

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case Nos. 2017-1579/1609
Plaintiff-Appellee,	:	
	:	On Appeal from the Franklin
v.	:	County Court of Appeals
	:	Tenth Appellate District
DAVID BRADEN,	:	
	:	CAPITAL CASE
Defendant-Appellant.	:	

**BRIEF OF *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION OF OHIO
FOUNDATION AND THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
IN SUPPORT OF APPELLANT DAVID BRADEN**

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STATEMENT OF AMICI INTERESTS

The American Civil Liberties Union of Ohio Foundation

The American Civil Liberties Union of Ohio Foundation (“ACLU of Ohio”) is a statewide non-profit, non-partisan organization with over 30,000 members, dedicated to defending the civil liberties of all Ohioans. The specific interest of the ACLU of Ohio in this case is to ensure that Ohio’s criminal justice system adheres to the Constitutional precepts of due process and equal protection under the law.

The American Civil Liberties Union Foundation

The American Civil Liberties Union Foundation (“ACLU”) is a nationwide, non-profit, non-partisan organization of more than 1 million members dedicated to defending the civil liberties guaranteed by the Constitution. The Racial Justice Program (“RJP”) of the ACLU is dedicated to combating the structural drivers of racism and inequality and works to end discrimination in the criminal justice system, education, housing, police profiling, and lending. RJP leads litigation and advocacy in multiple states aimed at protecting the rights of poor people in the criminal justice system, including challenges to unlawful incarceration for inability to pay fines and fees.

STATEMENT OF THE CASE AND FACTS

Amici adopt the statement of the case set out in David Braden’s merits brief.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

David Braden is awaiting execution at Chillicothe Correctional Institution, and he cannot afford a pair of shoes. His 1999 sentence included a civil judgment of \$2127.50 to recoup the costs of his jury trial. Since then, the Franklin County Court of Common Pleas has been extracting money from his prison account in nickel-and-dime sums. Although he earns \$16 each month in state inmate pay, Franklin County’s attachment of his prison account keeps it at a perpetual \$25 ceiling. At the Chillicothe Correctional Institution commissary, the cheapest pair of shoes is \$27.95.

In 2013, the Ohio General Assembly (“OGA”) amended R.C. 2947.23 to include subdivision (C), which clarifies a sentencing court’s continuing jurisdiction to waive, modify, or suspend payment of court costs imposed on criminal defendants for the cost of their prosecution. The legislature allowed defendants to make motions under 2947.23(C) (the “Statute”) “at any time” because it understood that prohibiting courts from modifying payment of costs served no practical purpose and could undermine the public’s confidence in the criminal justice system. The OGA enacted this provision to make clear that for orders imposing costs—civil judgments where the criminal defendant is the debtor, and the court itself holds the debt—the trial court is entitled to modify the debt it holds “at any time.” The Tenth District’s refusal to apply this jurisdictional rule to Mr. Braden contravenes the purpose of the Statute and puts thousands of prisoners and people about to reenter society in a position of immitigable poverty.

On April 24, 2018, this Court heard oral argument in *State v. Dunson*, which asks this Court do decide whether, under the same Statute, a trial court must consider individuals’ current

and future ability to pay if they move for modification of payment of their costs of prosecution. *See State v. Dunson*, Ohio Supreme Court No. 2017-0186. As *amici* briefed for this Court in *Dunson*, the Sixth Amendment to the U.S. Constitution, as well as all other jurisdictions *amici* examined, require trial courts to consider current and future ability to pay if a person petitions for relief from costs incurred from exercising their constitutional right to a jury trial.

The constitutional concern is even greater on the question before the court now, because under the State’s interpretation of the Statute, Mr. Braden would have *no* recourse to raise before the trial court the issue of his inability to pay. Adopting the State’s position here would eliminate a trial court’s ability to ever consider ability to pay for individuals sentenced before the Statute’s effective date. This approach would directly conflict with the Sixth Amendment. The canon of constitutional avoidance lends further support to giving the Statute its most natural reading: A defendant with pending debt for costs of prosecution, regardless of their sentencing date, may file a petition “at any time” with the trial court, which “retains jurisdiction” to grant the requested relief.

