ORIGINAL

IN THE OHIO SUPREME COURT

No. 2009-0739

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	
-vs-	:	
HERSIE WESSON,	:	MOTION TO RECONSIDER AND TO STAY THE ISSUANCE OF MANDATE
Defendant-Appellant.	:	
	:	DEATH PENALTY APPEAL

COUNSEL FOR APPELLEE:

SHERRI BEVAN WALSH, ESQ.
Summit County Prosecutor
53 University Street, 7th Floor
Akron, Ohio 44308-1680
(330) 643-2788

RICHARD S. KASAY, ESQ.
Regis. No. 0013952
Assistant Summit County Prosecutor
53 University Avenue, 7th Floor
Akron, OH 44308-1680

COUNSEL FOR APPELLANT:

DAVID L. DOUGHTEN, ESQ.
Regis. No. 0002847
4403 St. Clair Avenue
Cleveland, OH 44103-1125
(216) 361-1112
Facsimile: (216) 881-3928

GEORGE C. PAPPAS, ESQ.
Regis. No. 0037374
1002 Key Building
159 Main Street
Akron, Ohio 44308
Phone: (330) 535-6185

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Now comes the appellant, Hersie Wesson, by and through his attorneys, David L. Doughten and George Pappas, pursuant to Supreme Court Rule of Practice XI.2 and 4, and moves this Honorable Court to reconsider the above-captioned case and to stay the issuance of the mandate. Specifically, the appellant asks the Court to rehear Proposition of Law II and its determination that the error therein could be cured by its independent re-weighing.

Respectfully submitted,

David L. Doughten

DAVID L. DOUGHTEN per authorization Kathryn L Sandford #0063985
Regis. No. 0002847
Counsel for Appellant

George Pappas

GEORGE PAPPAS per authorization Kathryn L Sandford #0063985
Regis. No. 0037374
Counsel for Appellant

ARGUMENT

Proposition of Law II:

> **Where a defendant is found guilty for having committed an offense while under postrelease control, the conviction is invalid where the sentencing entry placing the defendant on postrelease control failed to follow the mandates of R.C. §2967.28(B).**

In his second Proposition of Law, Wesson argued that the evidence was insufficient to support a conviction for Aggravated Murder, R.C. §2903.01(D) (while on detention). This Court agreed and invalidated the conviction and sentence of death pursuant to the Proposition. This Court also invalidated Specification One to Count Two, which also alleged that Wesson was under detention at the time of the homicide. However, the sentence of death was affirmed after this Court engaged in its independent re-weighing.

In doing so, this Court followed its own established precedent. However, it ignored firmly established precedent of the Supreme Court of the United States. There is no longer re-weighing permitted in the case of an invalid aggravator, such as occurred here. Because the invalid aggravator included prejudicial evidence that the jury would not otherwise have considered, the sentence must be reversed and remanded for a new sentencing hearing.

In a weighing state, which includes Ohio, the sentencer's consideration of an invalid eligibility factor necessarily skews its balancing of aggravators with mitigators. Stringer v. Black, 503 U.S. 222, 232 (1992). Previously, such error required reversal of the sentence unless a state appellate court determined the error was harmless or reweighed the mitigating evidence against the valid aggravating factors. Clemons v. Mississippi, 494 U.S. 738 (1990). Although Clemons did allow re-weighing where the state statutory scheme permitted so, the Court determined that the

requirement proved cumbersome and was fraught with inconsistencies.

To remedy this situation, and to simplify the distinction between the traditional weighing and non- weighing states, the Supreme Court directly decided the issue in Brown v. Sanders, 546 U.S. 212, 126 S. Ct. 884 (2006). As the result of this case, there is no longer a harmless error analysis or re-weighing conducted where the jury improperly considered an invalid statutory aggravating factor. If the jury improperly considered evidence in aggravation that should not have been introduced, the result is constitutional error requiring reversal of the death sentence.

In Brown v. Sanders, supra, per Justice Scalia, the United States Supreme Court simplified the issue of jury consideration of an invalid statutory aggravating factor. The Court explained its rationale.

> This weighing/non-weighing scheme is accurate as far as it goes, but it now seems to us needlessly complex and incapable of providing for the full range of possible variations. For example, the same problem that gave rise to our weighing-State jurisprudence would arise if it were a sentencing factor, and *not* an eligibility factor, that was later found to be invalid. The weighing process would just as clearly have been prima facie "skewed," and skewed for the same basic reason: The sentencer might have given weight to a statutorily or constitutionally invalid aggravator. And the prima facie skewing could in appropriate cases be shown to be illusory for the same reason that separates weighing States from non-weighing States: One of the *other* aggravating factors, usually an omnibus factor but conceivably another one, made it entirely proper for the jury to consider as aggravating the facts and circumstances underlying the invalidated factor.

Id. at 219-20.

The rule was then clarified.

> We think it will clarify the analysis, and simplify the sentence-invalidating factors we have hitherto applied to non-weighing States, see *supra*, at 218 - 219, 163 L. Ed. 2d, at 733-734, if we are henceforth guided by the following rule:
>
> An invalidated sentencing factor (whether an eligibility factor or not) will render the

> sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances.

Id. at 220.

Stated otherwise, if the evidence introduced to establish the invalid aggravator was legally considered by the jury through the evidence proving the remaining valid aggravators, any error is harmless. However, if the jury considered evidence which would not otherwise have been considered by it in the penalty phase deliberations, the error is of a constitutional magnitude. Prejudice is presumed.

This Court did not address the effect of Brown v. Sanders in it opinion. It is requested that the Court rehear the harmless error aspect of its decision and apply the precedent.

CONCLUSION

Pursuant to the above argument, the defendant-appellant Hersie Wesson respectfully requests that this Honorable Court rehear the above issue and ultimately remand this matter for a new sentencing hearing.

Respectfully submitted,

David L. Doughten

DAVID L. DOUGHTEN per authorization
Regis. No. 0002847 Kathryn L Sandford
Counsel for Appellant #0063985

George Pappas

GEORGE PAPPAS per authorization
Regis. No. 0037374 Kathryn L Sandford
Counsel for Appellant #0063985

CERTIFICATE OF SERVICE

A copy of the foregoing Motion to Reconsider and to Stay the Issuance of Mandate was served upon Sherri Bevan Walsh, Esq., Summit County Prosecutor, 53 University Street, 7th Floor, Akron, OH 44308-1680 by Regular U.S. Mail on this 4th day of November, 2013.

David L Doughten

DAVID L. DOUGHTEN
Regis. No. 0002847
Counsel for Appellant

per authorization
Kathryn L Sandford
#0063985