need, because the weight of the aggravation is ascertained through the trial phase testimony, and the defense simply presents its evidence in mitigation and the prosecution is provided an opportunity for rebuttal of the evidence in mitigation. See State v. DePew, 528 N.E.2d 542 (Ohio 1989).
3. Lack of Fairness

In the past, there have been instances when defense counsel have sought a less conviction-prone jury by challenging the prosecution’s practice of death-qualifying a jury prior to trial.\(^9\) Their efforts were rejected,\(^1\) allegedly to conserve resources.\(^2\) By adopting Senate Bill 258, however, the legislature has now acknowledged that a second jury is resource-possible. Ohio courts may yet recognize the inherent injustice in supporting the State’s demands (made in the name of conserving resources) for a conviction-prone and less representative jury the first time around, and then granting the State the option of getting a new jury (and expending even greater resources), where a serious error (often of their making) occurs during the penalty phase. Given a defendant’s right to a fair, impartial, and representative jury, future defense arguments will undoubtedly assert that the scales of justice should not be tipped so dramatically in the State’s favor.

\(^9\)See State v. Jenkins, 473 N.E.2d 264 (Ohio 1984); State v. Mapes, 484 N.E.2d 140 (Ohio 1985). Death-qualifying is the process of removing those jurors who have views against the death penalty that would substantially impair their ability to impose a death sentence. Wainwright v. Witt, 469 U.S. 412 (1985); cf., Ohio Rev. Code Ann. § 2945.25 (C) (Anderson 1997) (noting that a cause challenge based on death penalty views is to meet a standard similar to that in the earlier case of Witherspoon v. Illinois, 391 U.S. 510 (1968)). Witherspoon held that a prospective juror must make it unmistakably clear that he will automatically vote against death. Witt, 469 U.S. at 412. Challenges to "death-qualification" have been based on empirical studies which suggest jurors who survive the selection process will be more conviction-prone and less representative of the community. See studies cited in Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983); aff'd, 758 F.2d 226 (8th Cir. 1985), reversed, Lockhart v. McCree, 476 U.S. 162 (1986). Although the United States Supreme Court questioned these studies, the Court assumed that the death-qualification process resulted in a jury more likely to convict the defendant. Lockhart, 476 U.S. at 173. The Court also concluded that the process reduced the number of women jurors and African-American jurors, jurors who were less likely to believe the prosecution's witnesses. Id.

4. Another Problem: New Jurors Will Not Harbor Residual Doubts About Guilt

Aside from the potential constitutional problems created by seating a new jury, there is the concern that a new jury will not carry residual or lingering doubts about choosing a guilty verdict. When refusing to require a separate death-qualified jury, the United States Supreme Court suggested that a single jury assured that a defendant was able to have the sentencing jury consider its residual doubts about guilt when deciding punishment. A jury that had not heard the trial phase could not accord the defendant the benefit of lingering doubts about guilt which may make the death sentence inappropriate. Until recently, this was considered a meaningful, relevant mitigating factor in Ohio, and it should be so again. Conducting a jury penalty retrial with a new jury

102 Residual doubts about guilt may be kept within the jury’s deliberations, or may on occasion surface. In a recent Cleveland case, during the period between the trial and penalty phases, a jury foreman told the prosecutor and a detective about his doubts regarding the verdict. See James Ewinger, Jury Meets to Decide Sentence in Two Killings, PLAIN DEALER, June 19, 1998, at 3-B. The foreman’s doubts apparently arose from witness credibility problems. Id. The prosecutor asked the judge to remove the foreman or dismiss the entire jury and allow the penalty phase to proceed before the trial judge alone. The judge denied both requests. Id. The penalty phase proceeded, and after several days of deliberation, the jury was unable to unanimously agree on a death sentence. See James Ewinger, Jury Unable to Agree on Sentence For Slayings, PLAIN DEALER, June 21, 1998, at 2-B. This resulted in a life sentence, by operation of section 2929.03(D) of the Ohio Revised Code. See OHIO REV. CODE ANN. § 2929.03(D) (Anderson 1997).

