IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	)	**SUPREME COURT CASE NO. _____**
Appellant,	)	
vs.	)	
MICHAEL SWAZEY, JR.,	)	**ON APPEAL FROM THE OHIO NINTH DISTRICT COURT OF APPEALS, CASE NO. 21CA0031-M**
Appellee.	)	

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT THE STATE OF OHIO

S. FORREST THOMPSON
Prosecuting Attorney
Medina County, Ohio

KIMBERLY L. STOUT-SHERRER (#0081735)
P.O. Box 271
Wadsworth, Ohio 44282
(330) 485-3204
(330) 722-4888 [Fax]

By: **VINCENT V. VIGLUICCI (#0084873)**
Assistant Prosecuting Attorney
Medina County Prosecutor's Office
60 Public Square, 3rd Floor
Medina, Ohio 44256
(330) 723-9536
(330) 723-9532 [Fax]

COUNSEL FOR APPELLANT STATE OF OHIO

COUNSEL FOR APPELLEE MICHAEL SWAZEY, JR.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case involves a felony and is a case of great public interest. It is axiomatic that there is no such thing as summary judgment in a criminal case. Unfortunately, the Ninth District Court of Appeals has brought its district, and by extension the State of Ohio, much closer to that becoming a reality, as it has dangerously expanded the definition of what may be decided in a motion to dismiss an indictment in a criminal case. This Court should reaffirm the principle that unless it can be determined from the face of an indictment that it is legally defective, the time to test the sufficiency of the State of Ohio's case is at the Crim.R. 29 stage of the trial. If any factual evidence about the case is required for the defendant to sustain his motion to dismiss, that is an issue that must be raised at trial.

In this case the Ninth District relied on this Court's decision in *State v. Palmer*, 131 Ohio St.3d 278, 2012-Ohio-580, but that case is highly distinguishable from the instant case. In *Palmer*, it could be determined by simply looking at the face of the indictment that it was defective. In that case the State of Ohio was attempting to apply the Adam Walsh Act retroactively when this Court had just held the previous year that it could not do so. Therefore, it was a simple matter of looking at the date of the charged offense and seeing that it was prior to the effective date of the Adam Walsh Act. That is not so in this felony nonsupport case. In this case, the trial court could not even determine that the indictment's three counts were for arrearage only without looking outside the face of the indictment to non-public documents from the Domestic Relations Court. Even after doing that, the trial court would have then had to determine whether R.C. § 2919.21(B) as amended February 11, 2019 applies retroactively and, if so, whether it is an unconstitutional Ex Post Facto law. Neither of those questions have been decided by this Court or any other court in Ohio. The Ninth District Court of Appeals has now erroneously asked the trial court to do so without Swazey

having to bear the risk of taking his case to trial. The Ninth District's holding will embolden Defendants to constantly file motions to dismiss indictments while being allowed to introduce factual evidence in a pre-trial hearing without having to risk going to trial.

Furthermore, Swazey pled guilty in this case. In so doing, he waived any nonjurisdictional defects in the case. The Ninth District erroneously held that "constitutional" arguments are not waived when a defendant pleads guilty, citing a decision of this Court which makes no such holding. The sentence cited by the Ninth District appears to be dicta with no bearing on the holding of the case in question and with no intention of setting out a bright-line rule. In any event, the primary issue raised in Swazey's motion to dismiss is not a constitutional issue, but an issue of statutory interpretation. Swazey's primary argument is that amended R.C. § 2919.21(B) does not apply retroactively, and if he is correct, the question of whether amended R.C. § 2919.21(B) is an unconstitutional Ex Post Facto law does not even come into play.

STATEMENT OF THE CASE AND FACTS

The Ohio Ninth District Court of Appeals accurately summarized the facts and procedural history of this case as follows:

> In December 2019, Mr. Swazey was indicted by a grand jury on three counts of nonsupport of dependents in violation of R.C. § 2919.21(B), all felonies of the fourth degree. The counts alleged that Mr. Swazey "abandon[ed], or fail[ed] to provide support * * * as established by a court order to K.S. (DOB: 03/13/1996)[.]" Each count of the indictment encompassed a different time period: Count 1 from November 1, 2013 through October 31, 2015; Count 2 from November 1, 2015 through October 31, 2017; and Count 3 from November 1, 2017 through October 31, 2019.
>
> Mr. Swazey entered a plea of not guilty and filed a motion to dismiss. In that motion, Mr. Swazey argued that the current version of R.C. 2919.21(B) was unconstitutional as applied to him because his child support order terminated on July 14, 2014, and, therefore, the charges of the indictment violated the Ex Post Facto Clause of the United States Constitution and the Ohio Constitution. The State opposed Mr. Swazey's motion, arguing that the issue could not be determined in a motion to dismiss. The trial court agreed with the State and denied Mr. Swazey's