Amici urge this Court to find that the Statute allows trial courts to consider motions to modify payment of court costs regardless of when a person’s sentence became final.

PROPOSITION OF LAW: R.C. 2947.23(C) PROVIDES TRIAL COURTS CONTINUING JURISDICTION OVER A MOTION TO MODIFY COURT COSTS REGARDLESS OF WHEN THE MOVANT’S SENTENCE BECAME FINAL.

A. Under R.C. 2947.23(C), sentencing trial courts have continuing jurisdiction over criminal defendants’ payment of court costs, regardless of sentencing date.

The plain text of the Statute grants trial courts the authority to waive, modify, or suspend payment of ongoing court debt “at the time of sentencing or at any time thereafter.” Both this language and the statutory purpose demonstrate that it expands jurisdiction equally over cases that were final before and after its March 22, 2013 effective date. Contrary to the Tenth District’s

holding below, and consistent with the weight of District Court authority, the term “retains” in the Statute is meant to clarify that the trial court’s jurisdiction over payment of court costs does not end at sentencing. Individuals do not waive their opportunity to seek relief from payment simply because they failed to request it at sentencing—rather, the Statute empowers them to petition the trial court “at any time” for modification of payment on their financial obligation.

This plain reading of the Statute does not require the Court to retroactively confer any benefit upon those sentenced before the Statute’s effective date, because a defendant’s obligation to pay ongoing court costs is a *prospective* obligation. Mr. Braden is not seeking to be resentenced or to obtain retroactive reimbursement for money already withdrawn from his account before the Statute was enacted; he is asking for his payments to be changed *going forward*, in light of his financial circumstances. Accordingly, the relief that the Statute makes available is prospective and must be available to every movant with outstanding court debt, regardless of their sentencing date.

1. The text of R.C. 2947.23(C) permits any defendant with outstanding costs to seek modification of payment at any time.

The Statute’s plain language makes clear that a sentencing court’s jurisdiction over payment of costs covers any time period when an individual has some amount of costs still outstanding. The Statute provides: “The court retains jurisdiction to waive, suspend, or modify the payment of the costs of prosecution, including any costs under section 2947.231 of the Revised Code, at the time of sentencing or at any time thereafter.” The trial court has jurisdiction over Mr. Braden’s motion because he has outstanding court debt, and subsequently sought to modify payment on this debt, “at a[] time []after” his sentence.

The word “retain” in this context makes clear that a trial court’s jurisdiction is not limited to the sentencing date, but includes “any time thereafter” as long as costs are still owed. In other

words, “retain” means that jurisdiction is maintained as long as there is court debt, so that a defendant has more than one opportunity to request waiver of payment, if, for example, his ability to pay changes. If a court retains jurisdiction over the matter, the defendant may ask for waiver or suspension of payment at sentencing, and if denied, can subsequently ask for modification of payment of costs as his financial circumstances inevitably change. In this way, the Statute makes clear that *res judicata* does not bar defendants from asking a trial court for modification of payment more than once; nor are they barred if they fail to seek modification at sentencing but request it later, even after the time for appeal has ended.

The context in which the legislature designed the Statute confirms this plain reading. The OGA enacted the Statute explicitly in response to precedent holding that trial court jurisdiction over court costs was confined to the time of sentencing. *See State v. Threatt*, 108 Ohio St.3d 277, 2006-Ohio-905, 843 N.E.2d 164, ¶ 23 (2006) (“Costs are assessed at sentencing and must be included in the sentencing entry. Therefore, an indigent defendant must move a trial court to waive payment of costs at the time of sentencing[,]” citing R.C. 2947.23 prior to the enactment of subsection (C)); *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 589, ¶ 5 (2007) (explaining, prior to subsection (C)’s enactment, that a motion for waiver of payment of costs must be made at the time of sentencing or the issue is not preserved for appeal). The OGA amended R.C. 2947.23 specifically to confer jurisdiction on trial courts to modify the *payment* of costs at the time of sentencing, *as well as* “at any time” after. The Statute gives courts limited jurisdiction to waive, modify, or suspend *payment* of court costs “at any time” after sentencing without disturbing the finality of the underlying sentence imposing costs in the first instance.