103 Lockhart, 476 U.S. at 181.


105 In State v. McGuire, 686 N.E.2d 1112 (1997), the Ohio Supreme Court reversed its earlier acceptance of residual doubt as a relevant mitigating factor under section 2929.04(B) of the Ohio Revised Code. The court held that Franklin v. Lyaugh, 487 U.S. 164 (1987), did not require states to allow a defendant the opportunity to argue residual doubt. McGuire, 686 N.E.2d at 1122-23. This holding appears to overstate the Franklin decision, which dealt merely with the narrowness of jury instructions. See Koosed, supra note 104. Franklin did not deal with the ability of defense counsel to argue residual doubt. Id. Further, it is illogical to suggest that such doubt is not germane to whether the offender should be sentenced to death. See McGuire, 686 N.E.2d at 1124 (Pfeiffer, J., and Moyer, J., concurring). Indeed, the Model Penal Code section 210.6 actually precludes death if the evidence fails to foreclose all doubt about guilt. See MODEL PENAL CODE § 210.6 (1962). See also Margery B. Koosed, Some Perspectives on the Possible Impact of Diminished Federal Review of Ohio Death Sentences, 19 CAP. U. LAW REV. 695, 777 (1990).
who has not heard the trial evidence raises the issue of whether one can reconstruct those doubts that may have been present in the minds of the original jury. Thus, in order to provide a fair determination on such mitigation, it should be necessary to present trial evidence that addressed the question of whether the defendant was assuredly guilty of aggravated murder, not merely whether the defendant was guilty of the aggravating circumstances.

5. The Costs of Retrials Under Senate Bill 258

Assuming that the prosecution and defense could somehow reconstruct the case to meet all of these concerns, the retrial process will be very costly.

a. Retrying the Entire Case

Senate Bill 258 retrials may well fail to achieve the degree of reliability and consistency necessary in a capital case. Jury penalty retrials create the substantial risk that aggravating factors will be the subject of mere speculation, that the ability to consider relevant mitigating factors will be undeniably impaired, and that arbitrary inconsistent decision-making will result. Thus, all indications point to only one conceivable remedy for the risks generated by the new law: the entire case must be retried.

The necessity to essentially retry the entire trial phase case, as well as the penalty phase, raises serious public policy concerns for prosecutors and the courts. When one considers the time needed for jury selection, the re-introduction of evidence, argument, instructions, and deliberations, one quickly realizes that the expense of retrying these cases will be enormous, as capital cases consume more judicial, prosecutorial, and defense resources than any other class of cases.106

106See Death Penalty Infor. Ctr., Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty (Oct. 1992). See also Coyne & Entzeroth, Capital Punishment and the Judicial Process 81-85 (1994). While no comparison of the specifics of retrial cost as compared to life imprisonment are available, several articles compare the costs of the death penalty and life imprisonment generally. See, e.g., D. Von Drehle, Bottom Line: Life in Prison One-Sixth as Expensive, Miami Herald, July 10, 1988, at 12 A (noting that the State of Florida is spending an average $3.2 million per execution); C. Hoppe, Executions Cost Texas Millions, Dallas Morning News, March 8, 1992, at 1A (noting that, in Texas, a death penalty conviction costs an average of $2.3 million dollars, about three times the cost of imprisoning someone for forty years in a single cell at the highest security level).
b. Compounding the Costs—When the New Jury Decides Against Death

Prosecutors need to consider whether they will be successful in re-seeking death. As demonstrated above, the costs are heavy, a fact which is compounded when one considers that a death sentence may not be achieved. Prosecutors must remember that to reverse a death sentence, significant error must have occurred. These cases are not reversed on technicalities—they are reversed when there is a genuine concern that had the case been tried properly, the result would have been otherwise.107 Furthermore, to elect a new death sentence the new jury must unanimously recommend death.108 Retrying these cases and seeking a death sentence may well waste resources for, inherent in the reversal, is the recognition that a life sentence would be likely in any retrial.109

c. More Appeals at More Cost

The resource costs of Senate Bill 258 do not end with the jury penalty retrial itself. Any death sentence imposed will be subject to automatic appeal in the Ohio Supreme Court, and likely post-conviction remedies in the state and federal courts if not overturned in the direct appeal process.110 And not only will jury penalty retrials lead to more appeals of death sentences, but it will likely increase the number of cases in which further appeals are sought relating to trial phase issues.111

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107This means there is at least a reasonable possibility that the life sentence would have been imposed if the case had been properly presented. See Chapman v. California, 386 U.S. 18 (1967). It may mean an even greater likelihood of a life sentence if relief has been granted due to ineffective assistance of counsel or the failure to disclose evidence, or for some other harmful error in a federal habeas proceeding. See Strickland v. Washington, 466 U.S. 668 (1984); United States v. Bagley 473 U.S. 667 (1985); Brecht v. Abrahamson 507 U.S. 619 (1992).