> motion. In its denial, the trial court stated that "[t]he defendant's motion to dismiss is based on factual assertions and evidentiary matters outside of the face of the indictment. * * * [Such] arguments are better suited for a motion for acquittal at the close of the State's [case.]"
>
> After the denial of the motion to dismiss, Mr. Swazey appeared before the court, represented by counsel, and changed his plea. On March 15, 2021, Mr. Swazey pled guilty to all three counts. The trial court held a sentencing hearing on May 6, 2021, and in an order entered on May 11, 2021, the trial court sentenced Mr. Swazey to 180 days in jail and two years of community control.

State v. Swazey, 9th Dist. Medina No. 21CA0031-M, 2022-Ohio-993, ¶ 2-4.

Swazey filed a notice of appeal to the Ninth District Court of Appeals on June 7, 2021. On March 28, 2022, the Ninth District reversed the trial court's decision to deny Swazey's motion to dismiss on procedural grounds and remanded the matter to the trial court, ordering the trial court to resolve the substantive issues set out in Swazey's motion to dismiss. The State of Ohio now appeals to this Honorable Court, urging it to accept jurisdiction of this case.

LAW AND ARGUMENT

STATE OF OHIO'S PROPOSITION OF LAW I

A motion to dismiss an indictment may only be decided in a defendant's favor if it can be determined from the face of the indictment that the indictment is legally defective.

I. Standard of Review – Motion to Dismiss an Indictment

Ohio Rule of Criminal Procedure (Crim.R.) 12(C) allows trial courts to rule on "any defense, objection, evidentiary issue, or request that is capable of determination without the trial of the general issue." When a defendant in a criminal action files a motion to dismiss that goes beyond the face of the indictment, he is, essentially, moving for summary judgment. *State v. Roman*, 9th Dist. Lorain No. 06CA009025, 2007-Ohio-4341, ¶ 4. As the Ninth District Court of Appeals has explained:

> The Ohio Rules of Criminal Procedure, however, do not allow for 'summary judgment' on an indictment prior to trial. Since [Appellant's] claim went beyond

> the face of the indictment, he could present his challenge only as a motion for acquittal at the close of the [S]tate's case. Crim.R. 29(A). As a general rule, 'premature declarations,' such as that presented [in a pre-trial motion to dismiss], are strictly advisory and an improper exercise of judicial authority. (Internal citations omitted.)

Id. Accordingly, where a defendant files a motion to dismiss an indictment on a factual basis prior to trial, such a motion is not properly before the trial court and should be denied. *Id.* at ¶ 5.

II. ***Pittman*, Amended R.C. § 2919.21(B), and *Brown***

As amended by Senate Bill 70, which became effective on February 11, 2019, Ohio Revised Code ("R.C.") § 2919.21(B)(1) provides as follows:

> (B)
>
> (1) No person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person:
>
> (a) Is legally obligated to support; or
>
> (b) Was legally obligated to support, and an amount for support:
>
> (i) Was due and owing prior to the date the person's duty to pay current support terminated; and
>
> (ii) Remains unpaid.

The February 11, 2019 amendment added Section (B)(1)(b) to the language of R.C. § 2919.21(B). Former R.C. § 2919.21(B) simply read: "No person shall abandon, or fail to provide support as established by a court order to, another person whom, by court order or decree, the person is legally obligated to support."

It is widely known that the General Assembly passed Senate Bill 70 in response to this Court's decision in *State v. Pittman*, 150 Ohio St.3d 113, 2016-Ohio-8314. In *Pittman*, this Court held that an arrearage-only felony nonsupport case could not be prosecuted when the defendant has no current obligation of support because the child is emancipated. *Id.* at ¶ 1. Interpreting the

language of former R.C. § 2919.21(B), this Court reasoned that "[b]ecause the statute uses the present tense in the phrase 'is legally obligated to support,' a person charged with a violation must be under a current obligation to provide support." *Id.* at ¶ 18. *Pittman*, therefore, banned the prosecution of arrearage-only child support cases. In 2018 the General Assembly responded by passing Senate Bill 70, adding the "was legally obligated to support" language to R.C. § 2919.21(B) and closing the loophole identified by this Court in *Pittman*. The State of Ohio submits that it could not have been the legislature's intent to have this loophole continue years into the future and leave child support obligees like the one in this case in the cold. Swazey has never provided any evidence that the legislature intended otherwise.