Contrary to the Second, Fourth, Eighth, and Ninth District Courts that have considered this question, the State and the Tenth District have adopted a reading that would insert a 2013

“Effective Date” requirement in the Statute despite the fact that the statutory text contains no such provision. The State argues that the word “retain” is intended to exclude anyone who was sentenced before the Statute’s effective date on the theory that, before 2013, the trial court lost jurisdiction after sentencing. As noted above, the OGA enacted the Statute *to extend* trial courts’ jurisdiction beyond the sentencing date and make clear that trial courts maintain jurisdiction over *payment* of costs as long as any debt remains. It would be perverse and unnatural to read the word “retain” as instead creating two classes of defendants, one where the Statute’s jurisdiction exists and one where it does not. The State’s reading ignores both the statutory text and its history.

In *State v. Banks*, the Tenth District misapplied the principle that “the legislature determines the jurisdiction of the courts of common pleas[.]” 10th Dist. Franklin No. 17AP-210, 2017-Ohio-7135, ¶ 10. The Tenth District’s decision in Mr. Braden’s case and in *Banks* disregards that the legislature acted pursuant to this very authority over court jurisdiction by extending it to motions to adjust payment “at any time” after sentencing. Thus, while it is true that Mr. Braden’s trial court lost jurisdiction over his *initial sentence*, the legislature has since acted to confer continuing jurisdiction on the trial court so that it will “retain” jurisdiction over his ongoing *payments*, and maintain it for the period that he owes costs of prosecution.

Mr. Braden’s interpretation of the word “retains” is the only one that comports with the legislation’s overarching purpose. Reading an “Effective Date” requirement into the Statute would run afoul of core principles of statutory construction and undermine the remedy that the General Assembly, by its rightful authority over jurisdiction, intended to create.

- 2. Four district courts of appeal have correctly interpreted that R.C. 2947.23(C) confers jurisdiction regardless of a defendant’s sentencing date and does not require retroactive application of any benefit.**

The Second, Fourth, Eighth, and Ninth District Courts of Appeal have issued several rulings upholding jurisdiction under the Statute in cases where cost orders became final before the effective date of the Statute.¹ The Eighth District’s decision in *State v. Hunter* provides the most detailed analysis:

In *Hunter*, the Eighth District rejected the same arguments the State invokes here:

The state argues that the current version of R.C. 2947.23(C) granting the court jurisdiction to consider a motion to waive costs did not become effective until March 22, 2013, and that the court sentenced Hunter on March 21, 2013—one day before the effective date of the statute. It argues that with *Clevenger* * * *barring a court from waiving court costs at any time after sentencing, the trial court could not have waived Hunter’s court costs unless it retroactively applied R.C. 2947.23(C).

We believe the state’s argument misapprehends what constitutes a “retroactive” application of R.C. 2947.23(C). It is true that absent express language indicting retroactivity, a statute is presumed to be prospective in its application. * * * But retroactivity is premised on the idea that a law reaches back in time to *upset settled legal expectations*. By its own terms, R.C. 2947.23(C) states that a court retains jurisdiction to waive, suspend, or modify court costs “at the time of sentencing or at any time thereafter.” No settled legal expectations are affected by the amended statute—it expressly states, consistent with prior precedent, that the court may waive court costs at the time of sentencing, but the statute goes on to expand the time frame in which a court may waive, suspend, or modify costs to “any time thereafter.” In other words, the plain wording of R.C. 2947.23(C) no longer places limits on when a defendant can seek a waiver, suspension, or modification of court costs. There is no dispute that Hunter sought a waiver of court costs after the effective date of the modifications to R.C. 2947.23(C), so there was no retroactive application of the statute.