109While there was no appellate reversal in the Charles Marshall trial, some jurors spoke to the likelihood of a life sentence if the penalty trial had been properly conducted. See Ewinger, supra note 12. The jurors discussed life without parole and wondered why that option had not been provided, and two stated the option "could have swayed a few people" and "might have changed some people's opinions," as "we just wanted to make sure that he never got out of prison." Id. If this jury, which the defense asserted was exposed to highly prejudicial information in the trial phase, was wary of imposing death if LWOP were available as a punishment, what likelihood is there of a death sentence on a retrial before a new jury? Several Cuyahoga County juries have recently chosen life without parole over death, concluding this met society's need for punishment. See James Ewinger, Defendant Accepts Life Sentence, Plain Dealer, May 17, 1997, at 2-B, available in 1997 WL 6594533; James Ewinger, Restaurant Worker's Killer, 18 Sentenced to Life, No Parole, Plain Dealer, Dec. 19, 1996, at 7-B, available in 1996 WL 14688662.

110See supra text accompanying note 98.

111Under the prior law, inmates who received a reversal of the death sentence have refrained from raising possibly significant issues relating to their trials in the appeals processes, because of the assurance of a life sentence. These defendants saved the State of Ohio the time and expense of costly appeals and possible retrials by giving up their right to appeal trial phase issues. Under the previous resentencing law, if the defendant...
Given the speculative benefits of re-seeking death, retrying the entire case will consume scarce resources that would be better spent on, among other things, reducing the burgeoning caseloads of Ohio trial courts. Because the eventual costs of re-seeking death will depend on how many jury retrials and penalty phase reversals occur, it is difficult to determine how much the enactment of Senate Bill 258 will cost the Ohio citizenry. Of course, even one jury penalty retrial will represent a greater expenditure of resources than that imposed under the prior law, where all one had was a modest hearing to impose a life sentence.

There is a further potential cost of Senate Bill 258: systemic integrity. The previous no-retrial-to-death practice serves justice as it likely yielded better tried cases the first time. Penalty phase errors are often preventable, and a no-retrial to death practice encourages their avoidance. To the extent the state seeks to avoid the risk of reversal and invests more resources and is more attentive to the reliable and fair conduct of the trial in the first instance, we all benefit. Senate Bill 258’s message that retrials will be conducted may well encourage litigants and courts to be lax in trying cases.

who won a penalty reversal gave up his attempts to overturn his conviction, he was assured a life sentence, State v. Penix, 513 N.E.2d 744 (Ohio 1987). If, on the other hand, the defendant who won a penalty reversal continued his efforts to overturn his conviction and was successful at overturning it, death was a possible punishment when the entire case was re-tried. Former section 2929.06 of the Ohio Revised Code foreclosed a new death sentence when the penalty was reversed, but there was/is no statutory bar to re-seeking death if the conviction is reversed. Id. Inmates who won a reversal of the death sentence gave up their appeals on trial phase issues to get a life sentence. See, e.g., State v. Denson, 531 N.E.2d 674 (Ohio 1988) (waiving appeal of trial phase issues). The old law thus saved resources. If prosecutors adopt a practice of re-seeking death through jury penalty retrials under Senate Bill 258, these defense appeals on trial phase issues will surely be resumed, for there is no difference in the risk presented to the defendant in appealing or not-appealing.