This Court recently decided the case of *State v. Brown*, 161 Ohio St.3d 276, 2020-Ohio-4623. *Brown* is not on point to the issue Swazey raises in this case because it is not concerned with the retroactivity of amended R.C. § 2919.21(B) and only applies former R.C. § 2919.21(B). However, it is worth noting that *Brown*'s holding limits the *Pittman* decision and strengthens the State of Ohio's position. *Brown* is concerned with the timing of a felony nonsupport indictment. The defendant in *Brown* argued that under *Pittman* a child support obligor could never be charged with felony nonsupport after the child in question had been emancipated and the support order was no longer a current order. *Id.* at ¶ 4. This Court rejected that argument, holding it does not matter that a defendant's child is emancipated and there is no current support order at the time a nonsupport charge is brought as long as the statute of limitations has not run and the other elements of the statute are met. *Id.* at ¶ 15.

III. The State of Ohio's Position on the Retroactivity of Amended R.C. § 2919.21(B) and Ex Post Facto Concerns

A. Retroactivity of Amended R.C. § 2919.21(B)

While the State of Ohio believes it is inappropriate to address this question at the motion to dismiss stage, in the event that this Court does address the question here or at some time in the future, the State of Ohio submits that amended R.C. § 2919.21(B) applies retroactively. It is axiomatic that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective." R.C. § 1.48. However, the State of Ohio submits that the General Assembly expressed its intention to make amended R.C. 2919.21(B) retroactive by its use of the phrases "was legally obligated to support" and "was due and owing prior to the date the person's duty to pay current support terminated." With respect to individuals whose support orders have terminated and remain unpaid, applying this statute only prospectively would leave the State of Ohio without a critical enforcement tool to collect any child support arrearage which accrued before February 11, 2019. Thousands of child support obligees across the State would be left without a remedy, which surely was not the legislature's intent in passing this important new law.

This Court has noted that "[a] statute, employing operative language in the present tense, does not purport to cover past events of a similar nature." *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, ¶ 17, citing *Smith v. Ohio Valley Ins. Co.* (1971), 27 Ohio St.2d 268, 276, 272 N.E.2d 131. If this is true, it follows that a statute employing operative language in the *past* tense *does* purport to cover past events of a similar nature. The fact that the General Assembly included both the present and the past tense in amended R.C. 2919.21(B) indicates that the statute was intended to be applied retroactively.

In *State v. Caldwell*, the Ohio First District Court of Appeals considered whether a 2013 amendment to the arson offender registration scheme, contained in R.C. 2909.13, R.C. 2909.14, and R.C. 2909.15, applied retroactively:

> In December 2012, the General Assembly passed legislation establishing a comprehensive registration scheme for the purpose of tracking arson offenders. *See* 2012 Am.Sub.S.B. No. 70. The new law went into effect on July 1, 2013. The enactment requires arson offenders to register annually, in person, with the sheriff of the county in which they reside, and subjects offenders to criminal prosecution for failing to register.
>
> Edward Caldwell pleaded guilty to one count of aggravated arson after setting his couch on fire. The crime was committed on June 22, 2013, just over a week before the July 1 effective date of the new registration laws. Mr. Caldwell was convicted on September 24, and sentenced on November 7, 2013, after the registration scheme had taken effect.

1st Dist. Hamilton No. C-130812, 2014-Ohio-3566, ¶ 2-3.

Amended R.C. § 2909.13(B) defined "arson offender," for purposes of the registration requirement, as follows:

> (1) A person who on or after the effective date of this section is convicted of or pleads guilty to an arson-related offense; [and]
>
> (2) A person who on the effective date of this section has been convicted of or pleaded guilty to an arson-related offense and is . . . serving a prison term . . . or other term of confinement for the offense[.]