¹ This Court accepted the certified conflict between the Tenth District’s holding in *Braden* below and the Eighth District’s holdings in *Price*, 8th Dist. Cuyahoga No. 102987, 2015-Ohio-4592 and *Bacote*, 8th Dist. Cuyahoga No. 102991, 2015-Ohio-5268 and the Second District’s holdings in *State v. Powell*, 2nd Dist. Montgomery No. 24433, 2014-Ohio-3842, ¶¶ 19–21 and *State v. Chase*, 2nd Dist. Montgomery No. 26238, 2015-Ohio-545, ¶¶ 9–10. The Second District’s holdings and one from the Ninth District as well, in *State v. Maciel-Valadez*, 9th Dist. Lorain No. 16CA011051, 2017-Ohio-8266, ¶15, were also decided consistent with the Eighth District’s rationale. In those three cases, appellate courts found that that R.C. 2947.23(C) conferred jurisdiction on trial courts to consider modification of payment of fines at any time, regardless of whether the conviction and sentence became final prior to the effective date. The Fourth District has also noted that the Statute applies to defendants who were sentenced prior to its effective date. *State v. Savage*, 4th Dist. Meigs No. 15CA2, 2015-Ohio-4205, ¶7.

State v. Hunter, 8th Dist. Cuyahoga No. 102245, 2015-Ohio-4180, ¶ 11-12. (emphasis added; internal citations omitted).

These four District Courts correctly rejected the State’s contention that the Statute is impermissibly retroactive. As the Eighth District noted in *Hunter*, the Statute does not reach back in time to disturb a settled legal judgment. In drafting the Statute, the OGA did not authorize courts to retroactively modify their sentences or their initial imposition of costs; rather, it conferred jurisdiction on them to alter the payment of costs owed on those judgments going forward. If the Statute permitted Mr. Braden to be resentenced or to seek reimbursement for court costs withdrawn prior to the effective date of the statute, it might present an issue of retroactivity. Here Mr. Braden has not moved to alter his sentence; the Statute does not function to provide him retrospective relief. The only thing that the Statute permits Mr. Braden to do is request changes to payment on his court costs going forward. The form of relief that he seeks is therefore entirely prospective. Conferring jurisdiction upon a court to modify *payment of costs* does not upset any final sentences or legal judgments—the Statute is not retroactive at all.

3. R.C. 2947.23(C) is a remedial statute designed to allow criminal defendants an opportunity to request modification of payment of court costs both before and after sentencing, regardless of when their sentence became final.

Even if the Statute could be construed as retroactively applying a benefit, the legislature’s clear remedial purpose would make this retroactive application permissible. “Remedial laws are those enacted to correct past defects, to redress an existing wrong, or to promote the public good.” *State v. Moore*, 165 Ohio App.3d 538, 2006-Ohio-114, 847 N.E.2d 452 (4th Dist), ¶ 21 citing *Wright*, 69 Ohio App.3d at 779, 591 N.E.2d 1279. This Statute, which has the exclusive purpose of providing debtors a mechanism to seek to adjust payments on their outstanding court debt, is by its nature remedial.

The Statute's legislative history makes clear that in enacting the statute, the OGA was responding to this Court's prior decisions by giving defendants a way to request modification of payment of court costs beyond their sentencing date. *See* Fiscal Note & Local Impact Statement, Sub H.B. 247 of the 129th G.A. (as enacted), Ohio Legislative Service Commission, Dec. 13, 2012; *see also* Rep. Butler's statement upon introducing the bill to committee, "the provision to permit trial courts the authority to suspend the imposition or payment of costs after the court has imposed a sentence is based upon the Ohio Supreme Court's decision in *State v. Clevenger*, 114 Ohio St.3d 258 (2007)," Tiffany L. Parks, *Bill would give trial courts authority to clear their uncollectable debt*, Akron Legal News (June 22, 2011) <http://www.akronlegalnews.com/editorial/640> (accessed May 1, 2018). By the General Assembly's own account the Statute is intended to "update the Revised Code to reflect two recent Ohio Supreme Court decisions regarding court costs * * *." There can be no serious doubt that the "two recent * * * decisions" are *Clevenger* and *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278. *See* Fiscal Note & Local Impact Statement at 2.

In *Clevenger*, this Court held that, absent statutory authority, a trial court may not suspend the imposition of court costs, and also held that criminal defendants lose the right to seek modification of costs if they do not raise the issue at sentencing. 2007-Ohio- 4006, ¶ 11. *Clevenger* was based on the idea that costs become final once the sentencing order is entered and that R.C. 2949.092 provided the *only* mechanism for waiver of payment, which needed to occur either at sentencing or not at all. Similarly, in *Joseph* this Court held, based on *Clevenger* and earlier cases, that it was error for a trial court to impose costs in its sentencing entry without informing the defendant at sentencing that it intended to do so because it precluded a defendant

from seeking waiver of payment of costs. 2010-Ohio- 954, ¶¶ 20–24. *Joseph* also assumed that a court loses jurisdiction to waive payment of costs after a sentencing order becomes final.

