

There was a valid death penalty in effect at the time the defendant committed and was charged for his crimes.

The subsequent declaration that the Arizona death penalty scheme was unconstitutional, after the defendant committed and was charged with his crimes, does not alter the fact that there was a valid death penalty in effect at the time the defendant committed and was charged with his crimes. Therefore, the defendant is not entitled to have the State's notice of intent to seek the death penalty stricken.

The defendant argues because the United States Supreme Court declared Arizona's death penalty scheme unconstitutional in *Ring v. Arizona*, 536 U.S. ___, 122 S.Ct. 2428 (June 24, 2002), there was no valid death penalty statute in effect either at the time the defendant committed these crimes or at the time he was indicted. Thus, the defendant claims that the State's notice of intent to seek the death penalty is null and void and must be stricken.

The defendant is wrong. The United States Supreme Court rejected a similar argument in *Dobbert v. Florida*, 432 U.S. 282, 296, 97 S.Ct. 2290 (1977). There, the defendant claimed that because the death penalty statute that had been in effect at the time he committed his crimes had been declared unconstitutional and amended, there had been no valid death penalty in effect at the time he had committed his offenses. The Court called this argument "highly technical" and "sophistic," said that it mocked the substance of the Ex Post Facto clause, and declared it to be without merit. *Dobbert*, 432 U.S. at 297. The Court stated that the actual existence of a statute, before being declared unconstitutional, is an "operative fact." *Id.* at 298 (quoting *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374 (1940) ("The past

cannot always be erased by a new judicial declaration.”)). See also *State v. Watson*, 120 Ariz. 441, 453-454, 586 P.2d 1253, 1265-1266 (1978), citing and quoting *Dobbert, supra*. See also *State v. Grimes*, 163 Or. App. 340, 348, 986 P.2d 1290, 1294 (1999) (stating that, according to *Dobbert*, “[W]hatever the technical legal effect of a later decision declaring a statute unconstitutional, until that decision, the statute still serves as a real world ‘operative fact’ that warned the public of the state’s intentions with respect to the crime at issue.”) See also *Selsor v. State*, 2 P.3d 344, 351, § 19 (Okla. Crim. App. 2000) (upholding the death penalty when the defendant was “charged, tried, and convicted pursuant to the original Information filed in the case, which correctly informed him of the 1973 statute and facts supporting its alleged violation.”))

Thus, the defendant’s claim – that there was no valid death penalty at the time he committed and was charged for his crimes because the death penalty statute in effect at those times was recently found to be unconstitutional – is without merit.