Caldwell argued that the amended statutes could be applied only prospectively because they lacked clear language of retroactivity. *Caldwell,* 2014-Ohio-3566, ¶ 18. In other words, the General Assembly did not formally state that "this statute shall apply retroactively" or words to that effect. However, the First District noted that amended R.C. § 2909.13(B) contained language incorporating criminal conduct that occurred prior to the statute's effective date:

> The registration requirements expressly apply to any arson offender who "*on the effective date * * * is * * * serving a prison term * * ** or other term of confinement for the offense[.]" (Emphasis added.) R.C. 2909.13(B)(2). The provisions also apply to any person who "*on or after the effective date * * ** is convicted of or

> pleads guilty to an arson-related offense[.]" (Emphasis added.) R.C. 2909.13(B)(1). Both scenarios necessarily incorporate criminal conduct occurring prior to the effective date.

Id. at ¶ 20. Therefore, the First District held: "Because the General Assembly plainly intended for the registration requirements to apply to conduct occurring before the statutes' effective date, we conclude that the statutes are retroactive." *Id.* The language of amended R.C. § 2919.21(B) at issue in this case similarly contains language that incorporates criminal conduct occurring before the amendment's effective date.

B. Amended R.C. § 2919.21(B) is not an Ex Post Facto law if applied retroactively

Once it is determined that a statute applies retroactively, it must be determined if that law is an unconstitutional Ex Post Facto law. Any constitutional analysis must begin with the basic premise that statutes enjoy a strong presumption of constitutionality. *State v. Cook* (1998), 83 Ohio St.3d 404, 409, 700 N.E.2d 570. "An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, 128 N.E.2d 59, paragraph one of the syllabus. "A regularly enacted statute of Ohio is presumed to be constitutional and is therefore entitled to the benefit of every presumption in favor of its constitutionality." *Id.* at 147.

Section 28, Article II of the Ohio Constitution provides that "[t]he general assembly shall have no power to pass retroactive laws . . . ." Despite the Ohio Constitution's pronouncement that the General Assembly "shall have no power to pass retroactive laws," this Court has concluded that "retroactivity itself is not always forbidden by Ohio law." *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, ¶ 31, quoting *Bielat v. Bielat* (2000), 87 Ohio St.3d 350, 353, 721 N.E.2d 28. "Ohio courts have long recognized that there is a crucial distinction between statutes that merely

apply retroactively . . . and those that do so in a manner that offends our Constitution." *Bielat*, 87 Ohio St.3d at 353. A "purely remedial," as opposed to a substantive, statute does not violate the Ohio Constitution, even when applied retroactively. *Id.* at 354.

Therefore, it must be determined if the law in question is substantive or merely remedial. *Cook*, 83 Ohio St.3d at 410-11. A statute is "substantive" if it impairs or takes away vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligations or liabilities as to a past transaction, or creates a new right. *Id.* at 411. Conversely, remedial laws are those affecting only the remedy provided, and include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right. *Id.*

Applying amended R.C. § 2919.21(B) retroactively would not make it an unconstitutional Ex Post Facto law because the amendment is remedial in nature. The amendment to R.C. § 2919.21(B) did not create a new right or take away an old one. Child support obligees have always had the right to be paid arrearages, but after *Pittman* and until the February 11, 2019 amendment, the remedy was confined to civil contempt proceedings in Domestic Relations Court, which can of course also result in incarceration. The R.C. § 2919.21(B) amendment merely added the remedy of criminal prosecution for arrearage-only nonsupport enforcement.

This Court has held that "a later enactment will not burden or attach a new disability to a past transaction or consideration in the constitutional sense, unless the past transaction or consideration, if it did not create a vested right, created at least a reasonable expectation of finality." *State ex rel. Matz v. Brown* (1988), 37 Ohio St.3d 279, 281, 525 N.E.2d 805. *See also Cook*, 83 Ohio St.3d at 412; *Bielat*, 87 Ohio St.3d at 357; *State v. Ferguson*, 120 Ohio St.3d 7, 2008-Ohio-4824, ¶ 34. This Court has further held that the commission of a felony is not a "past transaction" creating a reasonable expectation of finality: "[F]elons have no reasonable right to

expect that their conduct will never thereafter be made the subject of legislation." *Cook*, 83 Ohio St.3d at 412, quoting *Matz*, 37 Ohio St.3d at 281-82.

Because failure to support one's children is a felony under R.C. § 2919.21(G)(1) when that failure continues for at least 26 weeks out of a 104-week period, offenders have no reasonable expectation of finality or that they will escape responsibility for this crime if they simply wait until their child emancipates. The General Assembly recognized the unfortunate loophole created by *Pittman* and quickly rectified it by clarifying that arrearage-only nonsupport cases are prosecutable. The General Assembly also clarified that the statute of limitations is six years and begins to run when the duty to pay current support terminates. Therefore, amended R.C. § 2919.21(B) can be applied retroactively under Section 28, Article II of the Ohio Constitution and is not an unconstitutional Ex Post Facto law.