In 2008, after *Clevenger* and before *Joseph*, the OGA convened a Task Force to study among other things the imposition and collectability of court costs. The Task Force recommended that the OGA provide courts the statutory authority to do what the defendant in *Clevenger* requested. See Report and Recommendations of the Joint Committee to Study Court Costs and Filing Fees, 9 (2008)

<https://www.supremecourt.ohio.gov/Publications/JtCommCourtCostsReport.pdf>. Specifically, it stated at recommendation number five:

General Assembly should amend current law to give trial courts the statutory authority to suspend the imposition or payment of costs after the court has imposed sentence.

In *State v. Clevenger*, 114 Ohio St.3d 258, (2007), the Supreme Court held that a trial court does not have authority to either suspend the imposition or payment of court costs after the court has imposed sentence, even when the offender is indigent. The Court found trial courts lack this ability because they are not specifically authorized by statute to waive costs after sentencing.

This serves little practical purpose. Although section 2947.23 of the Revised Code allows for community service in lieu of payment of costs, many offenders become debilitated or have a change in circumstances after sentencing and cannot perform community service. This means indigent offenders do not pay their court costs and do not perform the community service. In order to rectify this problem, the *General Assembly should amend the statute to allow the court the discretion to suspend costs after sentencing.*

Id. at Recommendation 5 (emphasis added).

In 2011, on *Joseph*'s heels, the OGA introduced H.B. 247, which explicitly responded to the Task Force's directives and this Court's previous rulings. The bill, which in part became R.C. 2947.23(C), codified the legislature's decision that courts must have continuous authority to review the payment of outstanding debt owed to them. See Fiscal Note & Local Impact

Statement, Sub H.B. 247 of the 129th G.A. (as enacted), Ohio Legislative Service Commission, Dec. 13, 2012.

The very purpose of the Statute was to right an existing wrong: that defendants had no way to request modification of payment of court costs after sentencing because no judicial authority existed to support such a request. The Statute is thus remedial and must be construed to effectuate its clearly-intended corrective purpose. *State v. Moore*, 165 Ohio App.3d 538, 2006-Ohio-114, 847 N.E.2d 452, ¶12 (4th Dist.); *Naylor v. Cardinal Local School Dist. Bd. of Ed.*, 69 Ohio St.3d 162, 168, 630 N.E.2d 725 (1994) (noting, “[It is a] well-established principle that a statute susceptible of either of two opposing interpretations must be read in the manner which effectuates, rather than frustrates, the major purpose of the General Assembly.”); *see also State ex rel. Maher v. Baker*, 88 Ohio St. 165, 102 N.E. 732 (1913) at paragraph on of the syllabus (“[R]emedial statutes should be liberally construed so as to furnish all the remedy and accomplish all the purposes intended by the statutes.”).

Adopting the State’s perverse construction of the Statute would frustrate the legislature’s intent. It would create an artificial, meaningless, and cruel distinction between individuals sentenced before and after 2013. There is no support for such a division in the Statute’s legislative history which instead demonstrates that legislators were focused on granting courts the necessary authority to waive or modify costs in cases of hardship. The State’s approach would deny the remedy the Statute was designed for; that is, to provide people like Mr. Braden the right to request modification of payment after sentencing.

This Court should hold today—consistent with the plain language of the Statute and the legislature’s purpose—that the Statute provides continuing jurisdiction to modify payment of costs in every instance where they are owed, regardless of an individual’s sentencing date.

B. The State’s interpretation of R.C. 2947.23(C) would present serious constitutional concerns because it would preclude any avenue for the trial court to evaluate Mr. Braden’s ability to pay his costs of prosecution.