While less than ten cases have been reversed in the courts thus far, the numbers of retrials may grow as Ohio cases move into the federal system, where statistics show relief has been ordered in as many as forty-one percent of capital cases. See Michael D. Hintze, "Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After Furman," 24 Colum. Hum. Rts. L. Rev. 395, 410 (1993). There is also the possibility that Ohio appellate courts may reverse more cases if a resentencing process is available. The previous practice of foreclosing a death sentence may have dissuaded some justices from recognizing prejudicial error requiring reversal. Elected justices who see error may be unwilling to remedy it if it means taking the political heat of having foreclosed a death sentence. The current threats on the independence of the judiciary, and the apparent adverse impact reversing death sentences have sometimes had on judges’ ability to retain their position, may well be undermining the very integrity of the rule of law. See Stephen B. Bright & Patrick J. Keenan, "Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases," 75 B.U. L. Rev. 759 (1995). While this may be speculation, it does appear that reversal rates in other state courts with resentencing proceedings are higher, often ranging from twenty to thirty percent. See Mark Curriden, The Changing Faces of Southern Courts, 79 ABA J. 68, 70 (June 1993).
V. Conclusion

The Charles Marshall prosecution highlights a two-pronged legal dilemma. First, the case reminds us that litigants must diligently seek out the correct law in Ohio and be wary of relying on handbooks, or other condensed formulations of the law. Second, though the case fell short of testing the viability of Senate Bill 258, Marshall forecasts the unfairness, unreliability, and waste of resources which will arise should Ohio prosecutors employ the new law and choose to re-seek death before a new sentencing jury.

A cost-benefit analysis of Senate Bill 258 promises heavy losses when prosecutors re-seek death—and little, if any, benefit. By declining to use the jury penalty retrial practice now available in Ohio, a prosecutor avoids the costly expenditures of wasted time, court costs, prosecutorial and defense expenses, concerns about witness and evidence availability, and the complex problems of reliably recreating the trial phase of the proceeding.113

Finally, the Marshall case demonstrates the illusory benefits of re-seeking death. For his other accompanying crimes, Charles Marshall has been sentenced to a total of 159 years.114 Even if he had been re-sentenced to death, what will society have gained? According to the laws of nature, Mr. Marshall will die in prison. As the community is amply protected, deterrence achieved, and retribution satisfied by the sustained incarceration of a defendant, what compelling interest exists in making the defendant’s death an unnatural one? Some may suggest that a retrial should go forth as a gesture of deference to the family.115 But ours is a system of justice that kills in the name of all Ohio citizens. The system is not designed to exact private vengeance; and the penalty phase

113Prosecutors in other states have wisely refrained from pursuing death again following a penalty phase reversal in order to avoid a drain on limited trial and appellate resources, and because justice was amply served by a life sentence. See New Jersey v. Purnell, 708 A.2d 1196 (N.J. 1998). Unbelievably, some states have conducted two and three penalty phases at an enormous cost to taxpayers. See State v. Sanderson, 488 S.E.2d 133 (N.C. 1997) (employing three sentencing proceedings); McNair v. State, 706 So.2d 828 (Ala. 1997) (employing two jury sentencing hearings and four judicial sentencing orders).


115Id. The Buccieri family has indicated it will attend the retrial for justice’s sake. Id. Whether this means they favor, a death sentence, notwithstanding the 159 year prison term Mr. Marshall faces, is unclear. But it is likely the prosecutors have discussed this with them. See Andrew L. Sonner, Asking For the Death Penalty, CRIMINAL JUSTICE, Fall 1986, at 32, 34-35 (asserting that almost all prosecutors consider the wishes of the victim or the victim’s family when making critical decisions).
of a criminal trial is not a "substitute therapeutic environment."116 Tragically, vengeful decisions often work against healing.117

116 See Vivian Berger, Payne & Suffering—A Personal Reflection and a Victim-Centered Critique, 20 FLA. ST. L. REV. 21 (1992). The penalty phase process may well "disappoint the victim's family, by turning on them, ignoring them, or at best providing only partial relief." Id. "For reluctant participants in the penalty process, the need to dwell once more on their loss can only lead to renewed hurt and impede the healing process." Id. at 57.

117 Consider the words of the father of one victim of the Oklahoma City bombing:

   To me the death penalty is vengeance, and vengeance doesn't really help anyone in the healing process. Of course, our first reaction is to strike back. But if we permit ourselves to think through our feelings, we might get to a different place . . . . Since I've started expressing my views, I've been surprised by the number of people who tell me they feel the same way but were afraid to say anything for fear of offending those, like myself, who were most affected by the bombing . . . . [Killing the defendant] doesn't make any difference. The bottom line is that my little kid's not coming back. I'll have to deal with this till the day I die. Killing McVeigh will not change that[,] . . . .[D]ead men don't talk. If he is in prison long enough, he may tell us what his thought processes were, why he did what he did, and who else was involved. I want to hear that information.