IV. Analysis

The Ninth District Court of Appeals erred in holding that the trial court should not have denied Swazey's motion to dismiss on the basis that the issues could not be determined at the motion to dismiss stage. The trial court's ruling was correct. Swazey's motion to dismiss the indictment in this case was based on factual assertions and documents outside the face of the indictment. Specifically, Swazey attached to his motion the Termination of Child Support Judgment Entry filed on July 14, 2014 in his Domestic Relations Court case. Swazey offered that document in order to show that his child support obligation was terminated effective July 14, 2014, meaning that any felony nonsupport charges against him after that date were based on arrearage only. However, to know and consider that information, the trial court would have had to consider Swazey's Termination of Child Support order, which is factual evidence about Swazey's underlying case and outside the four corners of Swazey's indictment. It would have been improper

to consider that evidence in a pre-trial motion to dismiss Swazey's indictment. That factual information went to the ultimate issue in the case and, as the trial court correctly noted, Swazey's arguments could have been presented in a proper motion for acquittal at the close of the State's case. The Ninth District Court of Appeals has argued that the retroactivity of amended R.C. § 2919.21(B) and its constitutionality if applied retroactively do not go to the ultimate issue in the case. However, from a logical and practical standpoint, if amended R.C. § 2919.21(B) does not apply retroactively or if the statute is found to be unconstitutional when applied retroactively, that decides the ultimate issue of Swazey's guilt and the State's case cannot proceed against him.

The Ninth District Court of Appeals relies on this Court's decision in *State v. Palmer*, 131 Ohio St.3d 278, 2012-Ohio-580. However, *Palmer* is distinguishable from the instant case. In *Palmer*, the defendant was indicted for violating his registration requirements under the Adam Walsh Act. *Id.* at ¶ 9. In 2011, this Court had held in *State v. Williams* that the Adam Walsh Act could not be applied retroactively to defendants who committed sex offenses prior to its enactment. 129 Ohio St.3d 344, 2011-Ohio-3374, syllabus. Because Palmer's failure to register offense occurred before the enactment of the Adam Walsh Act, Palmer moved to dismiss the indictment on the ground that the Adam Walsh Act could not be applied to him retroactively. *Palmer*, 2012-Ohio-580 at ¶ 10, 25. The trial court granted Palmer's motion to dismiss, but the Tenth District Court of Appeals subsequently reversed, holding that the trial court exceeded its authority in dismissing the indictment because it looked to evidence outside the face of the indictment. *Id.* at ¶ 10-11. This Court ultimately agreed with the trial court and reversed the Tenth District, holding that "[w]hen a trial court faces an indictment based on the retroactive application of the Adam Walsh Act, the law not only allows but indeed demands dismissal." *Id.* at ¶ 3.

Palmer is distinguishable from the instant case because in that case it could be determined from the four corners of the indictment the date on which the State of Ohio was alleging that a failure to register offense occurred. It could further be determined from the face of the indictment that the defendant was being charged under the Adam Walsh Act and that the date of the alleged offense was prior to the effective date of the Adam Walsh Act. Then it was a simple matter of applying the recent holding of *Williams* that the Adam Walsh Act could not be applied retroactively. In the instant case, it could only be determined from the four corners of the indictment that the State of Ohio was charging three counts of felony nonsupport for three different 104-week periods. It could not be determined from the face of the indictment which, if any, of those counts were for arrearage only. To know that, the trial court would have had to consider the evidence that Swazey's child support obligation was terminated on June 9, 2013, which is a fact outside of the face of the indictment requiring the presentation of evidence. Put simply, in *Palmer* one could tell that the indictment was defective just by looking at it. That is not the case here, and the Ninth District has dangerously expanded the definition of what may be decided in a motion to dismiss in a criminal case.

The trial court properly denied Swazey's motion to dismiss his indictment because his indictment sufficiently contained in substance statements that Swazey committed nonsupport offenses. *See* R.C. § 2941.05 and Crim.R. 7(B). Swazey's indictment was in the words of the applicable felony nonsupport statute and was sufficient to give Swazey notice of all of the elements of the offenses with which he was charged. *See Id.* Therefore, Swazey's indictment was valid on its face under R.C. § 2941.05 and Crim.R. 7(B). In a pretrial motion to dismiss the indictment, the trial court was not permitted to consider the factual information that this was an arrearage-only case. The trial court was only permitted to consider whether the indictment on its face sufficiently

stated felony nonsupport charges against Swazey. The trial court was not permitted to consider the substantive merits of those charges at the motion to dismiss stage because that is what the trial is for. The trial court properly denied Swazey's motion to dismiss his indictment on this ground.