As *amici* have described in further detail in their brief in the *Dunson* case, a State may not place an undue burden on a criminal defendant’s exercise of their Sixth Amendment right to a jury trial or to appointed counsel. The U.S. Supreme Court has recognized that States have a legitimate interest in recouping costs associated with a jury trial or appointed public defenders. But even where a State’s criminal justice objectives are legitimate, “they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights.” *United States v. Jackson*, 390 U.S. 582, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) (citations omitted). As pertinent here, a State may impose costs of prosecution on a defendant who has invoked the right to a jury trial. But to avoid infringing on the Sixth Amendment, the State *must* provide some avenue to evaluate a defendant’s ability to pay such costs in order to ensure that payment is “enforce[d] * * * only against those who actually become able to meet it without hardship.” *Fuller v. Oregon*, 417 U.S. 40, 54, 94 S. Ct. 2116, 2125, 40 L. Ed. 2d 642 (1974).

Adopting the State’s interpretation of R.C. 2947.23(C) would run headlong into this constitutional conflict because it would eliminate any avenue for a trial court to exercise any discretion whatsoever regarding ability to pay for defendants sentenced before 2013. As explained in their *Dunson* brief, *amici* have not identified any other jurisdiction that entirely precludes a defendant from asserting inability to pay in such a fashion.

To the contrary, this would represent precisely the scenario that infringes on the Sixth Amendment. *See Fuller*, 417 U.S. 40 at 53 (upholding Oregon recoupment statute where it “is carefully designed to insure that only those who actually become capable of repaying the State

will ever be obliged to do so * * * [and t]hose who remain indigent or for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to repay”).

In *State v. White*, this Court upheld R.C. 2947.23 against a facial challenge under the Equal Protection Clause. 103 Ohio St. 3d 580, 2004-Ohio-5989, 817 N.E.2d 393, ¶ 13. It is important to understand that *White* considered a very different issue than the ability-to-pay inquiry necessary under the Sixth Amendment. *White* was a faithful and direct application of the U.S. Supreme Court’s analysis in *James v. Strange*, 407 U.S. 128, 141, 92 S. Ct. 2027, 2035, 32 L. Ed. 2d 600 (1972). *White* correctly noted that “[t]he *James* statute was held unconstitutional because of its failure to provide for indigent defendants protective exemptions that are available for civil judgment debtors” and concluded that “[t]he Ohio code has no such flaw.” *White*, 2004-Ohio-5989, ¶ 13.² The U.S. Supreme Court has treated this Equal Protection analysis as separate and distinct from the Sixth Amendment requirement that a State consider ability to pay criminal justice costs. *See Fuller*, 417 U.S. 40 at 51 (separately evaluating “petitioner’s second basic contention” that recoupment statute infringes upon Sixth Amendment “right to have counsel provided by the State * * * because of indigency”); *James*, 407 U.S. 128 at 134 (“Whether the statutory obligations for repayment impermissibly deter [Sixth Amendment] right[s] is a question we need not reach, for we find the statute before us constitutionally infirm on [Equal Protection] grounds.”) (emphasis added).

In order to pass constitutional muster, a court cost recoupment statute must *both* make civil debt exemptions available to criminal defendants *and* incorporate some avenue to consider an individual’s financial circumstances. *See Fuller*, 417 U.S. at 54. Nothing in *White* or its

² Contrary to the State’s argument in *Dunson*, *White* did not purport to deem collection of court costs constitutional in all possible respects or in every application.

progeny authorizes a State to infringe on the Sixth Amendment by entirely disregarding a defendant's actual ability to pay court costs.

Here, without access to the Statute, Mr. Braden would have no recourse for the trial court to consider his ability to pay. The legislature enacted the Statute to ensure that there would be some avenue to modify payment of costs for individuals who needed that relief. "Courts have a duty to liberally construe statutes to avoid constitutional infirmities." *State ex rel. Taft v. Franklin Cty. Court of Common Pleas*, 81 Ohio St. 3d 480, 481, 692 N.E.2d 560, 561–62 (1998). The Court should reject the State's position and reverse the decision below, in light of the serious constitutional concerns these readings of the Statute produce.

C. Failure to apply 2947.23(C) to all criminal defendants would harm Ohio prisoners and those reentering society and make Ohio prisons less safe.