For all of the foregoing reasons, the State of Ohio respectfully requests that this Court accept jurisdiction of its Proposition of Law I.

STATE OF OHIO'S PROPOSITION OF LAW II

A guilty plea bars a defendant from appealing a trial court's denial of a motion to dismiss the indictment where the issue raised by the motion is whether a statute is retroactive, which is an issue of statutory interpretation.

Swazey pled guilty to all counts in this case after the trial court denied his motion to dismiss the indictment. This Court has long held that "[a] defendant who enters a voluntary plea of guilty while represented by competent counsel waives all nonjurisdictional defects in prior stages of the proceedings." *Ross v. Common Pleas Court of Auglaize County* (1972), 30 Ohio St.2d 323, 323-24, 285 N.E.2d 25. Therefore, a defendant who, like Swazey, voluntarily, knowingly, and intelligently enters a guilty plea with the assistance of counsel "may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *State v. Fitzpatrick*, 102 Ohio St.3d 321, 2004-Ohio-3167, ¶ 78, citing *Tollett v. Henderson* (1973), 411 U.S. 258, 267, 93 S. Ct. 1602.

The Ninth District has cited the following sentence from *Fitzpatrick* to support its notion that this Court carved out an exception to the rule stated above: "A guilty plea renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of a conviction if factual guilt is validly established." *Id.* The Ninth District then states that "[e]ven if Mr. Swazey's factual guilt was established, Mr. Swazey is arguing that the application of the statute to his case would be a constitutional violation."

Swazey, 2022-Ohio-993, ¶ 14. The Ninth District ultimately held that "Mr. Swazey's challenge to the [denial of his motion to dismiss] is not barred by the fact that Mr. Swazey pled guilty to the charges against him." *Id.* First, it is at best unclear from the rather confusing language of *Fitzpatrick* that in that case this Court intended to carve out an exception to the axiomatic rule that a guilty plea waives all nonjurisdictional defects in a case. If this Court did intend to carve out an exception, it is unclear exactly what that exception is. The sentence quoted by the Ninth District appears to have been dicta which was not the basis of this Court's decision in that case.

In any event, the primary issue in this case is whether R.C. § 2919.21(B) as amended effective February 11, 2019 applies retroactively. That is an issue of statutory interpretation, not a constitutional issue. Swazey's Ex Post Facto argument only comes into play if amended R.C. § 2919.21(B) is first found to apply retroactively, which no court has held at this point. It is misleading to state, as the Ninth District did, that Swazey "is arguing that the application of the statute to his case would be a constitutional violation." Swazey's primary argument has always been that amended R.C. § 2919.21(B) *does not* in fact apply retroactively. If Swazey is correct and that is the case, the question of whether amended R.C. § 2919.21(B) is an unconstitutional Ex Post Facto law does not come into play at all. Swazey's Ex Post Facto argument is only made in the alternative in the event that his primary argument is rejected and amended R.C. § 2919.21(B) is found to apply retroactively.

For all of the foregoing reasons, the State of Ohio respectfully requests that this Court accept jurisdiction of its Proposition of Law II.

CONCLUSION

For all of the foregoing reasons, the State of Ohio respectfully requests that this Court accept jurisdiction of its Proposition of Law I and Proposition of Law II.

Respectfully submitted,

S. FORREST THOMPSON
Prosecuting Attorney
Medina County, Ohio

By: */s/ Vincent V. Vigluicci*
VINCENT V. VIGLUICCI (#0084873)
Assistant Prosecuting Attorney
Medina County Prosecutor's Office
60 Public Square, 3rd Floor
Medina, Ohio 44256
(330) 723-9536
(330) 723-9532 [Fax]

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was sent via regular U.S. mail to Kimberly Stout L. Stout-Sherrer, Counsel for Appellee, at 1653 Merriman Rd., Ste. 203, Akron, Ohio 44313, on this 13th day of April, 2022.

/s/ Vincent V. Vigluicci
VINCENT V. VIGLUICCI (#0084873)
Assistant Prosecuting Attorney