Mr. Braden is incarcerated in Chillicothe Correctional waiting for the State of Ohio to execute him as a punishment for his conviction. He invoked his constitutional right to trial by jury and fully litigated his defense. His sentence contained two separate results: first, a summation of his punishment—incarceration, financial remuneration, and death; and second, a summation of the civil costs that he owes to the public for the recoupment of his jury trial. The first part of this sentencing entry is punitive, and Mr. Braden is serving this sentence. The second part is not, and may not be, punitive. *See Threatt*, 2006-Ohio-905, ¶15. But the collection of costs against him despite his indigent status subjects him to *de facto* additional punishment: because he is so poor behind bars, he cannot afford basic necessities like hygiene items, medical items, food, and shoes. This deprivation of dignity is found nowhere in Ohio's sentencing statutes. In addition to its cruelty, it produces public policy concerns that this Court cannot ignore.

On its face, the Statute provides Mr. Braden a way to request modification of payment of costs that are preventing him from obtaining these basic necessities, but the State is asking this Court to ensure that he never even has the chance to ask. Beyond the legal and constitutional ramifications discussed above, denying the thousands of people sentenced before March 22, 2013 access to this Statute’s relief—relief that the OGA designed for just that class of people—is dangerous, nonsensical, and cruel.

Social scientists and criminologists recognize that lack of access to basic necessities in prison creates a resource scarcity problem leading to the expansion of underground prison economies. This creates dangerous conditions in Ohio prisons. The attendant dangers include exacerbating prison gang violence based on control of capital, and one-to-one prisoner violence based on the same. *E.g.*, Erin Fitzgerald, *Cell “Block” Silence: Why Contraband Cellular Telephone Use in Prisons Warrants Federal Legislation to Allow Jamming Technology*, 2010 Wis. Ll. Rev. 1269, 1278-9 (discussing the inflated costs of prison phone use contributing to contraband cellphone use, which in turn contributes to black-market trade issues including “run[ning] ongoing illegal enterprises through organized crime and gangs.”)

Courts have recognized that limiting exchange of goods through prison underground economies is a legitimate penological interest, in part because those markets are security concerns. *E.g.*, *Payton v. Cannon*, 806 F.3d 1109, 1110 (7th Cir. 2015) (Posner, J. prison limitation on pornography was reasonably related to legitimate penological interest in limiting violence attendant to black-market trading); *Collier v. Nelson*, 966 P.2d 1117, 1119 (Kansas App. Oct. 16, 1998) (limiting commissary items as currency in prison black markets served “two legitimate governmental interests—prison security and order”); *Morrison v. Cook*, No. 97-57-ST, 1999 WL 717218 at *4 (D. Oregon Apr. 27, 1999) (limiting religious material was permissible to

prevent “prison black market characterized by profiteering, extortion, blackmail, assaults, and staff involvement.”)

Limiting prisoners’ ability to purchase basic necessities, including socks and shoes, contravenes, rather than serves, penological interests. It makes prisons less safe, and it creates conditions of confinement that violate prisoners’ dignity and their constitutional rights. If this Court confines the Statute’s application only to Ohioans who were sentenced after March 22, 2013, it will seriously impede the ability of thousands of individuals who still have outstanding court cost debt from successfully reentering society from prison, and it will deny needed relief to thousands of imprisoned individuals who cannot afford to live safely or with dignity.

CONCLUSION

Amici urge this court to rule that R.C. 2947.23(C) applies to any individual with outstanding court costs—not only those whose sentences became final subsequent to the provision’s enactment. To rule otherwise would contravene the Statute’s purpose, present clear constitutional concerns, strip trial courts of their ability to collect court costs in a sensible way, and would be unnecessarily cruel to the thousands of people the State of Ohio has sentenced and incarcerated prior to 2013.

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CERTIFICATE OF SERVICE

I certify that on May 7, 2018, I filed the foregoing via the Court's electronic filing system, and I served a copy of this brief by e-mail to Kathryn Sandford, Ohio Public Defender, Counsel of Record for Appellant, at kathryn.sandford@opd.ohio.gov, and to Seth Gilbert, Assistant Franklin County Prosecutor, Counsel of Record for Appellee at sgilbert@franklincountyohio.gov.

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